

## DIVISION TWO

### 3.0 THE FISHING SITUATION IN THAILAND<sup>1</sup>

The marine fishery harvest of Thailand, including coastal aquaculture, has held steady through the 1990s at approximately 3 million metric tonnes (the harvest in 1997 was 2,979,200 m.t.). The value of the harvest is estimated to be about US \$3 million and contributes between 1.5 to 3% of Thailand's GNP. Of the marine harvest, approximately 10% comes from coastal aquaculture. The inland fishery contributes approximately 200,000 m.t. to the total Thai fishery harvest, of which 40 percent comes from freshwater aquaculture.<sup>2</sup>

A detailed 1995 study revealed that there were 80,710 marine fishery households (53,313 directly engaged in the marine fishery and 28,934 engaged as fish workers) and approximately 2,600 fishing communities (75% on the Gulf of Thailand and 25% on the Andaman Sea). Of Thailand's 76 provinces, 24 (including Bangkok) are coastal provinces. Of the marine fishery households, the number that were classified as small-scale varies from 73 to 88 percent with their contribution to the total marine harvest varying from 5.6 to 13 percent. Curiously, the interpretation of the 1995 study that viewed the small-scale households at 88 percent equated that with only 5.6 percent of the marine catch.

The number of fishers in the marine capture fishery has been estimated at 320,000 which includes 70,000 full-time commercial fishermen; 180,000 small-scale fishermen; and 70,000 engaged in related activities.

The number of fishing vessels registered with the Department of Fisheries was 18,182 in 1997. Over half of these vessels were less than 14 meters and only 206 over 25 meters. Otter board, pair and beam trawlers totaled 8,885; purse seiners 1,502; and gill-netters (including shrimp gillnets) 4,794. It is understood that a substantial number of fishing boats are not registered, licensed or included in the Department of Fisheries numbers.

There does not exist reliable information on the ownership of the Thai fishing fleet. Ownership appears to be broad rather than concentrated -- multi-vessel owners being the minority and no identifiable "mega-owners". In specific parts of the country and in some fisheries, vessel ownership is more concentrated than the broader national picture but the true situation is unknown.

Thai marine harvest statistics do not provide numbers regarding the amount of the harvest that comes from non-Thai waters such as from neighbouring state's waters (Cambodia, Vietnam, Malaysia, Indonesia and Myanmar) or further afield. One report noted that as many as 4,000 vessels could be engaged in fishing activities outside Thai waters.<sup>3</sup> The Eighth National Economic and Social Development Plan, 1997-2001 (see below, *Final Report* part 4.1) sets as a goal a sustainable harvest in Thai waters of 1.58 million m.t. If this

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1. All data, unless otherwise noted, is drawn from Deb Menasveta, "Thailand", Annex 2.6, *Fisheries Management Frameworks of the Countries Bordering the South China Sea* (FAO, 1997), 113-136; Pongpat Boonchuwong, "Socio-Economic Conditions of Small-Scale Fishing Communities and the Implications for Community-Based Fisheries Management in Phang-Nga Bay" in *Community-Based Fisheries Management in Phang-Nga Bay, Thailand* (FAO, 1998), pp. 136-152; and "Fisheries Monitoring, Control and Surveillance in Thai Waters", in *Report of a Regional Workshop on Fisheries Monitoring, Control and Surveillance, Kuala Lumpur and Terrengganu, 1998* (Field Report, Supp. 1, FAO, 1999), pp. 57-72.
  2. Kitjar Jaiyen, "Legislation and Policy in Aquaculture Management in Thailand" (paper presented at World Aquaculture '99, Sydney).
  3. Mensasveta, *supra* note 1, at p. 116.

were the approximate current harvest in Thai waters, a not unreasonable assumption, it would mean that one million m.t. was either being directly harvested by Thai fishermen from non-Thai waters or being purchased by Thai vessels and shipped into Thailand.<sup>4</sup> The Eighth Plan set as a goal the attainment of arrangements with neighbouring and other states for fishing for 3,5000 vessels and harvest goals of 1.8 million m.t.<sup>5</sup>

The reports on the status of fishery resources in Thai waters is not encouraging. Menasveta<sup>6</sup> notes that demersal resources in coastal waters have been severely depleted, and specifically in the Gulf of Thailand, have been overfished since 1973. Similarly, prawn small size shrimp, cephalopod stocks and crab have all been over-exploited. The story for pelagic species is equally bleak, mackerel, small tuna, anchovy, and scads, are all over-exploited. A few pelagic species (Spanish mackerel, carrangids and hardtail scads) are believed not to be fully exploited. Estimates of trash fish run as high as 70 percent, compared to 30 per cent edible fish, in trawl catches in the Gulf of Thailand.

Coastal aquaculture and mariculture has been an area of major growth in Thailand since the 1970s. The production of black tiger shrimp went from 15,841 m.t. in 1985 to 256,890 m.t. in 1995, representing approximately 75 percent of the marine aquaculture harvest.<sup>7</sup> The explosion of aquaculture activities on the coast and near-coast have reduced mangrove areas and led to deterioration of both the coastal environment and the land areas used for aquaculture. Again, ownership in the aquaculture sector tends to be broadly spread rather than concentrated in the hands of a few.

The high volume of trash fish has resulted in a substantial fish meal industry. Much of the edible fish catch is consumed locally or transported within Thailand for the fresh fish markets. While Thailand is a major fishery products exporter, the largest component is tuna processing where non-Thai vessels provide the tuna to Thai processors. Shrimp (particularly from coastal aquaculture) is also a major export product with markets in Japan, the United States and other parts of Asia.

While the Thai Fish Marketing Organization, which has its own legislation and mandate, operates fourteen landing sites and consequent marketing opportunities, there are 640 other landing sites in Thailand either publicly or privately controlled. Fish marketing is composed of many smaller brokers, transporters, and marketers. According to Department of Fisheries officials, there is virtually no vertical integration between harvesters and marketers (or processors). This appears to be the case for marine and freshwater products, as well as, aquacultural products.

The freshwater fishery, which can be sub-divided into river/canal fishing, reservoir fishing, flood-plain fishing, and inland aquaculture, is primarily subsistence or small market fishing. The state of the resource varies considerably depending upon location and species.

Modern Thai fisheries can be divided into the following categories:

- Freshwater fisheries: dominated by small-scale fishermen with limited commercial aquaculture -- the fishery can be sub-divided into river/canal fishery, reservoir fishery, flood-plane fishery and aquaculture;

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4. Department of Fisheries officials estimated that the fish originating from non-Thai waters was somewhere between 800,000 to 1.3 million m.t. It was never made clear whether the harvest/landing statistics included tuna caught by non-Thai vessels in non-Thai waters but landed in Thailand for processing.

5. Menasveta, *supra* note 1, at p. 121

6. Menasveta, *supra* note 1, at pp. 118-119.

7. Jaiyen, *supra* note 2, at p. 5.

- Coastal aquaculture: a major area of growth in the last decade, the shrimp fishery is oriented towards the lucrative export market;
- Coastal marine fisheries: dominated by small-scale fishermen with minimal gear and limited vessel size;
- Commercial marine fisheries: larger vessels with more sophisticated gear which have the capacity to venture far from shore, the catch is destined for commercial markets and, in some cases, the export market; the marine fishery can be sub-divided into fishing in Thai waters and fishing in non-Thai waters fisheries (or overseas fisheries).

The principal attention of the Department of Fisheries in recent years has been on the marine fishery both because of the explosive growth in the marine fishery harvest since the 1960s and because of the significant resource depletion of the 1980s and 1990s. Moreover, there has been increasing conflict between the commercial marine fishery and both coastal marine fishermen and neighbouring states. With coastal aquaculture, the conflict has been regarding inconsistent land-use and environmental degradation.

Through the mid-1990s the number of fishing vessels registered with Department of Fisheries has remained stable (this includes trawlers and purse seiners). This stability of numbers and the stability of harvest numbers (in the vicinity of 3 million m.t. throughout the mid-1990s), despite the increasing depletion of the marine living resources in Thai waters in both the Gulf of Thailand and Andaman Sea, indicates that in the marine commercial fishery money is still being made and that an undisclosed, but significant, amount of the harvest is coming from non-Thai waters. The non-shrinkage of the Thai fleet indicates new vessels being built (the precise number could not be secured by Department of Fisheries, although it was recognized that the number was significant) with the expectation of profits. The nature of most Thai fishing vessels -- less than 25 meters, simply constructed -- dictates that an immediate return on investment is the goal rather than a return over the long-term.

#### **4.0 LEGISLATIVE AND ADMINISTRATIVE STRUCTURE**

##### **4.1 The DOF and the Structure of Fisheries Policy-Making**

The Department of Fisheries, positioned under the Ministry of Agriculture and Cooperatives, has its mandate and structure set pursuant to a 1994 Royal Decree on Administration. Article 3 of the Royal Decree provides the Department of Fisheries with the authority and responsibility to:

- i) apply, implement and enforce the Fisheries Act of 1947 and other relevant laws related to fishery matters;
- ii) study, research and develop aquatic resources, the aquatic environment, aquaculture, fish enhancement including genetic research, and fishing gear;
- iii) study, research and develop preservation and food processing of aquatic products including analysis, inspection and certification of the quality of aquatic products;
- iv) survey, explore, analyze and research fishery grounds both within Thai waters and beyond, including developing overseas fisheries arrangements;
- v) promote and develop the possibilities for people to get involved in fishing, aquaculture and fishery products processing; and
- vi) such other activities as are assigned to the Department of Fisheries.

Also informing the direction of the Department of Fisheries are the policy directives of the National Economic and Social Development Plans. The Eighth Plan (1997-2001) contains four targets that relate to fisheries: attaining a sustainable harvest of 1.58 million m.t. from Thai waters; attaining access to 1.8 million m.t. of fish from non-Thai waters; increasing aquaculture production by 5 per cent per year; and producing one million m.t. of fishery product exports per year. In order to meet the targets, the Eighth Plan recognized the need to rehabilitate Thailand's aquatic environment, that aquaculture expansion had to be sensitive to environmental degradation, that improved quality assurance was critical to increased exports, and that measures were necessary to govern the conduct of Thai fishing vessels in foreign waters if harvesting levels from foreign waters were to be achieved. Pursuant to the Eighth Plan, the Department of Fisheries has developed and implemented a number of strategies.<sup>8</sup>

Two new policy-creating bodies were established in 1996: the Committee for the Policy and the Restoration of Thai Waters, chaired by the Prime Minister, and the National Fishery Policy Committee (NFPC) chaired by one of the Deputy Prime Ministers. The Restoration of Thai Waters Committee has established a Board with the mandate to write reports regarding environmental protection of Thai waters and to coordinate interdepartmental activities regarding environmental protection of Thai waters. Neither the Committee, nor the Board, have been very active. The NFPC is of direct relevance to fisheries policy matters within the Department of Fisheries. The NFPC has representatives from virtually every department or agency that has an interest in or impact on fisheries: Harbours, Interior, the Navy, Environment, Finance, Foreign Affairs, Communications, etc. Moreover, the NFPC has numerous members from the private sector, for example, the Overseas Fishery Association, the Thai Fishery Association, the Shrimp Aquaculture Association, etc. The secretariat to the NFPC is the Department of Fisheries which ensures that the Department of Fisheries has some control over the agenda of the NFPC. The mandate of the NFPC is to look at the broad issues of fisheries policy that appear to involve the responsibilities, and thus require the cooperation and coordination, of departments and agencies other than the Department of Fisheries. Also, where fisheries issues arise with potential or existing political consequences, the NFPC can be utilized to try and develop a policy to take into account such political consequences.

Ayut Nissapa, *et al.*<sup>9</sup> notes that the public administration of Thailand and the formulation of national policies and plans, in general and as regards fisheries and the coastal environment of Thailand, is a "top down" model with key policies and plans "formulated by the central administration and then handed over to the provincial and local administration for implementation." This policy development structure has been in existence since the modernization of the Thai state under King Chulalongkorn in the late 1800s. Note should also be made of the easy manner in which policy-making bodies (committees, boards, institutions) are created to deal with particular issues. There is less evidence of the effectiveness of many of these bodies. Ayut Nissapa, *et al.*<sup>10</sup> notes: "[D]ue to the many plans and committees, problems of overlaps, confused line of command and insufficient coordination among concerned parties are common."

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8. See: Menasveta, *supra* note 1, at pp. 122-123.

9. Ayut Nissapa, *et al.*, *Management of Fisheries, Coastal Resources and Coastal Environment in Thailand: Institutional, Legal and Policy Perspectives*(ICLARM, 1999), at pp. 30-31.

10. Nissapa, *supra* note 9, at p. 34.

## 4.2 Current Thai Legislation on Fisheries

The principal legislative instrument is the Fisheries Act of 1947, as amended in 1953 and 1985. Composed of 73 sections and directed primarily to the freshwater fisheries (inland fisheries), the Act provides for the adoption of regulations (instruments that require cabinet approval) and notifications (instruments that can be issued directly pursuant to the Fisheries Act). A number of regulations and notifications have been implemented regarding both the freshwater and marine fisheries. It is worth noting that Menasveta reports that: "It is generally agreed by the officials concerned that the Fisheries Act B.E. 2490 [1947] can accommodate important provisions of major international instruments and initiatives which are concerned with sustainable development of fisheries and environmental protection."<sup>11</sup> Others have suggested the need for legislative change and update.<sup>12</sup> The Department of Fisheries has directed that a new fisheries law be drafted.

Besides the Fisheries Act, there are other Acts which have a relevancy to fisheries matters in Thailand:

- i) Act Governing the Right to Fish in Thai Waters, 1939
- ii) Wild Animal Preservation and Protection Act, 1992
- iii) National Park Act, 1961
- iv) Thai Vessels Act, 1939
- v) Fish Marketing Act, 1953
- vi) Navigation in Thai Waters Act, 1913
- vii) Enhancement and Conservation of National Environmental Quality Act, 1992

References can also be made to the Finance Department's Import-Export laws and regulations, the Criminal Procedure Code and the Food Act.

Implementation of the Fisheries Act is carried out primarily at the Provincial and District (sub-provincial) level. The 1994 Royal Decree on Administration, in combination with the 1992 Administration Act, sets out the authority of both the Provincial Fishery Officer (each province has a Provincial Fishery officer) and the District Fishery Officers. The District Office and the officers therein report to the Provincial Officer. Because the authority of Provincial Fishery and District Fishery officers is derived simultaneously from the 1994 Royal Decree, the 1992 Administration Act and the 1947 Fisheries Act, the relationship between these officers and both the Provincial Governor<sup>13</sup> and the Department of Fisheries is complicated. It appears that while the District and Provincial Officers have implementation responsibilities under the Fisheries Act, they report through the Provincial Governor to Department of Fisheries rather than directly to senior officials in Department of Fisheries. While the Provincial and District Officers do not answer to, nor are under the control of the Provincial Governor, the cooperation of the Provincial Governor is important if smooth relations are to exist between the fishery officers and Bangkok. Other aspects of the broader Department of Fisheries mandate set out in the 1994 Royal Decree (see above, *Final Report* part 4.1) are implemented or carried out by the 30 divisions or institutions within the Department of Fisheries.

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11. Menasveta, *supra* note 1, at p. 123.

12. Plodprasop Suraswadi, "The Policy of the Department of Fisheries for Community-Based Coastal Fisheries Management", in *Community-Based Fisheries Management*, *supra* note 1, at p. 46.

13. Regarding the Provincial Governor, see below, *Final Report* part 4.3.5.

### **4.3 A Review of the 1947 Fisheries Act**

As noted, the 1947 Fisheries Act was primarily directed at the freshwater fishery and the collection of fees for the use of certain fishery gears. What follows is a brief review of the 1947 Act with an emphasis on the apparent authority that exists to implement control measures on fishing activities.

#### **4.3.1 Distribution of Authority**

The 1947 Fisheries Act distributes authority to a number of entities. First, there is the *Minister of Agriculture and Cooperatives* who is to take charge and control the execution of the Act (Section 5) and, as noted below, the Minister has broad powers regarding the creation of regulations and notifications. The Minister is part of the political government of Thailand through the Cabinet. The *Provincial Governor* has certain authorities under the Act equivalent to the Minister where the Minister approves of such authority. In essence, the 1947 Act creates the possibility of delegation of the Minister's authority to a Provincial Governor.<sup>14</sup> While it was asserted by Department of Fisheries officials that the Minister delegated authority to a Provincial Governor regularly, the mechanism for that delegation (notification, regulation, letter) was not clear. The Provincial Governor is appointed by the Minister of Interior.

The *Director-General of Fisheries* is provided certain limited powers under the legislation largely respecting the setting of conditions for issuing permissions, licences and permits. The "conditions", while required to be published in the Government Gazette (see, for example, Section 16(2)), are treated as different than regulations and notifications and are more like forms that must be completed properly. The Director-General of Fisheries is a member of the Thai bureaucracy.

Finally, there are *competent officials* who can be appointed by the Minister to carry out the purposes of the Fisheries Act (see: Section 5 and Section 4(16)). The definition section appears to create ambiguity whether a Provincial Governor and a fishery officer are competent officials under the Act or must be appointed as a competent official by the Minister (Section 4(16)). Competent officials have certain powers regarding licences and permits, including the authority to revoke certain licences (Section 36) and the authority to inspect vessels and to make arrests (Sections 56 and 57). The authority exercisable by the Provincial Governor, the Provincial Fishery Officer and District Governor (Amphor) is clarified by a Ministerial Notification respecting "competent authorities" under the 1947 Fisheries Act. The Ministerial Notification provides that designations, permissions, licences, etc. under the Fisheries Act can be undertaken or granted by the Provincial Governor, Provincial Fishery Officer or a District Governor (Amphor) unless the authority is explicitly excluded. What is included are local matters usually related to the freshwater or small-scale issues. Non-included matters relate to fishing gear, for example, and other broader issues. In these cases, the authority usually rests with the District Fisheries Officer.

#### **4.3.2 Public and Other Waters**

Section 7, paragraph 2 of the 1947 Fisheries Act provides that waters not designated as preservation, leasable or reserved are public and, pursuant to Section 16, in public waters every person has the right to fish and to cultivate aquatic animals. Paragraph 2 of Section 16 directs that any person fishing or cultivating aquatic animals in public waters "must comply"

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14. See below, *Final Report* part 4.3.5 for more information on the Provincial Governor.

with Ministerial conditions. Section 61 sets up a penalty of 2,000 baht or one month imprisonment for a person fishing in public waters in violation of Ministerial conditions. The Fisheries Act does not indicate the nature of the Ministerial conditions that can be imposed, moreover, it does not appear that any such conditions have been published in the Government Gazette.

### **4.3.3 Enabling Clauses and Their Use**

Section 25 provides that the Minister can make notifications requiring that all persons engaged in fishing or trade in fishery products be registered and apply for permission before undertaking the activity. Failure to comply with such a notification gives rise to a minor penalty under Section 63. Ministerial regulations and notifications have been issued under Section 25 of the Fisheries Act respecting coastal shrimp aquaculture. First imposed in 1991 and updated in 1998, shrimp farms are to be registered yearly with the Department of Fisheries. For the Department of Fisheries to accept registration, the proposed shrimp farmer must comply with conditions regarding the layout of the proposed farm, seawater storage, an effluent containment area, etc. Registration is required for shrimp farms over 50 ra. There is also a section 25 notification laying down the conditions and guidelines for the approval of fish processors.

Section 26 provides that the Minister can make a notification requiring owners or possessors of any kind of fishing implement (fishing gear) to have the gear registered. Again, the failure to comply with a notification gives rise to a minor penalty under Section 63.

Section 28 provides that a person is "entitled" to use a licensed fishing implement when a license has been issued and the fishery fee paid. A licensed fishing implement is defined as a fishing implement specified by Ministerial Regulation. The legislation is not clear who has the authority to issue the fishing implement licence but through a Ministerial Notification the competent official in this case is the District Fishery Officer. Use of a fishing implement without a licence gives rise to a fine three times the fee due. It appears that if a fisherman is willing to pay the necessary fee, the requisite licence will be issued.

It is pursuant to Section 32 that the Minister has made most of the regulations and notifications that are relevant to the marine capture fishery.

The Minister or provincial governor in his jurisdiction and with the approval of the Minister, is empowered to make notifications determining:

- (1) the size of mesh and dimension of every kind of fishing implement, and size, kind, number and parts of fishing implement, which is permitted in fisheries;
- (2) any kind of fishing implement which is absolutely forbidden to be used in fisheries;
- ...
- (4) the methods of using every kind of fishing implement;
- (5) the spawning and breeding seasons, fishing implement and methods of fishing in a fisheries during the said season;
- (6) the kind, size and maximum number of aquatic animals the fishing of which is permissible;
- (7) certain kinds of aquatic animals the fishing of which is absolutely forbidden.

A generous interpretation of this wording would suggest that the Minister has the authority to deal with all kinds of gear restrictions, open and closed seasons and to establish quotas. The wording appears even broader when it is recognized that a fishing implement includes a fishing vessel. Thus, Section 32 appears to give Ministerial regulatory power respecting numbers of vessels (hence control on entry into the fishery).

The Ministerial Regulations and Notifications that have been issued pursuant to Section 32 of the Fisheries Act fall into several categories.<sup>15</sup> In 1984 and 1985 Ministerial Regulations were adopted to prohibit the use of specific types of fishing gear during the spawning and breeding season of certain commercially important species. In the 1970s, regulations were adopted prohibiting trawlers, pushnets and shellfish racks from the area within 3 km. of the shoreline. Mesh size limits for purse seine nets and limits on gear using light lures to catch squid were adopted in the 1980s. Specific regulations prohibit the catching of turtles, dugong and dolphins and several conservation protection areas have also been established.

The thrust of the legislative management measures within and under the Fisheries Act has been the creation of closed seasons, certain closed areas and the regulation of fishing gear. None of the reviewed laws, regulations or notifications provide any restrictions on the number of fishermen or vessels or the establishment of quota limitations. The prevailing practice appears to be that the Department of Fisheries will provide the necessary licences for the use of any fishing gear listed in the relevant regulation provided the fee is paid and that no licence is required for a non-listed fishing gear. Requirements in the legislation requiring registration (for example, sections 25 and 26) are merely for purposes of counting and not for purposes of control. Department of Fisheries officials noted that respecting trawlers, they had adopted a policy of not permitting new trawlers to be licenced without the retirement of an old licence. However, there was little indication of how this was being carried out or supported by the Fisheries Act or any of the subordinate regulations or notifications.

Section 46 of the Fisheries Act provides that where an official with the authority to grant permissions or licences respecting fisheries refuses to do so, a complaint can be lodged with the Minister who shall make a final determination. While the section can be seen as an important safeguard against arbitrariness on the part of officials, it can also be seen as consistent with the pattern of the implementation of the Fisheries Act that licences and permissions are to be granted. Reportedly in several well-known situations, where Department of Fisheries officials withheld permissions, the Minister stepped in and granted the necessary permissions.

#### **4.3.4 Fishing Activities Beyond Thai Waters**

The 1947 Fisheries Act is silent regarding the activities of Thai fishing vessels in non-Thai waters. The presumption in the 1947 Act appears to be that it has application only to fishing activities within Thai waters. The exceptions are Section 28 bis and Section 64 bis which were added to the Fisheries Act in 1985. The goal of these provisions was to collect from the owners of Thai fishing vessels arrested for violating the fisheries laws of another country the costs incurred by the Thai government in securing the release of detained Thai fishermen. There is no consensus of whether these provisions have been successful in deterring Thai vessels from venturing into non-Thai waters. Nevertheless, the Department of Fisheries requires that all vessels wishing to engage in overseas fishing activities (participating in joint venture or access arrangements) to be licenced. The Department of Fisheries has established a set of criteria regarding overseas vessel licencing. The Department of Fisheries, in conjunction with the Department of Finance, has created an incentive scheme for overseas vessel registration, in that, fish brought into Thailand on a properly licenced vessel will be exempt from import taxes. Independent of this import tax exemption, the Finance Ministry can grant import tax exemptions for fish entering Thailand destined for re-

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15. See: "Fisheries Monitoring, Control and Surveillance in Thai Waters", *supra* note 1, at pp. 67-69.



export. (This is the exemption used for tuna imports and exports.) The Department of Fisheries has no involvement in this exemption. Department of Fisheries officials stated that fifteen of the larger fish harvesting companies involving approximately 200 vessels engaged in fishing beyond Thai waters were regularly registered by the Department of Fisheries.

#### **4.3.5 Inter-Departmental Issues**<sup>16</sup>

The Kuemlangan Report (1999)<sup>17</sup> clearly states that one of the difficulties respecting controlling Thai fishing vessel numbers in the marine fishery is that the registration of vessels is an activity undertaken by the Harbours Department which is concerned with vessel seaworthiness and not the subsequent use of the vessel. Once "registered", a fishing vessel is seen as being able to fish with or without the required gear licence. Recent discussions between the Department of Fisheries and the Harbours Board reportedly resulted in an informal agreement that the Harbours Board will consult with the Department of Fisheries about registering new fishing vessels.

Another inter-departmental issue of note arises when enforcement of the Fisheries Act takes place. In those cases where the Department of Fisheries seeks to apply the penalty provisions of the Fisheries Act, the Department of Fisheries brings the facts and, in some cases, the alleged law-breaker, to the local Police. The role of the Police, under the Criminal Procedure Code, is to review the written record and evidence and decide whether further investigation is necessary. The Police are to report to the Department of Public Prosecution (D.P.P.) whether or not they recommend that the case proceed or not. Ultimately, it is the determination of the D.P.P. whether to proceed.<sup>18</sup>

In various sections of the 1947 Fisheries Act, the Provincial Governor is provided with the authority to issue notifications and, in some cases to issue permissions or waive the requirements for licences or payment of fish fees. The action of the Provincial Governor is "subject to the approval of the Minister". With the exception of the Governor of Bangkok, all provincial governors are appointed by, and thus ultimately responsible to, the Ministry of the Interior. While various pieces of legislation and Royal Decrees establish the authority of the Provincial Governors, their relationship to the Department of Interior (the most powerful Ministry in the Thai government) is of overriding importance.

#### **4.3.6 Observations**

The fundamental premise of the 1947 Fisheries Act is that whomever wishes to fish may fish subject to the paying of a small fish fee and, in more recent times, subject to certain restrictions on seasons, places and types of gear. The open access orientation of the 1947 Fisheries Act was consistent with the then-scope of the legislation which was the freshwater fishery and near-shore marine fishery, in both cases undertaken by small-scale fishers. The arrival of the commercial marine fishery and the explosion of coastal aquaculture was not foreseen by the 1947 Act. Moreover, the role of the Department of Fisheries has been to promote the welfare of fishermen by assisting in developing better fishing gear, assisting in identifying new species available for harvest, finding new fishing grounds (including grounds beyond Thai waters) and assisting in the sales of fish and fish products, especially in export

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16. Also, see below, *Final Report* part 5.1.

17. Blaise Kuemlangan, *Preliminary Review of the Fisheries Legal Framework of Thailand*, (FAO, 1999), at pp. 10-11

18. Also, see below, *Final Report* part 5.2.2.

markets. The Department of Fisheries has been an advocate for the harvester and not for the fish -- with the primary goal, as set out in the numerous National Economic and Social Development Plans, being *more harvesting*. The combination of the open-access orientation of the 1947 Act with the primacy placed on increased catch (and, it has been believed, betterment of the lives of fishermen) by Department of Fisheries has resulted in there being little willingness or ability on the part of Department of Fisheries to constrain Thai fishing activities. What legislative powers as may be available, for example, sections of the Fisheries Act which allow the Minister to impose regulations on the numbers of fishing vessels,<sup>19</sup> have remained unused.

Another observation about both the 1947 Fisheries Act and the operation of the Department of Fisheries is that their principal orientation is towards the activity of fish harvesting -- the act of fishing that occurs on Thai waters, beyond Thai waters and in aquaculture. There is little attention paid to pre-fishing activities -- the decision whether to fish or not or how to control the numbers of fishers. Moreover, the 1947 Fisheries Act, as it has been applied, is little concerned with the effects of fishing (and particularly the effects of aquaculture) on the coastal environment or with post-harvest concerns such as processing and marketing. Regarding the latter issue, the Department of Fisheries has become engaged in seafood safety and inspection issues, although the pressure and demand for this has come from export markets. Moreover, the legal authority for exported fish inspection arises not from the Fisheries Act but from Ministerial Notifications under the Import and Export Controls Act or, in some situations, pursuant to a direct Cabinet authorization.<sup>20</sup>

#### **4.4 The Draft Fisheries Law of 1996**

An attempt to update and broaden the 1947 Fisheries Act was completed in the 1996 with a nine chapter and over 100 sections Draft Law.<sup>21</sup> Besides the introductory sections, the nine chapters were titled:

- I Fisheries
- II Fisheries Management
- III Coastal Zone Management
- IV Overseas Fisheries
- V Fishing Fees and Taxes
- VI Concessions, Licences and Permits
- VII Fishery Statistics
- VIII Competent Fisheries Officers
- IX Penalties

While the 1996 Draft Law broadened the scope of the 1947 Act, much of the wording and approach of the 1947 Legislation was replicated in the Draft Law. The Draft Law retained the public fisheries wording of the 1947 Act (see above, *Final Report* part 4.3.2) and the general thrust of open-access to fishery resources. Limited access and control over fishing vessels (rather than simply gear restrictions) was not adopted directly into the draft legislation. The 1996 Draft Law again emphasized fishing gear regulation and, therefore, repeated Section 32 of the 1947 Act. A somewhat similar enabling clause for Ministerial

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19. Explained in Kuemlangan, *supra* note 17 and Gerald Moore, *Thailand: Legal and Institutional Aspects of Fisheries Management and Development--A New Licensing System* (FAO, 1978).

20. See: Department of Fisheries, *Thailand: Fish Inspection and Control System* (2000).

21. Not available in English.

regulations/notifications was provided in Chapter III regarding Coastal Zone Management and appeared to allow the Minister to create regulations/notifications related to time and place restrictions on marine fishing, registering of coastal aquaculture activities, and respecting management measures more generally. The Overseas Fisheries chapter reportedly required that all Thai fishing vessels venturing outside Thai waters had to receive the permission of the Director-General.

The 1996 Draft Law was not adopted. There are conflicting views over the ultimate demise of the 1996 Draft Law and whether it failed to proceed because of inertia within the Department of Fisheries or as a result of a change of Department of Fisheries Directorship, whether the Minister of Agriculture determined it not to be acceptable, or whether political forces found the changes either unnecessary or unwanted. Regarding both legislative and policy change in fisheries matters, the Kuemlangan Report (1999)<sup>22</sup> notes: "the indications are that there has been a general lack of will by stakeholders in recognizing the problems that exist and to address them".

#### **4.5 The 1997 Constitution**

The adoption in Thailand of the 1997 Constitution, frequently referred to as the People's Constitution, has led all Ministries and Departments to re-examining their core legislation.

The provisions of Chapter V of the Constitution, "Directive Principles of Fundamental State Policies", are, according to Section 88, paragraph one, "to serve as directive principles for legislating and determining policies for the administration of State affairs". Several provisions in Chapter V are of relevance to fisheries matters. Of obvious relevance is Section 79 which directs that the State is to promote and encourage public participation in the preservation and exploitation of natural resources and, more generally, in the maintenance and protection of the environment. Other provisions of importance are: Section 78, which provides that the State is to decentralize powers to localities for the purpose of independence and self-determination; Section 87, where the State is to encourage a free economic system and refrain from enacting laws which unduly control businesses; Section 86, where the State is to promote employment and fair wages (also Section 83 which directs that the State "shall implement fair distribution of incomes"); Section 75, where the State is to "ensure the compliance with the law"; and Section 74, where the State is to promote friendly relations with other countries.

Chapter III sets out the "Rights and Liberties of Thai People". Section 50 has a direct relevance to fisheries and the question of free entry or open-access to fishery resources.

Section 50:

A person shall enjoy the liberties to engage in an enterprise or an occupation and to undertake a fair and full competition.

The restriction on such liberties under paragraph one shall not be imposed except by virtue of the law specifically enacted for ... preserving natural resources or the environment ... .

This provision appears to suggest that, if necessary for preservation of natural resources or the environment, laws can be enacted to restrict certain occupations and activities. Section 50 would appear to support restrictions on who can be allowed to fish and, thus, would support legislation creating a limited entry fishery system.

Section 56 of the 1997 Thai Constitution provides the right of a person and communities to participate in the preservation and exploitation of natural resources. Persons part of "a traditional community" have the explicit right to participate "in the management,

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22. Kuemlangan, *supra* note 17, at pp. 1-2.

maintenance, preservation, and exploitation of natural resources and the environment" as provided by law (Section 46). Participatory rights in governmental decision-making are also provided in Section 60 and Section 56, paragraph two. Tied to the rights of the Thai people are the duties on the Thai people (chapter IV). The duties include obeying the law (Section 67) and to conserve and protect natural resources and the environment (Section 69).

The two clear messages from the 1997 Constitution that relate to fisheries are: i) public participation is to be promoted, and ii) natural resources and the environment are to be conserved and protected.

#### **4.6 The Renewed Effort to Draft an Updated Fisheries Law**

Primarily in response to the 1997 Constitution and the direction of the Ministry of Agriculture and Cooperatives, the Department of Fisheries established the Law Drafting Committee chaired by the Deputy Director General of Department of Fisheries. In turn, a Working Group on the Draft Fisheries Law was created in early 2000 composed of 26 members under the chair of Dr. Manop Charoenruay. The Working Group has the following mandate:

- to draft a new fisheries law to replace the Thai Fisheries Act of 1947, as amended;
- to include in the new law a role for the National Fishery Policy Committee;
- to ensure that the new law takes into account the relevant provisions of the 1997 Constitution of Thailand; and
- to complete the work on the new law by the end of 2000.

The Working Group has been divided into seven sub-working groups:

- freshwater fisheries;
- marine fisheries;
- overseas fisheries;
- aquaculture;
- community-based management;
- food and fishery products; and
- the National Fishery Policy Committee.

### **5.0 REALITIES OF THAI LAW**

#### **5.1 Inter-Governmental Relations**

While not unique to Thailand, it is necessary to note that the Thai bureaucracy is rigidly vertical. Each department, agency, institution or ministry implements and administers the laws and mandates assigned to them with little regard or interest for the implications any action may have on other departments, agencies, institutions or ministries. Dr. Menasveta comments regarding the various ministries responsible for laws related to marine fisheries that: "There is definitely a lack of efficient coordination among those agencies who are enforcing individual laws."<sup>23</sup> Regarding environmental law in Thailand more generally, Dr. Menasveta comments: "the problem is not the lack of legislation, but coordination among the authorities in administering these laws and regulations."<sup>24</sup> He could easily have expanded his

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23. Menasveta, *supra* note 1, at p. 125

24. Menasveta, *supra* note 1, at p. 125.

comments to include a lack of coordination and cooperation amongst differing agencies on almost all matters related to fisheries. For example, what appears as a simple matter of bureaucratic cooperation between the Harbours Department and the Department of Fisheries on fishing vessel "registration", identified in the Moore Report (1978),<sup>25</sup> has yet to be resolved between the two departments, although, as noted, reportedly an informal agreement has been reached.

The rigidly vertical nature of the Thai bureaucracy has a number of consequences. First, accommodation between and among departments must be secured at the highest bureaucratic and political levels. Second, the accommodation, coordination or cooperation, if it comes into existence, must be re-affirmed every time there is change at the highest bureaucratic and political levels. Third, where each department or government agency applies its mandate and the relevant law to a particular matter, there is simultaneously overlaps, gaps, confusion and an ability of the governed to use one department against another. This is the issue specifically referred to above by Dr. Menasveta. Fourth, legislative change which appears to expand the authority of one department at the expense of another is inevitably regarded with suspicion and, more often than not, will not succeed. All of this has clear implications for the drafting of a new Fisheries Law for Thailand.

## **5.2 Enforcement/Compliance**

### **5.2.1 Overview**

There are a number of ministerial regulations issued during the past three decades, stipulating various fisheries management measures in order to effect the rational utilization and conservation of the fishery resources. However, the enforcement thereof has not been effective due mainly to misconduct at the operative level of the Government; poor coordination among the various government agencies concerned; and lack of understanding and interest in enforcement participation by the majority of the fishermen, many of whom have poor moral judgment and concentrate only on immediate economic gain.<sup>26</sup>

The Ayut Nissapa, *et al.* Report comments:

It has been shown that fisheries and coastal resources-use conflict is mainly due to insufficient law enforcement.<sup>27</sup>

The Nissapa Report further notes that in the face of insufficient law enforcement there is persistent violation of the law.<sup>28</sup>

Here is not the place to discuss the issue of the divergence between the law as written and the activities of the population of Thailand. This situation is not unique to Thailand. Nevertheless, the divergence between written law and activities is part of the realities of Thai law and relevant to understanding the fishing situation in Thailand. It is apparent and well understood that there is significant non-compliance with the existing laws regarding the fisheries. This non-compliance is more easily explained for subsistence fishermen and small-time aquaculturalists than for commercial fishermen and commercial aquaculturalists, but

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25. Moore, *supra* note 19, at pp. 4-5 and see above, *Final Report* part 4.3.5.

26. Menasveta, *supra* note 1, at p. 129.

27. Nissapa, *supra* note 9, at p. 39.

28. Nissapa, *supra* note 9, at p. 41.

non-compliance persists for all groups. The high societal tolerance for and acceptance of non-compliance influences enforcement decisions, with the rebound that indifferent enforcement priorities enhance non-compliance decision-making.

The central goal of all written law is compliance with that law. Enforcement is one element, albeit frequently seen as a major element, in inducing or achieving compliance with a law. It is understood that the manner in which legislation is created (participation in the process of law creation), worded (clarity and lack of ambiguity, such that both the enforcers and those seeking to comply are aware of what is acceptable and what is unacceptable), explained (informing both the enforcers and those to whom the law is intended to be applied of the contents of the law and the reason for the adoption of such a law), implemented (participation in how a law is to be made operational) and enforced is important regarding compliance. Specifically regarding enforcement, there has to be sufficient activities of enforcement and penalties that non-compliers do not benefit from their activities with the result that compliance is rewarded and thus encouraged. A key ingredient of the enforcement part of the compliance equation is that favouritism and arbitrariness not be exercised.

### **5.2.2 Under the 1947 Fisheries Act**

Responsibility for enforcement of the 1947 Fisheries Act, while primarily a responsibility of designated competent officials under the Department of Fisheries, can involve the Provincial Governor, District Governor (Amphor), the Police and the Navy. Under the Criminal Procedure Code, the Provincial Governor, District Governor (Amphor), the Police and the Navy (as well as village headmen) have both the authority and the responsibility to enforce all the laws of Thailand, which includes the Fisheries Act of 1947. The 1947 Fisheries Act provides that competent officials (Sections 56 and 57) have enforcement authority and, through Ministerial Notifications, the competent officials include Provincial Fishery officers, District Fishery officers, fishery patrol officers, as well as Provincial Governors and District Governors (Amphors). All enforcement action done pursuant to the Fisheries Act is required to comply with the requirements of the Criminal Procedure Code.

Within the Department of Fisheries, responsibility for enforcement of the 1947 Fisheries Act, the regulations and notifications, is divided between the Marine Fisheries Patrol and the Inland Fisheries Patrol. Sections 56 and 57 of the 1947 Act provide the general authority for the enforcement of the Act. Respecting the number of stations, staff and boats, see the Thai paper in the *1999 Report of a FAO-Regional Workshop on Fisheries Monitoring, Control and Surveillance*<sup>29</sup> and the Flewwelling Report (1999).<sup>30</sup> Inadequacy of equipment, training and funding arises regarding the capacity of the Patrols to enforce vigorously the relevant laws.

The 1997 statistics have been reported as follows -- 570 inland fishery offences and 751 marine fishery violations.<sup>31</sup> It is unclear whether the violations were merely reported, involved payment of penalties, or involved court cases.

Like many government agencies, the Department of Fisheries is simultaneously involved in encouraging fishermen, working for and protecting their interests, and enforcing the law against these same individuals. Given the general thrust of the Department of Fisheries mandate to assisting fishing activities, it is not surprising that enforcement involving

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29. "Fisheries Monitoring, Control and Surveillance in Thai Waters", *supra* note 1, at p. 70.

30. Peter Flewwelling, *FAO MCS Review: Thailand* (FAO, 1999).

31. "Fisheries Monitoring, Control and Surveillance in Thai Waters", *supra* note 1, at p. 70.

seizure, arrest and penalties is not a priority for the Department of Fisheries. Of course, enforcement is a multi-faceted concept with the result being compliance. It can be suggested that the intensive public relations and public information activities of the Department of Fisheries are more critical (and, perhaps, more effective) in achieving compliance (and thus a key part of an enforcement program) than active enforcement involving seizure, arrest and penalties. Such a perspective is more easily justifiable respecting small-scale and subsistence fishermen than regarding commercial fishing activities.

Respecting aquaculture, where it should be marginally easier to obtain compliance through the detection of illegality, it is reported that regarding coastal shrimp farms approximately 30 percent are not, as required under the relevant laws, registered with the Department of Fisheries. The reasons proffered include lack of proper land title documents thus making registration impossible, the regulatory requirement that only farms over 50 ra be registered, a desire to avoid paying income tax, and the perceived lack of services related to registration (i.e. what does the aquaculturist obtain for registering). Unstated was the policy of Department of Fisheries to encourage coastal shrimp aquaculture and, thus, be less vigilant regarding regulatory requirements.

## **6.0 THE INTERNATIONAL CONTEXT**

Thai fishery activities are being increasingly impacted by numerous international factors of which four are mentioned here. First, as a major fish and fishery products exporter, the demands of the international market place for assured product quality and seafood safety have resulted in the Department of Fisheries becoming involved in seafood inspection activities and the issuing of certificates attesting to the quality and safety of exported product.

Second, the demands and preferences of international markets have been in the direction of seeking to assure that fish and fish products have been harvested and produced in a sustainable manner. The World Trade Organization dispute between Thailand and the United States respecting the U.S. law requiring the harvesting nation to assure that shrimp exported to the United States was harvested in a manner that adequately protected turtles, while resolved in Thailand's favour, is indicative of the growing linkage between export market access and sustainable harvesting requirements. Irrespective of the inconsistency of such measures with the current rules of international trade, the World Trade Organization is under pressure to accept trade measures (embargoes) linked to environmental conservation and may eventually yield to this pressure. Moreover, it must be recognized that trade measures imposed in order to encourage countries to improve their environmental practices have had some success in achieving the desired result. As a consequence, the expectation is for more trade-linked-to-conservation measures in the future. Moreover, eco-labelling and the certification processes connected to it, whereby fish and fishery products can be or are to be labelled as having been caught in an environmentally-responsible manner, is gaining ground amongst consumers and importing states. Irrespective of the alleged fairness of such measures or the additional costs involved, fish exporters must face the reality of tying exports to responsible resource conservation.

Part of the international concern both for seafood safety issues and resource conservation issues is the increasing trend to require "certificates of origin" respecting where particular fish were caught. As part of HACCP (hazard analysis and critical control points) requirements, exporters must be able to demonstrate where the fish was harvested (not in an area subject to toxins, etc.). For shellfish and tuna such "certificates of origin" are routinely demanded by importers and their governments. "Certificates of origin" are tied to logbooks -- with proper logbooks fishermen can provide evidence of where particular fish was harvested.

Observers on board vessels, coupled with vigilant scrutiny by onshore officials and at-sea inspection, can reduce logbook irregularities.

Third, as already noted, it is apparent that a significant percentage of the current Thai fishery landings comes from non-Thai waters. Thai fishing vessels are generally unwelcomed in the waters of all of Thailand's neighbours and the last 20 years have been ones of neighbourly tensions regarding seizure of Thai vessels and imprisonment of Thai fishermen. The Department of Fisheries, charged with the responsibility of seeking overseas opportunities for the Thai fishing fleet, have found it increasingly difficult to secure bilateral arrangements because of the poor reputation of the Thai fleet in complying with access conditions imposed by foreign states. Nevertheless, it remains profitable to outfit a vessel and send it into foreign waters and return the catch to Thailand -- the risk of losing the vessel (and abandoning the crew in a foreign jail) is simply outweighed by the profit.

Fourth, the international community through treaties such as the 1982 United Nations Law of the Sea Convention, the 1993 F.A.O. Compliance Agreement and the 1995 United Nations Fish Stocks Agreement is demanding and requiring states to take a more direct responsibility for the conservation and management of marine living resources both within and beyond national waters and for the actions of their national fishermen both within and beyond national waters. Tied to these international legal instruments is the 1995 F.A.O. Code of Conduct for Responsible Fishing which attempts to set out how fishermen and governments are to conduct their activities in a manner consistent with good marine resource stewardship.

As the focus of the Thai fishery, both harvesting and sales, continues to shift beyond Thai borders, the realities of the international context (expectations of responsible behaviour and assurances that an export product is of high quality and harvested in a responsible manner) must be taken into account.