

**IMPROVING THE LEGAL
FRAMEWORK FOR
PARTICIPATORY FORESTRY:
ISSUES AND OPTIONS
FOR MONGOLIA
WITH REFERENCE
TO INTERNATIONAL TRENDS**

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IMPROVING THE LEGAL FRAMEWORK FOR PARTICIPATORY FORESTRY: ISSUES AND OPTIONS FOR MONGOLIA

With Reference to International Trends¹

Foreword

This paper is an examination of Mongolian law and practice against the backdrop of emerging international trends in legal arrangements for participatory forestry. We hope it will be of interest to two types of readers.

First, it will be most obviously pertinent for those readers with a particular interest in the challenges of forestry and community-based management in the Central Asian context.

At the same time, however, we recommend it to readers without this regional focus, who will find that it sets forth an analytical framework that should be a useful tool for assessing the legal constraints and opportunities for community-based natural resource management in all regions of the world.

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Acronyms and Mongolian Terms

Mongolian Government Ministries, Agencies, and other Organizations

CBO	Community-Based Organization
FUG	Forest User Group
GOM	Government of Mongolia
MAS	Mongolian Academy of Sciences
MFA	Ministry of Food and Agriculture
MNE	Ministry of Nature and Environment
MIC	Ministry of Industry and Commerce (sometimes referred to as Ministry of Trade and Industry)
MOI	Ministry of Infrastructure
MOJ	Ministry of Justice
MFA	Ministry of Food and Agriculture
MOFA	Ministry of Foreign Affairs
MOFE	Ministry of Finance and Economy
MOSTEC	Ministry of Science, Technology, Education, and Culture
MRAM	Mineral Resource Authority of Mongolia
NFWRA	Nature, Forest, and Water Resources Agency
OGMC	Office of Geological and Mining Cadastre
PICD	Policy Implementation and Coordination Department

International Donors/Organizations

ADB	Asian Development Bank
CIDA	Canadian International Development Agency
FAO	Food and Agriculture Organization of the United Nations
GEF	Global Environment Facility
GTZ	German Agency for Technical Cooperation
UNDP	United Nations Development Programme

Mongolian Laws

MLBZ	Law on Buffer Zones
MLEIA	Law on Environmental Impact Assessments
MLEP	Law on Environmental Protection
MLF	Law on Forests
MLK	Law on <i>Khorshoo</i>
MLL	Law on Land
MLLO	Law on Land Ownership
MLM	Law on Mining
MLN	Law on <i>Nokhorlol</i>
MLNGO	Law on Non-Governmental Organizations
MLRF	Law on Reinvestment of Natural Resource Use Fees for Conservation and Restoration of Natural Resources

MLSPA	Law on Special Protected Areas
MLSS	Law on State Secrets
MLW	Law on Water

Other Common Abbreviations

AAC	Annual Allowable Cut
EIA	Environmental Impact Assessment
CBNRM	Community-Based Natural Resource Management
NGO	Non-Governmental Organization

Mongolian Terms

<i>Aimag</i>	Province
<i>Bag</i>	smallest political subdivision (subdivision of a <i>Soum</i>)
<i>Ger</i>	traditional Mongolian dwelling (also written <i>gher</i>)
<i>Khoroo</i>	smallest political subdivision of a city (equivalent to a <i>Bag</i>)
<i>Ikh Khural</i>	Parliament
<i>Citizen Khural</i>	regional and local parliament/legislative branch
<i>Soum</i>	district (subdivision of an <i>Aimag</i>)
<i>Khorshoo</i>	Cooperative
<i>Nokhorlol</i>	Cooperative

I. Purpose of this Document

Mongolia is in the process of trying to improve the legal foundation for community-based forestry. Since 1995, Mongolian law has provided a mechanism by which private entities can access forest resources for periods of 15-60 years. However, there have been defects noted in the legal framework, and a growing recognition that important changes in both law and practice will be required if community-based initiatives are to succeed in the long run and on a wide scale.

Some very important proposals for amending current laws – including the Law on Forests (MLF) and the Law on Environmental Protection (MLEP) – have been put forward, and are currently being considered by the Standing Committee on Environment and Rural Development. These proposals have been developed over the course of several years, and reflect the learning and reflection that has taken place through national experimentation with community forestry and through collaboration with international partners like GTZ, UNDP, World Vision, CIDA and others.

This document has been prepared as a further contribution to this initiative. It is hoped that this document will help in the assessment and strengthening of the currently proposed amendments. It is based on learning emerging from an ongoing FAO-supported project called: *Support to the development of participatory forest management* (TCP/MON/2903). This project has involved the development (through extensive community-level consultations in forest areas) of a detailed Concept Document for the design and implementation of participatory forestry. It has also resulted in in-depth review of the legal opportunities and obstacles currently faced by participatory forestry.

II. Law and Community Participation in Forest Management

The importance of community participation in forestry is now recognised worldwide. It is also widely recognised that an appropriate legal framework is needed if community-based management is going to work on a sustainable basis.

National forestry laws have not typically been friendly to local management. Indeed, in many parts of the world, the overall trend until recently has been an assertion of government legal control over forest resources at the expense of local populations. While some resource usage by local people (usually for subsistence purposes) has often been given some degree of legal recognition, most laws have provided little scope for local people to play a meaningful part in the planning, management and allocation of resources on which they may have depended for generations – and which, in some cases, they may have actively managed and protected in accordance with long-standing traditional rules.

In the last fifteen years, there has been a very significant trend worldwide towards the revision of laws in order to support community-based forestry. FAO has been involved in supporting over 70 member countries to develop better legal frameworks for community-based forestry.

Recent legal changes that have enhanced the opportunity for local involvement have taken many forms, including:

- **Turning management of selected state forest areas over to local user groups.** The community forestry programme in Nepal is well-known for using this approach. A Forest User Group is formed by the people themselves. In consultation with the forest department, they develop a management plan. They are then entrusted with the responsibility for managing the forest according to the plan. Ownership of the land remains with the State, and the Forest Department has right of veto if management rules are transgressed, but the User Group

has the right to harvest and benefit from all products set out in the management plan.

- **Joint management or co-management of state forest land.** This is a variant of the first approach, and differs from it only in the sense that the role of the forest department in ongoing management is more clearly spelled out. Joint forest management is famous for having been pioneered in India, in the form of local agreements between forest departments and local groups in which management responsibilities and benefits are shared according to different formula and conditions, and over time-frames that differ significantly from state to state. Various forms of co-management are found all over the world, from Philippines to Canada (British Columbia) to South Africa to Mexico.
- **Limited rights of access and use permitted in state-owned protected areas or buffer zones.** This is not specifically a forest management model, but refers to the fact that in protected area legislation in many parts of the world (most notably perhaps in Latin America, but elsewhere as well), there are increasing examples of people being given limited access and use rights either in the protected areas themselves or in the buffer zones around them.
- **Leasing of state land for forestry purposes.** This is an approach used in Philippines, Nepal and a number of other countries, with the lessees either being individuals or local groups. These are often seen by governments as a means of re-planting degraded land (eg. Vietnam, Nepal, Sri Lanka, Uganda), although they may also be considered for productive, well-stocked forest (eg. Kyrgyzstan).
- **Enabling local management on community or privately owned land.** In recent years, some countries have accorded increasing recognition to the historical land or territorial claims of local peoples. The 1997 Indigenous Peoples' Rights Act from Philippines is an example of this trend, and the rights of indigenous communities figure prominently in several Latin American laws. A number of other countries, including Canada, Australia, South Africa, as well as several countries in central and eastern Europe, are engaged in restoring the lands of dispossessed communities and individuals, some of which include natural forests or

commercial plantations. In other cases, the communal ownership of some forest land has long been legally recognised, and forest laws have provided tools for community-based management, as in parts of Austria and Switzerland.

It is important that this list of examples should not convey the wrong impression. None of these legal innovations are perfect, and in many places they are poorly drafted, riddled with contradictions, or the political will to implement them is absent. But there is an unmistakable trend in the national laws towards greater local management of forests through peoples' participation, however imperfectly it has been expressed in some cases.

III. The Mongolian Legal Framework for Participatory Forest Management

Mongolia has itself been part of the worldwide trend described above. Recognizing the need to conserve resources through local action, the GOM has begun the process of enabling communities to engage in conservation by allowing them a stake in Mongolia's resource base. Beyond existing resource-based legislation, the primary legislative vehicles for local access to resources are: the Law on *Khorshoo* (MLK), the Law on *Nokhorlol* (MLN), the Law on NGO (MLNGO), and the Law on Buffer Zones (MLBZ). The first two offer local citizens the opportunity to form simplified business entities that can take advantage of local opportunities for livelihood improvement. The MLNGO creates the necessary framework for community participation in conservation activities. The MLBZ, limited in application to Mongolia's buffer zones, enables increased community participation in local management of resources and enforcement of environmental laws.

Proposed amendments to the Law on Environmental Protection (MLEP) and the Law on Forests (MLF) continue this trend and, if passed, will firmly anchor the concept of community-based natural resource management in Mongolia's national legal framework.

Even without these changes, certain basic legal and institutional prerequisites for community management are already in place. The MLF, MLN, MLK, and Law on Land (MLL), Law on Economic Entities (MLEE) all provide for different entities to lease forest land for terms of 15-60 years. Land possession contracts have been supplemented by Forest User Contracts specifically tailored to forest use by local entities. The MLL also affords a degree of security by requiring compensation for early termination of contracts.

However, as the legal analysis carried out under the FAO project concluded², important changes in both law and practice will be required if community-based initiatives are to succeed.

First, even though community groups may “possess” forest land, they are still not provided with clear rights to be an active and integral part of forest management. The MLEP amendments improve this situation somewhat, but still the focus is more on protection activities than actual management and sustainable use. Over the long run, this could undermine incentives to participate – unless local people see tangible and significant benefits to their livelihoods, participation will be hard to sustain, and even the protection objective of community-based management will be hard to achieve.

Second, although the law allows for access to forest resources, the security of right holders is insufficient. Only mining and petroleum concessions enjoy real tenure security. The law does not clearly prevent overlapping rights from being granted over a contracted forest area, with the result that from time to time, forest user groups have found that new concessions have been granted to outsiders over “their” forest. In addition, the law does not firmly establish fair and clear criteria and procedures for the termination of a contract, or deal adequately with compensation.

Third, the current legal forms available for group formation in the legal framework are not entirely well-suited to community-based

natural resource management. For example, the broad membership criteria of the MLK and MLN do not restrict membership in the organization to community members. If adopted, the MLEP amendments would link membership to residency, but still only rely on registration instead of actual residency leaving room for registered non-residents to participate in community organizations. It is very important that community-based management not be a vehicle by which outsiders acquire interests to the detriment of community members.

Fourth, proposed amendments that would create natural resource oriented community-based organizations could still be improved in terms of providing a process of formation that is easy to use and understand. Moreover, the proposed amendments have not yet answered open questions about existing entities: e.g., will the new forest *Nokhorlol* enjoy access to forest resources exclusive of other forms of *Nokhorlol*? Can a local government agency or *Nokhorlol*, for example, still be a member of a forest cooperative; or do the proposed amendments truly restrict membership to resident individuals? If the new criteria are exclusive, will already established *Nokhorlol* or *Khorshoo* engaged in forest activities have to reorganize under the MLEP’s membership rules or will they be “grandfathered” in? Will they be given priority status? If they must be reformed (or withdraw from forest resource use), how will the local government appraise and compensate them for the early termination of their land use possession contract?

Fifth, prescribing the use of funds by community-based organizations as proposed in the MLEP could have the unintended consequence of tying hands and denying local innovation. The success of such funds in the Gobi is a strong indicator that a degree of financial freedom is a powerful incentive to participate in this type of program. This freedom should be preserved.

Sixth, the law does not provide a participatory, fair and simple process for the development of management plans by community-based groups. Forest planning principles are virtually absent from Mongolian law. As used in the MLF, management refers to resource assessments exclusively and do

² See *Community-Based Forestry and Livelihoods in Mongolia: Initial Review of the Policy and Legal Framework*. (FAO, 2004)

not aid forest users in the development of planning documents.

Seventh, the legal framework is still silent on private enforcement and dispute resolution mechanisms. Dispute resolution is the exclusive domain of the Ministry of Justice and local governors, neither of whom are adequately equipped to handle the growing complexity of law and legal issues. The recent advent of an administrative court system in Mongolia will hopefully improve the situation and provide a degree of security against arbitrary government action.

Eighth, Mongolia has yet to develop an appropriate framework for community participation that ensures adequate and timely access to information, regular admittance to government meetings, and full participation in policy formulation and decision-making. At present, the laws directed at participation remain principles without defining a guaranteed and specified process for obtaining promised information, attending meetings, and participating in government decisions.

IV. Legal Principles for Community-Based Management: Lessons from International Experience and Options for Mongolia

The FAO project has identified a number of key legal principles that have emerged from international experience over the last several decades, related to the design of effective laws that enable and support participatory forestry. In the remainder of this paper, these principles are used as a way of assessing the strengths and weaknesses of the current legal framework in Mongolia, and for recommending ways to improve that framework.

Principle 1.

The law needs to provide a mechanism for granting or recognising the rights of community-based organizations to manage forest resources.

General discussion: This principle is an overarching one – all the other principles refer to it. It simply reflects the fact that many forestry and related laws, especially older ones, vest almost all powers in the State and do not provide a specific mechanism by which private people (whether communities, villages, cooperatives, households, etc.) can be granted significant management rights over forest resources. Hence, the first step is to consider whether such a mechanism already exists in the law, or whether a completely new mechanism needs to be created.

As described in Section 2, above, approaches to this have varied widely around the world, from relatively limited short-term contractual mechanisms, to mechanisms involving the granting of actual ownership over forest lands and resources.

Mongolia: As already noted, Mongolian law recognises the possibility of private entities acquiring “possession” rights over forest land. The MLF specifically creates a contracting procedure (clarified by Government Resolution 125) that enables private entities to realize commercial “possession” rights in specific areas for periods of 15-60 years. Until now, these provisions have served as the legal mechanism for Mongolia’s limited experimentation with contracting forest rights to community-based organizations.

In addition, the MLF allows private citizens the right to “own” trees planted by them on land leased by them. This is an incentive to plant trees beyond the reforestation requirements of MLF §23(2).³ This right can be a powerful motivator to restore and increase the resource base, but there are two points of concern.

First, privately planted trees are state property and granting ownership over them

³ “Reforested” trees do not become private property, but instead must be returned to the local governor’s possession after two years.

needs some support to be secure. The Constitution states without clarification that “forests” are property of the state;⁴ a status reiterated by the MLF. The MLF does not define “forests”; instead it refers to a “forest fund” and in that class lists “planted forests.”⁵ Because of the MLF’s reforestation requirements, we know that this class includes trees planted by private entities and that these trees belong to the state forest fund. Thus, “forests” under the Constitution include privately “planted forests” under the MLF and are state property. It is therefore possible to argue that all planted trees (including those planted in excess of the reforestation requirements) belong to the “forest fund,” are “forests” and therefore state property.

The question is whether the grant of private ownership by the MLF is effective or barred by the Constitution. Unfortunately, the Constitution provides no clear answer, but it does not explicitly permit the state to confer “ownership” of “forest resources” on private parties. And it is a certainty that joint ownership of the land and forest resources is prohibited by the Constitution, MLL, and MLLO. In any event, Mongolia’s Constitutional Council has the authority to hear this type of claim and, if it agrees, to nullify the ownership.⁶

Second, there is no mechanism in the MLF or subsequent regulations for recording the location, quantity, and ownership status of planted trees to protect this property against future adverse uses or claims. In short, the right to “own” trees exists, but remains vulnerable in the current framework.

Options for improving the legal framework: The specific strengths and weaknesses of the existing legal mechanism and some options for improvement will be looked at more closely under the principles that follow. But as a way of framing the discussion in the following pages, it may be useful to mention here, in passing, the range of options that could be considered, now or in the future, concerning the basic legal approach to the granting or recognising of local forest rights.

Most discussions of community-based forestry in Mongolia take it for granted that rights conferred on community groups will be contract based, for a certain number of years (15 to 60). With this assumption as the starting point, the question then becomes “how to design the legal framework for these contractual arrangements in a way that most effectively promotes the objectives of participatory forestry.” For the most part, this document as well focuses on this question.

However, it is important that the focus on improving a contract-based system of participatory forestry not preclude consideration of the possibility of a more fundamental reform, whether in the short term future or further down the road – namely, the option that community-based groups could eventually acquire permanent rights over the forest land and resources they manage. As international experience shows, successful community-based forest management can be achieved under contractual systems in the right circumstances. In general, however, the closer the “bundle of rights” held by the group approaches full ownership, the more effective and sustainable the results are likely to be. Given Mongolia’s relatively limited experience in participatory forestry so far, it may be too early to think about adopting such a fundamental reform. On the other hand, it may be useful even now to consider the possibility that, at some point in the future and in certain circumstances, it might be appropriate to allow well-performing community-based organizations to acquire full ownership of the land they manage. Short of a constitutional amendment, more explicit reference could be made in the MLL and MLLO expressly granting ownership of forest resources as one of or even the final stage in a series of acquired rights that attach not only to trees planted, but all resources (excluding wildlife) and land within a forest user group’s possession contract. In this framework, ownership rights would be tied to successful completion of specified management goals as defined and agreed upon in the management planning process. The possible revocation of such ownership, used judiciously, may be an

⁴ Constitution §6(2), 1992.

⁵ MLF §4(1), 2002.

⁶ Constitution §70(1), 1992.

effective disincentive to mismanagement of the resource.⁷

Principle 2.

The law needs to enable local groups to engage in forest activities that are important to them for their livelihoods.

General discussion: Sustained involvement by local people in forest management requires that they see clear benefits to their livelihoods from such involvement. Where the benefits are not clear, or where the responsibilities of participants in terms of protection and conservation outweigh the benefits they receive, their incentives to participate are weakened. Of course, improved forest protection is a very important objective of community-based management, but it needs to be balanced with sustainable activities that produce tangible and significant benefits for local people – otherwise, it will be extremely hard to sustain participation. And if active participation is not sustained, the protection objective itself will be difficult to achieve.

Internationally, some legal frameworks designed to promote community-based management, fail to observe this principle. While creating a legal mechanism by which groups can acquire rights over local forests, they then severely restrict the types of activities or types of forest utilisation that such groups can engage in. For example, some laws put a very heavy emphasis on community groups protecting forests, but with little prospect that they will actually realise any significant monetary or other livelihood benefits from the forest they have protected.

Of course, not every forest area is suitable for a community-based management approach that involves a significant level of utilization.

⁷ Following in the tradition of Russian land use regulation, the MLL provides for the confiscation of land for violation of the law. By comparison, developed market economies take a much less draconian approach recognizing that land users tend to have long-term interests in tenure security and that this alone acts as a form of insurance (albeit not complete) against land degradation. The power to confiscate is also an open door for abuse and, if considered, should be restricted to the most serious offences and be accompanied by fully defined condemnation proceedings.

Particularly sensitive ecosystems and habitats, for example, may not lend themselves to this approach (though even in such settings, there is often more scope for local involvement than is typically appreciated.) But this is better analysed and decided by looking at the local context, rather than through overly broad application of uniform and restrictive rules that apply across the board.

Mongolia: It is certainly a stated goal of the Mongolian government to provide access to forest resources to communities. Although the revised National Forestry Programme (G.R. #248) of 2001 does not mention community forestry as a specific program goal, this has arguably been subsumed under the following sub-objectives:

- Second Objective, No. 3, – provide “possession rights to ... organizations under contract [that] have the capability, techniques and technology to conduct logging, reforestation and forest protection activities”;
- Third Objective, No. 14 – provide ownership rights to private parties; and
- Fourth Objective, No. 5 – support local citizen initiatives, voluntarily joined in a form of economic entity to conduct forest maintenance and reforestation activities.

Beyond these guiding principles, access to and use of forest resources is a function of private tenure rights, business entity rights, zoning restrictions, permitted uses, and prohibited activities. A potential problem in Mongolia is that in many places, these may operate to restrict quite severely the types of activities and uses people may make of the forest. The danger is that in such situations, people may not see the relevance of forest management to their own livelihoods, and hence may feel little incentive to get involved.

For example, even though private entities may possess forests pursuant to contract, complex zoning regulations contained in the MLF and other laws may seriously restrict the uses to which contracted areas can be put.

The MLF creates and relies on an array of forest zones as its primary regulatory framework. It divides forests into Strict, Protected, and Utilization zones and further subdivides them into four sub-zones and eight forest types.

The first two zones (Strict and Protected) are almost exclusively for environmental protection and technically not available for any exploitation. For the most part these zones have not been mapped and Mongolia's Law on State Secrets prevents the use of maps at appropriate scales.⁸ Nevertheless, it appears that a significant portion of Mongolian forest areas fall into the two most restricted zones.⁹ All forests that do not belong to the previous two categories are Utilization Zone Forests and are open to commercial exploitation pursuant to contract and the payment of fees.

In addition to zoning restrictions, both the current laws and proposed amendments consistently focus attention on protection requirements. One of the primary purposes for creating natural resource community organizations is to increase the local presence in conservation activities. The organization charter in the proposed MLEP amendments specifically requires applicants to state what types of protection activities they will engage in. Again, while protection is an obvious and appropriate part of the activities in which community-based groups should be engaged, if there is not sufficient tangible benefits for the community from forest management, involvement will be difficult to sustain over the long term. In the end, the protection objective itself will not be reached.

Options for improving the legal framework:

As mentioned above, the two concerns in this context are the degree of access permitted in areas not designated as utilization zones and the protection orientation of access rights. A significant percentage of forested land falls under the "strict" and "protected" categories and is off-limits to forest concessions, and hence

utilization by FUG's would necessarily be limited.

Neither the existing laws nor the proposed amendments address the constraints on access and use. Some thought might be given to specifically permitting certain carefully defined and sustainable uses within these areas and grant rights exclusively to community-based organizations to use the area in a way that will clearly benefit them. Absent some approach like this, large areas of Mongolia's forests will likely not benefit from appropriate uses of a participatory forestry approach.

Principle 3.

The law needs to provide an appropriate mechanism for local groups to make management decisions about their forest resources.

General discussion: In most older forest laws around the world, management planning was viewed as a technical exercise undertaken by foresters, with no consultation required or contemplated. In addition, as a matter of practice, planning criteria and objectives have until relatively recently focused mainly on trees. Social functions, water production and biodiversity values of forests and non-wood forest products were generally underemphasized.

Management of local forests *by and for* local people requires a new approach¹⁰. Most laws supporting community-based management now provide for some sort of local planning process for community or locally-managed forests. The resulting plan then serves as the basis for the contract or other type of agreement between government and the group.

However, even in some new laws, what is striking is the extent to which government holds on to the decision-making function. This expresses itself in a number of ways. Often the legal requirements for doing a management plan are quite complex, and likely to be alien to what communities are

⁸ MLSS Item #34, 1995.

⁹ Strict Zones include about 8.44 million ha or 47% of the "forest territory" of Mongolia. Protected Zones cover about 8.22 million hectares, or 46% of the "forest territory." Utilization zones cover about 1.19 million ha or 7% of the "forest territory." (World Bank, Mongolia Forest Sector Review, p. 83) It should be noted that the Forest Sector Review report goes on to point out that statistics on forest zonation are presented in various documents in an inconsistent and contradictory way. Nevertheless, the report concludes that "the current forest zoning appears to reflect a GOM preoccupation with natural resource protection and conservation."

¹⁰ Indeed, even management planning for state forests where direct community involvement is *not* contemplated requires a new approach, but this is beyond the scope of this paper.

used to and perhaps what the situation requires. Frequently regulations regarding co-management continue to vest almost all management decisions in government. The problem with such a “top down” approach is that it increases the risk that management choices will be made that do not reflect the actual priorities and needs of local people, nor take into account their local knowledge of the resource.¹¹ Some recent laws are sensitive to this concern and include simplified planning requirements for community forest areas and spell out steps in the planning process to ensure that decisions are made in a participatory and transparent way.

Mongolia: Management planning principles are virtually absent from Mongolian law; the MLF, MLN, MLEP amendments, and MLK are no exception. As used in the MLF forest management refers to resource assessments exclusively. By law, “management” consists of studies of forested areas, reserves, distribution, composition, quality, characteristics, and changes to determine the justification for forest conservation, proper use, and restoration.¹² Financing for these studies comes from three sources depending on the purpose of the study. The State finances the overall assessment of forest resource reserves and their potential for development including forests in Strict and Protected Zones (conducted by the NFWRA). Local budgets finance studies to establish boundaries for Protected Zone and Utilization Zone forests. The user must finance all other forest studies.

Government Resolution #125 makes only brief reference to an “annual management plan” that should be attached to the Forest Use Contract. It directs the forest user to “precisely indicate all activities related to the forest resource, its use, protection and restoration, and the responsibilities of each party.”

Options for improving the legal framework: In Mongolia, the planning

¹¹ Related to the issue of management planning is the question of how the area subject to the agreement is to be determined and defined. This is discussed more under Principle 12. Issues related to public participation in forest policy and decision-making more broadly is discussed under Principle 14.

¹² MLF §6 2002.

requirements for community-based forestry cannot be considered too complex or burdensome. On the contrary, they are overly broad and lack sufficient specificity. Both forest user groups and forestry officials would benefit if the law:

- spelled out in more detail some basic management principles;
- set forth a transparent and participatory process that should be followed in formulating a management plan, including the delineation of the area to be covered by the contract;
- established the criteria government is to use in reviewing and approving management plans;
- specified the ways in which plans can be modified or adjusted; and
- defined the legal significance of plans.

Also useful at this juncture would be the promulgation of a management plan template more specifically describing subjects and content for management planning. (See Principles 12 and 14 for related matters).

Principle 4.
The law needs to define the criteria and process for group membership appropriately and fairly.

General discussion: Community-based forestry is largely intended to enhance livelihoods within communities in the vicinity of forests that are engaged in active forest management. Hence, the criteria for the appropriate composition of an eligible forest user group become very important. FUG formation should not be a vehicle by which “outsiders” acquire interests in a local forest to the detriment of local people. It should also not provide opportunities for a few community members who take the initiative to form a Forest User Group to exclude others who are legitimately interested in participating and sharing in the benefits, particularly where there is a local history of traditional use of forest resources in daily life. The experience of other countries shows that these types of problems can arise where care is not taken in both defining carefully the criteria for membership and ensuring that membership is open to interested stakeholders that meet those criteria.

Mongolia: The definition of community is especially complex in Mongolia where communities (or significant portions thereof) may move, merge and separate depending on the time of year. Complicating matters is the diverse history of some of Mongolia's forest communities; essentially collected towns that remain strongly divided along social and ethnic lines. The question here is how to define "community" in a way that fairly recognizes these sometimes disconnected, sometimes moving parts.

The current approach relies on the formation of two distinct and specialized organizations called *Nokhorlol* and *Khorshoo*. While these groups are typically local and community based, neither law defines "community" nor places any constraint on membership in the organization outside the community in question.¹³ The proposed amendments to the MLEP are therefore particularly important because they identify this critical gap and propose a workable solution by tying membership in a *Nokhorlol* to resident registration.¹⁴ The Forest Use Contract reinforces the residency requirement.¹⁵

Because *Nokhorlol* are the targeted business form in the current proposals for amending the environment-related laws, we note two additional concerns with the existing membership criteria. First, allowing one organization (in this case, *Nokhorlol*) to be a member of another is a confusing regulatory framework; it is especially confusing considering the prohibition by the same law on individual *Nokhorlol* members being members of other *Nokhorlol*.¹⁶ If there is logic in prohibiting one type of membership (i.e., conflict of interest), there is probably logic in prohibiting the other. Second, the inclusion of government organizations as possible members seems to negate the intent of forming community organizations¹⁷ and raises

the question of how to manage conflicts of interest.

Options: Rather than wrestle with the unwieldy task of defining the term "community," the preferred and probably more efficient approach is to refine membership criteria.

The proposed amendments to the MLEP take this approach and are reinforced by the Forest Use Contract. Additional criteria (not yet proposed in the MLEP amendments) should be considered to ensure that these CBOs will be representative of the community. These could include:

- minimum number of members;
- an "actual" residency requirement to ensure that registered residents in fact live in the area;¹⁸
- some requirement to use a portion of the income for identified community needs (see Principle 6).

At the same time, some procedural safeguards could be incorporated into the law to help ensure that membership is indeed open to all community stakeholders who have a genuine interest in participating. In many areas in Mongolia, this issue may not arise in practice¹⁹ – if a FUG with a small membership acquires rights over one forest area, there will often still be enough forest areas in the vicinity for other FUG's to form. But in some places, it could be a problem, with small groups of users effectively shutting out others who have for generations had access to a particular area. The best way to avoid this problem is to ensure that the law requires public consultation and open access to information during the process of assigning an area to a particular FUG.

Concerning government participation, given the small size of some communities, it may not be possible (or even desirable) to exclude government employees from membership in

¹³ The MLK has the broadest membership criteria, setting only a minimum membership level of three. MLK §6, 1997; MLN allows private citizens, other *Nokhorlol*, and government organizations to be members. MLN §2(3), 2002.

¹⁴ The MLEP amendments predicate membership on citizenship, age of majority, and permanent registration as a resident of the area. Proposed amendments MLEP §31^{1.2}, 2004.

¹⁵ Forest Use Contract §3(3).

¹⁶ MLN §22(3), 2002.

¹⁷ The inclusion of government officials has raised concerns in the formation and management of buffer zone councils and should not be forgotten in the context of this discussion.

¹⁸ Actual residency is particularly important since the 2004 elections revealed in full color that registration and actual residency are two different things.

¹⁹ It is a very common problem in more densely populated countries where there are long traditions of intensive local dependence on forests.

Nokhorlol, but there seems to be no need to anticipate the involvement of government organizations in what is otherwise a private entity.

Principle 5.
Forest users need flexible, easy-to-use and appropriate mechanisms for forming legal entities.

General discussion: Most countries trying to promote greater local involvement provide for the formation or recognition of local legal entities (villages, societies, committees, forest user groups, cooperatives, etc) for participation in community/smallholder forestry. Depending on the country, such mechanisms may be created by the forestry law itself, or by general laws of association.

It is also increasingly recognized that such mechanisms need to be easy for people to use and socially appropriate. Experience shows that the imposition of institutional arrangements on people that are out of step with their traditions, their aspirations and their capacities can *disable* rather than *enable* participation. Unfortunately, the framers of some laws that are otherwise supportive of participation have failed to take this fully into account, and instead require local groups to adopt organizational forms that are often complex and alien to a local situation, and that are expensive to establish. This may lead to the creation of legal entities that have little legitimacy among their members, and can provide opportunities for more sophisticated group members to gain advantage by manipulating unfamiliar legal forms. It can also lead to serious delays in the initiating local management, if the process of approving and registering the legal entity is too lengthy.

Mongolia: The two most common business entities used by communities are *Nokhorlol* and *Khorshoo*. Other than the vague requirement for “additional information as needed” that appears at the bottom of each organizational charter list, the required documentation to form either business type does not appear to hinder entity formation. The principal concerns are the length of time required to register and the degree to which the charter requirements adequately identify organizational functions and relationships.

The proposed MLEP amendments directly target the timing problem by guaranteeing registration within five days. However, the same amendments may complicate the process by requesting information at the entity formation stage that is probably more readily available and appropriate at a later stage; i.e., the land possession contract application.

Revising the MLN charter and/or excluding *Khorshoo* from participating in forestry activities also raise the question of reformation under the MLEP’s proposed changes. The proposals do not attend to this question.

Formation under the MLK: Enacted in 1995, (amended in 1997) the Law on *Khorshoo*²⁰ (MLK) describes a specialized business entity akin to a simple partnership. It distinguishes itself from the MLN by containing a list of possible business activities including among others livestock, agriculture, transportation, certain banking functions, insurance, housing construction, and health care.²¹ Although the list of business types does not appear to be especially restrictive, the MLK does not explicitly list forestry. This is presumably the reason the proposed MLEP and MLF amendments do not include formation as a *Khorshoo*.

The list of organizational charter requirements under the MLK are shown in Annex 1 to this report. This list is more detailed than either the MLN or MLEP charters, and is probably the most appropriate of the formats. Instead of focusing on the project or business the organization intends to conduct and asking for information that may not be available, it restricts its inquiry to the organizational rules necessary for the creation of a well-defined association. It also maintains adaptability by not prescribing rule content and allowing the group to self-define.

Formation under the MLN: Enacted in 1995, (amended in 1997, 1999 and 2002) the Law on *Nokhorlol* (MLN) governs the formation and management of *Nokhorlol*.²² As

²⁰ A name that almost suggests “community” in translated form.

²¹ MLK §5(2), 1997.

²² Translated as “cooperative,” but is closer to the concept of “working collectively” in English.

conceived, the law focuses on general business entity formation similar to a partnership or corporation. It provides for two types of *Nokhorlol* – general and limited liability – but requires virtually identical organizational charters. It does not restrict the type of business and specifically permits either form to engage in foreign trade.²³ *Nokhorlol* conducting business requiring special permission must obtain such permission pursuant to relevant legislation.²⁴ So, for example, *Nokhorlol* intending to use forested areas would be subject to relevant provisions in the MLL, MLLO, MLF, etc., but are otherwise authorized to engage in the commercial use of forests.

To form either type of *Nokhorlol* requires the submission of a set of organizational documents listed in Annex 1.

In a limited liability *Nokhorlol*, the specific rights and responsibilities of the individual members must also be spelled out in the charter. Establishing a *Nokhorlol* reportedly takes a substantial amount of time (as much as 6 months) due to local decision-making processes and to some degree discourages formation.²⁵

Formation under the MLEP proposed amendments: Potentially replacing or supplementing the provisions of the MLN are proposed amendments to the MLEP.²⁶ If approved, these amendments will make it possible to organize a *Nokhorlol* specifically for natural resource use, including forest management. The amendments delegate to the MNE the responsibility for approving *Nokhorlol* rules²⁷ and set a short timeframe of five days for registration by local government.²⁸ Commensurate with existing legislation, a separate contract with the either the *Soum* or *Aimag* governor would control access to local resources.²⁹

Under the MLEP changes, legal recognition of forestry *Nokhorlol* would require the approval of a special set of organizational

documents (with further guidelines to be produced by the MNE), including:³⁰

- Name of *Nokhorlol*;
- Name of *Soum*, *Duureg* or local community that will conduct activities;
- Number and names of members;
- Sizes, types of natural resources, and boundaries of exact area where resources are to be protected;
- Types of environmental protection activities;
- Management structure of the *Nokhorlol* and its authority;
- Rights and obligations of the members;
- Income sharing structure among members;
- Production and sales procedures; and
- Financing arrangements.

This list poses a few concerns directly tied to ease of use. The first concern is the proposed requirement that potential forest *Nokhorlol* state the boundaries of the exact area where their activities will take place. The question is: can an unregistered forest *Nokhorlol* actually specify the exact area if it has not been granted a possession contract? And, if it has not been granted a possession contract, can it be registered? Is there a possible catch here, even if it is unintended or unlikely?

The second concern is the recognition of the pending registration by other land allocation procedures. Assuming local officials allow an interested CBO to identify an area without a contract, is there any guarantee that the area will still be available after the CBO finally registers?

Third, the amendments ask for information that may not be available in any useful form until the CBO exists, and has been or is in the process of being granted an area – namely, what specific conservation measures it will use and what financing arrangements it will employ. While these are useful, even necessary, for encouraging sustainable forest use, forest CBOs will probably not be able to provide this information until more is known about the area and its potential commercial uses (including type of resource, quantity, quality, environmental concerns, etc.). The Forest Use Contract may be a more appropriate place for gathering such project

²³ MLN §4, 2002.

²⁴ MLN §5(1), 2002.

²⁵ cf. 153 days to start a business in Mozambique; 3 days in Canada.

²⁶ Proposed amendments MLEP §31 et. seq., 2004.

²⁷ Proposed amendments MLEP §31¹.4, 2004.

²⁸ Proposed amendments MLEP §31¹.6, 2004.

²⁹ Proposed amendments MLEP §31¹.13, 2004.

³⁰ Proposed amendments MLEP §31¹.3, 2004.

specifics and already anticipates this kind of specification.³¹

Reformation under the MLEP: The special membership requirements in the MLEP appear to create an exclusive breed of CBO specifically for natural resource use based more closely on local residency. There is, however, no indication whether these criteria are exclusive of or in addition to those set out in the MLN and what affect they have on *Khorshoo* currently active in forestry.

Options for improving the legal framework:

The MLEP amendments eliminate the vague “other information” requirement from the organizational charter. This is an excellent recommendation that avoids potential uncertainties and delays in the process.

To further assist with ease of use, some consideration should be given to eliminating from this stage of the process (entity formation) requests for information too closely tied to actual project implementation. Project specific information can still be gathered at a later stage and be part of a simple project approval process.

Attempts to create a separate and exclusive natural resource cooperative regime will have to consider the question of transitioning from one entity form to the other. The caution being: the law cannot change the rules of the game in an equitable manner without also addressing the status of the players already involved. Questions that need to be answered in any proposed amendments might include:

- Can a local government agency or *Nokhorlol* still be a member of a forest *Nokhorlol*; or do the proposed amendments truly restrict membership to registered residents only?
- If the new criteria are exclusive, will already established *Nokhorlol* or *Khorshoo* engaged in forest activities have to reorganize under the MLEP’s new membership rules or will they be “grandfathered” in (i.e., allowed to continue in their current form because of their pre-existing status)?
- If “grandfathered,” will it be automatic or will some process be required?
- If they must reform, how will this be accomplished, how long will it take, and

what happens to the resource in the meantime?

- If they must withdraw from forest resource use entirely, how will the local government appraise and compensate them for the early termination of their land use possession contract?

Principle 6.

The law should not place unnecessary restrictions on how a community-based organization uses or invests the benefits it receives.

General discussion: Quite a few laws worldwide prescribe how the proceeds of economic activities need to be used by the community – i.e., a certain percent must be reinvested into protection or reforestation or community development activities. It may be desirable to target some of the benefits on “community” needs, in order to maintain the spirit of a community-based enterprise. But over-targeting in the law, with little flexibility for FUG members themselves to decide how to use the benefits, can undermine incentives. A proper balance must be sought.

Mongolia: Perhaps most important to CBOs is the MLN’s authorization to hold accounts, and especially the power to provide small-scale loans to cooperative members. The MLN does not restrict the purposes for which income may be used, requiring only that the *Nokhorlol* establish internal rules for fund management.³² In contrast, the MLBZ and proposed MLEP amendments specifically define the purposes – a refinement that has for BZCs resulted in the restriction not only of the use, but also the mechanisms through which they use the fund; e.g., small-scale loans.

The MLEP amendments similarly define the purposes and may therefore also inadvertently (or intentionally) restrict fund use. Internal regulation of fund use remains within the discretion of the *Nokhorlol*, but is limited to or directed to be used for “social” issues and “restoration of natural resources.”³³ Unfortunately, the amendments fail to go one crucial step further and explain

³¹ Forest Use Contract §1.8.

³² MLN §20(2), 2002.

³³ Proposed amendments MLEP §31¹, 2004

what this might mean or, better yet, place a limit on the percentage of income that must be spent on these activities or specifically authorize *Nokhorlol* to act as a lender within their organization.

Experience with the implementation of the MLBZ and other laws demonstrates that a lack of legal clarity cuts both ways. Mongolia's legal heritage, founded on the principle of "whatever is not permitted is prohibited," has shifted in recent years to some degree to the opposite principle – "whatever is not prohibited is permitted." However, the paradigm shift has not solidified and therefore cannot be relied upon to predict what will happen in the event of a gap. Gaps therefore create confusion and even obstacles that further detail in the law can avoid. Because the language authorizing the forest cooperative account is still only a proposal, it is difficult to predict what practical affect it will have.

Options for improving the legal

framework: The proposed amendments to the MLEP recognize the importance of a group's right to hold and use funds. However, if defining how these funds are to be used is important to the "community" aspect of the venture, then it is also important to make sure that definition is clear and not likely to result in unnecessary restrictions. Attention should be given to clarifying this definition and to ensure that it does not result in undesirable restrictions on decision-making by FUG's.

Principle 7.

Rights of forest user groups need to be of sufficient duration.

General discussion: Rights need to be long enough over time so that a group feels real commitment to the area it manages, and feels secure about investing time and effort into that management. Theoretically, this sense of security is maximised if the rights are perpetual – i.e., actual ownership of the resource, or some other type of open-ended arrangement that will continue indefinitely, subject perhaps to revocation in extreme cases of abuse or abandonment. As discussed earlier, not all countries are ready to use such an approach in participatory forestry contexts, though it may be a long-

range goal, and is being used with apparent success in a number of places.

If rights are to be in force only for a particular period of time – as in co-management arrangements or community forestry leases, for example – care should be taken to ensure that agreements are at least as long as is realistically required to reap the benefits of participation. Some of India's joint forest management programmes, for example, prescribe terms that range between five and ten years. Such provisions (which are not untypical of co-management in other countries as well) could create the impression of a "one-shot" approach that could undermine the community sense of ownership of the resources in question and weaken its long-term attitude towards management.

Mongolia: Land possession is the typical form of land tenure for resource users provided for by the MLF, MLL, MLLO, Constitution, and other laws. Pursuant to land possession agreements, private citizens may possess land from 15 to 60 years with extensions of 40 years. Typical contract terms are 15 years. Depending on the extent of initial investment and the type of use, the length of time necessary to ensure that benefits accrue to the possessor will vary. Forest users, because of the length of time required for harvesting and replanting operations, will probably require longer tenancies than the current 15 year average.

Options for improving the legal

framework: The proposed amendments do not mention contract duration. To ensure that forestry related groups receive equal treatment and are of adequate duration, one option would be to consider stipulating to a longer tenancy period for FUG's as an amendment to the MLF and/or MLEP. For the reasons stated above, due to the nature of the resources involved, it is worth considering at this point making the minimum length 40 or even 60 years. This could be preceded by a short "trial" period, during which the FUG would have to demonstrate commitment and good practice in order for its longer term rights to ripen (this is recommended by the Participatory Forest Concept). Finally, it would be appropriate to consider the possibility (as in a number of countries) of perpetual rights that would not terminate

except upon the happening of specified events or violations.

Principle 8.
Rights of forest user groups need to be exclusive.

General discussion and international experience: People are unlikely to manage a resource if they know that someone else can reap the benefit of their work. Hence, the holders of rights under a community-based management scheme need to be able to exclude or control the access of outsiders to the resource over which they have rights.

“Exclusivity” does not mean that there are no people outside the principal group responsible for management that might have certain rights that need to be respected. Distant or sporadic users of a resource may have legitimate historical claims that need to be accommodated. “Exclusive” also does not mean that resources cannot be shared – simply that the group that holds the right should be involved in the decision to share. Finally, “exclusive” does not mean “exclusionary” – it does not mean that community members who want to participate in management can be unfairly excluded from the group (see Principle 4).

What exclusivity does mean is that once the holders of rights have been defined, other users cannot be imposed on the group against its will. This means that government, for example, cannot assign rights to others over the same resource (such as giving forestry cutting licenses to outsiders in a community forest). It also means that government needs to recognize the power of the community group to apply its rules to outsiders, and where necessary, to assist in the enforcement and protection of the group's rights from outside interference.

Mongolia: The wording of the MLLO makes land ownership on its face exclusive of other right holders. However, the same law omits the term “exclusive” in defining “land possession.” As a result, local organizations find themselves unable to exclude others from using their land and negatively impacting the resources for which they have contracted with the state. There have been reports, for example, of government allowing

commercial firms to harvest timber in areas that have already been contracted to community-based groups.

Defined by the MLLO, land possession in Mongolia is an estate for a period of years comparable to the legal concept of leasehold. Similar to leasehold, land possession is simply a long tenancy – the right to occupy and use the real property for the term of the lease, in this case 15-60 years. The lease is the contract between the leaseholder (land possessor or FUG) and the landlord (the Mongolian government).

One of the principal rights associated with this type of tenure is the right of “quiet enjoyment”; meaning the right to occupy the property without interference from third parties. It is not the same as the exclusivity referred to under “ownership” because the arrangement necessarily contemplates the involvement of more than one party.

The relationship between these two parties needs to be defined and typically addresses when the “owner” is permitted to enter upon the premises, for what purposes, and with what kind of notification.

The tenure security enjoyed by a forest users group also depends on the recognition of such rights in other land allocation procedures. Indicative of the problem are the procedures contained in the Law on Mining (MLM). As with all other natural resources, minerals are the property of the State.³⁴ Decision-making authority rests solely with the Office of Geological and Mining Cadastre (OGMC). This office has the right to grant exploration and mining rights on all land other than State special needs land and Protected Areas.³⁵ Procedurally, the OGMC checks only for overlap with “reserved land” (areas specifically reserved by the Cabinet Ministry), “special needs land” (areas under some form of government protection), and existing or pending mining licenses.³⁶ Absent overlap with these land allocations, the OGMC must issue either 1) a mining exploration license

³⁴ MLM §5, 2002.

³⁵ MLM §6(2), 2002.

³⁶ MLM §14(9), 2002.

within 10 business days;³⁷ or 2) a mining license within 20 business days.³⁸

Other land possession contracts (including Forest Use Contracts) do not fall under any identified category and therefore do not enjoy the procedural protection afforded by the MLM. The lack of integration in land allocation procedures results in overlapping and conflicting land grants.

Options: Current proposals do not address the need for defining the exclusivity of land possession agreements. Two options are available:

- Grant the right of “quiet enjoyment” directly in the Forest Use Contract without amending the MLLO. At a minimum, this would help regulate the relationship between the contracting agency and the land possessor. It is also probably the easiest, but not the best option because it would not regulate the rights held by third parties to use land pursuant to other laws. In the end, the conflict would revolve around the power of a ministerial order (Forest Use Contract form) to regulate rights granted by a Parliamentary Act (i.e., MLLO). All indications are that the ministerial order would lose because it is legally defined as “subordinate legislation” and must be in conformity with parliamentary acts.
- The better option would be to amend the MLLO, defining the degree of exclusivity land possessors hold (something less than complete exclusivity) and define specific aspects of the right directly in the contract.

With respect to the timely recognition of FUG rights in other land allocation procedures, an adequate solution will probably require amendments in more than one law – at a minimum, in the MLM to require verification of overlap with other pending and existing land possession contracts (not just forest concessions); and most likely in the MLLO and/or MLL to require verification of pending and existing concessions in any land allocation procedure. There may be an additional need to ensure that the status of

land possessions concessions are verifiable in a central registry.

Principle 9.

Rights holders need to feel secure that their rights will not be terminated unfairly or arbitrarily

General discussion: The law should not allow for a contract to be terminated unilaterally by the Government for a vaguely defined or insufficient reason. In almost any situation, of course, there are circumstances where rights can be taken away or diminished, but conditions for doing so need to be fair and clearly spelled out, the procedures for doing so need to be fair and transparent, and the issue of compensation needs to be addressed.

In a number of places around the world, the security of a local forest management agreement may be weakened by very wide powers on the part of the government to terminate the agreement. The grounds for termination may be poorly defined or vaguely spelled out, with the result that a significant amount of discretionary power is vested in a government agent. In some jurisdictions, for example, wide discretion may be given to a Minister or a forest officer to terminate an agreement where he or she determines it is appropriate to do so. Sometimes this is because governments continue to think of community management arrangements as a “favour” they are giving to people, as opposed to legally binding agreements. In situations where a community feels wronged by a government’s termination decision, the law may provide only limited recourse to various levels of officials within the relevant ministry.

A number of recent laws have included provisions to reduce the potential for inappropriate termination. In some instances, such termination requires the payment of compensation. In other instances, laws now contain much clearer criteria for determining whether a serious breach has occurred that would allow the government to take some disciplinary action, and steps for inquiry, notice and review are spelled out in detail.

³⁷ MLM §14(9), 2002.

³⁸ MLM §18(6), 2002.

Mongolia: Applying this Principle in the Mongolian context requires us to look at two issues: (i) the criteria for termination of land possession contracts, and (ii) compensation requirements upon termination.

Termination: The MLL authorizes the government to terminate land possession contracts and requires that the conditions for and upon expiration be spelled out in the contract. Government Resolution #125 specifically states that such contracts may be terminated for “repetitive violations of relevant laws, not meeting the obligations [of the] contract, and failure to follow the land possession requirements. . .”³⁹ The decision to terminate rests solely with the *Soum Khural*.⁴⁰ The Forest Possession Contract contains slightly different wording and conditions termination on the continuous failure to “meet the requirements of state environmental inspectors, rangers, and contract obligations.”⁴¹

Compensation: The MLL requires that compensation terms be included in land possession contracts. The MLF provides for compensation in only two instances – when land has been taken under state protection or use of the forested area prohibited by the local government.⁴² In either instance, the user’s rights are limited to the substitution of another contract area with the same volume of wood. The Forest Use Contract, like most other land possession contracts, does not further elaborate compensation terms.

The exception to this practice is the mining land possession contract. The MLM also requires compensation in the event a local government establishes special needs land within their territory that overlap with existing mining concessions.⁴³ It further defines the terms for compensation in the law and bases them on international standards (albeit undefined).⁴⁴ The MLM also requires actual payment of compensation before requiring a contract holder to cease operations.⁴⁵ In addition, it permits mining companies

investing greater than 2 million USD to establish a “stability agreement” with the GOM locking in legal and economic preferences for 10-20 years.⁴⁶

The result is that mining concessions enjoy a level of security, while the government may terminate other forms of land possession without substantial difficulty or consequences.

Options for improving the legal framework: The current proposals do not identify or suggest solutions to these elements of tenure security.

Termination: The contract language relies on an undefined category of “requirements” that may make it difficult for FUGs to predict exactly what requirements they must meet to avoid termination. This language should be either changed to match the regulation (G.R. #125) or clarified further by the contract.

Conditions for termination in the regulation and contract currently focus only on breach by the land possessor. However, there are usually four conditions for early termination of a lease agreement all of which should be addressed by amendments to the MLLO and/or MLL – breach by the landlord (government), breach by the tenant (land possessor), destruction of the contract subject, and voluntary termination.

Breach by Landlord: The land possession agreement envisions obligations on the part of the government (landlord) that are prerequisites to the forest user group’s ability to derive a benefit from the contract; i.e., providing “favourable conditions for normal functioning of FUGs to use non-forest timber products, establishing tree nurseries,” etc. It is worth considering what rights the FUG should have, including termination, in the event the government fails to provide such services.

Destruction of the Contract Subject: There are also circumstances where the land, through no fault of the FUG, is rendered untenable. This might include destruction of the resource by insect damage, fire, grazing, or overlapping and incompatible concessions (esp. mining). Denying FUGs the right to terminate where the land is no longer usable for the contracted purposes will result in

³⁹ G.R. 125 §6(24), 1998.

⁴⁰ G.R. 125 §6(24), 1998.

⁴¹ Forest Use Contract §5.4.

⁴² MLF §26(6), 2002.

⁴³ MLM §8(3), 2002.

⁴⁴ MLM §8(4), 2002.

⁴⁵ MLM §8(4), 2002.

⁴⁶ MLM §20, 2002.

FUGs being locked into the agreement and carrying costs for which they can receive no benefit.

Voluntary Termination: Sometimes both the landlord and the tenant may agree to end the tenancy prior to the date specified in the contract. If this is the case, then this agreement should be made in writing and included in the contract.

Compensation: Neither the MLF's nor the MLM's compensation structures provide adequate security to the land possessor. There are several different theories and numerous nuances in the area of appraisals and compensation that may improve the current approach.

One standard is to simply pay the right holder the fair market value of the land at the time of condemnation. "Fair market value" might be defined as:

- the highest price estimated in terms of money that the property will bring
- if exposed for sale in the open market
- with a reasonable time allowed to find a purchaser
- who buys with knowledge of all of the uses and purposes to which it is adapted and for which it is capable of being used, or alternatively
- the value of similarly situated properties as determined by a court of competent jurisdiction.

Another standard would go further and seek to put the individual in the position they would have been in had the termination not occurred. Damages in this instance are entirely unrelated to property market value and typically include the value of immovable fixtures, the detach-reattach costs of movable fixtures, business interruption damages (lost profits and all costs associated with relocating), and the availability of comparable land in exchange.

Mongolia's private real estate market is probably not sufficiently developed for the first method to be viable. The second method seems better suited as it relies on the assessment of values that can be readily determined.

Principle 10.
Rights need to be enforceable and enforced

General discussion: A frequent complaint among those participating in community-based management in many jurisdictions is that they have no clear power to directly apprehend outsider violators or to sanction members of their own group who violate the rules. One approach to this problem has been to spell out in the law that whenever someone violates the approved management plan for a community-based forest management area, that person is in effect committing an offence under the forestry law. Another is to explicitly give power to community members (or specially designated members) to act as forest guards with respect to the area, with equivalent authority to any other forest guard under the forestry law.

Mongolia: The MLN, amendments to the MLEP, and the MLK are silent on the issue of enforcement of internal management rules. The MLN specifically provides for judicial review in the event a member is expelled, but otherwise says nothing about enforcement or dispute resolution.

This does not mean that *Nokhorlol* and *Khorshoo* cannot establish specific enforcement procedures or internal dispute resolution mechanisms in the framework of their organization's bylaws. Nothing in the law would prevent it. However, without any guidance directing the drafting of such rules (default bylaws, for example) or formal recognition of their legal status by other laws, CBOs run three substantial risks: 1) establishing wildly different standards that negatively impact management, 2) inadvertently creating conflicts with other laws, and 3) ultimately being unable to implement their own rules.

Apprehending outside violators is discussed briefly in Government Resolution #125, which states that FUGs have the right to "stop illegal logging and non-timber forest product collection and poaching ... [t]o require individuals ... who cause damage to repair such damage at their expense ... [and] require relevant authorities to take necessary measures."

Options for improving the legal

framework: Current proposals do a good job of identifying the types of rules necessary for the equitable operation of a FUG. However, they do not speak directly to the enforceability of such rules.

It may be that no change is required. Membership in a FUG is essentially a contract (contained in the organizational charter) between the individual and the organization as a whole. The enforcement of the terms of that contract rightfully falls under Mongolia's contract law and should be enforceable without further modification. Whether or not the judiciary understands organizational charters in these terms may be a question of interpretation and not actual legal status.

That said, internal dispute resolution may be significantly assisted by a requirement to form a dispute resolution body for the organization whose rights within the organization would include the authority to resolve disputes internally pursuant to agreed upon rules. Such rules can become a part of the organizational charter or bylaws and be declared binding upon its members. This should not mean that the organization has unfettered discretion in the enforcement of its rules. For example, certain forms of penalty (forfeiture of the property or stock of the defaulting member) should be restricted. In the same vein, rules which are vague and lacking in particularity would be unenforceable. Particularly important to equity within the group is the clear right to request review of internal dispute decisions by a competent court. In addition, creating a set of simple rules guiding the interpretation and application of CBO rules would standardize how third-party adjudicators review organizational dispute resolutions. See Annex 3: Interpretation of Internal Rules by Third Parties.

The right to private enforcement of environmental law would not be new to Mongolian law having already been granted in the Law on Buffer Zones (MLBZ).⁴⁷ The rights provided in the Forest Use Contract obviously speak to the right to enforce, but stop short of an unequivocal grant of authority. Moreover, their inclusion in a government resolution has drawbacks

already mentioned. Amendments of this kind should be included in the appropriate Parliamentary Act, either the proposed amendments to the MLEP or the MLF.

Principle 11

Rights, responsibilities and sanctions need to be clearly defined

General discussion: Part of the overall legal security of an agreement is that the parties and anyone adjudicating a dispute between them is clear as to what their respective rights and duties are. In many cases, this is not clear. Confusion as to one's rights can significantly undermine the effectiveness and enthusiasm with which those rights are exercised. Examples from India and elsewhere, for instance, testify to frequent confusion about the way in which benefits are to be shared, leading to false expectations and possible disillusionment. Hence, whatever the specific balance between rights and responsibilities is in a particular place, these need to be clear.

Mongolia: Mongolia's prohibition on judicial interpretation places a premium on the creation of a well-defined, comprehensive legislative framework. Because judges may not interpret law, only apply it, the risk is high that disputes will not be resolved simply because the law has either not anticipated them or inadequately defined the relationship.

Forest use rights, responsibilities, and sanctions are found in several places including national legislation, Government Resolution #125, the Forest Use Contract, and the organizational charter.

Government Responsibilities: Government responsibilities are sometimes broadly worded making them exceptionally difficult to enforce. For example, pursuant to G.R. #125 Aimag and Soum governors must provide "all favourable conditions" and "full support" to forest user groups and "assist" them in fire suppression or other emergencies. The wording begs the question: what are the favourable conditions and specifically what kind of support and assistance? Without further definition, a court would be required to interpret these provisions before being able to enforce them. This they cannot do and so the provision is hollow. The Forest Use Contract

⁴⁷ MLBZ §6.4.1, 1997.

helps some by saying “favourable conditions” and then expressly requiring the establishment of tree nurseries and reforestation. Arguably, a court or other mediator would be able to cite the failure to establish nurseries or reforest as a failure to provide “favourable conditions,” thus giving the requirement a measure of enforceability.

Private Responsibilities: By contrast, private responsibilities tend to be specific. For example, FUGs may use a contracted area after paying fees; must conduct regular patrols, prevent and suppress fires, establish three fire prevention boards, pay for forest inventories every 10 years, regularly research, monitor and record data on flora and fauna, settle tax accounts by December 10th each year, etc.⁴⁸

Sanctions: Sanctions are contained primarily in national legislation including the MLEP, Criminal Code, MLF, etc. These acts specify the nature of the violation and the level of the penalty depending on the violator's status as an individual, economic entity, organization, or public official. While there may be room to argue that the overall framework for sanctions needs adjusting (in particular, inflation-indexing and the elimination of distinctions based on the violator's status), the laws are typically clear. Proposed amendments in the MLF and MLEP attempt to rectify the problem of inflation-indexing by tying penalties to wage levels. However, it does not indicate whether the targeted fine is a multiple of one day's, one month's or a year's wage.

The Forest Use Contract also indicates that penalties may be imposed for violation of the contract itself. However, it does not contain any statement as to what violation would result in what sanction other than to say repeated violations may result in termination of the contract.

Internal Rules and External Relations: The last arena for the definition of rights and responsibilities is the organizational charter. In general, the charter contents under the MLK, MLN, and MLEP amendments reflect the categories of rules typically identified by partnership or association laws – describing the nature of the association, the relationships of the members to each other and to the association, property rights of the

members, and dissolution and winding up of association affairs.

Missing from this categorical list is the relationship of the members to third parties (agency relationships), but more importantly some suggestion as to the standards behind each of the listed rules. The considerable complexity of relationships in any organizational structure calls for additional detail to ensure a minimum degree of equity – something the present legal framework would have difficulty achieving with just a list of the types of internal rules required.

Options for improving the legal

framework: There is no easy solution to this principle because detail is really the key to success. For this reason, the following options contain specific examples, language, and concepts that should be deliberated. The examples are only illustrative and not intended to be exhaustive or prescriptive.

Government Responsibilities: Identify key government services to FUGs (favourable conditions, support, and assistance) and define discrete components so that they can be enforced. In other words, specifically state what constitutes “support.” For example:

- Provide access to resource maps to registered FUG members upon request;
- Review and comment on management plans within a specified period of time or by a certain date;
- Maintain and distribute current market information relevant to FUG products;
- Develop and distribute guidelines for management plan drafting;
- Provide training to FUGs in management and business planning;
- Create easy to use explanations of the laws and regulations governing natural resource uses;
- Post and distribute new legislation;
- Provide timely notification to FUGs of pending legislation that may affect their rights or activities;
- Provide timely notification to FUGs of pending land possession and use applications;

Sanctions: If additional sanctions may be imposed for violation of the contract, the types of violations and sanction levels should also be defined consistent with existing legislation. Sanctions should also apply not

⁴⁸ Forest Use Contract §3.

only to the FUG but also the responsible government agency. Penalties do apply to government employees under Mongolian law, but only for violation of law, not the terms of land possession contracts.

Internal Rules: Consider developing of a set of standard organizational charter rules and/or bylaws that can act as a default, be adopted in whole, or adjusted as the group deems appropriate. To avoid being too prescriptive, a first suggestion might be to create a more refined list of the internal relationships that need to be defined. The MLEP amendments explore this possibility by requiring a second set of rules after entity formation.

Annex 2 sets forth a matrix of common matters that charters and bylaws cover, some of which are addressed by the various charter requirements existing and proposed.

Principle 12.

The law needs to provide a fair and transparent process for determining what area will be assigned to a particular group.

General discussion: This has been touched upon in earlier principles. Just as the criteria for membership in a group should be fair and transparently applied, so should the process for determining what area a particular group will have rights over. If the boundaries of the management area are defined inappropriately, there is a potential that some people who traditionally use the area will be excluded.

But aside from the problem of fairness between adjacent communities, there is also a need to put in place an open and responsive process by which government receives, considers and decides upon the requests of community groups for areas to be assigned to them. In many parts of the world, the most frequent problem is *not* that excessively large areas are granted to groups, but that *no* area or *the wrong* area is assigned, frequently with no explanation and little or no consultation with the group in question – in other words, local people have essentially no say in the process. Some laws try to reduce this problem by requiring decisions to be open and given within a specified time period; reasons for rejection

given in writing; and a process of public consultation.

Mongolia: Forest concession allocation is a function of two decision-making processes – 1) determination of Annual Allowable Cut (AAC) and local harvest levels and 2) contracting procedures. Both processes are top-down and the lack of a legal framework allowing public participation means there is little transparency built into the system.

AAC and Harvest Level Determination: The legally defined process for determining AAC and harvest levels places the MNE's Policy Implementation and Coordination Department (PICD) at the top with decision-making authority for determining the maximum allowable cut for each *Aimag* and the Capital City on an annual basis. The responsible branch within the MNE (until very recently – the Forest and Water Research Center (FWRC) within the NFWRA) conducts forest inventories and provides the results to the *Aimag* governor's offices (including Environment and Administration offices) with recommendations for logging amounts to the MNE's PICD. Based on the inventory, *Aimag*s submit requests to the PICD. The PICD's forestry specialist reviews all material and determines the recommended AAC for each *Aimag*. The PICD then submits the recommended AAC to the minister's council within the MNE for consideration and by ministerial order, the AAC for each *Aimag* is determined.⁴⁹ Thus, all harvest levels are in theory tied to the assessments and inventories.⁵⁰ Pursuant to these national level limits, the respective *Aimag* and *Soum Khurals* decide actual harvest areas and amounts.

Contracting Procedures: Once local harvest levels have been set, the granting of timber concessions is supposed to take place at the local level.

The law defines the same process for commercial logging regardless of the organizational form, although individuals may not apply. The proponent submits a bid to the *Soum* governor.⁵¹ If the proposed area is

⁴⁹ In 2004, the AAC was set at 30,000 m³.

⁵⁰ The lack of experienced personnel at the local level is the primary reason cited for the disconnect between AACs and actual logging.

⁵¹ MLF §26(1), 2002.

within an established buffer zone, the proponent must first comply with the requirements of the MLEIA and complete a detailed environmental impact assessment.⁵² In both instances, the *Soum* governor solicits recommendations from the *Aimag* governor's office prior to final consideration of the request. Approved commercial operations enter into a logging contract with the local governor and are subject to annual performance assessments.⁵³

Soum governors also review requests for household timber harvests from individuals, while *Soum* rangers review fuelwood harvest requests. In both instances, approval comes in the form of a license.⁵⁴

Proponents may challenge denied applications with either the *Aimag* governor or the newly established Administrative Court directly⁵⁵ – appeals to the Court of Appeals and the Supreme Court possible. In the event denial of a proposal raises a constitutional question, proponents may also file directly with the Constitutional Council.⁵⁶

Contracting Practices: Contracting practices work differently and likely make it more difficult for community organizations to have a voice in the process. As per the law, *Aimag*s submit annual logging requests for their area. The MNE maintains the list of companies and prepares a draft ministerial order setting forth all concessions (names, companies, areas, amounts, and times) for general discussion and approval by the MNE Council. Companies (LCs) receive permission pursuant to the order from the MNE indicating the amount and general (sometimes specific) area for their logging operations – entirely bypassing the local governors or other private citizen input.

LCs then enter into a contract with the *Aimag* Governor including a designation of the exact area where the LCs will log. The *Soum* government only becomes involved because LCs pay logging fees to the *Soum* government. The *Soum* ranger shows LCs

the location in the field, monitors and inspects logging operations, and collects fees.

Options for improving the legal framework: At one level, the solution is not to change the law, but the practice. The law already places decision-making authority at the local level where local parties would theoretically have the opportunity to become involved. However, in practice real decisions happen in Ulaanbaatar where only larger companies can influence the process.

Beyond the practice, there still needs to be a participatory procedure for reviewing, responding to, and deciding upon forest allocations at the local level. It may be appropriate to consider establishing an annual Forest Use *Khural* bringing together officials, bidders, and community members to decide on forest uses within their territory. Prior to convening this *Khural*, it may be useful for community members and officials to create decision-making guidelines and criteria appropriate to the community's specific needs and resources.

Principle 13.

The legal framework should provide a fair and efficient process for resolving disputes within groups or between groups and outsiders (including government).

General discussion: Effective management by local groups can be undermined by disputes within the group or with outsiders, especially if there is no mechanism for resolving those disputes efficiently.

Mongolia: Not surprisingly, Mongolian law is strong on enforcement and weak on dispute resolution. The entire institutional framework (including the Ministry of Justice) serves some kind of enforcement function. Dispute resolution, on the other hand, is the exclusive domain of the MOJ and local governors, neither of whom are adequately equipped to handle the growing complexity of law and legal issues.

The recent advent of an administrative court system in Mongolia will hopefully improve the situation and provide a fair and efficient framework for dispute resolution. Most important for community organizations will be the effective elimination of a built in conflict of

⁵² MLBZ §9(1), 1997; MLEIA §5, 1997.

⁵³ MLF §26(2), (3), and (5), 2002.

⁵⁴ MLF §27(1), 2002.

⁵⁵ MLL §61(1), 2002; MLAP §7, 2002.

⁵⁶ Constitution §66(1), 1992.

interest that requires parties to seek resolution of conflicting land use disputes from the same governor that allocated or denied the uses.

Alternative dispute resolution mechanisms have not been developed and no guidelines exist in current legislation or proposed amendments for instructing cooperatives in this area of management.

Options for improving the legal

framework: External dispute resolution mechanisms have been significantly improved with the advent of an administrative court system. It would be premature to identify changes to this system before it has had a chance to operate and gain experience.

One option for internal disputes has already been mentioned, but is probably worth repeating. Before resorting to the court system, community organizations would benefit from the legal recognition of internal dispute procedures. This can take many forms and, not wanting to push any particular one, it may be sufficient to provide the framework in the law through which these organizations can establish their own dispute resolution council. The dispute resolution body's rights would include the express authority to resolve disputes internally pursuant to agreed upon rules. The rules would be part of the organizational charter or bylaws and be declared binding upon its members. Important constraints on this power should be included in the scheme. For example, certain forms of penalty (forfeiture of the property or stock of the defaulting member) should be restricted. In the same vein, rules which are vague and lacking in particularity would be unenforceable. Particularly important would be the right to appeal such decisions to a court of first impression, including guidelines for the application and interpretation of such rules. (Annex 3).

Principle 14.

The law needs to provide a meaningful opportunity for wider public participation at various levels on a range of forest issues.

General discussion: If forest policy is to accommodate multiple interests, the legal framework needs to provide an effective mechanism by which diverse stakeholders can make their interests known. This is as important at national and regional levels as it is at the level of particular forest areas or communities (discussed under previous Principles). The assumption is that greater public participation can improve the quality of decisions, improve the public's respect for those decisions, and improve public perception of Government. The question is whether the existing legal framework facilitates or constrains this approach.

In general, most older forest laws are silent on the question of how policy should be made, and what role if any non-governmental stakeholders and, indeed, non-forest sector governmental stakeholders, should have in that process. Instead, they focus almost exclusively on the powers and duties of government with respect to forests, and on managing and controlling access to forest resources by other parties. Consultation may in fact be pursued, but it is done on an ad hoc basis, and is not institutionalized or required by law.

By contrast, public participation in formulating forest policy and regulation, and in overseeing their implementation, now figures prominently in forest legislation in other countries. Legislative approaches include:

- *The statutory creation of multisectoral, government/civil society advisory bodies.* An increasing number of countries have created "forest forum" bodies through legislation, choosing to vest them with permanent legal status rather than leave them as ad hoc administrative creations. Drafting such legislation requires answering questions such as: (i) what would be the composition of such an institution; (ii) what powers would it have; and (iii) where would it "sit" in terms of its

placement within the government structure.

Many examples and varieties may be found in the forest legislation of Western European countries. Portuguese law creates a Forestry Advisory Council with wide representation of interested parties including forest industry and trade, agricultural and environmental associations and research institutions. A Forestry Council with advisory functions is also created by the law of Denmark, and central and regional advisory committees are established by that of Great Britain. South Africa also provides an interesting example. Under the National Forests Act, 1998, a National Forests Advisory Council is to be appointed by the Minister. In making appointments, the Minister must balance the interests of (a) categories of persons disadvantaged by unfair discrimination; (b) communities involved in community forestry; (c) environmental interest groups; (d) persons who carry on small scale plantation forestry; (e) persons who carry on small-scale timber processing; (f) persons with expertise which can assist the Council achieving its objects; (g) the forest industry; (h) the forest products industries; and (i) trade unions. §34. The Council has the role to advise the Minister on any matter concerning forestry, and the Minister is obligated to consider and respond to the advice. Among specific functions of the Council is to review all proposed regulations under the Act.

- *Required public consultation before certain major government actions, such as the adoption of regulations or management plans.* Once again the statutory creation of such mechanisms represents the trend internationally. It is now frequently the case that forest legislation requires a public notice and comment period prior to adoption of a forest management plan, at least where such plans cover relatively large areas. Similarly, it is increasingly common for legislation to require publication of proposed rules or legal amendments, and to establish a process for receiving and reviewing comments. Such provisions are often initially viewed as burdensome by government officials who are worried that

the process of plan adoption or regulatory reform will grind to a halt under an avalanche of comments. In fact, such fears are usually exaggerated, and, indeed, the process can serve very pragmatic purposes. It can lead to greater public “ownership” of new rules and laws, increasing acceptance and improving the level of compliance. It can also help ensure that legal provisions are drafted in practical and realistic terms.

- *Legally-mandated public access to information.* Participation at all levels can only be effective if information and actions about the forest are open to public scrutiny. Increasingly, countries have recognised that meaningful civil society involvement in all facets of public life requires better public access to Government information, access which may at times be constrained by antiquated legal controls and overly-broad definitions of “national security” or “classified information.” International recognition of the importance of freedom of access to environmental information is epitomized by the Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters [Airbus Convention]⁵⁷ signed in 1998 by 35-states of Europe, Former Soviet Union and North America. At national levels, there are a growing number of freedom of information laws that provide mechanisms by which the public can gain access to a wide variety of information.

Mongolia: Mongolia's legal framework has not yet fully developed avenues for informed public participation. In general, laws recognize the need, but fail to make rights a reality by defining procedural mechanisms.

Access to Information: The right to “seek and receive” information from the government is firmly anchored in the tenets of Mongolia's Constitution, which exempts only those types of information otherwise classified as state secrets.⁵⁷ The MLEP also recognizes the need for information. It grants citizens the right to receive “truthful” information about the environment⁵⁸ and requires the MNE to

⁵⁷ Constitution §16(17), 1992.

⁵⁸ MLEP §4(4), 1995.

“provide environmental information.”⁵⁹ In addition, Cabinet Ministry Resolution #58 requires state employees to honour such requests without delay or bureaucratic hassle.⁶⁰

Seriously constraining access to adequate information is the secret status of maps in Mongolia. The MLSS contains a list of the types of information protected as a state secret. Included in this list are maps at scales greater than 1:200,000.⁶¹ This restriction has serious implications given Mongolia's heavy reliance on zoning as a regulatory mechanism, and the central role mapping plays in any land management scheme.

Participation in Policy Formation: Mongolia has not yet developed full public participation requirements for the drafting of law. Legally, participation occurs purely at the government's discretion. National NGO pressure and international donor activity have helped to amplify the level of participation in recent years. However, no law requires participation or defines a process for citizen input.

Participation in Resource Decisions: Public participation in forestry decision-making has even less basis in Mongolian law than policy formulation. With the exception of the MLEP's one reference to an open meeting requirement,⁶² no law specifically spells out conditions for participation in resource decisions.

Options for improving the legal framework: Short term, there may be no easy answer. The concept of participation is an overarching theme that, given the current status of Mongolia's legislation, demands changes in the overall framework.

One key to the approach should be Mongolia's accession to the Aarhus Convention and the consequent systematic redefinition of public access to and participation in environmental decision-making.

Even without the Aarhus Convention, a number of possible changes to the law are available. The following comments state both what the Aarhus Convention's principles are as well as the critical aspects that would need to be addressed by any amendments.

Access to Information: Article 4 of the Aarhus Convention requires member states to provide environmental information, including copies of the actual documentation:

- Without an interest having to be stated;
- In the form requested unless:
 - ♦ It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or
 - ♦ The information is already publicly available in another form.

Beyond this principle, access to information rights need a guaranteed and specified process for obtaining the promised information before they will become a reality.⁶³ Some of the questions that would have to be answered include:

- How are requests for information to be made?
- Is there a fee for processing requests and copying materials?
- Are there exemptions to fee requirements for non-governmental organizations and the poor?
- Precisely what kind of information must be kept and by whom?
- What kind of information must be released, what not, and on what grounds?
- How long should it take to answer requests?
- Are there penalties for public officials who improperly withhold information?
- What are the judicial mechanisms and procedures for challenging denied requests?⁶⁴

⁶³ See Aarhus Convention §3: requires member states to institute whatever legislative, regulatory or other measures are needed to ensure access to environmental information.

⁶⁴ Aarhus Convention §9: “Each Party shall ... ensure that any person who considers that his or her request for information ... has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.”

⁵⁹ MLEP §15(6), 1995.

⁶⁰ Cabinet Ministry Resolution #58, State Employees Principles of Conduct, §2(4.1), April 1999.

⁶¹ MLSS Item #34, 1995

⁶² MLEP §5(2) supp. 4, 1995.

In addition, some effort should be made to eliminate the MLSS's hold on resource maps. This is especially true in light of the gold mining boom and the reported increase in overlapping and conflicting land use concessions. A change in the MLSS, coupled with additional regulation on access to information, has the potential for immediate impact by permitting access to already existing information. The MLL requires each administrative unit or territory to maintain maps no greater than 1:25,000 – they can be smaller scales.⁶⁵ A set of these maps is stored with the “authorized government organization” – i.e., MNE, governors' offices, etc. Because of the MLSS, however, these maps stay in locked drawers, unavailable to private individuals, and viewed by official organizations only under strict conditions.

Participation in policy formation and resource decisions: Stressing the need for early involvement, Aarhus Convention §6 addresses the following informational needs relevant to participation in decision-making:

1. The proposed activity and the application;
2. The nature of possible decisions;
3. The public authority responsible;
4. The envisaged procedure, including:
 - i) commencement of the procedure;
 - ii) opportunities for the public to participate;
 - iii) time and venue of any public hearing;
 - iv) public authority from which information can be obtained and where the information has been deposited;
 - v) relevant public authority or other official body to which comments can be submitted and the schedule for transmittal of comments; and
 - vi) indication of what environmental information is available; and
 - vii) whether the activity is subject to a national or transboundary environmental impact assessment procedure.

Typical open meeting legislation would further require that every meeting of an agency be open to public observation. “Meeting” usually refers to deliberations that include the number of individuals required to make decisions on behalf of a government body and result in disposition of government business.

In the interest of practicality, a schedule of meetings is required with the stated condition that agencies may not conduct official business unless it is in accordance with open meeting provisions. Carefully drafted exceptions ensure that purely internal matters (personnel decisions, national security issues, etc.) are not discussed publicly.

Principle 15.

Necessary steps should be taken to strengthen the capacity of all stakeholders to understand and use the law.

General discussion: Exercising rights effectively, as well as complying with restrictions in the law, requires understanding what the law says and knowing how to use it. Frequently there is very poor understanding, amongst the public and forest officials alike.

In some countries, the complexity and confusing nature of forestry legislation is in part due to the fact that the views of forest-dependent populations are not taken into account by those who draft laws and amendments. Even new legal provisions that are designed to encourage participation are drafted in a non-participatory manner, resulting in laws that remain divorced from the realities and expectations of forest villagers.

Internationally, in many fields of law, there is increasing understanding that much of the effectiveness of new laws governing forestry in general, and community-based management in particular, lies in the process by which they are drafted and subsequently understood and appreciated by the full range of people who use, benefit from and administer them. Hence, there is a new emphasis on including stakeholders in the drafting of new legislation, as a way of ensuring that the law reflects reality and is “owned” by those most affected by it, as well as an increasing emphasis on enhancing “legal literacy” and building capacity amongst stakeholders to understand and use laws.

Mongolia: One of the fundamental similarities across different legal systems is that, to be of general approval and observation, a law has to appear to be public, effective, and legitimate, in the sense that it has to be available to the knowledge of the

⁶⁵ MLL §8(1) and (2), 2002.

citizen in common places or means, it needs to contain instruments to grant its application, and it has to be issued under given formal procedures from a recognized authority. Many of the previous principles discussed in this paper look at the instruments granting authority and the associated procedures. Here the question is: to what extent does the law help or hinder the ability of stakeholders to understand and use it?

Participation is of course a large part of the equation because it gives people the opportunity to be involved in the development of policy and understand the reasoning behind resource decisions. Discussed previously, Mongolia's basis for participation exists in name, but needs substantial definition to become a reality.

Other than participation, important areas of concern include the degree of specificity and clarity included in regulations, the drafting of implementation guidelines that turn legalese into action, and the creation of explanations of the law for use by the general public.

The lack of specificity and clarity in Mongolia's regulations is in part a function of drafting, but also structural changes in the institutional framework. Since 1991, Mongolia has continuously reordered its agencies and their attending responsibilities. The legal framework, as best it can, anticipates these changes by steadfastly refusing to actually name an agency, instead referring to a generic "state administrative body in charge of . . ." In this climate of constant change, regulatory provisions designed to implement national legislation are naturally cautious, only occasionally achieving procedural definition. Regulations tend to be repetitive of organic legislation stating only the basic rights and obligations of the various parties and the liabilities attached to certain violations of the law.

Forestry regulations are no different. On the one hand, G.R. #125 elaborates on some points included in the MLF and makes them easy to understand and use; e.g., to whom requests for forest possession should be sent and what documents need to be attached,⁶⁶ the process for bid application and review.⁶⁷ In other instances, it remains as vague as the

organic legislation and risks losing all meaning in practice; e.g., the requirement to provide "all favourable conditions" to forest users. In the end, no one seems entirely certain who is to provide what service for whom and when.

The drafting of detailed implementation guidelines and explanations of the law are two areas that need special attention. Nothing in the current legislation or proposed amendments addresses their creation.

Options: The concept of participation (including policy formation) needs developing and options have been listed in the previous section. However, it alone cannot bring the intricacies of law to the knowledge of the common citizen.

To assist in using the law, consider requiring the promulgation of detailed implementation guidelines for specific areas and the publication of explanations of the law for the general public. Similar efforts must be made to enhance understanding among foresters and other public officials, such as judges and local administrators.

V. Summary of Recommendations

Following is a summary of the main proposals made in this paper associated with each of the 15 Principles for improving the legal framework for participatory forestry:

Principle 1.

The law needs to provide a mechanism for granting or recognising the rights of community-based organizations to manage forest resources.

Mongolian law already provides a mechanism for the contracting of possession rights over forests areas to private groups. The question is whether this mechanism, as currently designed, is adequate to serve as a basis for wide-scale and optimal implementation of participatory forestry in a way that truly meets the needs of people while promoting sustainable forest management. Looking at how this existing mechanism can be made better is what all these Principles are about.

⁶⁶ G.R. 125 §2, 1998.

⁶⁷ G.R. 125 §4, 1998.

But in addition, it may also be advisable for Mongolia to start thinking more broadly about the possible advantages of eventually giving *ownership* rights rather than *contract* rights to community-based forest user groups. It is proposed to:

- **Consider the eventual possibility of recognising ownership of forest land in certain cases.** Although at present, FUG rights are contract based and limited to a certain number of years, it should be considered if and when it might be appropriate to allow well-performing community-based organizations to acquire ownership of the land they manage. Room could be made for eventually acquiring this type of ownership (in the MLL, MLLO, and MLF) as one of or even the final stage in a series of acquired rights that attach not only to trees planted, but all resources (excluding wildlife) and land within a forest user group's possession contract. In this framework, ownership rights would be tied to successful completion of specified management goals as defined and agreed upon in the management planning process. As international experience shows, the stronger and longer the rights held by the group, the more effective and sustainable the results are likely to be.
- **Resolve existing ambiguity between laws concerning ownership rights of forest resources.** Clarify the relationship between ownership rights envisioned by the MLF, the prohibition on ownership of forest resources contained in the MLL, MLLO, and overlapping possession or use rights created by the current framework.

Principle 2.
The law needs to enable local groups to engage in forest activities that are important to them for their livelihoods.

For participation to be meaningful, community organizations must see that their livelihoods are benefitted, or else it will be hard to sustain participation. In Mongolia, one obstacle is that a significant percentage of forested land falls within the protected categories and is generally off-limits to forest

concessions, and hence utilization by FUG's would necessarily be very limited. Unless this problem is addressed, it may significantly lower the incentives of local groups to participate. It is proposed to:

- **Consider careful adjustments to prohibitions affecting protected zones to allow community groups to engage in a greater variety of productive activities.** Some thought might given to specifically permitting certain carefully defined and sustainable uses within these restricted areas and grant rights exclusively to community-based organizations to use the area in a way that will clearly benefit them.

Principle 3.
The law needs to provide an appropriate mechanism for local groups to make management decisions about their forest resources.

For forests that have been turned over to FUG's, forest management choices need to reflect the priorities and needs of local people as much as possible. This is less likely to happen if those choices are made entirely by foresters without meaningful consultation with local people, or if the planning requirements are too complex for local groups to comply with. It is proposed to:

- **Include in the law more specificity about the management planning process for FUG managed forests.** This could include:
 - spelling out in more detail some basic management principles;
 - setting forth a transparent and participatory process that should be followed in formulating a management plan, including the delineation of the area to be covered by the contract;
 - establishing the criteria government is to use in reviewing and approving management plans;
 - specifying the ways in which plans can be modified or adjusted; and
 - defining the legal significance of plans.

- **Consider promulgation of a management plan template.** Such a template, more specifically describing subjects and content for management planning, would help considerably in the practical implementation of the above process.

Principle 4.

The law needs to define the criteria and process for group membership appropriately and fairly.

Community-based forestry is largely intended to enhance livelihoods within communities in the vicinity of forests that are engaged in active forest management. Hence, the criteria for the appropriate composition of an eligible forest user group become very important. FUG formation should not be a vehicle by which “outsiders” acquire interests in a local forest to the detriment of local people. It is proposed to:

- **Specify membership criteria that will ensure that CBO’s are representative of the community.** These could include establishing:
 - a minimum number of members;
 - an “actual” residency requirement to ensure that registered residents in fact live in the area;
 - some requirement to use a portion of the income for identified community needs.
- **Provide safeguards to help ensure that membership is open to all community stakeholders interested in participating.** At least in some places, there may be potential for a small group of users to effectively shut out others who have for generations had access to a particular area. The best way to avoid this problem is to ensure that the law requires public consultation and open access to information during the process of assigning an area to a particular FUG.

Principle 5.

Forest users need flexible, easy-to-use and appropriate mechanisms for forming legal entities.

Forest user groups need to take the form of legal entities, with the right to own property, receive funds, etc. International experience has shown that if the steps needed to acquire this legal status are too complex, expensive or culturally alien to the group, this can be a real obstacle to establishing participatory forestry. Hence, there is a need to find simple, “user friendly” and locally-appropriate legal solutions. The proposed amendments to MLEP and MLN are in the right direction, but additional improvements should be considered if *Nokhorlol* are to be the entity form that is used. It is proposed to:

- **Allow greater ease of use for groups attempting to form natural resource management Nokhorlol.** Suggested improvements include:
 - Eliminating (as suggested in the MLEP amendments) the vague “other information” requirement from the organizational charter, in order to avoid potential uncertainties and delays in the process of formation.
 - Eliminating from the entity formation stage of the process requests for information too closely tied to actual project implementation (such as the exact boundaries of the management area and the conservation measures to be used). This kind of information will not necessarily be available until a later stage and could be instead supplied as part of a simple project approval process.
- **Resolve uncertainty about the future status of already existing Nokhorlol if the proposed amendments are adopted.** Questions that need to be answered include:
 - Can a local government agency or *Nokhorlol* still be a member of a forest *Nokhorlol*; or do the proposed amendments truly restrict membership to registered residents only?

- If the new criteria are exclusive, will already established *Nokhorlol* or *Khorshoo* engaged in forest activities have to reorganize under the MLEP's new membership rules or will they be "grandfathered" in (i.e., allowed to continue in their current form because of their pre-existing status)?
- If "grandfathered," will it be automatic or will some process be required?
- If they must reform, how will this be accomplished, how long will it take, and what happens to the resource in the meantime?
- If they must withdraw from forest resource use entirely, how will the local government appraise and compensate them for the early termination of their land use possession contract?

Principle 6.

The law should not place unnecessary restrictions on how a community-based organization uses or invests the benefits it receives.

To what extent should the law restrict how the proceeds of economic activities are used by the community? It may be desirable to target some of the benefits on "community" needs, in order to maintain the spirit of a community-based enterprise. But over-targeting in the law, with little flexibility for FUG members themselves to decide how to use the benefits, can undermine local initiative and the incentive of people to participate. A proper balance must be sought. It is proposed to:

- **Clarify the definition of allowed uses of funds in the MLEP amendments.** Under the MLEP amendments, internal regulation of fund use remains within the discretion of the *Nokhorlol*, but is directed to be used for "social" issues and "restoration of natural resources." Unfortunately, the amendments fail to go one crucial step further and explain what this might mean – hence, there may be quite a bit of uncertainty about whether a particular kind of use or investment is allowed.
- **Set a reasonable minimum amount on funds that must be used for certain purposes.** The MLEP amendments also

do not place a limit on the percentage of income that must be spent on these activities, leaving open the possibility that *all* income must be used this way – this kind of over-restriction would be counterproductive for the reasons mentioned above. A reasonable minimum figure should be set.

- **Specify that Nokhorlol involved in community-based management may act as lenders to their own members.** As the experience in Buffer Zone management has shown, it is useful for groups to have the authority to establish internal lending schemes as a way of using the benefits of management. The amendments do not specifically authorize *Nokhorlol* to act as a lender within their organization. Attention should be given to clarifying all of these points.

Principle 7.

Rights of forest user groups need to be of sufficient duration.

The rights of a FUG need to be secure over a long enough time so that the group feels real commitment to the area it manages, and feels secure about investing time and effort into that management. This is best achieved if the rights are perpetual – i.e., not limited to a particular period of time. If rights are to be in force only for a particular period of time – as is currently the case in Mongolia – care should be taken to ensure that agreements are at least as long as is realistically required to reap the benefits of participation. It is proposed to:

- **Stipulate contract duration.** The proposed amendments do not mention contract duration. To ensure that forestry related groups receive equal treatment and are of adequate duration, one option would be to consider stipulating to a longer minimum tenancy period for FUG's as an amendment to the MLF and/or MLEP.
- **Consider longer minimum durations preceded by a probationary period.** For the reasons stated above, due to the nature of the resources involved, it is worth considering at this point making the minimum length of 60 years. This could

be preceded by a short “trial” period, during which the FUG would have to demonstrate commitment and good practice in order for its longer term rights to ripen. The possibility (as in a number of countries) of perpetual rights, which would not terminate except upon the happening of specified events or violations, should also be considered.

Principle 8.
Rights of forest user groups need to be exclusive.

People are unlikely to manage a resource if they know that someone else can reap the benefit of their work. Hence, the holders of rights under a community-based management scheme need to be able to exclude or control the access of outsiders to the resource over which they have rights. This is a problem under current Mongolian law, and the proposed amendments do not go far enough in addressing it. It is proposed to:

- ***Specify more clearly extent to which FUG rights to an area are exclusive.*** There is a need to make it clearer that overlapping rights to an area (such as harvesting rights) cannot be granted if it is already subject to a forest possession contract. One approach to this problem would be to grant the right of “quiet enjoyment” (meaning the right to occupy the property without interference from third parties) directly in the Forest Use Contract without amending the MLLO. The better option would be to amend the MLLO, defining the degree of exclusivity land possessors hold and define specific aspects of the right directly in the contract.
- ***Provide for timely recognition of FUG rights in other land allocation procedures.*** An adequate solution will probably require amendments in more than one law – at a minimum, in the MLM to require verification of overlap with other pending and existing land possession contracts (not just forest concessions); and most likely in the MLLO and/or MLL to require verification of pending and existing concessions in any land allocation procedure. There may be an additional need to ensure that the

status of land possessions concessions are verifiable in a central registry.

Principle 9.
Rights holders need to feel secure that their rights will not be terminated unfairly or arbitrarily

The law should not allow for a contract to be terminated unilaterally by the Government for a vaguely defined or insufficient reason. In almost any situation, of course, there are circumstances where rights can be taken away or diminished, but conditions for doing so need to be fair and clearly spelled out, the procedures for doing so need to be fair and transparent, and the issue of compensation needs to be addressed. So far, these issues are not dealt with adequately in relevant laws and regulations. It is proposed to:

- ***Clarify the basis for termination.*** The language currently used in forest possession contracts relies on an undefined category of “requirements” that may make it difficult for FUGs to predict exactly what requirements they must meet to avoid termination. This language should be either changed to match the regulation (G.R. #125) or clarified further by the contract. It would be best if the basic safeguards against unfair termination were put into the MLF and MLEP themselves, rather than only in a resolution or contract.
- ***Improve the standards for compensation.*** In the interest of developing a more equitable system of compensation for early termination, establish a methodology that would put the individual in the position they would have been in had the termination not occurred. Damages in this instance are entirely unrelated to property market value and typically include the value of immovable fixtures, the detach-reattach costs of movable fixtures, business interruption damages (lost profits and all costs associated with relocating), and the availability of comparable land in exchange.

Principle 10.
Rights need to be enforceable and enforced

A frequent complaint among those participating in community-based management in many jurisdictions (including Mongolia) is that they have no clear power to directly apprehend outsider violators or to sanction members of their own group who violate the rules. It is proposed to:

- **Include an unequivocal grant of authority for FUGs to enforce environmental laws within their territory.** It needs to be clear to all that FUGs have a right to insist that members and outsiders do not violate laws in their forests.
- **Strengthen the right of FUG's to apprehend outside violators.** Apprehending outside violators is currently discussed briefly only in Government Resolution #125. To resolve doubts concerning the legitimacy of this power, it should be included in the MLF Amendments or some other Parliamentary act, rather than leaving it in resolution form.
- **Include requirements for the formation of an internal dispute resolution body.** internal dispute resolution may be significantly assisted by a requirement to form a dispute resolution body for the organization whose rights within the organization would include the authority to resolve disputes internally pursuant to agreed upon rules.

Principle 11.
Rights, responsibilities and sanctions need to be clearly defined

Part of the overall legal security of an agreement is that the parties and anyone adjudicating a dispute between them is clear as to what their respective rights and duties are. If these are unclear, the chances for debilitating disagreements and disputes between parties are much higher. Under the current legal framework, rights,

responsibilities and sanctions are often not clear enough. It is therefore proposed that:

- **More detailed delineation of the rights, responsibilities and sanctions are needed.** Part of the overall legal security of an agreement is that the parties and anyone adjudicating a dispute between them is clear as to what their respective rights and duties are. At the moment, there is not sufficient clarity or detail in the relevant Mongolian legal instruments. This applies to the responsibilities of government as well as FUG's and their members – i.e., key government services to FUGs (favourable conditions, support, and assistance) should be identified and discrete components defined so that they can be enforced. Detailed examples are found in Part IV.
- **Sanctions should be consistent with relevant legislation.** If additional sanctions may be imposed for violation of the Forest Use Contract, the types of violations and sanction levels should also be defined consistent with existing legislation. Such sanctions should apply not only to the FUG but also the responsible government agency.

Principle 12.
The law needs to provide a fair and transparent process for determining what area will be assigned to a particular group.

- **Establish a participatory procedure for reviewing, responding to, and deciding upon forest allocations at the local level.** It may be appropriate to consider establishing an annual Forest Use *Khural* bringing together officials, bidders, and community members to decide on forest uses within their territory. Prior to convening this *Khural*, it may be useful for community members and officials to create decision-making guidelines and criteria appropriate to the community's specific needs and resources.

Principle 13.

The legal framework should provide a fair and efficient process for resolving disputes within groups or between groups and outsiders (including government).

Effective management by local groups can be undermined by disputes within the group or with outsiders, especially if there is no mechanism for resolving those disputes efficiently. It is proposed to:

- **Monitor the effectiveness of the new administrative court system.** External dispute resolution mechanisms have been significantly improved with the advent of an administrative court system. It would be premature to identify changes to this system before it has had a chance to operate and gain experience.
- **Provide for the constitution of internal dispute resolution procedures.** Before resorting to the court system, community organizations would benefit from the legal recognition of internal dispute procedures. This can take many forms and it may be sufficient to provide the framework in the law through which these organizations can establish their own dispute resolution council. The dispute resolution body's rights would include the express authority to resolve disputes internally pursuant to agreed upon rules. The rules would be part of the organizational charter or bylaws and be declared binding upon its members. Important constraints on this power should be included in the scheme. For example, certain forms of penalty (forfeiture of the property or stock of the defaulting member) should be restricted. In the same vein, rules which are vague and lacking in particularity would be unenforceable. Particularly important would be the right to appeal such decisions to a court of first impression.

Principle 14.

The law needs to provide a meaningful opportunity for wider public participation at various levels on a range of forest issues.

If forest policy is to accommodate multiple interests, the legal framework needs to provide an effective mechanism by which diverse stakeholders can make their interests known. This is as important at national and regional levels as it is at the level of particular forest areas or communities. The assumption is that greater public participation can improve the quality of decisions, improve the public's respect for those decisions, and improve public perception of Government. To improve the Mongolian legal framework in this regard, it is proposed to:

- **Improve the legal framework for access to information and for public participation in policy making.** Detailed recommendations are set forth in the body of the report.

Principle 15.

Necessary steps should be taken to strengthen the capacity of all stakeholders to understand and use the law.

Exercising rights effectively, as well as complying with restrictions in the law, requires understanding what the law says and knowing how to use it. Frequently there is very poor understanding, amongst the public and forest officials alike.

- **Provide guidance on how to use the law for various stakeholders.** Consider requiring the promulgation of detailed implementation guidelines for specific areas and the publication of explanations of the law for the general public.
- **Strengthen the understanding of those enforcing or implementing the law.** Similar efforts must be made to enhance understanding among foresters and other public officials, such as judges and local administrators.

Annex 1: Formation requirements for *Khorshoo* and *Nokhorlol*

The organizational charter requirements for *Khorshoo* include:

- Name and address of Khorshoo;
- Names addresses of the organizers;
- Khorshoo's purpose, direction and types of activities;
- Khorshoo's property type, amount, and timeframe for acquisition;
- Property amounts, registration rules, and state real property registration numbers of member contributions;
- Accounting, inventory, income sharing, and distribution among members and the organization;
- Property use rules;
- Rules governing joining, departing, and removal from the organization, members rights, responsibilities, and sanctions;
- Property responsibilities, and reimbursement requirements;
- Types of services provided to members;
- Voting rights, and decision-making rules in the event of a split vote;
- Rules for changing Khorshoo activities, terminating activities, and final accountings;

- Rules for Khorshoo directors;
- Rights and responsibilities of branch Khorshoo;
- Other information required by law.

To form either type of *Nokhorlol* requires the submission of a set of organizational documents as follows:

- Name and address of the Nokhorlol;
- Types of industrial activity and services, and timeframe for activities;
- Name, address, and registration number of director;
- Estimated size and value of each members contribution, appraisal methods, conditions for returning contributions, and state real property registration numbers;
- Estimated value, appraisal methods, types of services and timeline for each member's service contributions;
- Income and loss sharing structure among members;
- Name, citizenship, address, and signature of each member;
- Other necessary information.

In a limited liability *Nokhorlol*, the specific rights and responsibilities of the individual members must also be spelled out in the charter.

Annex 2: Common Matters Covered by Charters and Bylaws

Meetings	a. Annual meetings	i. Time
		ii. Place
		iii. Notice requirement
		iv. Election of directors
	b. Special meetings	i. Who may call
		ii. Purpose to be stated in notice
		iii. Number of days notice required
	c. Quorums	
Directors	d. Adjournments	
	e. Proxies	
	f. Voting	
	g. Action without a meeting	
	a. Number	
	b. Qualification	
	c. Term of office	
	d. Meetings of Directors	i. Purpose
		ii. Notice requirements
		iii. Quorums
		iv. Adjournments
	c. Removal of directors	i. Who may remove
		ii. For cause only
		iii. Without cause
	d. Filling vacancies	i. Who may fill, i.e. members or remaining directors
		iii. If directors have power to fill vacancies, add provision allowing members to fill when no directors in office
	e. Compensation	
	f. Action by written consent without meeting	
	g. Waiver of notice of meeting	
	h. Indemnifications and liability of directors	
	i. Conflicts of Interest	
Committees	Executive committees	i. Numbers of members
		ii. Powers
		iii. Quorum
		iv. Procedure and meetings
		v. Changes in membership
		vi. Actions by written consent
Notices	a. Form and delivery	
	b. Waiver	i. Written ii. Attending meeting without objection
Officers	a. Types of officers	i. Chairman
		ii. Director
		iii. Vice Director
		iv. Secretary
		v. Treasurer
		vi. Other officers
	b. Duties and powers of	i. Specifically set out in bylaws

		officers	ii. Delegate to directors to determine
		c. Term	
		d. Power to remove	
		e. Compensation	
Certificates of Interest		a. Signatures required	i. Two officers ii. Manual
		b. Transfer of interest	
		c. Restrictions on transfers of interest	
		d. Profit sharing	
Financial Reserves		a. Authorize directors to create	
		b. Purposes	
		c. Source	
Fiscal year		a. Set out in bylaws	
		b. Authorize directors to determine	
Organizational seal		a. Form	
		b. Custody and use	
Organizational records		a. Membership records	
		b. Meeting minutes	
		c. Records of accounts	
		d. Right to inspect corporate records	
Banking powers		a. Signing checks on behalf of corporation	
		b. Borrowing money on behalf of corporation	
Amending bylaws		a. Who may amend	i. Board of directors ii. Stockholders
		b. Vote needed to amend	i. Majority ii. Greater percentage

Annex 3: Interpretation of Internal Rules by Third Parties

Sample rules that specifically address judicial or third party interpretation of organizational rules:

- First, language contained in charters or bylaws should be construed according to its usual, ordinary, and commonly accepted meaning, unless legal phrases having special meaning are used.
- Second, where a charter or bylaw uses term which as a matter of law has no fixed meaning, the intent and understanding of the parties should control. Intent should be determined considering all the evidence available including organizational documents and testimony.
- Third, organizational rules should be construed reasonably, and if susceptible of two reasonable constructions, one of which would invalidate the rule, in accordance with the view sustaining validity.
- Fourth, ambiguous or obscure provisions should be construed in harmony with the general intent of the governing regulations as a whole, and that construction will be adopted which is best calculated to promote the business or essential welfare of the organization.
- Fifth, only where a court finds a provision to be ambiguous is it authorized to interpret it or to search for the parties' intent behind the rule.
- Sixth, when a rule is unambiguous, disagreeing parties will not make it otherwise.
- Seventh, charters and bylaws have the same force and effect as provisions of the charter or articles or certificate of incorporation.
- Eighth, charters and bylaws, where not in contravention of any statutory provisions, have all the force of contract as between the organization and its members, and as between the members and themselves.
- Ninth, a bylaw should not be interpreted as a limitation or restriction of a power expressly contained in the charter.