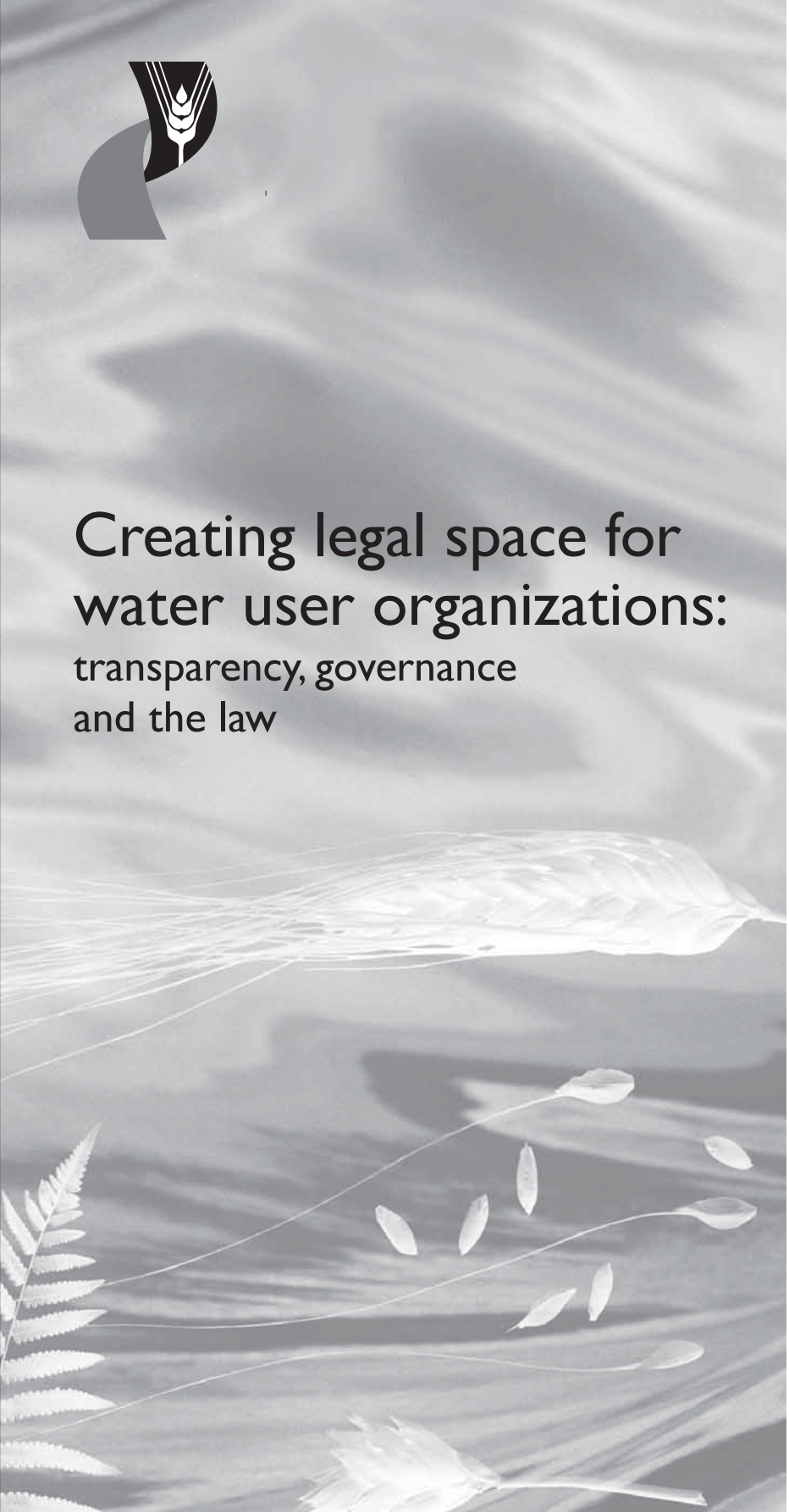

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Creating legal space for water user organizations:

transparency, governance and the law

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transparency, governance and the law

Stephen Hodgson

for the

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FAO Legal Office

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Acronyms and abbreviations

collectivized farm	a socialist farm structure such as a state farm, collective farm, cooperative or *agro-kombinat*
CPR	common pool resources
governing document	the "constitution", "charter" or "statute" of a WUO
IMT	irrigation management transfer
on-farm system	an irrigation and/or drainage system formerly operated by a collectivized farm
OMOV	one member, one vote
operating rules	the internal rules of a WUO adopted by the general assembly
PIM	participatory irrigation management
state water agency	the state agency responsible for the irrigation and/or land drainage sectors
VAT	value added tax
WUO	water user organization

FOREWORD

Governments in many countries around the world are promoting the policy of transferring responsibility for the operation and maintenance of irrigation and other water management infrastructure to self-financing water users' organizations governed in a participatory manner by water users, often farmers. A robust regulatory framework for the corporate governance of such organizations is an indispensable adjunct to the irrigation management transfer policies pursued by governments.

This study complements and follows on from the FAO Legislative Study No.79 (2003) *Legislation on water users' organizations – A comparative analysis*, which carries a general review and analysis of legislation on water users' organizations from around the globe. Following on from that, the present study zeroes in on the experience of a number of "transition" countries in Central and Eastern Europe and the Former Soviet Union. It describes what legal solutions these countries have devised in answer to their specific problems and, based on these, it seeks to distil a number of key regulatory requirements. In this latter respect in particular, this study serves also as a design/drafting manual for policymakers and for drafters of legislation on water users' organizations.

This study has been written by Mr Stephen Hodgson, working under a contract with the Development Law Service. Mr Hodgson is also the author of the FAO Legislative Study No.79 mentioned earlier.

Jean-Pierre Chiaradia-Bousquet
Officer-in-Charge
Development Law Service

1. INTRODUCTION

Governments in many countries around the world are currently promoting the policy of transferring responsibility for the operation and maintenance of irrigation and other water management infrastructure to self-financing water user organizations governed in a participatory manner by water users, often farmers. A key question that arises concerns the role of formal law – legislation adopted by a parliament or other legislative body – in this process. More specifically, what legal space is necessary for the establishment of sustainable water user organizations (Lindsay, 1998)? In other words how can formal law, indeed the formal legal system, interact with water user organizations while at the same time leaving such entities sufficient freedom to elaborate and enforce their own rules in accordance with their own specific circumstances?

For whatever else it may be, an effective water user organization (WUO) is a rule-based entity: it cannot function without rules. Such rules determine a wide range of issues including: who may participate in a WUO and thus benefit from its services, how such participation takes place, the rights and duties of participants, how decisions are made on water allocation and the cost of its delivery. Just as importantly rules specify how such decisions are implemented and enforced.

Like other community-based organizations, much of the legitimacy of such rules (as well as specific decisions made on the basis of such rules) derives from the fact that a WUO is governed in a participatory and democratic manner by the farmers and others who benefit from, and pay for, the services it provides. The level of fees and charges for the supply of irrigation water, for example, as well as the volume allocated to each farmer and the order of the water delivery schedule reflect rules determined by the WUO in accordance with the wishes of its participants rather than the whim of a politician or the discretion of a bureaucrat.

At the same time, though, there is a tension at the heart of every WUO. For while a WUO is premised on the notion that the common interest of water users is best served through cooperation, the actions of individual users directly affect each other.[1] Indeed, particularly in the case of WUOs engaged

[1] In other words, irrigation water is a common pool resource.

in irrigation, users may at the same time be in competition for scarce water and other resources (including land). In other words there is an inherent risk of conflict within WUOs particularly those in arid areas where irrigation water is an essential input. As noted by Meinzen-Dick and Bruns, "people depend on water for their life and livelihood; people also get killed fighting over water" (Meinzen-Dick and Bruns, 2000).[2]

In the context of large-scale infrastructure on which many people depend, usually paid for using public money, it is difficult to argue that it is not in the public interest to ensure that WUOs have effective governance structures and that they operate in a fair and transparent manner. But once again the question arises: how can formal law, which by its nature is external to an individual WUO, promote effective governance without stifling the very autonomy that makes WUOs effective? How can a balance be struck between the rules of formal law and the "local law", the rules in use, of individual WUOs with their own individual needs, without creating a rigid, top-down, "one-size fits-all" legal straightjacket?

Few practical answers to these questions are provided in the existing literature. Based primarily on the experiences of a number of transition countries in Central and Eastern Europe and the Former Soviet Union[3] ("the transition countries"), the aim of this study is to begin the process of filling the literature "gap". Following on from an earlier Legislative Study (Legislative Study No. 73, *Legislation on water users' organizations - A comparative analysis*) which contained a general review and analysis of WUO legislation from around the world, this Study describes the experiences of the transition countries in designing appropriate legal space for WUOs and based directly on that experience seeks to identify a number of key legislative requirements. As such, this Study can be seen as part detailed case study and part design/drafting manual for policy makers and the designers and drafters of legislation for WUOs. It is written for lawyers who may not be familiar with the irrigation and drainage sectors and for engineers and policy makers who may not be so familiar with the legal aspects of sector reforms.

As to its form, this Study is set out in Six Parts.

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2 As the old saying from the American West goes: "whiskey is for drinking; water is for fighting over".

3 Namely Albania, Bulgaria, FYR Macedonia and Romania as well as the newly independent states of Armenia, Azerbaijan, Estonia, Georgia, Kyrgyzstan and Moldova.

Part Two sets the scene by describing the particular factual background to WUO establishment in the transition countries. Of course in many ways the factual situation of the transition countries, with the fall of communism, was and indeed remains unique. While the relevance of the experience of the transition countries is an issue that is considered in more detail in Part Six of this Study, it suffices here to say, that notwithstanding a slightly different context many of the issues faced by the transition countries are also faced by other countries in connection with irrigation sector reforms.

Part Three contains a description and analysis of the early attempts at creating legal space for WUOs, often in a hurry and as a result of donor pressure, and the kinds of legal problem that typically resulted.

Part Four describes how legal solutions to these problems were identified in the practices of Western European and other countries with a longstanding tradition not only of WUOs but also of WUO legislation.

Based on experience and practice of the transition countries Part Five sets out to describe the issues that should typically be addressed in WUO legislation while some conclusions are drawn in Part Six.

2. BACKGROUND TO THE SECTOR REFORMS IN THE TRANSITION COUNTRIES

The establishment of WUOs in the transition countries was a direct result of the land and agrarian reforms of the 1990s which saw the dissolution of the large collectivized farms that were such a feature of socialist agriculture. Before describing the reforms and their impacts on the irrigation and drainage sector it is appropriate to outline the pre-reform situation in the late 1980s immediately before the momentous political changes that followed.

2.1 Pre-reform arrangements for irrigation and drainage

Pioneered in the Former Soviet Union during the last years of the life of Lenin,[4] the forced collectivization of agriculture was a policy that was enthusiastically, and often brutally, completed by Stalin. The result was that

[4] Collectivization marked the end of the "New Economic Policy" and was accompanied by the liquidation of the rich peasants or *kulaks*.

throughout the Former Soviet Union two types of collectivized farm existed alongside each other: state-owned *Sovkhozes* ("state farms") and "collectively" owned *Kolkhozes* ("collective farms"). Apart from the fact that the former, as state entities could obtain subsidies, there was in practice little difference between the two legal forms both of which were effectively controlled by the state in accordance with the dictates of central planning.

Following the Second World War, reforms that took place in the newly socialist countries of Central and Eastern Europe saw the introduction of collectivized agriculture along broadly similar lines.[5] In Albania, for example, "state farms" were established in the coastal plains, on the estates of former noble families or on reclaimed land, while in the remainder of the country forced collectivization led to the establishment of cooperatives. In Bulgaria (Penov, 2002) and Romania (Ionita, 2000) cooperative farms were established alongside state farms. Cooperatives were also established in Yugoslavia alongside state owned *Agro-kombinats* (literally "agricultural factories") which combined crop production with processing activities (such as wine production in FYR Macedonia for example).

Although the expression "collectivized farm" is used in this Study as a generic term, some care is needed regarding the use of the second word: "farm". Responsible for a few hundred to several thousand hectares of land, these farms were really agro-industrial communities often comprising several villages and responsible for a range of primary processing activities as well as crop cultivation and animal husbandry. The farms were also often responsible for the provision of schooling, health care and even the cultural well-being of their workforces. The "boss" of a collectivized farm (the Director or Chairman) was an important and powerful person and invariably a member of the Communist Party.

The collectivized farms in the transition countries were the beneficiaries of significant investments in irrigation and drainage infrastructure. In the Former Soviet Union alone by the late 1980s some 23 million hectares of land had been placed under irrigation (FAO, 1997).[6] Some of the biggest investments took place in the soviet states of Central Asia with the

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5 The pace of collectivization varied from country to country and some countries such as Poland, for reasons which are beyond the scope of this paper, largely avoided its effects.

6 Around half was located in Central Asia and about one quarter in what is now the Russian Federation.

construction of vast irrigation schemes, supplied with water from the *Syr Darya* and *Amu Darya* rivers, for the purpose of cotton growing, investments that lead *inter alia* to the radical transformation of land use, ecology and social structures as millions were settled onto the formerly arid lands.[7] Particularly in the smaller soviet states, the net effect was that a significant proportion of the total arable land area was served by irrigation schemes. By the time of its independence in 1991 more than half of the total arable land of the Republic of Georgia was irrigated[8] while in the Kyrgyz Republic, for example, almost all of the 1.4 million hectares of arable land was under the command of irrigation schemes (FAO, 1997).

Box A – Irrigation water application methods

Two basic techniques were typically used in the transition countries to apply irrigation water to land: **surface irrigation** and **pressurized irrigation**. Surface irrigation included **furrow irrigation** (using small earth channels), **basin irrigation** (where water is channelled into earth basins formed around the plants or trees to be irrigated) and **flood irrigation** (in which whole fields are flooded, for example for the cultivation of rice). Generally speaking, fairly flat land is considered preferable for surface irrigation schemes.

In **pressurized irrigation** water is generally pumped from the water source (often through underground pipes) to a network of hydrants in the fields to be irrigated. The sprinkler equipment is next connected to the hydrants using pipes. A variety of different types of sprinkler equipment was used in the transition countries, ranging from rain guns through centre-pivot systems, in which a large gantry rotates around a centre-pivot (a model found throughout the former Soviet Union was called the "*Frégat*"), to large 'lateral-move' systems, in which a large wheeled gantry advances slowly across the field to be irrigated. These included the larger tall-standing "*Dniepers*" which could be several hundred metres long and which advanced on wheels or the smaller "*Voljankas*" which rolled forward on wheels attached to the central "axle" from which water was emitted. In general terms sprinkler systems are advantageous on gently undulating terrain. However they are more costly both to construct, due to the need for pumping stations to place the water under pressure, and to operate given that the pumps are powered by electricity. In fact in the socialist era the cost of electricity was negligible.

The other main technique for applying water to crops, drip irrigation, was generally not used during the socialist period except on a very small-scale and experimental basis. **Drip irrigation**, as its name suggests, is used to delivery very small quantities of water very precisely to the roots of the plants to be irrigated.

7 The most well known ecological impact being the de-watering of the Aral Sea.

8 Infrastructure was constructed to irrigate some 469 000 hectares of land out of a total arable land area of some 800 000 hectares.

But the construction of large irrigation schemes was not limited to the Former Soviet Union. In Albania, for example, out of the 702 000 hectares of arable land, 417 000 hectares were placed under the command of irrigation systems that watered fields that accounted for some 80 percent of the value of agricultural production (Republic of Albania).[9]

The scale of investments in irrigation was matched by investments in land drainage infrastructure. In the Former Soviet Union infrastructure was installed to drain some 25 million hectares of land either in "stand alone" drainage schemes (in the low lying Baltic republics for example) or in irrigation schemes on soils with poor natural drainage.[10]

While the precise details varied from state to state, the institutional arrangements for the management of irrigation and land drainage infrastructure were broadly similar. Responsibility for the operation of the so-called "inter-farm" schemes[11], that could provide irrigation water to and/or convey drainage water away from more than one collectivized farm, generally lay with the state body responsible for irrigation and drainage water management (referred to in this paper as "the state water agency"). Consequently, dams, head-works, diversion structures as well as main canals and large pumping stations were under direct state control.[12]

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[9] At the date of the National Water Strategy this land currently accounts for 80 percent of the value of agricultural production. Similarly out of nine million hectares of agricultural land in Romania some three million hectares benefited from irrigation infrastructure.

[10] Such drainage networks, which are necessary to remove excess water and salts, were prevalent in parts of Central Asia and Azerbaijan. In parts of Azerbaijan additional winter "irrigations" are applied to wash out the salts that a are an invariable by-product of irrigation.

[11] There does not seem to be any systematic usage in the literature of the terms irrigation (or drainage) system and scheme. In this Study the terms "system" or "on-farm system" are used to refer to the network of irrigation and/or drainage infrastructure located within the borders of a (former) collectivized farm while the terms "scheme" or "inter-farm scheme" are used to refer to the infrastructure that could serve more than one "system".

[12] Apart from those cases where a collective farm had direct access to its own water source.

Box B - Land drainage techniques

A number of different land drainage techniques were used in the transition countries including **open field drainage**, **sub-surface drainage** and **polders**. Very often a combination of techniques was used within the same scheme.

Open field drains are simple earth ditches. Water collects naturally in these ditches and then flows by gravity into larger "collector" drains from which it is then either pumped or discharged into surface watercourses. In some places, the land between the drainage ditches is back-ploughed to raise it further above the ditches and therefore the water table. While they are relatively cheap to construct, open field drains take up valuable space, provide obstacles to farming activities and furthermore can cause increased soil erosion and run-off. **Sub-surface drainage** systems are considerably more expensive to construct but are both more effective and more environmentally friendly. Drainage pipes are typically laid in lines 12 –75 metres apart and 0.8–1.5 metres below the surface. Sections of the pipes, usually clay tiles, do not have flanges and are not physically connected or joined together. This allows water to drain down from the surface and into the pipes which typically have a diameter of 50–75 millimetres. Depending on the soil type, the pipes are enveloped with various filter materials to improve the flow of water into them. The collected water then flows by gravity to a larger collector pipe or an open canal from which the water is either pumped or dispersed through gravity. These main drainage canals, in turn, drain into natural water bodies, whether rivers or lakes. Manholes are often installed at the junctions of the collector drains for the purpose of inspection and weirs are used to control water table sediment movement. Finally a **polder** is essentially an area of land, which is drained by field or sub-surface drainage surrounded by a dyke from which water is pumped.

In Albania, for example, the Ministry of Agriculture and Food had a "District Water Enterprise" in each administrative district which like state water agencies in other socialist states had a remit that included flood defence as well as irrigation, land drainage, land amelioration, torrent control, and erosion control. Within the Former Soviet Union, overall responsibility at the national level for irrigation and drainage lay with the Soviet Ministry of Amelioration and Water Economy (*Ministerstvo Amelioratie e Vodnohajestva)* which was based in Moscow.[13] Each separate Soviet Socialist Republic within the Former Soviet Union had its own republic level Ministry of Amelioration

[13] The term "water economy" has no real equivalent in western conceptions of water management. It certainly does not mean "water resources" although this term is sometimes erroneously used. The task of water economy bodies related to the design, construction, operation and maintenance of "water economic" structures such as irrigation, drainage and flood defence structures, including that prevent the flooding of non-agricultural land.

and Water Economy with subdivisions at province (*Oblast*) level (the "*Oblvodhkoz"*) and district (*Rayon*) level (the *"Rayvodhkoz"*).

Water was delivered by the state water agency to the boundary of each collectivized farm, usually at a measurement point or "hydro post". Although they were state bodies it is important to note that in most transition countries the state water agencies were required to enter into annual contracts with the collectivized farms for the supply of water and drainage services and to charge for this.[14]

Following the delivery of water by the state water agency, each collectivized farm was in turn responsible, through its own workforce, typically organized as an irrigation (or drainage) "brigade" or "department", for the operation and maintenance of its "on-farm" irrigation and/or drainage system: the network of canals, pipes, pumps and hydrants within its boundary necessary for the final delivery of irrigation water and/or for the removal of surplus water.

Each brigade typically comprised qualified hydraulic engineers together with skilled, semi-skilled and manual workers. This was a large workforce. For example in the former Kyrgyz Soviet Socialist Republic, which had a total population of around five million people, around 10 000 people were employed in the "hydro-brigades" of the collectivized farms.

2.2 The land and agrarian reforms

Following the collapse of the Berlin Wall and the emergence of the newly independent republics, land and agrarian reforms in the transition countries saw the break-up of the collectivized farms and either: (a) the distribution of the land they had used among their former workforce; or (b) the restitution of that land to former owners or their descendants.[15]

With the exception of Albania land restitution took place in the countries of Central and Eastern Europe including the Baltic States where collectivization

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[14] In fact no money changed hands. Invoices were issued and the relevant amounts were simply credited at central level to the accounts of the state water agency. Similar provision was made for the operation of drainage canals.

[15] Land Reform in the then Kyrgyz Soviet Socialist Republic began with the adoption of the Law on Peasant Farms on 2 February 1991, several months before the country's independence in September that year.

had taken place after 1945. Thus in Bulgaria, for example, where land had not been nationalized during the original collectivization process, following the liquidation of the collectivized farms the rights of individual owners could once again be recognized in accordance with the boundaries that existed in the early 1950s (Penov, 2002).

In a decision that is still highly controversial, Albania, in opting for land distribution, took the same path as the non-Baltic transition countries of the Former Soviet Union.[16]

Box C - Land restitution in Estonia

In 1939 there were approximately 140 000 family farms in Estonia. After the Second World War and the establishment of the Estonian Soviet Socialist Republic land was nationalized. The first step towards land reform took place in 1989 with the passage of the Law on Peasant Farming which permitted the establishment of private farms of up to 50 hectares on the basis of either commercial leases or long term rights of usufruct. By 1992 some 8 300 farms had been established pursuant to this law, mostly by employees of collective and state farms, occupying 200 000 hectares of arable land on the basis of rights of usufruct. No leases were granted.

Following Estonia's independence in 1991, land reform was part of the general privatization process which initially focussed on the return of original property - land, buildings and production assets - to former owners or their descendants. The first phase of the land reform process provided for the restitution of land, including arable land, on the basis of the boundaries which existed in 1939. Where restitution was not possible, for example because the land was subject to rights of usufruct in accordance with the Law on Peasant Farming, compensation was payable instead, either by way of 'replacement', in the form either of equivalent land of equal value and/or size, or of privatisation vouchers of equivalent value. The deadline for restitution claims was originally February 1992 (subsequently extended to 31 March 1993), while the deadline for amending pending applications was 15 January 1997. Some 200 000 claims for restitution had been received by this deadline which was many more than had been anticipated.

[16] The decision was controversial because the original land collectivization/ nationalization process took place only in the late 1940s/early 1950s, still within living memory. The effect was that farming families still knew where "their" land was situated. Moral, in some senses legal, support for such claims in Northern Albania was provided by Albania's customary law as set out in the *Kanun* (Code) of *Lekë Dukagjini* which establish the absolute nature of land ownership rights. Population pressure and notions of equity were the reasons why distribution was preferred to restitution.

> Unsurprisingly the process of restitution proved to be relatively complex. Following the determination of the validity of claims (and conflicting claims), which was the responsibility of the municipalities and cities, it was necessary to register each plot in the cadastre, prior to the registration of title in the land register - the Title Book - which is maintained by the county courts. This process was very time-consuming. It is estimated that restitution claims covered about 50 percent of arable land, out of which 30 percent were subject to contradictory claims. The balance, the remaining 50 percent of arable land, was not subject to restitution claims and remained in state ownership until its subsequent privatization. (FAO, 1998)

A full description of the land and agrarian reform process in the transition countries is beyond the scope of this paper. It suffices here to say that the process was long, complex and sometimes controversial.[17] Furthermore the pace and scope of the reforms varied both between the transition countries and sometimes even within the same countries.[18]

Sometimes, for example, reforms took place largely on paper with "farmers" leaving their land and property shares with the legally re-registered successors of collectivized farms. In some cases this was a result of the deliberate obstruction of reform by local officials or the determination of collectivized farm bosses to hold on to their power bases.[19] Elsewhere it was because those entitled to land and infrastructure shares, which included not only pensioners but also teachers, engineers, tractor drivers, lacked the knowledge, will or ability to undertake private farming. Leaving land shares with the successor of the collective farm successor very often seemed like a safer bet.[20]

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17 In Romania, for example, by 1997 only 63 percent of eligible owners had received title deeds while around a million disputes regarding land ownership were before the courts (Ionita, 2000).

18 In the Kyrgyz Republic, for example, the reforms were initially far more complete in the densely populated Fergana Valley in the south of the country than in the north.

19 In Moldova, some of those who left the collectivized farms were initially portrayed as "traitors" (and often given non-irrigated land or land at the end of the irrigation system).

20 In fact it often wasn't: in many countries the state farm successors quickly failed.

Box D - Land distribution in Azerbaijan

The land and farm reform process, which began in 1996 was substantially completed by 2002 when of the 2 022 state and collective farms that existed in 1996, only some 41 remained most of which were specialist livestock operations. Some 3 366 498 individuals within 855 516 families received land plots of a total area of 1 372 820 hectares. The process began with the entry into force of the Law on Land Reform of 16 July 1996 and was implemented through land reform commissions established in each village. Such commissions were also established at Rayon and national level to supervise the process and to hear appeals.

The law provided that every permanent village resident, including children, was to receive a land share irrespective of whether or not they were employed by the relevant state or collective farm. The land of the farms was divided into separate plots on the basis of their assessed value. This was calculated using cadastral information by reference to the quality of the land. The sizes of plots differed depending on the quality of the land. Thus smaller plots were created on better land and larger on worse. The land plots were actually distributed through a lottery system to each family. The average size of an individual's plot was approximately 0.4 hectares meaning that an average of 1.6 hectares were allocated to each family. However, care need to be taken with such figures. In areas of particularly high value land, individual plots were as small a 0.1 hectares. The canals and ditches of the former 'on-farm' systems located within the boundaries of state and collective farms together with the land appurtenant thereto were not included among the distributed land.

Once the land plots were allocated land certificates were issued and these were then registered at the Rayon land register. A land certificate was initially issued to the head of each family but it also contained the names of other family members and a description of their individual land plot as a share of the family land plot. All land plots could be freely disposed of. A family member who married, for example, was entitled to remove his or her share from the family plot. Land sales were introduced in 2000 as well as the mortgaging of land plots.

Not all of the land of the former state and collective farms was distributed. Some 5 percent of land was retained as a reserve fund and placed under the management of the relevant municipality to be rented out for short periods. One of the purposes of the land reserve was to ensure that replacement land was available should it become necessary to expropriate private land for the purpose of constructing or re-constructing irrigation systems.

As a result of the legal reforms a range of new farms and farming structures typically came into being ranging from one to several thousand hectares in size. In the Kyrgyz Republic, for example, a Government Regulation "On Categories of Subjects of Agricultural Enterprises in the Kyrgyz Republic" of 12 April 1996, listed the following categories of farming enterprise: personal

household enterprise (household and plot cultivated by family members); farm enterprise (farm operated by one family on at least 5 hectares of irrigated land or at least 1 hectare of suburban vegetable land); peasant enterprise (two or more families cultivating 5 to 100 hectares of irrigated land or 1 to 100 hectares of suburban vegetable land); collective peasant enterprise (cultivating more than 150 hectares of irrigated land); joint stock company (enterprise capitalized with shareholders non-land property which uses shareholders land shares); state enterprise; agricultural cooperative (Giovarelli, 1998).

2.3 Impacts

Whatever the pace and scope of the reforms, a common feature was the significant impact that they had on the irrigation sector.

2.3.1 Legal and institutional vacuum

First and foremost, the dissolution and liquidation of the collectivized farms created a legal and institutional vacuum as far as the operation and maintenance of the on-farm irrigation systems were considered. More specifically there was no longer anyone formally legally responsible for their operation and maintenance.

2.3.2 Increased operational complexity

At the same time another impact of the land reforms was that the process of distributing irrigation water had become a great deal more complex. By 1 October 1997 in the Kyrgyz Republic, for example, there were 38 964 private farm enterprises, 677 collective farms and 43 state farms in place of the 470 state and collective farms that existed in 1991 (Giovarelli, 1998).

The number of farms, however, tells only part of the story. When land reforms took place on the basis of distribution (as opposed to restitution) in recognition of variability of land quality, individuals or families were usually each allocated a parcel of "good quality" land, a parcel of "medium quality" land and a parcel of "poor quality" land. In Albania, for example, while each former collectivized farm family received on average a total of approximately 1.2 hectares of land, actual land plots were sometimes as small as 0.2 hectares in places, or even smaller (see further Box D).

The effect was that within each (former) on-farm irrigation system, the large fields of the collectivized farms were typically split into scores, hundreds even, of small land plots each planted with different crops and thus with different water requirements.

2.3.3 Land rights without water rights

Thirdly the land and agrarian reforms usually took place without any obvious consideration being given to the issue of water rights. Even if they did not create a system of formal water rights, the institutional and budgetary arrangements, including the relevant central plan, more or less guaranteed the delivery of irrigation water to the collectivized farms and/or the provision of drainage services.

The net result was that farmers received land plots with no legal rights whatsoever to water or, for that matter, to land drainage.

2.3.4 The ownership of infrastructure

Finally, in a process that was largely guided by notions of land tenure law (it was, after all often described as "land and agrarian reform"), in country after country, a curious lack of attention was paid to the legal status and future use of irrigation infrastructure.

Invariably, newly adopted land legislation that provided for private land tenure rights, including use rights and ownership, failed to take account of the specific nature of irrigated land and the fact that for irrigation to take place a number of ancillary rights must be provided for including rights to water, rights to access land for the purpose of operating and maintaining irrigation systems and rights to allow the flow of water across land.

Consequently it was often no longer clear who, if anyone, owned the on-farm systems. Sometimes, as in the case of Armenia, steps were taken to

transfer the on-farm systems into state ownership.[21] This approach at least had the benefit of simplicity.

Elsewhere things became more complicated. Very often, for example, land legislation failed to specify whether fixed infrastructure (canals, pipes, concrete "canaletti", pumping stations, etc.) formed part of the land plots on which they were located or whether they were to be treated as non-land assets that could be owned separately.

In Moldova, for example, where around one third of the collectivized farms had irrigation systems installed at great expense (and which with Moldova's rich soils had contributed to significantly increased yields), irrigation infrastructure was treated in the Government's Farm Privatization Programme as a non-land asset to be distributed among former collectivized farm employees alongside tractors and livestock in accordance with the provisions of the Law on Privatization of 1991. The first step under this process was to value the non-land assets. Each individual entitled to take part in the privatization process then received a voucher that represented that person's share represented in money terms but reflecting a percentage of the total (notional) value of different categories of the former collectivized farm's assets (Booz, Allen and Hamilton, 2000).

Similar problems arose in the Kyrgyz Republic where a series of less than fully thought out items of primary and secondary legislation saw irrigation and drainage infrastructure first included on the balance sheets of the former collectivized farms as "non-land assets" to be distributed on a share basis and then, when it became obvious that this could not work, transferred to local government control. In practice these developments led to a range of different outcomes, although often irrigation infrastructure simply ended up with the successors of the collectivized farms (see Box E).

Underground pipes, either for irrigation or land drainage, posed a particular conceptual challenge that all too often the legislation failed to address. More

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[21] Strictly speaking the legality of such transfers may be suspect even though the effect is probably correct. After all the on-farm systems of the kolkhozes were not in state ownership. A similar approach was taken in neighbouring Azerbaijan where pursuant to Council of Ministers Resolution No. 43 dated 15 March 2000 the former on-farms systems were transferred to the balance of the State Amelioration and Irrigation Committee.

specifically, were these "immovables" (fixed assets permanently attached to the land) a part of each land plot or were they owned separately?

The lack of legal certainty was not confined to irrigation. In Estonia, where despite the fact that two thirds of the arable land area contained sub-soil field drainage systems, these were effectively ignored as far as land restitution was concerned, even though in many cases individual (restituted) land plots were actually split by open drainage channels. The parts of the drainage systems located on privately owned land plots belonged to the land owner: they were classed as an "essential part" of the land plot.[22]

Box E – Infrastructure ownership issues in Kyrgyzstan

Field work undertaken in Issyk Ata Rayon, Chui Oblast in Northern Kyrgyzstan in 1999 yielded the following three typical examples.

In Tuz village, the successor of a former *sovkhoz* with 2 200 hectares of land had re-registered as a United Peasant Farm (UPF) using some 1 800 hectares of land at which time it acquired a certificate of property rights issued by the State Assets Fund. The certificate did not expressly refer to the irrigation systems but provided that the new entity succeeded to the assets of the *sovkhoz*. This was taken to include the irrigation infrastructure. Meanwhile the remainder of the land of the former *sovkhoz* was used by some 71 farms (of which 46 were small family farms using only a few hectares of land).

In the village of Pervimayskaya, a large UPF was established after which the *kolkhoz* which had previously used 2 488 hectares of land was liquidated. The assets of the *kolkhoz* were then transferred to the new UPF. No documents recorded the transfer of the irrigation system or other immovable assets to the latter: they were simply recorded on its "balance sheet" (inventory). One reason given as to why the infrastructure had not been transferred to the village government was that this would have been wrong as the infrastructure belonged to the *kolkhoz* and not the state. Meanwhile 94 other farms had been established, ranging in size from less than one hectare to 50 hectares, which used the remaining 943 hectares of the land of the former *kolkhoz*.

At Sintash village, a former Kolkhoz containing seven villages had been split into four UPFs while a (special) *sovkhoz* continued to operate as a *sovkhoz*. The *sovkhoz* continued to own and operate its own irrigation network, while the system of the former *kolkhoz* had divided into two, and transferred to two of the four UPFs. Meanwhile 254 smaller farms had been established using between 0.6 to 80 hectares of land.

22 Article 16 of the Law on Real Estate.

2.3.5 Use and access rights

Even in those countries where tertiary canals were retained in some form of state or local government ownership, final delivery of irrigation water using surface techniques frequently involves the use of temporary earth channels that flow across (more specifically down the edge of) numerous land plots.

And as regards the infrastructure that had not been so transferred, even if, for the sake of argument, every land owner did own the section of the system that was on his or her land, what legal rights did other landowners have to require the passage of irrigation or drainage water through the sections on their neighbours' land?

While traditional land legislation typically contains provisions on servitudes and rights of aqueduct and drainage, these are invariably too formal and too clumsy to provide a practical solution within irrigation and drainage systems.[23] And what of the rights of access over land necessary to clean and maintain open canals and ditches?

3. IRRIGATION SECTOR REFORMS: OPTIONS, SOLUTIONS AND LEGAL PROBLEMS

3.1 Options for reform

To summarize the previous Part, the net results of the land and agrarian reforms in the transition countries were typically as follows:

- the entities that had previously been responsible for the operation and maintenance of the "on-farm" systems were liquidated with no replacement provided for;

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[23] Land legislation typically provides that a right of servitude such as a right to convey water can be imposed on plot A in favour of another plot, say land plot B. As a real or property right, however, such a right can usually only be perfected by registration in the land register. While registering such a right over a single plot of land might be reasonable (if costly) such a right would need to be registered against every plot of land in respect of which a right of "aquaduct" (or drainage) was claimed. And to be effective such rights would need to be claimed and registered by each land plot within the relevant irrigation system, clearly an impossible task.

- the operation and maintenance of the on-farm systems had been rendered infinitely more complex due to the fact that the large fields of the former collectivized farms had been split into hundreds of small fields;
- land tenure rights were conferred on farmers in respect of irrigated land without any legal rights to irrigation water;
- the issue of the ownership of irrigation and drainage infrastructure was obscure;
- issues of access to, and use of, infrastructure were largely ignored.

With the benefit of hindsight it is clear that the legal aspects of irrigation and land drainage were largely overlooked in the process of land and agrarian reform.

Irrigation and land drainage were treated as merely another type of agricultural input rather than as a fundamental attribute of the land subject to reform. This omission can be seen as part of a wider failure to link aspects of land tenure with the role that water plays in the use of land.[24] Of course this is harmful to the irrigation sector but can also be seen as harmful to the reforms themselves. In short the very same legal reforms that had conferred private land tenure rights over irrigated and/or drained land had removed the legal and institutional framework for an essential element, namely the supply of irrigation water and/or land drainage, without which the land itself was often of little or no use. This would be surprising enough in its own right but as described above in many of the transition countries irrigated or drained land formed an extremely large percentage of the total arable land area.

Notwithstanding the reforms the importance of irrigation and land drainage meant that somehow through a range of temporary *ad hoc* arrangements on-farm irrigation and drainage systems were kept functioning, at least to a degree.[25]

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[24] See FAO, 2004.

[25] In parts of the Kyrgyz Republic, for example, the former hydro-brigades of the former collectivized farms kept operating under the supervision of newly established village governments. In places where land reforms had been mainly on paper the successors of the collectivized farms kept things going at least for their own benefit if not for the benefit of those who had sought to set out on their own. In some countries, such as Armenia, the state water agency sought to operate the on-farm systems but, with grossly insufficient personnel, it had limited success.

Maintenance, however, was largely "deferred". In other words it was not done.[26]

In these circumstances a solution, or set of solutions, was urgently called for. The "do-nothing" option was not a realistic solution particularly in those more arid areas where irrigation is essential for crop production and/or where whole new agricultural communities had been established on and around irrigation schemes.[27] It was clearly unrealistic to expect that farmers would be able to muddle through and somehow secure the irrigation services they needed. Leaving aside the value of the investments in irrigation infrastructure[28], the key issue is that land had been irrevocably changed so as to support entire agricultural sub-sectors of their own.[29]

Privatization, which had after all been the policy behind the land and agrarian reforms, was not seen as a realistic option not least because of the decayed condition of much of the on-farm infrastructure. In any event given the range of legal questions regarding the ownership of the infrastructure, the depressed state of the agricultural sector and the political controversy that

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[26] Another impact of these reforms was that the state water agencies had lost their clients. As described above, while these agencies were notionally paid for the water they supplied in bulk to the collectivized farms, although no money changed hands it still showed up in their accounts. As budgets began to be squeezed in the reforms the state water agencies started to look for income but from where? As already mentioned, attempting to supply and collect money from individual farmers was largely a non-starter. Consequently maintenance on the major structures of the inter-farm system also began to be deferred.

[27] In Central Asia and the Caucasus for example. Even if the land could eventually revert to its previous state (steppe/desert/grazing land) this would be totally incapable of supporting the large communities living there. In the Kyrgyz Republic where as already mentioned nearly all of the arable land is irrigated approximately one third of the population relied on agriculture for their livelihoods.

[28] Which in accordance with applicable accounting standards was often recorded on balance sheets on the basis of the costs of construction with little if any provision for depreciation.

[29] Reclaimed land on which drainage schemes have been constructed does not simply revert to its former state if those schemes are taken out of operation. Instead a new type of semi-drained wasteland is created and the risk of harmful flooding can be increased.

would have been caused by the idea of irrigation water being controlled by a monopoly supplier, this "option" was quickly ruled out.[30]

Although, as mentioned, in some countries state water agencies attempted to provide irrigation services at the on-farm level, this was not a viable long term solution either. First of all state operation of the on-farm systems would have been simply too expensive: neither the personnel nor the financial resources were available. Secondly, as already described, the state water agencies had historically never been involved in the operation of the on-farm systems. Even with the staffing levels of the socialist era, they simply did not have the resources or the personnel to undertake this task following the demise of the collectivized farms.

In any event the problems of state-run irrigation schemes had been clearly demonstrated by the experiences of a number of developing countries (and which have been one of the main drivers for irrigation sector reform). At best such problems include the fact that state institutions and employees have little incentive to provide an economical, efficient or responsive service to farmers. At worst such problems included a variety of different types of rent seeking behaviour.[31]

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[30] In fact it is the risk of monopsony as much as monopoly that suggests that this is not a good business model: there are rather few examples of successful private sector involvement in the irrigation sector. For example, although in California, many private businesses (often real estate development companies) supplied water to users up to the 920s, commercial companies have long since been eclipsed. Having supplied water to approximately 10 percent of the irrigated land area in 1920 this had gone down to 0.5 percent by 1978. While the suppliers in such cases enjoyed an effective monopoly over water supply at the same time their potential customer pool was physically limited to those who held land capable of being supplied by the relevant irrigation system. Consequently the customers effectively enjoyed considerable monopsonistic power, and were thus able to demand a low price that barely covered the supplier's short-run operating costs of capturing and delivering the water. As Thompson has noted the separation of water delivery and water use will thus often present both seller and buyer with considerable economic risk as well as constant and expensive conflict (Thompson, 1993).

[31] Such rent seeking behaviour has been categorized as economic in the form of direct bribes and corruption, or socio-political in the form of empire building, high costs and excessive supplies, the divorce of incentives from performance - indeed, sometimes almost an inverse relationship capture of public agencies and funds by politically powerful interests and their clients administrative operations, "by the book," rather than management in terms of objectives and results (Perry *et al*, 1997).

Operation by local government was not considered to be a long term option either. Apart from the fact that the newly established local government bodies were often extremely weak and under-resourced, there were also sound objections at a policy level to this option, one that has been used with limited, if any, success elsewhere. First of all, at a purely practical level the hydraulic boundaries of irrigation and drainage systems do not always follow local government boundaries. But the main problem with this option is the inherently political nature of local governments.

Box F – Transitional arrangements in Armenia

Unlike some of the other transition countries, the tertiary canals and the former "on-farm" irrigation systems were placed in state ownership. Until 1997 the systems were owned by District State Operation and Maintenance Enterprises (DOMEs) of the Ministry of Agriculture. In 1997 the tertiary systems were transferred to the local governments (*Hamainks*).

As regards operations, until 1996 the 38 DOMES actually operated the on-farm systems delivering water directly to each farmer. However, and similar to the experiences of numerous other countries around the world, this approach failed. Apart from anything the enterprises simply had too few staff to actually operate the former on-farm systems and in practice the DOMEs had to rely on the *Hamainks* to deliver the water in the fields. In 1997 the DOMEs were split into two parts, with one part taking responsibility for the primary and secondary canals and the other part taking responsibility for the secondary canals. However, this added little except a further layer of bureaucracy as the DOMEs still had to rely on the *Hamainks* to deliver water to farmers. In 1997 after the failure of this approach, the tertiary systems were transferred to the *Hamainks* on the basis of the Law on Local Self Government.

The operation of an irrigation or drainage system is a complex technical task that can involve the collection and management of relatively large sums of money. Experience shows that mixing politics with irrigation and drainage usually does not work. Irrigation and drainage are ultimately non-political issues. Local elections tend be won or lost on the basis of trends in national politics and/or other local issues (education, roads, and healthcare) but not usually matters as un-glamorous as irrigation and drainage. At the same time, however, if a local government is responsible for these sectors, monies raised from irrigation (and drainage) may be applied to more pressing social issues in accordance with local political imperatives rather the maintenance of irrigation infrastructure. Indeed in countries where irrigation agencies are under government control politicians at all levels are notorious for promising to cancel or reduce irrigation fees and charges as a cheap electoral bribe.

Ruling out these three options - privatization, state management and local government management - left the establishment of self-funded, non-profit WUOs as the only potentially viable vehicle for the operation and maintenance of the on-farm systems. This approach was enthusiastically supported by a number of major donor agencies. However a further legal benefit was that if a WUO was established to take responsibility for the operation of each on-farm system (or for that matter more than one on-farm system) this would provide the means of solving the various legal problems or *lacunae* summarized at the beginning of this Part regarding the ownership of infrastructure and the issue of water rights.

First of all, whatever the legal niceties of the situation, the fact of the matter was that at a moral level the on-farm systems were owned by the "community" of land owners and users comprising the workforces of the former collectivized farms. Transferring the on-farm systems (in use or ownership) to WUOs would effectively remove the notion that individuals might own, or have claims of ownership over, parts of the on-farm systems. Secondly, problems over access to infrastructure and to land in order to operate and maintain infrastructure could be dealt with through the mechanism of the local rules of the WUO.

Finally, as regards the issue of water rights the sheer number of land plots was such that it was clearly not practical economically or technically to seek to allocate a notional volumetric water right to each individual land plot particularly in those cases where irrigation water was delivered from more than one source. This would be a hugely expensive and ultimately pointless task as the "water right" so created would be of no value unless the service of conveying water from the source to the land plot was also included within the "right" through, for example, a water supply contract.

As already seen, the idea that the state water agency could enter into individual water supply contracts was simply not feasible. On the other hand, there was usually no reason why the state water agency could not enter into a limited number of water supply contracts with WUOs thus creating a form of contractual water right.

WUO participants could then in turn hold a notional "share" of the WUO's water right. Put another way, the interests of individual farmers could be safeguarded not through the mechanism of water rights *per se* but by

conferring legal rights upon them against the WUO which would in turn hold a contractual water right. In other words through these two legal mechanisms (namely rights against the WUO and the fact that the WUO itself held a contractual water right) the effect would be that an individual farmer would hold an enforceable legal right to water.[32]

Although various forms of WUO had long existed in Western Europe and North America, most of the expertise regarding WUO formation available to the governments of the transition countries through donor agencies and international consultants, as well as much of the literature, derived from recent experiences in a range of developing countries in the context of "irrigation management transfer" (IMT) programmes and other policies to promote participatory irrigation management (PIM).[33]

Although the socio-economic conditions in developing countries and the drivers for undertaking such reforms[34] were not identical to those found in the transition countries, that expertise and literature was readily available for the task of developing WUOs and WUO programmes and policies in the transition countries. After all, the basic concept of a WUO - a farmer managed self-governed and self-funded non-profit organization responsible for the operation and maintenance of an irrigation system - was essentially the same.

Although there was some scepticism as to whether farmers recently "liberated" from collectivized agriculture would be willing to work together to provide irrigation and drainage services, in the absence of any other obviously viable solution and with the support of the donor community, including the international development banks, the transition countries

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32 Put another way the community, acting through the WUO, would hold the (contractual) water right while individuals would hold rights against the WUO and thus against the community.

33 IMT had become a national strategy in many developing countries in the 1980s and 1990s. For example in Mexico, nearly 90 percent of publicly irrigated land was transferred to joint management involving WUOs between 1989 and 1996. Other well known examples included India, Indonesia, Nepal and Pakistan.

34 Apart from the desire to improve efficiency and to reduce rent-seeking behaviour, the main drivers behind IMT in developing countries have included the need to decrease spending on government irrigation agencies and to increase recovery of irrigation fees.

moved to establish WUOs to take responsibility for the operation and maintenance of the on-farm systems.[35]

3.2 Early experiences …

The first attempts to establish WUOs in the transition countries took place in Albania and Bulgaria in 1992. In all of the transition countries the first WUOs were invariably established as a "pilot" WUOs in the context of development or assistance projects to assess the extent to which this apparently new concept might work.

From the very beginning it was clearly recognized that in order to be able to function effectively WUOs would need to have independent legal personality. In other words they would need to be legal persons and thus have the capacity to enter into contracts, including contracts of employment, to hold property, to open bank accounts and to take and defend legal proceedings in their own name, independently of their participants. Without independent legal personality WUOs would not be able to have a legal relationship with their participants (or for that matter with third parties), hold use or ownership rights over irrigation infrastructure and other assets or hold water rights.

In some countries, such as Armenia and Bulgaria, the first projects and programmes to establish WUOs began without any specific reference to the concept in legislation. Elsewhere, at around the same time as the first WUOs were established, brief references were made to WUOs in new water or irrigation legislation (see Box G).

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[35] Another benefit of establishment of WUOs as far as the need for rehabilitation of on-farm systems was concerned was that they would provide a mechanism for consultation with farmers as to the design and implementation of works necessary to rehabilitate and modernize the systems to take account of the needs of water metering and the land reforms. Such projects could thus be characterised as community-based development projects.

Box G - Minimal legislative references to WUOs

1. Azerbaijan - Article 24(3) of the Azerbaijani Law on Amelioration of 1996 stated:

> To organize operation and protection of amelioration and irrigation systems being in joint or individual ownership, to manage them, to collect water fees, to settle disputes arising during the use of water and to solve other issues, an association of water users could be established. These Organization "activities shall be regulated by the legislation of Azerbaijan Republic."

2. Kyrgyzstan - Article 37 of the 1995 Law On Water provided that:

> "… water users shall be entitled to … form unions, Organization, concerns and other amalgamations on a voluntary basis with the aim to coordinate activities, protect their rights, represent common interests in public and other bodies".

3. FYR Macedonia - Chapter V of the 1998 Law on Waters was entitled "Organization of the Users of Water for Irrigation and Drainage". Article 148 provided that:

The users of water, owners of agricultural and other land, can found Organization of users of water for irrigation and drainage (hereinafter: Organization), for the purpose of constructing small hydro-reclamative systems for irrigation and drainage of the land for a part of a flow, in accordance with the water balance and the plans for the development of the Public water-economy, after a previous consent by the Ministry of Agriculture, Forestry and Water-economy. The association manages the water-economy objects from paragraph 1 of this article. As to the legal status of such Organization, article 150 simply stated that "The Association is a legal person and it is a non-profit association".

Typically, such references did not provide much detail as to what a WUO was or how it was to operate. While such provisions were often cited, particularly by non-lawyers, as providing a "legal basis" for WUO establishment, in truth they were little more than passing references and as such they did not create very much in the way of legal "space".

Nevertheless, passing references or not, in all of the transition countries the first WUOs were established using existing (often recently-adopted) legislation enabling the creation of "standard-form" legal entities (Hansmann and Kraakman, 2000) such as commercial companies, cooperatives and civil associations. It follows that the legal rules concerning the establishment and operation of the first WUOs were contained in the laws that regulated these types of organizational form.

In Azerbaijan, for example, the first WUOs were established as private companies.[36] In Bulgaria the first WUOs were established either as companies or co-operatives. In Armenia the first WUOs were established as "consumer cooperatives" while in Georgia the first WUOs (called "Amelioration Service Cooperatives") were established as "commercial cooperatives" in accordance with the 1994 Law "On Entrepreneurs"[37]. In the Former Yugoslav Republic of Macedonia the first WUOs were established under the 1998 Law on Associations of Citizens and Foundations while in the Kyrgyz Republic the legal basis used was the Law "On Public Unions" of 1991.

Even in those countries, such as Estonia and Romania, where new legislation was subsequently specifically adopted in connection with early WUO reforms, existing organizational forms were still used for WUO establishment. In Estonia, for example, the 1994 Land Amelioration Law simply stated that the establishment of WUOs must "correspond" to the Law of Associations.[38] In Romania a relatively detailed "Emergency Ordinance on Irrigation Water User Associations"[39] was adopted in 1999 to permit the establishment of WUOs as a specific type of association in accordance with the provisions on associations contained in the Civil Code.[40]

It does not appear that anyone particularly questioned the suitability of such forms. The key point was that they appeared to provide a legal basis for WUO establishment. Very often, in the context of the donor-driven project support cycle, time was short and quick responses were called for. Indeed, the use of existing organizational forms appeared to be perfectly logical particularly in those jurisdictions where WUOs were established as "water user associations". After all the term "water user association" (WUA) is

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36 More specifically they were established as "limited liability enterprises" in accordance with the Law on Limited Liability Enterprises dated 29 December 1998.

37 The use of this specific legal from was specified by an order of the Ministry of Agriculture (Order No. 2-37 "About the first stage of implementation of reform in the land reclamation and water economy sector", dated 14 February 1997) adopted to give effect to Presidential Decree No. 20, "About the first stage of implementation of reform in the Land Reclamation and Water Economy Sector".

38 Article 7.

39 GEO No. 14799.

40 In Albania the 1992 Law "On Irrigation and Drainage" contained specific reference to water user associations but the legal basis for their establishment was also the provisions on civil associations contained in the Civil Code.

frequently used in the literature. Surely a water user association is just another type of non-profit association?

Box H

Elinor Ostrom's "Design principles illustrated by long enduring CPR institutions"

Clearly defined boundaries

Individuals or households who have rights to withdraw resource units from the CPR must be clearly defined, as must the boundaries of the CPR itself.

Congruence between appropriation and provision rules and local conditions

Appropriation rules restricting time, place, technology and/or quantity of resource units are related to local conditions and to provision rules requiring labour, material, and/or money

Collective choice arrangements Most individuals affected by the operational rules can participate in modifying the operational rules.

Monitoring who actively audit CPR conditions and appropriator behaviour, are accountable to the appropriators or are the appropriators

Graduated sanctions Appropriators who violate rules are likely to be assessed graduated sanctions (depending on the seriousness and context of the offence) by other appropriators, by officials accountable to those appropriators, or by both. **Conflict resolution mechanisms** Appropriators and their officials have rapid access to low-cost local arenas to resolve conflicts among appropriators or between appropriators and officials

Minimal recognition of rights to organize The rights of appropriators to devise their own institutions are not challenged by external government agencies.

For CPRs that are parts of larger systems

Nested enterprises Appropriation, provision, monitoring, enforcement, conflict resolution, and governance activities are organized in multiple layers of nested enterprises.

Indeed some support for a "minimal approach" using existing organizational forms appeared to be provided by Ostrom's important work *Governing the Commons* (Ostrom, 1990). In her analysis of long enduring, self-organized and self-governing common pool resource (CPR) institutions, which included a number of long established WUOs, Ostrom sought to identify a number of common "design principles". Among these principles is that of "minimal

recognition of rights to organize". Rightly or wrongly this appears to have been understood as meaning that minimum legal recognition, for example through registration would be sufficient to establish WUOs. In fact the point that Ostrom seeks to make was that "appropriators", in the context of irrigation water, WUOs themselves, should have the right to make their own internal rules about resource allocation which is surely correct. In any event in *Governing the Commons* Ostrom was discussing farmer mobilised WUOs (as well as other sorts of common property rights institution) and not WUO establishment as part of a national government policy.[41]

3.3 … and legal problems

Following the completion of the relevant legal procedures, including the development and agreement of governing documents[42], the first WUOs were "successfully established": they acquired independent legal personality, an official stamp and seal, a governing document, a bank account and so forth. They existed in the (metaphorical) eyes of the law: it seemed that a suitable legal space had been created.

There is, however, clearly a major difference between formally establishing an organization called a WUO and establishing a sustainable WUO. Formal establishment is but an early, albeit important, stage in the process.

Sooner or later, in a pattern repeated in country after country, one or more of a number of legal problems arose, problems that directly or indirectly threatened the sustainability of the newly formed WUOs. In no particular order these legal problems included the following:

3.3.1 Unclear nature and purpose

First of all, at a conceptual level as a result of the use of existing organizational forms the precise nature and purpose of the new WUOs was often unclear.

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41 However, in a subsequent publication *Crafting Institutions for Self-Governing Irrigation Systems*, which is concerned with how WUOs can be successfully promoted on larger government funded schemes, while Ostrom cautions against the use of blueprints she places little if any direct emphasis on the importance of specific legislation for WUO establishment.

42 Described variously as a "statute", a "charter" or a "constitution".

In order to establish a sustainable WUO, or any type of community-based organization for that matter, potential participants must have a clear understanding of its purpose and manner of operation from the very outset. Furthermore if they are to spend time and effort to support the creation of such an entity they must have trust in the eventual outcome. This is normal human behaviour – who, after all, would join a club without being aware of the implications of membership? Such caution was particularly strong in the transition countries where, following the experience of collectivization, farmers were often somewhat sceptical about the merits of collective activity.

For those "in the loop" – farmers and government officials people who in the course of technical assistance projects had been on PIM seminars and overseas field trips - the concept was relatively clear. They could understand that WUOs were being established using existing organizational forms. The problem is that at a basic conceptual level, as will be seen, none of these existing organizational forms proved to be entirely suitable for WUOs.

Companies and production cooperatives are organizational forms that are specifically designed to generate profits and to distribute such profits among their shareholders or members.[43] WUOs, on the other hand, operate as "non-profit" organizations. In fact this term is slightly misleading as in order to avoid insolvency a WUO needs to make a "profit" in the sense that a surplus of income over expenditure is needed. The key point, though, is that any such surplus is retained within organization rather than being distributed as a dividend. Such retained surpluses may be applied to a number of ends including the creation of sinking or reserve funds or to reduce the level of water charges over following years.

The problem is that simply calling a company or cooperative a "WUO" does not have any legal effect on its status and thus its rights and obligations. A company with the words "Water User Organization" in its name is still, as far as the law is concerned, a company with all of the rights and duties of a company including the duty to pay a range of taxes including profit taxes. So

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[43] The size of each member's profit, often paid out as a "dividend", is typically calculated by reference to the size of his or her share. Although they are designed to facilitate business activity such entities can also be seen as investment vehicles as the value of an individual's share may rise over time. The fact that such entities have independent legal personality means that the liability of the shareholder/member is limited, making investment a less risky business.

what exactly was a WUO set up as a company? Confusion, or at best a lack of clarity, as to the purpose of WUOs set up as companies or cooperatives was not limited to farmers and other potential participants, however[44] government officials too were not always clear what exactly they were dealing with. In addition the cooperative legal form had a number of negative connotations for farmers. In Georgia, for example, farmers were extremely suspicious about the new cooperatives they were being asked to join fearing a kind of "backdoor" collectivization.

Furthermore, having promoted the establishment of WUOs as companies or cooperatives no-one could really complain when they were operated as such. In Azerbaijan, for example, where it will be recalled the first WUOs were established using this form, one report prepared by a donor agency that shall remain nameless[45] noted with surprise that that "there is a belief in the government both at national and local levels that WUOs are for-profit organizations". In fact the government was legally quite correct: article 4 of the Azerbaijani Law on Enterprises states very clearly that "enterprises shall deal with entrepreneurial activity".

On the other hand the overtly "non-profit" nature of associations does not necessarily provide a conceptually more appropriate solution. In the transition countries legislation on private associations or NGOs typically permits them to undertake commercial activity ancillary to their main task. A (private) association established to promote the teaching and study of water legislation, for example, might be entitled to sell water law text books to its members as a service subsidiary to its main task. But given its non-profit, and thus typically tax favourable, status (an issue returned to below) it is not a suitable vehicle for the commercial publishing, printing and sale (wholesale or retail) of text books on this exciting topic. WUOs, however, engage in what is essentially a commercial activity: purchasing water in bulk from a supplier and then selling that water on to users who may include both members and non-members. This is their main task.

Government officials, and in particular tax officials, struggled to reconcile the stated purpose of WUOs with the organizational form used. What exactly

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44 "My brother is doing very well – he has his own WUO". "I used to be the boss of a state farm but now I have my WUO". These are both statements relayed to the author in the course of interviews in the transition countries.

45 As it had promoted the use of this form in the first place.

were these WUOs? Non-commercial organizations undertaking an essentially commercial activity? It looked like a scam.

Finally at a purely practical level the situation was not helped by the fact that, at best, the "legal basis" for WUO establishment was found in two legal texts – such as a passing reference in a water law and the law relating to the relevant organizational form – and at worst in four: the two texts just mentioned together with relevant provisions in the Civil Code and an item of subordinate legislation.[46] While lawyers and government officials may be used to simultaneously consulting several legal instruments, farmers, typically, are not.

3.3.2 Participation and establishment

Another common problem with the use of existing organizational forms concerned the issue of participation. Sometimes the legislation actively precluded full participation. Otherwise it merely failed to promote it.

If a WUO is to be effective it is important to involve as many participants from the outset in order to both build a sufficient momentum and generate a sense of ownership. If too few potential participants are involved, a WUO will probably be neither economically nor institutionally viable. In other words, it is highly desirable that as far as possible, the entire "community" of water users should support the establishment of a WUO as "their" WUO. Thus in the context of government policies to support WUO formation it is equally important to ensure that participation is widespread from the outset. Again training, awareness and capacity building all have a key role to play but it is also important to ensure that the applicable legislation takes a positive role in encouraging participation.

In some countries, such as the Former Yugoslav Republic of Macedonia, the legislation used precluded the participation of legal persons.[47] On the other hand in Kyrgyzstan the law appeared to prevent the participation of natural persons, at least in the process of establishment.[48] As farms had typically

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46 In the Kyrgyz Republic, for example.

47 As already mentioned the first WUOs in FYR Macedonia were established under the Law on Association of Citizens and Foundations, 1998.

48 In Kyrgyzstan the first WUOs were established on the basis of the Law on Unions of Legal Persons.

been established as both natural and legal persons such restrictions were hardly conducive to encouraging broad participation in WUOs.

In some countries, such as Georgia, where it will be recalled the first WUOs were established as cooperatives, the relevant legislation required a capital contribution from potential WUO members. This had the effect of precluding all but the richest from membership or participation in the establishment procedure: hardly a sound method of promoting popular support.

Another problem with the use of existing legislation was that it typically permitted the establishment by only a handful of people of a WUO that might potentially have hundreds of members. Because such legislation had not been drafted for the purpose of WUO establishment it did not set any minimum threshold of participation. As a result WUOs could be, and indeed often were, established largely on paper by a handful of interested parties. In cases where this happened, those who had not participated in the establishment process (and who had sometimes not even been consulted) understandably felt little sense of ownership over "their" WUO, in some cases (rightly) distrusting the motives of the WUO founders.

In a number of cases, for example in Bulgaria, WUOs were set up as companies or cooperatives by the entrepreneurial and well connected who saw an opportunity to set up a monopoly business. This was not illegal but it was certainly not within the spirit of the WUO concept (Theesfeld, 2004).[49]

In any event, such legislation could not, by its very nature, confer legal rights to membership in WUOs nor specify the rights and obligations of members with any degree of specificity, certainly as far as rights to water were concerned. Nor was there anything to prevent two or more WUOs being established in respect of the same irrigation or drainage system or to prevent their operational boundaries from overlapping.

3.3.3 Weak and inadequate internal governance structures

Another problem was that governance structures designed for small private businesses and private associations were not always sufficiently robust or flexible for WUOs.

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[49] Theesfeld, 2004, p. 11.

As noted in the Introduction to this Study, there is an inherent risk of conflict within WUOs. Conflicts may arise between farmers on the same canal or between villages located within the same irrigation system.

While the risk of conflict is real enough perhaps equally important in the early stages of WUO establishment is the fear of conflict and the distrust that this may cause. Potential WUO participants may be unwilling to invest time and effort in WUO formation unless they can see that mechanisms are in place to prevent or minimize the otherwise "inevitable" conflict.

Furthermore, as with all community based natural resource management organizations, there is a tendency for local elites to seek to seize control over the resource, especially in the case of irrigation. Particularly robust governance structures are therefore necessary to prevent elite capture taking place, to promote accountability and transparency and to prevent conflict. Bulgaria offers a good example in this respect (Theesfeld, 2004).

While in theory the governing document of a WUO established as an association, company or cooperative could be drafted in such a way as to protect the interests of all participants, such provisions would generally have no legislative support and indeed the more complex they were the less transparent might be the operation of the WUO. Furthermore, there would be nothing to prevent the governing document being changed to benefit one or other group of participants.

At the same time, mechanisms that seek to promote effective governance must take account of variations in the sizes of the farms of those who participate in WUOs. The typical "one member, one vote" (OMOV) model is frequently unsuitable where, as was often the case in a number of the transition countries, there were large variations in the size of landholdings.

To take the examples from Northern Kyrgyzstan described in Box E, in each case an OMOV arrangement would mean that the WUOs would be effectively controlled by the large number of small farmers among their members. Unsurprisingly, in such circumstances the large farms were frequently unwilling to support WUO establishment on such terms. Equally, though, if votes could be allocated on the basis of, say, land area used then clearly the larger farms would dominate. Are such concerns legitimate? Was it likely that smaller farmers would "gang up" on larger farmers? In places

where there is severe competition for water such a scenario cannot be ruled out. But even ostensibly "fair" proposals might have unforeseen impacts for example as regards the setting of graduated tariffs. And the key point to note is that, real or not, such concerns were felt.

In practice where the cooperative and association organizational form was used, OMOV was prescribed. While in theory a different basis of vote allocation could be used in cases where the company legal form was used, in practice it is extremely difficult to ensure transparency if more complex approaches to vote allocation are used without legislative backing. In some countries lack of clarity about voting arrangements were enough to sabotage WUO establishment.

3.3.4 Distrust of subordinate legislation

As already noted, in several of the transition countries the legal framework for WUOs made considerable use of subordinate legislation in the form of decrees, orders and regulations. This approach, however, was not always either effective or popular.

First of all it is axiomatic that subordinate legislation cannot contradict primary legislation and thus at best it offered only a partial solution to other legal problems. Second, by its nature subordinate legislation can only address matters of detail.[50] Equally it can usually be changed relatively easily, thus providing a somewhat weak or transient framework for WUO establishment and operation.

In Kyrgyzstan where the brief references to WUOs in the water law (described in Box G above) were supplemented by subordinate legislation, farmers argued with some justification, that if the government was genuinely seeking to promote WUOs as a matter of policy then this should be backed up in primary legislation rather than something that could be altered at little more than the stroke of a pen. Why should farmers invest time and effort in such flimsy structures?

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[50] A related problem in many of the states of the Former Soviet Union was a common yet erroneous perception that subordinate legislation only applied to officials within or dependent on the ministry that issued such legislation.

3.3.5 Unrelated legislative amendments

Another problem with the use of existing organizational forms was that changes made to the legislation relating to those forms for other, un-related, reasons frequently negatively impacted WUOs.

This happened, for example, in Romania where new non-government organization legislation, intended to simplify legislation governing non-government organizations, significantly modified the internal structures of existing WUOs by removing various safeguards that had in fact been carefully included to promote WUO transparency. In Estonia, new non-governmental organizations legislation effectively removed the legal basis for WUO establishment over-night.

This kind of risk will always be present as long as WUOs are established using legislation for existing organizational forms, legislation that is typically under the responsibility at the policy level of a ministry other than that which is responsible for WUOs (such as the ministry of justice or the ministry responsible for economic matters).

3.3.6 Tax treatment

As a direct result of the lack of clarity as to the function and purpose of WUOs established using existing legal forms, problems frequently arose regarding their tax treatment. First of all, WUOs established as companies or cooperatives were *prima facie* liable to pay profit tax on any surplus of income over expenditure thus imposing an additional financial burden upon them. The fact that such entities were described as WUOs or that their governing documents specified that they were "non-profit" had no impact on their legal status or liability to pay taxes.

At the same time, as already noted, the use of the association form also created problems due to the fact that the commercial activity of water purchase and sale was in fact the principal task undertaken by WUOs. In Romania, for example, the Tax Inspectorate sought to apply the non-profit concept to the letter and argued that as WUOs were non-profit organizations, they could not hold over any surpluses from accounting year to year. In other words they were not to be allowed any profit (in the form of

surpluses) at all, irrespective of the fact that there was never any intention to distribute accrued surpluses.

3.3.7 Powers of supervision

Another problem with the use of existing organizational forms was the fact that the ministry or agency[51] that had most actively supported the establishment of WUOs, and thus had the greatest interest in seeing their successful operation, typically had no formal legal means of supervising their performance or intervening the case of actual or potential failure.

Not only were other ministries responsible for this task, such supervision took place by reference not to the performance of these WUOs as WUOs *per se* but rather by reference to the organizational forms in accordance with which they had been established. In other words WUOs established as NGOs were typically subject to the minimum regulatory supervision applicable to NGOs while those set up as companies were subject to the potentially quite onerous reporting requirements of that organizational form which was not always entirely relevant to their performance as a WUO.

Consequently in Albania, for example, the Ministry of Agriculture and Food had to rely on the goodwill of "its" WUOs to provide copies of accounts and other records.

3.3.8 No legal power to impose compulsory measures

Last, but not least, was the fact that WUOs established on the basis of existing organizational forms lacked the powers to impose compulsory measures. As already noted WUOs are premised on the basis that participants will cooperate in the achievement of a mutually beneficial activity, namely the operation and maintenance of an irrigation and/or drainage system. But what happens if they do not?

For example what happens if, for example land-owners/water users choose not to join a WUO established using one of the existing legal forms? The short answer is that unless such persons choose to join a WUO they are not subject to its rules. This can create a particular problem for land drainage: a

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[51] Typically a ministry of agriculture or water resources or an irrigation agency.

drainage system will lower the water table beneath the land of participants in a WUO just as effectively as will under the land of "free riders" who are not. In such circumstances who would bother to join a WUO? But similar problems may arise in connection with irrigation. It can be difficult to prevent land holders from benefiting from irrigation. And what of the non-participant who refuses to allow field channels to be laid over his or her land or to allow access to other canals or ditches for the purpose of operation or maintenance? There was nothing that WUOs could do in such circumstances.

And what of those who agree to establish and participate in a WUO and to abide by its rules but then fail to do so by, for example, failing to pay irrigation and/or drainage fees? In certain circumstances it may be possible to withhold the supply of irrigation water but this option is not usually available as far as land drainage is concerned and in any event it is not likely to be effective where irrigation is supplemental. Furthermore, in those cases where it is possible to cut off irrigation water supply the net effect may be to destroy the entire harvest and thus any prospect of recovering the costs incurred by the WUO. In such cases, where a participant has failed for whatever reason to comply with the rules of the WUO there is usually a point at which a WUO's ability to enforce its own rules comes to a natural limit and recourse is necessary to involve an outside agency such as the courts.

In theory by agreeing to be a member of a WUO each participant entered into a contractual relationship whereby s/he agreed to comply with the rules of the WUO. In practice, however, this was not a realistic option. Court proceedings are time consuming and expensive. Furthermore in order to obtain a judgment against a recalcitrant participant a WUO would need to prove every element of its claim. In other words, just like any other claimant in civil proceedings, it would need to prove: (a) that the defendant was, say, a member of the WUO; (b) the duties and obligations of membership; (c) that, for example, a delivery of irrigation water had been requested in accordance with the appropriate procedures (in other words that a valid contract existed); (d) that the delivery had been made in the appropriate quantity at the specified time by the WUO (in other words that the WUO had itself fulfilled its contractual obligations); and (e) that the outstanding charges had been properly invoiced and so on.

Furthermore, even if a WUO was able to obtain a judgment against such a participant it would then have to rely on the ordinary court procedures to secure payment (assuming that this was not forthcoming) such as reliance on the court bailiff. In short, the first WUOs lacked legal "teeth".

4. SEEKING LEGAL SOLUTIONS

Not all of the transition countries experienced all of the legal problems described in the previous Part. Nevertheless it is fair to say that by establishing WUOs on the basis of existing organizational forms all of the transition countries experienced some of these legal problems and many experienced most of them.

Sometimes the legal problems were quite obvious and open. Elsewhere they were part of a wider problem of distrust of the WUO concept or a lack of faith in the new organizations.

It must also be acknowledged that the legal problems were not the only problems faced by the new WUOs in the transition countries. Many of these other problems related to the depressed state of the agriculture sector and the ongoing impacts of the land and agrarian reforms. This in turn impacted negatively on the ability of WUOs to operate and maintain their irrigation and drainage systems and to recover the necessary financing for this.[52]

Box I - Non legal problems faced by the first WUOs

One of the main challenges faced by the first WUOs in the transition countries was financial viability due to the weaknesses of the post-transition agriculture sector. These weaknesses included: (a) **problems over market access** - in many of the transition countries there were problems of market access either because private marketing infrastructure had yet to be developed or because previous markets (e.g. the former Soviet Union) had been closed off by new international borders; (b) a **lack of inputs** - accessing inputs other than irrigation water (such as seeds and fertilizer) was frequently problematic, as markets sought to replace the centrally planned approach previously in place; and (c) a **lack of farming skills** - many of the new "farmers" lacked farming skills by reason of the fact that land had been distributed to all previous collectivized farm members irrespective of their former occupation.

[52] Another problem was that in a number of countries, Armenia included, the early WUOs were simply too small to be economically viable.

Thus in Armenia, for example, after the reforms which began in 1992 less than 40 percent of the new owners of agricultural land had been engaged in agricultural activity in the pre-independence period. In short it is more or less impossible for WUOs to function other than on a minimal basis unless farmers have sufficient income to make it worthwhile paying irrigation and/or drainage charges. Other problems related to the dilapidated state of inter-farm irrigation and drainage schemes as well as the on-farm systems themselves as a result of years of "deferred maintenance".

Nevertheless, the legal problems were genuine and in need of a solution. Indeed, in some cases just of one of the legal problems described in the previous Part was sufficient to hinder the sustainability of the new WUOs.

As already mentioned, the rich body of literature on PIM and WUOs, which has tended to focus on the experiences of so-called developing countries, had generally paid little attention to legislation and thus the legal aspects of WUO establishment.[53] It was not, therefore, much use in seeking to resolve the kinds of legal problems faced by the first WUOs in the transition countries.

Instead given their shared legal and other cultural traditions it was necessary to turn to those Western European countries with a long-standing WUO tradition.

The Dutch *Waterschappen* or "Water Boards"*,* for example, date back to the thirteenth century (Lazaroms and Poos, 2004) while some of the Spanish WUOs are almost as ancient (Ostrom, 1990). WUOs in England are based closely on the Dutch model and date from the 17th century. In other words WUOs in these countries have stood the passage of time. It is pretty safe to describe them as sustainable.

Apart from irrigation and drainage, such WUOs undertake a wide range of activities relating to the use of land and water including flood defence, potable water supply, waste water treatment, surface water course maintenance and even, in the case of the Dutch Water Boards, pollution control. Although the socio-economic circumstances in which they undertake their activities were somewhat different to those of the transition countries (i.e. a richer agricultural sector), from a legal and institutional perspective they function on a basis that is almost identical to that foreseen for WUOs in the transition countries (and in developing countries for that matter).

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53 Salman Salman's useful publication *The Legal Framework for Water User Organizations – a Comparative Study* of 1997 focussed primarily on the governing documents of WUOs.

Curiously relatively little appears to have been published in either legal or development literature on WUOs legislation in these countries. They do not seem to be of great interest to lawyers or anyone else.[54] One commentator has suggested that this is because they have "worked so smoothly and unobtrusively for so long" (Perry *et al,* 1997).[55] Fee collection rates in these countries tend to be very high: around 100 percent in Germany (Wolf and Konig, 1997). Consequently, in the absence of specialist literature it was necessary to turn directly to the legislation in these countries and to explore how this legislation is implemented in practice.

Indeed further investigation shows that a similar legal approach is found in countries in North and South America as well as Japan.

4.1 Four key features

Analysing the legislation in these countries very quickly revealed four key features. More specifically the legislation showed four major differences in the legislative treatment of WUOs.

4.1.1 Specific legal form

The first, and perhaps most important, finding was that the legislation provides for the establishment of WUOs as a specific type of organizational form. In other words WUOs are established as WUOs. They are not established as cooperatives, companies or associations or anything else.

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[54] This may be because the topic is boring, the term "boring" in this context being intended as a compliment. Legal scholarship tends to be excited and informed by interesting legal questions often arising out of the decisions of the courts. The courts only become involved in the consideration of points of law if there is a dispute. While court cases may provide dramatic theatre (and much material to film and television programme makers) and a living for lawyers they are indicative of things gone wrong.

[55] Wolf and Konig note that "The performance of the German (WUOs) was so successful and without any major problems that at the time of Germany's reunification – the beginning of the nineties – little or not written material was available which could be used as a guide for the establishment of similar institutions in the Eastern part of the country. This shows that the associations have been very successful. We assume that if this would not have been the case, a large number of investigations would have been carried out over the years with respect to the performance of the (WUOs), and therefore a larger number of publications should be available". (Wolf and Konig 1997).

For example WUOs in Belgium are established as *Wateringuen*, those in France are established as *Associations syndicales de propriétaires* (Landowners' Syndical Associations), while those in Germany are *Wasserundbodenverbanden* (Water and Land Organizations). In Italy WUOs are established as *Consorzi* (Consortia) while in the Netherlands they are *Waterschappen* (Water Boards), in Spain they are *Comunidades de Regantes* (Irrigation Communities) while in England and Wales they are established as "Internal Drainage Boards".

At the same time the legislation specifies exactly what the permitted land/water-related tasks of WUOs are. For example Article 2 of the German WUO Law provides:

Permissible Tasks

Subject to derogating regulations under *Land* law, responsibilities of the Association may be:

1. Expansion of water-bodies, including close-to-nature restoration and maintenance;
2. construction and maintenance of facilities in and along water bodies;
3. construction and maintenance of rural road and streets;
4. construction, procurement, operation and maintenance as well as disposal of joint facilities to manage agricultural areas;
5. sea defence and flood protection measures including forelands near embankments;
6. improvement of agricultural and other areas including the regulation of the soil water and soil air table;
7. construction, procurement, operation, maintenance and disposal of irrigation facilities as well as facilities for irrigation and drainage;
8. technical measures to manage the groundwater and surface water-bodies;
9. waste water disposal;
10. waste disposal in connection with the carrying out of association tasks;
11. procurement and provision of water;
12. establishment, maintenance and care of areas, facilities and water-bodies to conserve the natural balance and the soil and to tend the landscape;
13. promotion of cooperation between agriculture and water management as well as further development of the conservation of water-bodies, soil and nature; and
14. promotion and monitoring of the aforementioned tasks.

The law goes on to specify that the relevant governing document must state the primary task of each WUO. In other words although the same law applies to all German WUOs, different WUOs may undertake different tasks.

This is in contrast to practice in the United States, where state legislation provides for the establishment of different types of WUO depending on such matters as the task to be undertaken. Thus the names used to describe WUOs include "Water District", "Irrigation District", "Land Improvement District" and so forth.

Obviously each of these jurisdictions has legislation in place that permits the establishment of standard-form legal entities such as associations, companies and cooperatives. Those forms are simply not used for the establishment of WUOs. In other words a specific legal space for WUOs is provided for.

4.1.2 Specific legislation

Second, and following on from the first point, WUOs are established on the basis of specific WUO legislation. In other words they are established on the basis of special WUO laws. Furthermore, although in some countries such legislation is quite old,[56] generally speaking the legislation is rather recent or more specifically it has been revised relatively recently. In Spain the establishment and operation of WUOs is regulated by legislation dating from 1985,[57] the current German WUO law was adopted in 1991,[58] while a new law regulating the establishment and operation of WUOs in France was adopted in 2004 (replacing earlier legislation from 1865).[59]

In other words, although WUOs were long-established in these countries, time and energy and political capital have been spent relatively recently in order to ensure that the legislation is updated as necessary. Apart from anything else this tends to suggest that the legislation is considered important by the governments and parliaments of these countries: after all it is the source of WUO legal space.

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[56] Some of the old WUOs in Northern France and Belgium are said be regulated by legislation that dates back to the middle ages and the Belgian law on WUOs dates back to 1832.

[57] Water Law as amended.

[58] Federal Water and Land Organization Law of February 1991, Federal Law Gazette I, p. 405.

[59] *Ordonnance n° 2004-632 du 1 juillet 2004 relative aux associations syndicales de propriétaires.*

4.1.3 Detailed legislation

Third, the legislation is generally rather detailed, addressing most aspects of the establishment and operation of WUOs. In other words the legislation creates substantive legal rules – far more than the passing references found in legislation in the transition countries. The German WUO law, for example, contains 82 articles in nine chapters.[60]

Why such a level of detail is necessary and the type of issues that fall to be addressed, are discussed in more detail in Part Five of this Study. The short observation though is the legal space for WUOs is not an "empty" space.

4.1.4 Public law basis

Finally the legislation typically provides for the establishment of WUOs under "public law" as opposed to "private law".[61] This is a somewhat technical legal distinction. It is nevertheless a crucially important one.

In general terms, public law is the body of legal rules that regulates the conduct of state bodies (including central and local government) as well as bodies that undertake public functions (such as state agencies and universities) on the basis of specific laws.[62]

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60 The English translation of the law is 26 pages long.

61 Article 74 of the Spanish Water Law provides: "The water users communities are corporations under public law, assigned to the river basin administration. They shall supervise the fulfilment of the statutes or rules as well as the proper use of water".

62 The distinction between public law and private law is more marked in the legal systems of the civil law tradition (which includes continental Europe, large parts of Africa, South America, a number of Asian countries including Japan and China) than in the legal systems of the common law tradition (which includes Australia, England, India, New Zealand, North America and Pakistan and a number of African and Caribbean countries): for example in some civil law jurisdictions disputes concerning public law are resolved before a separate system of courts. Nevertheless the distinction is found in all legal systems that follow the two main legal traditions.

Legal persons that are established under public law are known as "bodies of public law" or "public corporations".[63] The fact that many bodies of public law receive state funding does not prevent self-governing, self-financing WUOs from also having this legal status.

This approach is in contrast to the early practice of the transition countries where the first WUOs were established on the basis of **private law** organizational forms (companies, cooperatives and associations). Private law regulates the private legal relationships between natural persons (citizens) and legal persons.

At the same time, though, WUOs are not controlled by the state or state entities but by the private individuals, the farmers and water users, who are their participants and the beneficiaries of the services they provide. Consequently, the employees of WUOs usually do not have the status of civil servants and WUOs are not bound by public procurement rules. They are controlled by private sector actors but discharge a public function. They are run on a commercial basis, like a business, but do not seek to make a profit.

As such, in legal terms WUOs can be understood to operate half way between the private sector and the state or public sector. They are a good example of a "public-private partnership" (although that particular expression is of course usually used to describe a commercial relationship between companies and public bodies).

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[63] The precise definition of a body of public law will tend to differ from jurisdiction to jurisdiction. The term "body governed by public law" is defined by the European Community in the context of a legal instrument regulating procedures for the award of public works contracts as any body "established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and having legal personality, and financed for the most part by the State, or regional or local authorities, other bodies governed by public law or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or other bodies governed by public law". As described in the text most bodies governed by public law are state funded but this definition is broad enough to include WUOs. It should be noted that this instrument does not create a general definition for the European Union member states: this definition applies in connection with the subject matter of the relevant directive, Council Directive 93/37/EC of 14 June 1993 concerning procedures for the award of public works contracts (O.J. 199, 9 August 1993, p. 54).

4.2 Public law and the public interest

The fact that WUOs are established under public law means that their public interest function can be effectively taken into account. A moment's reflection shows why in most cases this is conceptually the most appropriate legal basis for WUO establishment.

An agreement between a few farmers to share the costs of digging an irrigation (or drainage) ditch to serve their privately owned land plots is essentially a private matter. As such that falls to be regulated under private law.[64] In such circumstances, the establishment of a WUO under private law may very well be appropriate. Indeed the WUO legislation in both France and Italy provides for the establishment of WUOs under private law in circumstances where all land owners specifically agree to this: in other words when such landowners come to a private arrangement among themselves.[65]

In other circumstances, however, WUOs are likely to operate in the public interest.[66] This might be because of the sheer size of the irrigation and/or drainage systems that they are responsible for and/or the vital role they play in securing a range of social objectives including food security, full employment or the well being of rural populations. Another reason why WUOs may be considered to operate in the public interest is if they operate or benefit from publicly owned irrigation and/or drainage schemes.

In the context of the transition countries it would be hard to argue against the public interest nature of WUOs. Doing nothing and simply leaving farmers to muddle through or abandon irrigated agriculture or the use of land drainage systems was, as already mentioned, not a realistic option. Furthermore, governments in the transition countries sought funds on both grant and loan basis from a range of donors, including the World Bank, for

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64 Of course a permit may be necessary to abstract the water in the first place but that is another issue.

65 The German WUO law is interesting in this respect. All WUOs are established under public law but only those that operate in the public interest are entitled to exercise the full range of legal powers potentially available to WUOs such as the right to force compulsory membership. In recent years, given current food surpluses in Western Europe, WUOs that deal only with irrigation have not been currently entitled to force compulsory membership. Food shortages might alter this situation of course.

66 A full discussion of the notion of the "public interest" is beyond the scope of this paper.

the rehabilitation of irrigation and drainage schemes that served the on-farm systems as well, in many cases, as the on-farm systems themselves.[67]

Furthermore, given their public interest nature, not only was private law the "wrong" legal basis for the establishment of WUOs but it was also the cause of many of the practical legal problems faced by the early WUOs. More specifically many of the problems faced by the early WUOs arose because the private law organizational forms used could not by their very nature reflect their public interest nature or function.

For while WUOs are controlled by their participants, they provide a service that is in the public interest. They operate publicly funded infrastructure and use a state-owned resource (water) which is characterized as a "public good" in this context. The correct operation of WUOs is a matter of public interest. They are not simply private clubs or companies. A farmer whose land lies within the service area of non-functioning or poorly functioning WUO cannot simply move to join another one, or for that matter, realistically establish a new WUO using the same infrastructure. Nor can s/he usually obtain water from another source.

The legal effect of having public law status is that WUOs in the developed countries lie halfway between the state and the private sector. Unlike most public law bodies, which tend to be funded by, and largely controlled by, the state, they are self-managed making their own decisions concerning operation and maintenance as well as setting of their own tariffs and their operating rules. While they may be entitled to claim subsidies or state assistance, they are largely self-financing the bulk of their income being provided by their participants. They operate on a "non-profit" basis or, more accurately, such profits (surpluses) as they accumulate are retained rather than distributed.

At the same time, as a result of their public interest status the performance of such WUOs is supervised by the state which may challenge their decisions in the courts. It is, however, important to note that a decision taken by a WUO can usually on be challenged on the ground of illegality. In other words the supervisory body can only challenge a decision made by a WUO if that decision is legally wrong: it cannot challenge a decision that it does not like in

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[67] If such works were not undertaken in the public interest then arguably the use of such funds was unlawful!

order to substitute its own decision. In other words despite their public law status WUOs retain their functional independence from state bodies involved in the water sector.

Finally by reason of the legislation and their public law status, WUOs focus only on clearly defined water management tasks. They cannot branch out into potentially risky commercial activities.

4.3 Benefits of the specific legislative approach

The benefits of a specific legislative approach outlined above, in other words establishing WUOs as a specific type of organizational form, on the basis of specific and detailed legislation as bodies of public law, are several. Crucially, this approach can also remove the kinds of legal problem that were faced by the first WUOs in the transition countries as outlined above.

4.3.1 Clarity as to nature and purpose

First of all, the fact that WUOs are established on the basis of specific legislation means that their basic nature and purpose is clearly set out in a single legal text. Such a text can also specify the manner in which WUOs are to be established and how they are to function. In other words it is no longer necessary to do a training course on PIM to understand what a WUO is or to wade through a patchwork of legal texts. It is sufficient simply to read the WUO law. A farmer or land owner can understand exactly what, for example, participation in a WUO entails, how a WUO operates and what tasks it may undertake. This is evidently important as a means of encouraging participation and building trust.

At the same time, because the concept is set out in legislation, other actors, including government officials, can easily understand just what a WUO is and how WUOs fit into the overall scheme of water management, what their rights and duties are and so forth.

Finally, adoption of specific legislation demonstrates a clear government commitment at a policy level to the WUO concept.

4.3.2 Participation, establishment and governance structures

Another benefit of providing for WUOs to be established as a special type of organizational form on the basis of specific legislation is that such legislation can also take account of the specific nature of WUOs through, for example, the provision of suitable and appropriate governance structures that are designed to promote transparency and effective rule making.

In other words the legislation can take account of the specific organizational requirements of WUOs and such matters as the allocation of voting rights within those structures. How this can be done is a matter that is considered in more detail in Part Five below.

4.3.3 Tax benefits

Establishing WUOs as a specific type of organizational form under public law makes it possible to confer favourable tax treatment upon them that takes account of the fact that they are at the same time non-profit entities that are engaged in a form of commercial or quasi-commercial activity. Thus, as non-profit bodies, they are invariably exempted from the duty to pay profit or turnover tax. Of course the corollary is that "profits" in the sense of surplus income over expenditure may not be distributed among participants (although that is not the purpose of a WUO in any case). It does not mean, however, that participants do not indirectly benefit from such surpluses which may be applied towards reserve or sinking funds or, in appropriate circumstances, to reducing the level of fees and charges payable in future years.

It may also be possible to exempt them from land and/or property taxes. Furthermore in many countries they are also exempted from the requirement to levy value-added tax (VAT) or alternatively their services are "zero rated" for VAT purposes.[68]

4.3.4 Other benefits

Public law status makes it easier to provide for the transfer of user, or even ownership, rights relating to state-owned infrastructure to WUOs. There is no question of privatization as WUOs are not private law entities. At the

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[68] In other words VAT is payable at the rate of 0 percent but WUOs are entitled to recover the VAT that they themselves pay out.

same time, however, depending on how the relevant legislation is drafted the state need not lose complete control over the final use and destination of such infrastructure. A WUO can require the approval of, say, the relevant minister or supervisory body before it can sell, mortgage or pledge such an asset.

4.3.5 Power to impose compulsory measures

Furthermore public law status also makes it easier confer to powers on WUOs to take and impose compulsory measures.

Such measures can include:

- the right to impose compulsory participation on those who benefit from the WUO's activity;
- the right to levy compulsory charges regarding, for example, the costs of maintaining an irrigation or drainage system;
- the right to make binding operational rules concerning, for example, the use and allocation of irrigation water;
- compulsory access rights over land for the purpose of operation and maintenance and if necessary the rights to compulsorily acquire land; and
- the right to recover outstanding fees and charges on the basis of direct execution or by imposing a lien over the land of the debtor without needing first to obtain a judgment in the civil courts (FAO, 2004).

What is interesting about the kinds of enforcement powers that WUOs in developed countries have is that although they appear somewhat draconian they are seldom, in fact, used. It is usually sufficient that they exist on the statute books.

4.3.6 State supervision

Finally, the use of specific legislation means that provision can be made for WUOs to be effectively and appropriately supervised by the state so as to ensure that they operate fairly and lawfully in the interests of their participants as well as in the wider public interest.

Again the differences between public law and private interest can be seen. Taking the example of companies and cooperatives the state has an interest in ensuring that a private company is run lawfully (with regard to information filing and disclosure requirements as well as ensuring compliance with applicable accounting and auditing rules).[69] But in general terms (with the exception of certain companies engaged in particular sensitive issues) in a market economy the question of whether or not a company fails is essentially a private matter at the risk of the owners or shareholders. If a WUO that is established and operated in the public interest fails, or risks failure, however that failure is also a matter of public interest.

This justifies a higher degree of state supervision/monitoring than would be the case with a purely private organization and for that reason the necessary supervisory powers are typically conferred on a responsible state body. Again, though, it is important to emphasize that supervision in this sense must be understood as legal and financial supervision as opposed to technical supervision. Financial supervision implies ensuring compliance with financial and accounting rules. Legal supervision means ensuring compliance with the law and the various procedural and other requirements imposed by the law. In other words a decision taken by a WUO can only challenged on the ground of illegality and not on substance. The supervisory body cannot simply overrule a decision on technical grounds simply because it does not consider the decision to be technically correct.[70]

Thus the purpose of supervision is not to control but rather to ensure good governance and transparency.

5. DESIGNING AND DRAFTING WUO LEGISLATION – CONCEPTUAL APPROACH AND CONTENTS

5.1 Making the case for legislative reform

The approach outlined in the previous Part, namely the use of specific and relatively detailed legislation permitting the establishment of WUOs as a

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69 Additional rules are typically also provided for publicly quoted companies.

70 In exactly the same way the (public law) courts can only challenge the decision of a minister or other state agency on the grounds of illegality. They cannot substitute their own decisions simply because they do not like the decision previously taken.

special type of organizational form under public law, appeared to provide a potential legal solution to the legal problems faced by the early WUOs in the transition countries.

Initially, however, not everyone was convinced. "So what?" was one typical response, "these are developed countries with long established WUOs where farmers are rich and the rule of law is respected. What has this legislation to do with us at this time? When our WUOs are long-established then we, too, can consider adopting specific legislation."

At first sight such a response may have appeared well-founded.[71] It is certainly true that West European farmers were richer and better established (not least because of the availability of various subsidies).[72] Furthermore, at a substantive level certain legislation is clearly more relevant to some countries than to others.[73] Even where a robust legislative response may be objectively "necessary" due to, say, the existence or threat of significant environmental harm, it can be sometimes difficult to effectively transfer approaches used in richer countries elsewhere simply due to resource limitations.[74]

However, WUO legislation is a little different. For a start it is primarily "organizational" as opposed to "regulatory". Regulatory legislation, in the sense of laws that provide for the setting, implementation and enforcement of legal rules using the threat of sanctions under criminal or administrative law to secure compliance, tends to be relatively more expensive to implement and enforce.[75] New legislation seldom, if ever, has a zero implementation cost but WUO legislation, as with most types of organizational legislation, is relatively speaking much cheaper for the state to implement. More specifically, given that WUOs are self-funding and self-managing, in

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71 Although by its nature it offered no solution to the legal problems faced by the first transition country WUOs!

72 On the basis, for example, of the Common Agricultural Policy for farmers in the Member States of the European Union.

73 For example, securities legislation may not be particularly necessary in a country that has no stock market.

74 Complex European Community water legislation such as the Water Framework Directive [Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22 December 2000, p. 1)] is a good example of complex legislation that is costly to implement even for the EU Member States.

75 Even though it is frequently used in transition and developing countries.

comparison with other environment or natural resources legislation WUO legislation does not require expensive mechanisms for ensuring compliance and taking enforcement action.[76]

Other arguments relating to respect for the rule of law, however, are equally unconvincing. It is true that WUOs were long-established in the countries with specific WUO legislation, but whatever the status of the rule of law, the fact remains that the people who live in such countries are no more law-abiding than those who live elsewhere. Indeed, in practice, without specific legislation in place that confers the necessary legal powers on WUOs it is extremely doubtful that they would be able to function effectively if at all.[77] They would face the same kinds of legal problems as the first WUOs in the transition countries faced. The legislation that confers specific legal powers on WUOs is there for a reason.[78]

Box J - New bottles, old wine

Research in **Bulgaria** revealed the earlier existence on the statute books of a law adopted in 1920 that provided for the establishment of WUOs called "Water Syndicates". Similar research in neighbouring **Romania** revealed the previous existence of two laws regarding different types of WUOs. These were "Law No. 3020 of 1910 for the Taking Advantage of the Land in the Flood Area of Danube" which provided for the establishment of WUOs called "syndicates" and the 1934 Law "Regarding the functioning and administration of the hydraulic syndicates of Transylvania and Banat, subject to the provisions of the Trianon peace treaty of 4 July 1920" which as its name suggests provides for the establishment of "hydraulic syndicates".

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76 Although, as will be seen below, the state will usually incur the costs of undertaking a regulatory or supervisory role.

77 To gain confirmation of this it is necessary simply to talk to the manager of a WUO in a developed country. Farmers may be slow in paying fees in charges. Indeed, just as few people relish paying taxes, they might prefer not to pay them at all! Yet they do so simply because they are fully aware of the potential legal consequences of non-payment. Similarly, as regards the routine maintenance of irrigation and drainage systems, farmers very often resent having to allow access to their land to enable the cleaning of ditches and canals as the effect is to reduce the total land area available for farming (and thus their profits). Rationally farmers may be aware that such work is undertaken for the common good, for the community, but it is ultimately the threat of legal sanctions that helps them to facilitate such access!

78 Furthermore no one ever realistically argued that the transition countries were not ready for company law.

Interestingly, following the Second World War, and after the process of land reforms had begun (but before their subsequent "completion"), a "General Decree" had been adopted in 1952 in the Federal People's Republic of Yugoslavia permitting the establishment of a type of WUO called a "Water Community".

In several of the transition countries justice ministries were initially hostile to the need for the creation of a new type of organizational form fearing the opening of a "Pandora's box" of new types of legal person. Seminars, study tours to developed countries and the provision of translations of WUO legislation from those countries were of assistance in making the case for WUO legislation. But ultimately the best argument is the linkage between water and land. Water and land are, after all, both unique resources and their use is closely inter-linked.

In several of the transition countries the case for legislative reforms was assisted by further detailed research that revealed that: (a) WUOs were not such a new idea; (b) that they had previously been established on the basis of specific legislation; and (c) that such legislation had provided for them to be established as bodies of public law (see Box J). In other words proposed "new" legislation turned out not to be so new after all!

In other transition countries in the Caucasus and Central Asia, where there was no history of formal legislation regarding WUOs, traditional water management institutions such as the *mirabi* structure together with the practice of voluntary work for the community (*hashar*) were useful in demonstrating that communities had in the past successfully managed their own irrigation systems. Support from farmers who had suffered the difficulties of trying to operate WUOs was also extremely effective in lobbying for legislative reforms at the political level.

In short, in most of the transition countries the case was made for new legislation. Furthermore, in the countries of East Europe the creation of WUOs under public law was not particularly problematic. The concept of the

body of public law was understood and accepted.[79] As regards the former soviet countries – with the exception of Georgia which had a specific reference in its Civil Code to bodies of public law – the notion was not so well known, largely it seems, because this type of legal entity had no place in soviet law.[80] Nevertheless the key breakthrough was that WUOs would be a specific type of legal entity on the basis of specific legislation. In practical terms they would be bodies of public law even if this was not expressly stated.[81] Only in Albania, for specific historical reasons, was new WUO legislation adopted that used as a basis an existing organizational form, albeit modified. Though understandable this was a decision that was subsequently to have negative consequences (see Box K).

5.2 Conceptualizing WUO legislation

Having made the case for legislative reform the next question is: what should WUO legislation look like? What should it say?

Although the legislation from the countries with a long tradition of WUO legislation provides useful insights, the wholesale import of laws from other countries, a technique commonly called "transplanting", is generally not

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79 Examples of new WUO legislation providing for the establishment of WUOs as a specific legal form in these countries include: Bulgaria's Water Users Association Act which was adopted on 22 March 2001, FYR Macedonia's Law on Water Communities which entered into force on 31 July 2003 and Romania's Land Reclamation Law which was adopted in 2004.

80 Communist legal theory, it seems, had little use for a type of entity that was mid way between the state and the private sector. Examples of new legislation providing for the establishment of WUOs as a specific legal form include: the Kyrgyz Republic's Law "On Unions (Associations) of Water Users" which entered into force on 27 March 2002; Armenia's 2002 Law "On Water User Associations and Federations of Water User Associations"; and the revisions to Azerbaijan's "Law on Amelioration and Irrigation" which were adopted on 29 May 2003.

81 In any event the lack of legal precision as to the status of WUOs is not confined to the former soviet transition countries. Courts in the United States of America have struggled to define the precise legal nature of WUOs there as well. See FAO, 2004.

advisable.[82] Each jurisdiction has its own specific legal and drafting traditions let alone cultural differences.[83] Cutting and pasting was out.

Box K - Legal personality problems in Albania

Albania's first WUOs were established as 'associations' on the basis of provisions in the Civil Code. When the new Law "On Irrigation and Drainage" was adopted in 1999, however, it was decided not to alter the basic status of WUOs: although the new law added a number of requirements for "water user associations" they remained essentially a sub-category of private law associations.

The main reasons for this were as follows. The legacy of Albania's particularly harsh interpretation of socialism had left a deep distrust of the state. One of the reasons Albania's WUOs had initially been relatively successful was because they were perceived as belonging to the "community" as opposed to having anything to do with the state. Coming only two years after the major social disturbances that followed the collapse of the fraudulent pyramid schemes, it was feared that altering their status to bodies of public law, a legal form not well known in Albania at the time, would suggest greater state involvement and possibly risk de-stabilizing the existing WUOs. It is also interesting to note in this connection that while there was lot of damage to state property in the disturbances of 1997 little if any damage was reported to infrastructure used by WUOs.

However, following a series of wet summers and an inappropriate fee recovery system (discussed in more detail in the body of the text below) Albania's WUOs found it increasingly difficult to recover outstanding fees and charges. Consequently the law was amended in 2008 to provide for compulsory membership in order to make the payment of fees and charges mandatory. Inevitably this meant altering the legal status of WUOs from private law to public law making the reforms a rather complex process.

Instead, it was necessary instead to go back to basics and to analyze the specific requirements needed for effective WUO legislation. The remainder of this Part considers the types of issues that fell to be considered in the design and drafting of WUO legislation in the transition countries.

First, though, it is appropriate to conceptualize the different levels of rules and rule-making that apply in respect of a WUO. For WUOs, as indeed for all forms of legal person, there is a formal hierarchy of rules in terms of legal effect.

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82 Schleyer shows how the German WUO law was not quite suitable for Brandenburg in former East Germany (Schleyer, 2002).

83 It is for this reason also that FAO has generally not supported the use of model legislation.

At the apex are found those rules that are contained in primary legislation: an "enabling law" which permit WUOs in general to be established as a specific type of organizational form. The rules contained in such a law apply to all WUOs within the jurisdiction in which that law applies. Some of the specific rules found in such a law derive from the norms and practice of the relevant legal system as opposed to the particular needs of WUOs particularly as far as the requirements for legal persons, and the procedures for their establishment, are concerned.

Nevertheless, the rules contained in such a law need not be entirely prescriptive. Thus they may, and indeed should, allow a degree of flexibility as regards a number of matters including the tasks to be undertaken by a given WUO, its internal governance structures and so forth. A WUO law will typically contain a rule requiring such matters to be determined in the "governing document" of each individual WUO. A governing document is typically described as a "constitution", a "charter", a "regulation", a "set of by-laws" or a "statute". None of these expressions are terms of art and the use of one word or another in a specific national context will depend on national practice. In this Study the term "governing document" is used as a generic expression: whichever term is used, the governing document comprises the second layer of rules. Such rules are partly dictated by and reflect the requirements of formal law (i.e. the enabling law). At the same time they are also determined by, and for, each WUO.

The governing document of an individual WUO is essentially its constitution. Like the constitution of state it should be possible to amend the rules that it contains but, in order to prevent instability, safeguards are necessary. In other words, the formal procedures for amending the rules contained in the governing document are typically relatively onerous requiring approval by an enhanced majority of WUO participants and (typically) the agreement of the supervisory body on behalf of the state.

Finally, the third layer of rules comprises the operating rules adopted by each WUO in accordance with its governing document and of course the WUO law.[84] Like the provisions of the governing document the operating rules are binding on WUO participants. Concerned with such practical issues relating to the functioning of the WUO such as procedures for the payment of

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84 Again, a range of different expressions are used to describe such operating rules including "rules", "by-laws" and "regulations".

charges and for ordering and receiving irrigation water, the operating rules should be relatively easy to change as necessary, usually by a simple majority decision by the WUO's principal governing body.

As already mentioned this kind of hierarchy of legal rules is not unique to WUOs but can be found in connection with other types of legal entity, including the organizational forms used for the first WUOs in the transition countries.[85] In drafting WUO legislation, a key issue is to achieve the correct balance between the rules that are contained in law and those that are contained in the governing document and operating rules. Indeed it can be tempting to argue for a rather brief WUO law with most of the detail being addressed in the governing document.

There are, however, two potential problems with this approach. First of all, while the idea of simply leaving everything to be determined by the "community" is superficially attractive, given the potential for conflict within a WUO there is no guarantee that such rules will actually be fair or transparent.[86] There is a public policy case for specifying minimum standards in order to protect the rights of all potential participants.

Second, it is all very well to say leave it up to each WUO to determine its own rules, but in practice how are WUO participants, who are usually farmers, to know what rules to include? Indeed if a "model" governing document is used, a matter discussed in more detail below, the less detail that is provided in the law the more it becomes likely that the provisions of the model document will be strictly followed leading to a more rigid "blue-print" approach. In other words putting more detail in a law may actually allow a greater degree of choice and flexibility as regards the elaborations of the fundamental rules of an individual WUO.

Furthermore, a minimum set of formal legal rules are required by law for the creation of a new type of legal person. From a legal perspective this is quite a big deal: perhaps the legislative equivalent of giving birth!

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85 A cooperative, for example, is established on the basis of an enabling law, typically has its own governing document and may also have its own operating rules that apply to its members.

86 See the examples from Bulgaria described above.

5.3 The design and content of WUO legislation

Based on the experience of the transition countries, which in turn sought to make use of the experiences of the countries with longstanding WUO legislation, the rest of this Part seeks to identify the issues, the "legal rules", that should ordinarily be contained in WUO legislation.

5.3.1 Status, name and tasks of a WUO

Evidently, the first task of WUO legislation is to provide for the establishment of WUOs as a specific type of organizational form. To this end the legislation must specify that WUOs are legal persons or that they enjoy legal personality. Article 1 of Azerbaijan's Law on Amelioration and Irrigation, for example, provides that a WUO is a "special organization-legal form".

Second, WUO legislation must specify the generic name to be used by WUOs as well as requiring each WUO to include that generic name in its own name. The actual name given to a WUO is entirely a matter for the relevant legislature although evidently in circumstances where WUOs are to be established as a new type of form it is not appropriate to use a name that is already used by an existing organizational form.[87]

Next, the legislation must specify the purpose or purposes for which a WUO may be established. In other words it must set out the permitted tasks of a WUO. Of course the precise purposes for which a WUO might be established will depend on the particular requirements of that jurisdiction. In the transition countries most WUO legislation envisaged the establishment of WUOs to operate and maintain irrigation systems. Other permitted tasks might include the operation and maintenance of a drainage system or flood defence infrastructure or some combination thereof.

In responding to the particular needs of that country, the Romanian legislation, for example, provides that a WUO may be established to undertake one or more of the following tasks:

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[87] In other words if existing legislation already provides for the establishment of "associations" it would not be advisable to use the name "water user association" for WUOs as a specific type of legal form.

(a) to deliver irrigation water, operate, maintain and repair an irrigation system that serves more than one land owner;
(b) to operate, maintain and repair a drainage system that serves more than one land owner;
(c) to maintain and repair flood defence works that protect the land of more than one land owner;
(d) to maintain and repair soil erosion control works and undertake other land reclamation activities that protect the soil on the land of more than one land owner.[88]

Next, it can be useful to indicate at the outset that a WUO operates in the public interest and/or that it is established as a body of public law.[89] Equally it can be useful to indicate at the outset that a WUO operates on a non-commercial or non-profit basis.

Article 4 of the Armenian law, for example, states that WUOs are "non-profit legal entities that operate in the public interest to carry out the operation and maintenance of irrigation systems".

Such provisions have a number of different functions. Some are likely to be legislative drafting requirements. For example, legal persons cannot simply be created through legislation: the legislation has to specify their purpose. While this matter is therefore typically a mandatory functional requirement of legislation, the other provisions may also act as statements of state policy as to the role and functions of WUOs as well as providing a concise legal description. Such articles therefore become a primary source of information regarding WUOs: a brief introduction. This is particularly important where WUOs are a new concept.

Such provisions provide a rather definitive description that is relevant both to potential WUO participants and to third parties who may enter into legal relationships with WUOs. Article 2 of the FYR Macedonian Law on Water Communities provides an example of a concise description of a WUO:

> A "water community" within the meaning of this law is an association of owners or users of agricultural land associated for: operation, management, maintenance, construction, reconstruction or expansion of

88 Land Reclamation Law, article 6(1).
89 In some countries the public law status of WUOs is implicit.

> small irrigation and/or drainage systems and the tertiary and/or secondary network of hydro-reclamation systems for irrigation and/or drainage (hereinafter: the irrigation and drainage infrastructure), on the water community territory ratified on the base of hydro-melioration unit.

An issue that frequently arises in the context of the development of WUO policy and legislation is whether WUOs should be restricted to water-related activities or whether they should be entitled also to undertake other activities. There is usually no objection to WUOs undertaking public-interest type activities such as training and capacity building relating to land and water use. These can be seen to fit in with the overall public service remit. More difficult is the argument that WUOs should undertake a range of commercial or quasi-commercial activities such as the supply of agricultural inputs (seeds, pesticides, fertilizers etc) as well as playing a role in marketing, for example by acting as a wholesaler or agent in negotiations with wholesalers.

In favour of this approach it is claimed that the supply (or removal) of water is not sufficient and that farmers also need assistance with inputs and marketing. It is also claimed that by undertaking such activities, WUOs will be able to make a profit which they can then use to subsidise the cost of their water management tasks.

Superficially attractive, there are sound reasons why such arguments should be rejected and why such multi-purpose WUOs would not work. First of all, operating an irrigation or drainage operation is a difficult and complex task. If a WUO has multiple tasks this may lessen its focus on water management. This also has implications for monitoring of performance. If a WUO has a single task it is relatively easy to judge its performance. In the context of irrigation WUO, for example, either the water is delivered in the correct quantity at the right time or it is not. Similarly with drainage: either the water table is lowered or it is not. If not, in either case, then it is clear that something needs to be done and appropriate action can be taken by the WUO and its participants ranging from removing the board to removing the manager.

Furthermore, if a WUO is to undertake commercial or quasi-commercial activities it makes it harder for it to realistically claim a special status and the tax and other benefits that go with that status. In addition, commercial activity is inherently risky. Most new commercial ventures fail and there is no particular risk why a "commercial WUO" should not. Third, commercial activities will have their own costs. An efficient WUO should, for example, employ (on a full

or part-time basis) the minimum number of staff necessary for the effective fulfilment of its tasks. If WUO's staff is idle then this is symptomatic of a poorly managed WUO rather than an under-used human resource.
Finally, there is a question as to what is really being proposed. There may well be a case for the establishment of agricultural cooperatives in rural areas. Small, under-resourced farms may not be efficient (indeed some even questioned the logic of splitting up the collectivized farms in the transition countries). France and Denmark provide good examples of countries where agricultural cooperatives can work well. But surely if what is being proposed is a cooperative then this should be spelt out rather than trying to create cooperatives disguised as WUOs.

An important issue of principle is at stake in this respect: not everyone may want to be a member of a cooperative but everyone typically needs the water services provided by a WUO operating in the public interest. The reason for establishing a WUO is that these services cannot be provided by the private sector or by farmers acting alone.

5.3.2 Governing document

WUO legislation usually specifies the minimum contents of the governing document of each WUO. This is typically as much a legal requirement as anything else.

The Kyrgyz WUO law, for example, specifies:

> The Charter of a WUA shall contain the following:
> 1. the name of the WUA;
> 2. the location of WUA;
> 3. a description of the WUA Service area by reference to plans and maps;
> 4. objects and purposes of the WUA's activity;
> 5. structure and competences of management organs of the WUA;
> 6. rights and duties of members of the WUA;
> 7. order for joining into the WUA, bases and order for termination membership in WUA;
> 8. procedures for the calling of meetings of the General Assembly;
> 9. provisions on the setting fees in WUA;
> 10. responsibility of WUA members;
> 11. order and sources for compensation of damage of agricultural crops and agricultural plots of land to members of the WUA.
> 12. conditions of termination activity (reorganization and liquidation) of the WUA.

Such rules clearly specify the minimum issues to be addressed in a WUO governing document. There is no reason why additional issues should not also be included in a particular case.

5.3.3 Participation

A key issue that must be addressed in a WUO law is the matter of participation and the legal rules concerning this. Given that in practical terms a WUO law is primarily addressed to actual or potential participants it is often considered advisable to place provisions on participation towards the beginning. Such issues are likely to be of greatest interest to the reader.

An important policy question that needs to be resolved at the outset is whether or not participation in a WUO is to be compulsory. As seen above, the West European legislation typically provides for this. Indeed in the case of a WUO that deals primarily with land drainage or flood defence it is hard to see how a WUO can operate without compulsory participation. At a political level compulsory participation can usually be justified on the grounds of public interest.

In the case of irrigation, however, the picture is less clear-cut. Indeed, curiously, in those countries where irrigation water is an essential input, compulsory membership may be less of an issue. If land without water is worthless then non-participation may not be a realistic option (at least for as long as the land is to be put to use).

What is more difficult is those cases where irrigation is supplementary or where, for whatever reason, land is taken out of production. More specifically the economic viability of an individual irrigation system may be harmed if too few people irrigate. Although this also has implications for the tariff structure used (see below), as the case of Albania shows, farmers may be willing to take a risk on adequate rainfall thus threatening the economic viability of WUOs.

What is interesting, though, is that whatever the notional benefits of compulsory participation this approach has not proved popular in the transition countries (or at least not yet) for irrigation WUOs. Unpleasant memories of forced collectivization and a realisation that a voluntary approach may actually contribute to stronger WUOs have combined to provide for voluntary membership. Instead different mechanisms have been used to

encourage participation ranging from conferring on WUOs the right to charge higher tariffs to non-members, to conferring priority on WUO members, such as the case of Romania where irrigation subsidies are withheld from those who are not WUO members.

The next issue that falls to be addressed is the form of participation. Participation need not necessarily take place through membership although this is the approach that is commonly taken in the civil law tradition and in the transition countries. The other option is simply to confer powers on the WUO to levy, say, drainage charges on land plots while in return conferring on the owners or users of those land plots the right to participate in the governance of the WUO through, for example, the election of its officials.

The main benefit of this approach is that it avoids potential political and legal reaction against forced membership.[90] On the other hand membership provides for a ready package of rights and duties and furthermore as it had been used in the context of the first WUOs it was something that people were familiar with.

It then becomes important for the legislation to specify clearly who is entitled to participate. This is a key issue for all community-based organizations.[91] Furthermore, if membership is not compulsory, it is important to specify that those so entitled have a legal right to membership. It can also be useful to specify that such rights are held by both natural and legal persons.

In the context of a WUO that deals with irrigation or land drainage it will usually make most sense to limit participation in accordance with the hydraulic boundaries of an individual irrigation/drainage system. After all, it would not make much sense for a WUO to operate and maintain only part of an irrigation or drainage system. The easiest way of doing this is to require each WUO to identify its "service area" by reference to the land area that benefits from the system that it operates. Those who hold land plots within the service area have rights against the WUO while those whose land lies outside the service area do not.

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[90] Because of historical sensitivities regarding forced membership and provisions on freedom of association contained in the German Constitution, the German WUO law in fact imposes the membership obligation on individual land plots rather than on the owners of such plots.

[91] See Ostrom, 1990.

For the sake of clarity and legal certainty it is usually best to describe the service area by reference to a plan or map that should be annexed to the governing document of each WUO. It follows that an amendment to the service area is treated as an amendment to the governing document.

The next question is precisely who should hold rights to participate such as membership rights. From a legal perspective the simplest solution is to limit participation to land owners as such persons can be identified from a land register or cadastre.[92] While this is the approach taken in Germany[93] it was generally not considered suitable for the transition countries due to the large number of persons who used land on the basis of leases and other use rights. In some places this was state land that had not been distributed.[94] Elsewhere it was because land was being rented by absentee land owners. Simply extending participation rights to all land users, however, is probably not a good solution. Short-term land users (by tenancy or otherwise) may lack sufficient interest in seeing the creation of sustainable WUOs and if there are frequent changes in the identity of land users this can destabilize a WUO as well as placing it under an increased administrative burden.

For this reason, WUO legislation in the transition countries typically specifies that those with long-term use-rights (of, say, more than three years) have an automatic right to participate, usually through membership, while others can only participate with the approval of the land owner. This is probably justified on the basis that if the WUO operates well the landowner benefits in the long term.

For the sake of legal certainty and to avoid potential disputes, a number of other "housekeeping" type issues concerning membership are usefully addressed in primary legislation (see Box L).

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92 While in theory WUOs may provide other services such as water supply then it may be possible or desirable for other criteria to be used. In some parts of the world other water users also benefit from irrigation systems such as for fish breeding. This, however, is not typically the case in the transition countries which have restricted WUO membership to farmers/land owners.

93 However as Schleyer points out this approach caused difficulties when the WUO law was applied to Brandenburg in the former East Germany due to the large number of absentee landowners and high percent age of leased land (Schleyer, 2002).

94 See Box D above for example.

If participation through membership is not compulsory then it also becomes necessary to specify how membership can be terminated and the circumstances in which this can take place. Again such issues could, and should, be addressed in the governing document but there is no guarantee that this will be done fairly. In these circumstances expulsion becomes a sanction for non-compliance with a WUO's governing document and operating rules.

Box L – "Housekeeping" issues on membership

For the sake of legal certainty in cases where participation is through membership it can also be advisable to specify that:

- in the case of rented land the land and tenant cannot simultaneously both be members in respect of the same plot;
- if land is held by more than two or more people, they should nominate one of their number to exercise the joint membership rights;
- in order not to disrupt irrigation schedules, to specify no person may join or leave the WUO during the irrigation season;
- that following the death of a member, that person's successor may accede to membership provided any debts owed by the deceased are first paid off; and
- that a person who is expelled from the WUO may not apply to re-join the WUO until all outstanding liabilities are first discharged and a period of, say, three years has elapsed since the date of the expulsion.

So much for the practical aspects of participation but what does it actually mean in practice?

5.3.4 Rights and duties of participants

The first question is what, if anything, should WUO legislation say about the minimum rights and duties of participants? In this connection it is particularly useful to specify the minimum rights and duties of participants in legislation.

Again, it is true that these issues will usually be specified in the governing document but again there are sound policy reasons for entrenching such rights in law. First of all, the implications of membership are made clear from the outset. Second, it means that there can be no room for argument as to just what the minimum rights of WUO members are with regard to a particular WUO: they are all the same. Emphasising the legal rights of WUO members in this way is not intended to promote litigation. However, by

entrenching such rights in law they are arguably reinforced. Given the inherent risk of conflict within WUOs, anything that strengthens the legal rights of members arguably reduces the likelihood of such conflicts breaking out, at least between a WUO and its participants.

Legal rights, in the sense of rights conferred by law, are important. A person holding such a legal right is in a much stronger legal position than a person holding a right created under a contract or the governing document of an organization. A right created in law is typically much more easily established: there is less scope for argument. This is not to suggest for a moment that every farmer should run off to court to assert his/her rights or even that this is a practical solution: it will probably not be (courts may be far away, too expensive, too slow). However going to court may not be necessary. Every WUO member will typically have access to an advocate – whether a family or clan member, an NGO, a local political leader – or may even be their own advocate. Armed with a clear legal right an advocate is in a much stronger bargaining position in negotiations.

In some of the transition countries the WUO legislation goes further and specifies that the rights of founders and subsequent participants are the same. So what rights should be specified? Key rights typically include the right:

(a) *to a "fair" share of water*. In the context of irrigation WUO this is likely to be the most important practical right for a WUO member. Given that, as described above, formal water rights could not be allocated against individual land plots the right to WUO membership (together with the range of rights that that implies) combined with the right to a fair share of water effectively constitute the "water right" of an individual member. In practice it is doubtful that primary legislation in the form of a WUO law can really do much more than confer a right to a "fair" share of water. Indeed it is doubtful that more would really be desirable.[95] In practice, taking account of the total volume of water available to the relevant WUO, the size of the land area to be irrigated and the type of crops planted farmers can assess what is a "fair" share just as the courts can;

(b) *to benefit from services provided by the WUO*. Such a right might be of more relevance to a WUO engaged in land drainage or flood defence as well as

[95] In theory a WUO could seek to allocate volumetric rights to each land owner calculated as a fraction of the total water entitlement of the WUO.

other services such as advisory and training services;

(c) *to vote in elections for WUO officials*. This is clearly a key right without which the democratic functioning of a WUO could not take place. In some countries this right is, however, subject to the holder having discharged all charges due to the WUO. While on the one hand this kind of approach may have the effect of encouraging payment there is also a risk that in cases of genuine hardship an unfortunate side effect may be to preclude the poor and disadvantaged members of the community from voting;

(d) *to stand for office*. Again the exercise of such a right is often subject to the holder not being in arrears to the WUO;

(e) *to propose matters for discussion at meetings of the general assembly*. This right is important to ensure that General Assembly can provide a genuine forum for WUO members to raise matters of concern to them rather than to act as a "rubber stamp"; and

(f) *to inspect the books and records of the WUO*. This right is particularly important in terms of promoting transparency within a WUO.

With rights come duties: if a WUO law is to set out rights of WUO participants then it is only logical that it also sets out the duties to which they are subject. This too can have a positive benefit in strengthening the authority of WUOs against their participants in circumstances where this is necessary.

Such duties typically include the duty:

(i) *to comply with the provisions of the governing document and operating rules of the WUO*. The effect of this duty to provide statutory backing (in other words the backing of formal law) to the rules that pertain to the relevant WUO;

(ii) *to promptly pay fees and charges*. The need for this duty is evidently necessary to ensure the financial viability of the WUO;

(iii) *to allow water to pass through channels over land*. This duty is particularly necessary in those cases where final delivery of water is *via* temporary earth channels in circumstances where all of the members to not have direct access to fixed channels and canals;

(iv) *to allow access to land for the purpose of operation and maintenance*. This duty is necessary to enable routine operation and maintenance works to take place; and

(v) *to comply with the decisions of WUO officials and staff*. This kind of duty is necessary for the smooth functioning of a WUO.

Of course specifying these rights and duties in a WUO law does not preclude a WUO from including other rights and duties in its governing document and indeed this possibility is sometimes explicitly stated in WUO legislation.

5.3.5 Establishment procedure

As a matter of legislative practice and common sense a WUO law cannot provide for the establishment of WUOs without specifying how this is to be done.

Just as with the establishment of other types of legal person, including the organizational forms first used for WUO establishment in the transition countries, the basic formal procedures typically involve the preparation and adoption of a governing document by the founding participants followed by a formal procedure on behalf of the state such as a decision by an official and/or the registration of the legal entity in a register and/or notification of that decision in an official journal.

While the precise procedures vary from jurisdiction to jurisdiction, and need to be specified in WUO legislation, what is perhaps of greater interest is the process that leads to the formal stage and the techniques that can and should be used to promote participation in the establishment process.

This is of particular importance in cases where WUOs are based not only on voluntary participation but also, as almost invariably the case in the transition countries, where the decision to establish a WUO is also taken on a voluntary basis by its future participants (as opposed to a decision to establish being forced by a government official). As described in Part Three, one of the legal problems with the use of existing organizational forms was that it allowed for the formal establishment of WUOs largely on paper or without the participation of the bulk of potential beneficiaries. WUO legislation can seek to resolve this kind of situation while at the same time ensuring that potential participants are not left out such that the establishment process leads to a greater sense of ownership. In other words broad consultation and greater participation in the establishment process is likely to lead to a better "product" and better "buy in".

The challenge is to get the balance right. The more complex the procedure, the greater consultation required, the longer the establishment process will take and the greater will be the cost.

In some cases, WUO establishment may be supported financially and materially by the state (in the context of an investment project for example). Elsewhere, WUOs will be established by farmers acting alone. If the procedure is too complex then this may have the unfortunate effect of discouraging the establishment of WUOs solely on the basis of the initiative of farmers.

On the other hand if the procedure is too brief then there is once again a risk of WUOs being established by a few participants or by the establishment procedure being rushed by government officials seeking to comply with their own work plan. The WUO legislation in the transition countries typically seeks to provide a compromise solution as follows.

a. *Initiative group*

The first step is typically for the creation of a small group of people who are potentially interested in creating a WUO.[96] This is essentially a self-selected body with the inevitable risk that it will be made up only of those who have their own personal interests in establishing a WUO. Consequently its tasks need to be carefully limited to making a provisional identification of the "service area" of the proposed WUO and to arranging the selection or election of a more broadly representative establishment committee.

b. *Establishment committee*

To be effective the establishment committee needs to be sufficiently representative to prevent capture but not so large that it becomes unwieldy. The Armenian WUO law, for example, specifies that such type of committee should not contain fewer than nine members.[97] It can also be helpful to specify that as far as possible its members should represent different parts of

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[96] In Macedonia this can be done by as few as two people (article 10(1)): their task is to call a "preliminary assembly").

[97] Article 6, Law on Water User Associations and Federations of Water User Associations, 2002.

the proposed service area (for example different villages or those at the tail as well as the heads of the canals within the proposed service area).

c. *Development of establishment documents*

The main task of the founding committee is to prepare the documentation necessary to formally establish a WUO. These will as a minimum include the governing document and the plan of the proposed service area as well as other documents specified as necessary for the establishment of a WUO (such as a full list of participants). If a representative system is to be used (an issue that is discussed in more detail below), it will be appropriate to propose the representative "zones". Furthermore, in order to determine the likely operating costs of the proposed WUO it will usually be necessary to prepare a draft budget and work plan.

In short, the elaboration of the necessary documentation will usually be far more than a simple paper exercise as it will typically involve making key decisions about the internal governance structure of the proposed WUO as well as the allocation of votes. Another task is to identify the potential members of the WUO. For example article 5 of the Armenian WUO law provides:

> The founding committee elaborates the Charter of the Association, does the mapping of the Association's irrigation system in compliance with the service sub territories mentioning the sizes and location of those territories; prepares the list of the Association's possible members in compliance with the service sub territories; drafts the budget and work plan of the Association.
>
> More than one hydraulic unit completely can be included in the service territory of the Association following the principle of indivisibility (non-separation) of hydro-units.

d. *Approval of the draft documentation*

Once the draft documentation is prepared but before this is put to the potential participants for a final decision there are sound public interest grounds for requiring the approval of state, usually the supervisory body. This is justified by the public interest nature of WUOs but also at a practical level so as to ensure the establishment of viable WUOs. It may be necessary, for example, to ensure that a proposed WUO service area forms a hydraulic unit (or more than one hydraulic unit). It may also be appropriate for the

supervisory body to evaluate the economic viability of a proposed WUO as well as ensuring that the draft documents comply with the relevant WUO law.

It is, however, important to ensure that the supervisory body's rights to reject the draft documentation are tightly specified so as to prevent arbitrary decision making. To remain with the example of the Armenian law, article 6 states:

> The Regulatory Board may reject the establishment of the Association if:
>
> (a) The charter contradicts the requirements of the present law and the RA legislation;
> (b) The principle of indivisibility (non-separation) of hydro-unit is not kept;
> (c) The irrigation system located in the service territory does not have possibility to get water directly from a supplier or other sources.

e. *Establishment meeting*

The establishment meeting is where a decision is taken whether or not to establish the WUO. Ideally this should be attended by as many of the participants in the proposed WUO (or their elected representatives) as possible in order to confer the maximum amount of legitimacy on the new organization. WUO legislation typically requires widespread notification of potential participants. The Bulgarian WUO law, for example requires the establishment committee to: "promulgate the project for the Association establishment in the State Gazette and shall publish it in one national daily newspaper and one local newspaper; the invitation shall contain the date and place of the Constituent Meeting, as well as the place where the draft constituent documents are displayed and the time at which they are available".[98]

In order to ensure that there is sufficient support for the establishment of a WUO, legislation typically requires at least 50 percent of the identified potential participants to approve the decision. Sometimes this requirement is supplemented by the additional requirement that such potential participants own (or use) at least 50 percent of the land contained in the proposed "service area".[99]

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98 Article 10.

99 Article 14 of the FYR Macedonian WUO law requires "The foundation assembly shall adopt the community statute by majority of potential community members, provided they own or use more than half of the agricultural land within the community territory".

The key issues to be determined by the establishment meeting are: whether or not to establish the proposed WUO; (if so) to approve the founding documents (including the governing document); to elect the first office holders; and to approve the initial budget and work-plan.

What happens if the establishment meeting is not quorate? In some countries the legislation simply requires the establishment meeting to be re-convened after a specified period (*e.g.* 20 days in FYR Macedonia). Clearly, though, such establishment meetings cannot be re-convened indefinitely. At some point it must be acknowledged by the establishment committee that the necessary will to establish a WUO is lacking. Thus article 11 of the Bulgarian law states:

> ...
> (2) In case quorum is not achieved, a new session of the Meeting shall be scheduled at least 20 days later but not later than 30 days from the date of the first meeting. The date of the new Meeting shall be set in an invitation as stated in article 10, Para 4.
> (3) Under the provisions of Para 2, no more than two sessions of the constituent meeting could be scheduled. In case quorum is not achieved at the second session either, the procedure for the Association establishment shall be terminated by an order of the Supervisory Body.
> ...

Similar provisions are typically found in the WUO legislation of other transition countries.

f. *Formal legal establishment*

After a decision has been made to establish a WUO it is next necessary to move to the formal procedure whereby the new entity is recognized by the law. As mentioned above, the precise mechanism to be followed will depend on existing legislation and practice in the country in question. In FYR Macedonia, for example, following the establishment meeting it is necessary to obtain the formal approval of the supervisory body within a specified period following which an application is made to register the new WUO in the register of water communities that is to be maintained by the "first instance court".

A similar procedure is required by the Bulgarian legislation save that the decision on registration must also be published in the official journal. On the

other hand in Armenia and the Kyrgyz Republic formal registration is undertaken on the basis of an existing law "On state registration of legal entities".

g. *Costs of establishment*

The activities described in the previous paragraphs clearly have financial costs. To that end legislation typically provides that the establishment committee is entitled to be reimbursed by the WUO the reasonable costs incurred in connection with its establishment.[100]

5.3.6 Internal governance structure

As the source of legal personality of WUOs, a WUO law has to say something about the institutional arrangements within WUOs. Furthermore, as already mentioned, one of the main benefits of specific WUO legislation is that it can provide for the development of internal governance structures that can take account of the specific needs of individual WUOs.

In fact the basic governance structure of a WUO is suggested by usual practice regarding other organizational forms that are based on participation including membership. In other words as a minimum each WUO needs to have a mechanism whereby all of the participants can jointly make the most important policy decisions in the form of a general meeting or assembly, an elected management board[101] and a chairperson who is also the spokesperson and formal legal representative of the WUO.

Given the importance of ensuring sound financial management, WUO legislation typically provides for the establishment of some form of internal oversight body and, given the risk of conflict within WUOs, it can be useful to provide for some form of internal dispute resolution mechanism. However within this basic structure there can be major variations in the structure of individual WUOs and the legal rules contained in WUO legislation need to facilitate and support such diversity.

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100 Article 6 of the Armenian WUO law provides an example.

101 In practice various terms are used to describe both the "general assembly" and the "management board" but for consistency's sake these terms are used throughout this paper.

Again, it is necessary to undertake a balancing exercise. If the legislation prescribes a structure that is too simple then this may be inadequate for a larger more complex WUO (one containing numerous village communities for example). On the other hand small WUOs may need only simple structures. For the fact is that even within the same jurisdiction there may be considerable variations in the size of WUOs and the manner in which they operate.

Particularly in mountainous areas WUOs may be quite small with less than, say, 50 participants. Such a small WUO may not need to employ staff or invest in equipment and indeed at some point the question may arise as to whether such a small WUO actually needs formal personality.[102] Having said that, one good reason why such a WUO should have legal personality is so that it can hold a water right on behalf of the community that it serves.

At the other end of the range, a WUO with a service area of several thousand hectares will most likely be responsible for a rather complex irrigation system comprising concrete canals, storage reservoirs, regulators and gates (and even pumping station) that will in turn almost invariably require a manager and team of operators with a sufficient degree of technical skill to operate it. While farmers may be able to contribute to maintenance by providing work "in kind", if staff are to be employed this means that charges have to be paid by WUO participants. It also means that there is likely to be a minimum economic size for viability which might mean including more than one irrigation system within the same irrigation scheme in the service area of a single WUO.

Once a WUO gets beyond a certain size however a further complication arises. If a WUO has more than, say, 200 members it can be difficult to hold an effective meeting of the general assembly – simply finding a suitable location can be difficult. A typical solution to this kind of problem is to sub-divide the WUO service area into a series of "zones" or "divisions" with each such zone or division electing one or more representatives to the general assembly which in turn starts to look more like a parliament. In order to

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102 Indeed the problem with creating such a small WUO is that will probably not be able to recover sufficient fees to be able to employ staff, at least not full time.

promote transparency and certainty – to guide the drafters of the governing document – it becomes important for this issue to be addressed in law.[103]

Another question concerns voting rights. Where, and for as long as, all WUO members have similar sized land holdings then the allocation of votes on the basis of OMOV may be acceptable. But if there are wide variations in the size of landholdings then, as described above, this approach can rapidly be perceived as unfair. If, however, provision is to be made in the governing document for a different allocation of votes then WUO legislation has to specify how this is to be done and to provide the necessary safeguards.

If different villages are involved then it is clearly desirable that they are each represented on the management board. It may be also appropriate to address this kind of issue in law.

One further issue that arises at the general level concerns the respective roles of the general assembly, the management board and the chairperson. The first WUOs in the transition countries generally provided for the WUO chairperson to be elected directly by the general assembly and to act as the full time manager of the WUO.

Under this approach (which it must be acknowledged is also provided for in the legislation of some of the West European countries) the chairperson acts effectively as the chairperson and chief executive officer of the WUO. In favour of this approach it was argued that only a "strong" chairman could perform the job of the chief executive officer and that his (for it was invariably a he) authority of his mandate could only be achieved on the basis of a direct election.[104] Furthermore, as the chief executive officer, the chairperson would have to work full time for the WUO and therefore he should be paid.

The problem with this approach in the transition countries was that the WUO chairperson started to look rather like an all-powerful collectivized farm boss. Elected directly by the WUO membership he had a mandate that was as

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[103] One issue that should be stressed is that the function of such representatives should not be confused with that of the executive staff of the WUO. In other words elected representatives should not be involved in the collection of fees or the operation of the system. This issue is considered in more detail below.

[104] A "presidential" approach.

strong, if not stronger, than that of the management board. More specifically this approach hindered accountability with the chairperson reporting to the meetings of two bodies which he himself chaired: the management board and the general assembly. Not only was this conceptually impossible, as far as accountability is concerned, the chairperson also had an incentive to hide those problems he could not resolve if he wanted to keep his job. The question was how to make WUOs with this structure more accountable? These issues are discussed in more detail in the paragraphs that follow.

a. *General assembly*

WUO legislation needs to make it clear that the general assembly is the sovereign, or main decision making, body of each WUO. It needs to set out the main tasks of the General Assembly which will typically include the following:

1. setting the annual budget for the WUO including the level of fees and charges payable by members;
2. approving an annual work-plan and, in the case of an irrigation WUO, the watering plan or schedule;
3. approving the annual accounts of the WUO and reports prepared by its other organs;
4. electing the officers of the WUO;
5. adopting the operational rules of the WUO; and as necessary,
6. amending the governing document of the WUO.

As a minimum WUO legislation typically requires every WUO to hold a meeting of its general assembly at least once a year.[105] In this sense it is not so different to other types of legal entity. Indeed in some countries the legislation requires the general assembly to meet twice a year, before and after the irrigation season. However, calling such meetings clearly has a cost and this may be considered excessive.

Ultimately though it is suggested that it should be up to each WUO to determine, in accordance with its own governing document or simply on the basis of practice, how frequently the general assembly should meet.[106] It is, in

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[105] Such an approach is commonly found for other types of legal entity – companies, associations and cooperatives.

[106] There is, for example, nothing to stop a meeting of a general assembly setting the date for its next meeting say six months later.

any event, important to ensure that provision is made for the calling of emergency meetings as necessary, typically at the discretion of the management board (or chairperson) or on the request of a specified fraction, say one third, of the members of the WUO. These issues are important and should be set out in law.

It is also important to address the issue of quoracy and to require that records of meetings of the general assembly be kept. Quoracy is a tricky issue as if a WUO is working well it can actually be difficult to persuade a sufficient number of WUO members to attend. Specifying a level for the quoracy of general assembly meetings in law or even in the statute of each WUO is risky in the event that an amendment to the specified figure becomes necessary. On the other hand if the level for quoracy is set too low then there is a risk that decisions will be taken against the interests of the majority of WUO members.

What about the issue of the allocation of votes? To take the actual case of a WUO established on the irrigation system at Pervimayskaya village in Northern Kyrgyzstan (described in Box E above) it will be recalled that the former collectivized farm of 2 488 hectares had been replaced with a large commercial farm using 1 545 hectares and 94 other farms using 943 hectares and ranging in size from one to 50 hectares. With an OMOV system then the large farm would be outvoted every time. Whether or not the small farmers would have "ganged up" against the large farm in practice is a matter of conjecture although they were in competition with it for water. The problem is the perception that they might have done.[107] An alternative mechanism for the allocation of votes, on the basis of land area owned or used, would have seen the commercial farm dominating the WUO.[108] Other options for vote allocation are on the basis of charges paid to the WUO or the amount of water used. These will however tend to reflect the size of the land holdings of individual members. So what is the solution, what should a WUO law say about this?

If votes are allocated on a basis other than OMOV the first technique to mitigate the potential dominance of a larger farm is to limit any one WUO participant from holding more than a specified percentage of the votes – say

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[107] In practice this was the reason why large farms in the Kyrgyz Republic were often unwilling to participate in the first WUOs.

[108] Usually such provisions provide that every WUO member is to have a minimum of one vote.

between 10 percent and 40 percent. Nevertheless, such a rule may also be too rigid. Consequently it may be best for WUO legislation not to specify exactly how votes are to be allocated but to leave this with suitable safeguards to be determined during the course of the establishment process.

After all, if potential WUO members cannot agree on such basic issues at the outset it is unlikely that they will be able to work together effectively whatever other solution is imposed on them by law or otherwise. Article 38 of the FYR Macedonian WUO law has wording that gives effect to this approach:

> The Community statute shall define each member's number of votes. The statute may regulate that:
> - each member shall have one vote;
> - voting right shall be proportionate to the size of the land owned or used by the member, whereas each member shall have at least one vote; or
> - any other type of allocation of votes that shall ensure protection of the interests of each community member.

What then of the situation where a WUO has too many members to enable all to participate effectively in WUO meetings? One legislative solution is to provide for the creation of a system of representatives the precise details being spelt out in the governing document in accordance with the parameters set out in law. In FYR Macedonia the law requires each WUO with more than 200 members to have a representative system. Elsewhere the legislation leaves this matter to the discretion of the individual WUO (or more precisely its founders). In Azerbaijan, by contrast, the WUO law envisages that each WUO will have a representatives system unless its membership is sufficiently small such that all members can meaningfully participate in general assembly meetings.

In cases where a representative system is used, the law should provide for the division of the service area into separate zones or areas with one or more representative being elected by each zone to represent the interests of the participants with land that zone. In the interests of transparency, it is important though, to provide that ordinary participants in WUO (*i.e.* other than the representatives) can attend and observe meetings of the assembly even if they may not play an active part.

WUO legislation that provides a number of options for the drafters of WUO governing documents can lead to a range of different outcomes as seen in the examples described in Box M.

Box M - Variations on a theme: neighbouring WUOs in Talas Oblast Kyrgyzstan

At Ogortochon WUO it was decided that representatives should be elected for one year. In the case of land farmed by small farms, one representative is allocated for every ten hectares. However, this allocation formula is not applied to the land of larger farms. For example one large farm with 480 hectares of land has only 30 votes while two smaller 60 hectare farms each have five representatives. However due to the size of the WUO territory the effect of this allocation formula is that the Representative Assembly has 160 members. All WUO members receive a copy of the Representative Assembly agenda and all may attend its meetings although they may not vote.

It was also interesting to learn that the Management Board comprises seven members, of which five represent the five small villages within the WUO territory with two members representing the one large village.

At the Chjon Tubur WUO, representatives are elected for three year terms by land-field (fields of the former collectivised farm) which are roughly 25 hectares in size. However, in some cases the land fields have been subdivided into many small plots and following a process of negotiation, these were allocated additional representatives meaning that there are 65 representatives in total. In this WUO notice of the Representative Assembly meetings are only given to the representatives, which makes sense given that they hold office for three years. However like the Ogortochon WUO, the Management Board members represent a number of specific zones.

In the Suu Umur WUO each Management Board member represents a specific canal. However, that WUO takes an interesting approach to the question of assemblies. A General Assembly is held once a year while Representative Assemblies are held three times a year. On one hand this approach does appear to remove one of the benefits of the Representative Assembly approach, namely the cost and logistical challenges of organizing a large meeting. On the other hand it does not seem to be contrary to the WUO law and the philosophy behind the law is that WUOs should design their own internal arrangements within its parameters.

b. *Management board*

As already mentioned the management board should be elected by, and from among, the participants in the WUO. At a theoretical level its principal task is to prepare for the meetings of the general assembly when the main policy decisions are made and to oversee the running of the WUO in between such meetings. In practice, much like the board of a company, its role is stronger than that. The dynamic of a WUO is such that as long as the participants are broadly happy with the performance of the WUO then they will tend to go

along with the proposals of the management board at the general assembly as to tariffs and budgets and rules and so forth.

WUO legislation typically sets out the basic tasks of the management board. An example from the Azerbaijani WUO law[109] is as follows:

> Management Committee shall:
>
> - carry out general management of the Association's activity;
> - represent the Association in relations with a third party;
> - convene the General Assembly and prepare their agendas;
> - consider issues on accepting new members and termination of membership;
> - consider drafts of water distribution schedule, activity plans and budget to be submitted to the General Assembly for approval;
> - conclude contracts in accordance with the approved budget and plans;
> - employ and fire an executive director and hire employees of the Association;
> - monitor Association's operations;
> - elect one its members to be its chairman; and
> - perform other functions defined in the statute.

So what is the composition of the management board? It can be helpful for a WUO law to specify the minimum number of members (which may range from three to five in the case of WUOs operating larger systems) as well as the maximum (typically no more than around 12) as otherwise it becomes difficult to hold effective meetings. In any event, the precise numbers will usually fall to be determined in the governing document. To prevent deadlocked decision making WUO legislation in some countries specifies that the management board should be made up of an odd number of members. Elsewhere the chairperson is giving a casting vote. The effect of the latter approach is of course to strengthen the relative power of the chairperson.

As already mentioned the members of the management board are participants in the WUO. In FYR Macedonia the WUO law also provides that two places on the management board are to be reserved to (un-elected) representatives of local government. It is hard to see the benefits that this approach confers in practice given the risk that WUOs may become politicised. Indeed in Armenia a presidential decree was issued in 2004 which expressly prohibited local government officials from holding any form of

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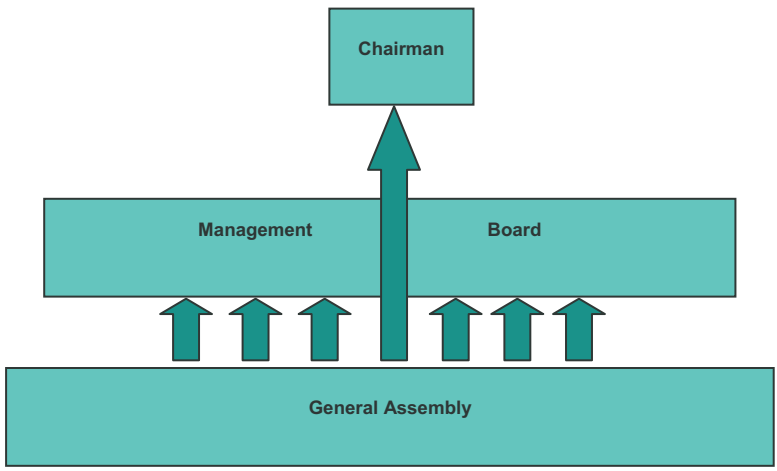
109 Article 39.

office within WUOs due to the degree of political interference that was starting to take place, particularly in terms of pressure to keep down the level of fees and charges.[110]



In order that it may effectively fulfil its oversight role, WUO legislation typically requires the management board to meet at a minimum once a month but provision is often made for more frequent or additional meetings as necessary. Thus meetings might be called at the discretion of the chairperson, on the request of say two thirds of the members (and in Bulgaria at the request of the "control board").

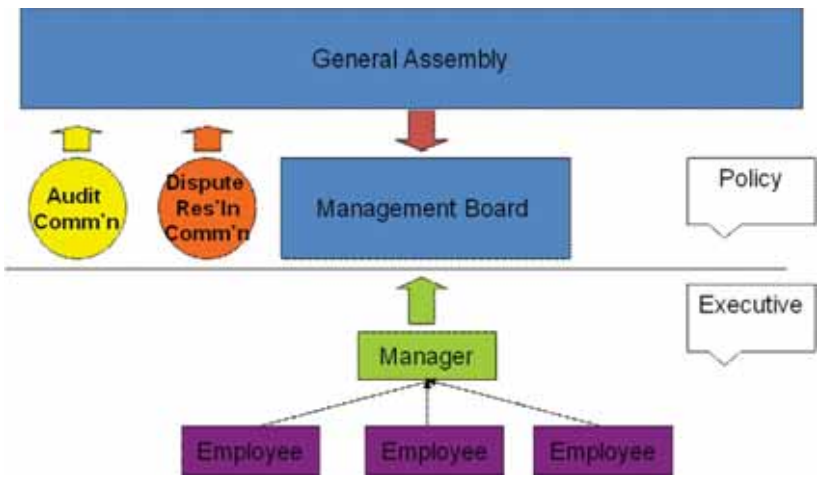
Decisions of the management board should be made by consensus or by vote with each member having a vote. In practice it is probably desirable if decisions are made by consensus (although this may have an impact if the manager is present, an issue that is returned to below).

In order to resolve the problem of the "strong chairman", described above, and to promote the collective responsibility of the management board, WUO legislation in a number of the transition countries provides for the chairperson to be elected by and from among the management board and to separate this role from that of managing the WUO through the use of an

[110] In practice the WUOs were often used a "springboard" for local political ambition. Unfortunately the decree has not, however, prevented indirect pressure continuing.

employed manager. This is done by specifying that none of the management board members may at the same time be employees of the WUO.

Box P – Structure to promote accountability



Under this approach the manager is appointed by, and reports to, the management board. He should be required to attend the meetings of the management board when so invited (in practice he should attend regularly) and in practice the management board will listen to his advice - after all the manager is employed for his experience and expertise. Clearly if the chairperson was previously paid a salary this approach is no more costly.

The benefits of this approach – of separating policy making from execution – are numerous. As far as the manager is concerned, as long as he does his job properly he will remain in employment without having to worry about re-election. If he does it badly he may be fired, but that is generally true of any job. The decision whether or not dismiss a manager will be taken by the management board which is in turn accountable to the general assembly for the performance of the WUO. Policy decisions are made by the management board which can guide the manager in the fulfilment of his tasks.

What was interesting, when this new approach was adopted in the WUO legislation of a number of the transition countries, was just how popular it was. While some of the "strong chairmen" initially resisted this reform as a threat to their jobs, many did not. They did not particularly want to be full time WUO managers but had been elected to the job as someone the community could trust.

Similarly, very often large farmers and responsible community members were keen to serve on a management board that had a truly responsible role at the overall policy level rather than acting as a mere "rubber stamp".

Under this approach a WUO law should still specify the tasks of the chairperson even if these will typically be relatively limited. They would generally include:

- chairing the meetings of the general assembly and management board;
- acting as the spokesman of the WUO;
- acting as the legal representative of the WUO and signing contracts etc. in accordance with the budget and resolutions of the management board; and
- calling additional meetings of the management board as necessary.

c. *Audit commission*

Financial mismanagement and even downright theft is a major potential threat to WUO sustainability. However appropriately rigorous auditing facilities may not be available or affordable in the rural areas where WUOs typically operate. In any event the *post facto* nature of formal auditing procedures can come too late to prevent financial disaster.

To that end it is advisable for WUO legislation to require WUOs to set up an audit or supervisory commission. This has some similarities with the regulatory boards that are found in commercial companies in many civil law countries, albeit with a more narrowly defined mandate to routinely supervise the books and report to the general assembly.

WUO legislation typically requires the election of the audit commission by the general assembly from among the members of the WUO. In the

transition countries teachers, book-keepers and other "specialists" with an appropriate level of education, have typically been elected to these positions.

The minimum size of an audit commission is usually three persons[111] and WUO legislation typically requires such commissions to meet monthly to routinely inspect the accounts and books of the WUO in order to signal any problems or wrongdoing to the management board. In addition it is advisable to require the audit commission to prepare an annual report to the general assembly on the manner in which the WUO's accounts and books have been kept.

d. *Dispute resolution commission*

Given the inherent risk of conflict within WUOs it can be useful to include rules in a WUO law requiring each WUO to provide in its governing document for a mechanism to resolve disputes between WUO members.

One option is for the law to require each WUO to have a dispute resolution commission and to specify how this is to operate. The other approach is simply to require each WUO to have some form of mechanism but without specifying what this should be. The latter approach can be appropriate if local formal or informal dispute resolution mechanisms already exist. In the Kyrgyz Republic, for example, some of the first WUOs had provided for the election of their own "water judges". Elsewhere WUOs had already decided that water disputes should be resolved by the "*Aksakals"* Councils,[112] traditional councils of village elders, the authority of which had already been recognized by formal law.

If local dispute resolution mechanisms do not exist, or if they are not suitable in the given circumstances, then WUOs may determine to have a more formal dispute resolution commission comprising elected WUO members. WUO legislation typically specifies the rights and duties of such a commission and may set out the basic procedure to be followed.

Generally speaking the tasks of such bodies should be restricted to the resolution of conflicts between WUO members and not to conflicts between participants and WUO staff or WUO officials. In particular it is important that the elected management board and the general assembly have sufficient authority to impose their decisions. If these can be second guessed by an

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111 In FYR Macedonia it is five.

112 The word "Akzakal" means "white beard" in the Kyrgyz language.

organ within the WUO there may be a heightened risk of conflict. At the same time, an infringement of the rights of a WUO member is always ultimately capable of being challenged in the courts.

e. *Common provisions on employees and elected officials*

Finally, it is usually necessary for a WUO law to address a number of issues that should be common to all elected officials (in other words the members of the management board, audit commission and, if there is one, the dispute resolution commission).

First of all such officials should not be considered to be employees of the WUO. Indeed the law should specifically provide that a person cannot at the same time serve as an official of the WUO and be an employee. Nevertheless, even though such officials are not employees, and thus do not receive a salary, WUO legislation would usually provide for them to be reimbursed the reasonable costs incurred by them in the discharge of their duties and could provide for them to be paid a token "sitting allowance" if this is provided for in the governing document and in the budget. Evidently the payment of such allowances will impact on the financial situation of the WUO.

Next the legislation needs to address the duration of the terms of office to be held. A term of less than three years is probably too short to be effective; more than five years may be too long. Legislation may also address the issue of re-election perhaps by setting a limit of two subsequent terms of office.

WUO legislation typically provides that the same person may not simultaneously serve in more than one body. In other words the same person cannot at the same time serve on the management board and, say, the dispute resolution commission.

The grounds for removing management board members as well as the other officials should be specified in the law and would be broadly the same. These would include:

- a persistent failure without good reason to attend meetings;
- failure to discharge tasks effectively;
- breach of the WUO's governing rules; and
- conviction of a criminal offence.

5.3.7 WUO staff

It can be useful to specify that a WUO may employ staff including a manager. This is implicit from the fact that a WUO has legal personality but including such a provision can assist in presenting a picture as to how a WUO will operate.

It is usually desirable for the manager to be appointed by the managing board but for the other staff to be appointed, on suitably objective criteria, by the manager. After all, they will report to and be directed by the manger.

5.3.8 WUO income

WUO legislation should clearly specify the possible sources of income of WUOs. These typically comprise:

- fees and charges for services provided to participants (including as relevant non-members);
- gifts;
- grants and subsidies;
- loans; and
- interest on savings.

Although in some countries the relevant legislation also lists a WUO membership fee as an additional source of income the benefit of this approach seems questionable. If the fee is but a token amount then how does this help.[113] If it is supposed to cover part of the WUOs costs why not include it under the heading of fees and charges?

In practice fees and charges will usually make up the bulk of the income of each WUO. As mentioned above in order to encourage non-members to join, WUO legislation in a number of countries allows WUOs to charge higher fees and charges to non-members but usually sets a limit on this (by requiring them to be not more than 25 percent higher, for example). Otherwise it is important for the legislation to make it clear that WUOs have

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[113] In Albania WUOs typically levied a membership fee of a token amount (roughly the price of a packet of cigarettes) which all members paid. More difficult was to get them to pay the irrigation service fee.

a complete discretion as to the level of such charges payable by participants and non-members alike.[114]

Should the legislation say anything further about how such fees and charges are to be determined? For WUOs operating land drainage systems it can be appropriate to specify that fees are payable on an area basis. For irrigation WUOs the simplest option is for each WUO to levy a water supply charge, on a volumetric basis in those cases where the quantity of water delivered can be measured or by the number of irrigations (and the area irrigated if there is a wide variety in land parcel sizes) if not.

This approach can work satisfactorily in places where irrigation is essential. However, particularly in the case of supplemental irrigation, there can often be a good policy case for the law to distinguish between the income necessary for operation and that for maintenance. The risk with supplemental irrigation is that if it rains and irrigation is unnecessary then if a WUO's income is entirely dependent on the volume of water actually delivered it may have insufficient funds to prepare the system for the next irrigation season.[115]

The problem is that if farmers take the same "wait and see" attitude to irrigation the following year, it is usually too late to undertake the necessary pre-season maintenance if the rains fail. In such circumstances it can be advisable for the legislation to specify that, say an area-based irrigation service fee should be payable by all WUO participants before the start of the irrigation season so that the system can be prepared. Subsequently WUO participants who choose to irrigate should pay a water supply charge calculated on a volumetric basis (or equivalent). As such the payment of the irrigation service fee can be seen as a kind of insurance premium: if it rains irrigation is not necessary, but if it does not then the irrigation system is at least ready to be operated.

Apart from specifying that a WUO is to operate on a non-profit basis it can also be useful to require each WUO to set up a reserve or emergency fund and to require all surplus income to be transferred into that. Apart from the

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[114] In this connection it is important to ensure that irrigation WUOs as effective monopoly suppliers of irrigation water are not subject to anti-monopoly legislation, requiring the approval of tariff rates by a special central commission, as was the case in Azerbaijan before the WUO law was adopted.

[115] This is exactly what has happened in Albania.

fact that such a fund is likely to be objectively necessary it may make it easier to argue that WUOs should be subject to more favourable tax treatment than types of organizational form (an issue that is returned to below).

5.3.9 Accounts books and records

Another matter that WUO legislation needs to address is the accounts and records to be maintained by WUOs.

Evidently, if it is to be run effectively a WUO must be required to prepare annual accounts. At a minimum these should be approved by the general assembly and ideally they should be verified or audited by an external source as well as by the audit commission (an issue that is returned to below).

In the name of transparency and good book-keeping WUO legislation should require WUOs to maintain a series of records such as:

- a register of participants that should be periodically updated;
- minutes of the meetings of the general assembly, management board, audit commission and dispute resolution commission if there is one;
- a register showing the quantities of water received and supplied; and
- copies of contracts entered into by the WUO.

5.3.10 Supervision of WUOs

The supervision of WUOs is an extremely important yet potentially delicate matter. On the one hand some form of legal and financial supervision by the state of all forms of legal person is justified on a range of public interest grounds. Companies, cooperatives and non-government organizations are subject to such supervision, for example, to ensure compliance with relevant accounting and other legal rules. As described above, the public interest functions of WUOs make it particularly important that they are subject to appropriate supervision in order to ensure as far as possible that they do not fail. The main objective of supervision is, after all, to ensure effective and lawful WUO governance.

A WUO law will first need to identify the supervisory body. This is typically a ministry or a special unit established by law but located within a ministry.

In countries where the ministry responsible for irrigation and land drainage is not also responsible for agriculture it can be appropriate to set up a statutory committee.[116]

In order to prevent excessive or undue interference, it is particularly important that the WUO law carefully sets out the circumstances in which the supervisory body can intervene in the activities of a WUO. Specifically a WUO law should make it clear that the supervisory body is not entitled to substitute its own judgment for that of the WUO. In other words, it should be entitled to intervene in the operation of a WUO only if there is *prima facie* evidence of wrongdoing or illegality. Of course the degree to which a supervisory body can take an active supervisory role depends on the resources available to it and so once again a balancing exercise is called for.

At the very minimum the supervisory body needs to have up to date information about all WUOs operating within the jurisdiction. The first requirement is therefore for WUOs to file an annual report or return providing up to date details of the WUO including the composition of its management board. Such a report or return should be accompanied by a copy of the WUOs most recent accounts.

In an ideal world such accounts would be audited but in practice, for the reasons sketched out above, this is often not practical. Consequently the supervisory body should have the legal power to undertake random audits of the WUOs that it is responsible for. In any event the filed accounts should be reviewed by the supervisory body along with the report or return for obvious examples of wrongdoing.

What about the powers of a WUO supervisory body to intervene? First of all the supervisory body should have the power to routinely request copies of documents. Furthermore it should be entitled to inspect the accounts and records of a WUO: (a) where this is directly requested in writing by a percentage of the participants in a given WUO; or (b) where following an audit or on the basis of an inspection of the accounts or annual return there is *prima facie* evidence of wrongdoing. In order to undertake such an inspection the supervisory body, or more specifically one of its authorized officers, will need the necessary "police" powers including powers of access,

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116 This is the case in the Armenian WUO legislation for example.

inspection as well as a right to require the provision of information by WUO officials and employees.

What if an inspection takes place and evidence of wrongdoing is found? One option would simply be to give the supervisory body the power to order the necessary action to be undertaken to remedy the situation. Such an approach may, however, have the negative effect of disempowering the WUO and its membership. An alternative approach is to confer the necessary power on the supervisory body to require the management board to call an extraordinary meeting of the general assembly to which its findings can be presented. If the management board refuses to do so then the supervisory body should have the power to dismiss the management board and to call a meeting itself and to appoint a temporary "interim manager" until such time as new elections can be arranged.

5.3.11 Rights of WUOs

WUO legislation typically confers a number of additional legal rights upon WUOs. These may include the right:

a. *to use infrastructure*. This is a key right without which a WUO cannot operate. This issue is discussed in more detail below;

b. *to impose fines for non-compliance with the governing document or operating rules*. Such a right is important. If the WUO is established under public law there is no conceptual reason why such fines should not be imposed against non-members as well as members. Such fines are typically reviewable by the courts;

c. *to expel members*. As described above this becomes the main sanction open to a WUO in which participation is by voluntary membership, provided it confers upon the WUO the right to charge non-members at a higher rate for the services that it provides As a sanction this will only be effective if the WUO can refuse to supply water to non-members or if it can charge them a higher price for any water supplied or services provided;

d. *to acquire access rights over land*. Again if a WUO is established under public law, WUO legislation can confer the necessary legal powers for it to

obtain public servitudes over land where this is necessary for it to undertake its tasks or even to compulsorily acquire land (usually subject to payment of compensation to the land owner). WUO legislation can also confer temporary rights of access on WUO staff where this is necessary for the purposes of operation and maintenance[117];

e. *to recover outstanding fees and charges by direct execution.* As described above, WUO legislation in the developed countries typically confers on WUOs the right to recover outstanding fees and charges using a variety of legal techniques that obviate the need to first obtain a court judgment. Perhaps unsurprisingly this approach has to date been little used in the transition countries, largely due to fears that such powers might be abused. Only in Romania and Bulgaria does the legislation provide for outstanding invoices to have executive title meaning that they can be recovered directly by the court bailiff. The key point to note, though, is that as WUOs have a special legal status such additional powers can be conferred in due course as necessary.

5.3.12 Sanctions

As an organizational as opposed to a regulatory law a WUO law does not require extensive use of sanctions. In other words it does not need to create a large number of offences, whether under criminal or administrative law, or to specify sanctions when such offences are committed. Nevertheless, as a minimum it is usually necessary to create a limited number of offences (and suitable sanctions) in order to ensure that that WUO officials comply with obligations regarding reporting and accounting requirements and cooperation with the supervisory body.

5.3.13 Federations

Another issue that is sometimes, but not always, addressed in WUO legislation is the concept of Federations of WUOs. The basic idea is that a Federation can be established by a number of WUOs to take responsibility

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117 Article 36 of the Armenian WUO law provides, for example:

1. The Association and the Federation can use the right of servitude in accordance with the order defined by the RA Civil Code and legislation.
2. An authorized officer of the Association or the Federation has the right to enter into any private land for the purposes of undertaking surveys and emergency works in respect of any infrastructure, which is under the use of the Association or the Federation.

for the operation and maintenance of an entire irrigation scheme or an element thereof such as a primary canal. This approach has been undertaken in a number of the transition countries. In Armenia, for example, the full name of the WUO law is actually the "Law of the Republic of Armenia on Water User Associations and Federations of Water User Associations". Extensive provisions on Federations are also contained in the Romanian law.

If it is to operate successfully a Federation, like a WUO, needs to have independent legal personality. While the structure of a Federation can be simpler to that of a WUO – essentially it can have just a management board made up of representatives of each WUO - in practice a Federation can be harder to operate successfully given that it is even further away for the "community" of water users.

In terms of drafting, a complication is that while a Federation shares many of the features of a WUO as the structure is somewhat different it can be difficult to cross-refer back to provisions on WUOs in the legislation. For example the foundation procedure may require the same technical steps but the potential participants will not be land owners but other WUOs.

Consequently if detailed provisions on Federations are to be adopted then it becomes necessary to draft quite extensive provisions even though these may reflect albeit not directly copy those relating to WUOs. An alternative approach, that which is followed in Germany, is to draft the WUO legislation in such a way that the Federation is just a large WUO – clearly for this the concept of members or participants would have to be drafted in a way that potentially includes WUOs.

5.3.14 Liquidation

If WUO legislation is to be the source of legal personality of WUOs then it must also address the issue of their possible dissolution and liquidation.

Grounds for liquidation could include:

- that the purpose for which the WUO was established is no longer necessary (because, for example, farming has ceased within the service area); and
- the insolvency of the WUO.

Usually a decision to dissolve a WUO should be taken by its members but to avoid the situation where a failed WUO has simply collapsed, and thus lacks the capacity to make decisions, it may be appropriate to confer the necessary powers on the state, represented by the relevant minister or possibly the supervisory body, to dissolve a WUO. To avoid the risk of political interference or coercion then it may be appropriate to require any such decision to be finalised only after sufficient notice has first been given to the WUO to enable a pre-emptive legal challenge to be made in circumstances where WUO participants do not agree with the proposed dissolution.

5.3.15 Transitional provisions and recognition of previous forms

Finally, in order to prevent any institutional capital generated by WUOs already established on the basis of existing organizational forms from being squandered it will usually be necessary to provide for such entities to become "re-established" under the new specific form. In practice, however, it will usually be necessary for existing WUOs to be dissolved and a new WUO established in its place: generally speaking formal legal systems do not approve of the "transformation" of legal persons.

5.4 Drafting WUO legislation

Having considered the kinds of issue that should typically be addressed in WUO legislation, the types of legal rules that it should contain, it is appropriate also to consider a number of practical aspects regarding the preparation of a WUO law.

5.4.1 Source

The first question is the source of WUO law. More specifically this question concerns the scope of the law that contains the legal rules that govern WUO establishment and operation. Should such a law be concerned only with these narrow issues or should it also address those issues relating to irrigation and drainage, such as the right to use infrastructure or to receive irrigation water without which a WUO will struggle to function (a topic that is considered in more detail in part 5.5 below) or should the relevant provisions be contained as a chapter in the basic water law or code?

All options are to be found in the practice of the countries with a long tradition of specific WUO legislation. Germany, for example has a specific law on WUOs, the English legislation on WUOs is contained within a sub-sector law (the Land Drainage Act) while legislation on WUOs in Spain is contained in a chapter in the Water Law.

At a practical level including all of the relevant provisions on WUOs in a basic water law can lead to the creation of an extremely long text[118] or extensive use of subordinate legislation.[119] On a conceptual level the permissive organizational provisions on WUOs may be considered sit uneasily with the regulatory type provisions typically found in a basic water law but this is not a completely compelling argument. The point though is that a new water law will only be introduced in connection with a broader set of reforms and clearly introducing WUO legislation as part of a revised water law will have the effect of making what can already be quite complex legislation (in other words a basic water law) even longer.

There is in fact no "correct" answer to this question. Much will depend on the content of existing legislation, the government's legislative programme, parliamentary practice and ultimately politics.

As regards the transition countries while Armenia, Bulgaria, Kyrgyzstan and FYR Macedonia all adopted specific legislation on WUOs, Albania, Azerbaijan, Georgia and Romania included the provisions on WUOs in their irrigation sector laws. Why? A few examples will suffice. In Kyrgyzstan, given the national importance of water, the then Minister was very keen to develop a new Water Code and to include provisions on contractual water rights alongside abstraction water rights in a single text. The position was similar in Armenia. In Azerbaijan and Georgia, in contrast, the government considered that it would be easier to amend the existing irrigation sector legislation by the inclusion of a new chapter on WUOs. It was thought that this would be better accepted by parliament and that amending existing legislation was easier than introducing a new law.

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118 Even allowing for the level of detail found in US legislation and the fact that it provides for a large number of different types of WUO, the California Water Code is the thickness of a telephone directory for a large city.

119 As is the practice in Spain. However excessive use of subordinate legislation may not be desirable in circumstances where WUOs are new as described above.

5.4.2 Style and order

It is a trite observation that legislation should be clear. No-one, after all, sets out to draft unclear laws even if that is sometimes, unfortunately, the result. In some circumstances, however, a degree of complexity may be acceptable particularly in the context of legislation that addresses technical issues and is addressed primarily to, say, industry and regulatory bodies.

In the context of WUO legislation, however, it is clear that a law whose principal audience is farmers and other water users must be capable of being understood by such persons.

This has implications for the language used, the structure of sentences and also, it is suggested, for the order of the text. In particular it can make sense to try and design the text to be "bottom-up" by placing the rights and duties of the participants at the beginning of the text so that a potential WUO participant can understand what participation means.

5.5 Other issues that must be addressed in legislation to render WUO legislation effective

The discussion so far has focussed on the legal rules that regulate the establishment and operation of WUOs. A WUO clearly, though, does not operate in a vacuum. In order to be able to operate in a sustainable manner, however, a number of other issues need to be dealt with in legislation addressing such issues as land tenure, the irrigation/land drainage sector and water resources management in general as well as taxation.

5.5.1 Land tenure

Land tenure legislation plays both a direct and an indirect impact on the sustainability of WUOs. First of all if potential WUO participants themselves do not hold secure land tenure rights, either because the legislation does not provide for this or because it has not been implemented, then it is extremely difficult for them to make a meaningful contribution towards the establishment of a sustainable WUO. This does not mean that sustainable WUOs can only be created if a majority of their members are landowners (as opposed to holders of use rights) but it does mean that whatever rights are

created must be sufficiently clear and secure to make the establishment and operation of a WUO worthwhile.[120]

Secondly land tenure legislation needs to be able to support the secure transfer of infrastructure, whether in use or in ownership to WUOs. A full discussion of the form of such transfers is beyond the scope of this study.[121]

5.5.2 Irrigation/land drainage sector legislation

Even though it is important that land tenure legislation is supportive of the transfer of infrastructure to WUOs, the substantive provisions on this are typically set out in sectoral, or more accurately sub-sectoral legislation.

In the context of irrigation, in order to be able to provide a secure and reliable service to its members a WUO needs to hold a secure and reliable right to water itself. In those cases where a WUO has direct access to a natural water source, such as a dam or diversion structure, then this can only be achieved if a WUO can hold a secure long term water right, an issue that is returned to below. In the majority of cases, however, a WUO will, at least initially,[122] be supplied with water on a contractual basis by a bulk water supplier, usually a state water agency. In this connection it is important that the legislation confers upon WUOs the legal right to enter into a long term contract right for water supply. Annual contracts with no legislative backing offer little in the way of water security. What if there is a dispute? How can a WUO be sure that the supplier will enter into a new contract the following year? Furthermore the legislation should specify that within its own service area each WUO is to have an exclusive right to supply irrigation water to participants as well as non-members. Otherwise the situation can arise, as happened in FYR Macedonia, where at a local level the bulk water suppliers competed with WUOs for customers.

Finally, it is important to ensure that the legislation contains appropriate incentives for the bulk water supplier to provide an efficient and responsive service to WUOs. This issue raises a much broader set of questions of course that may go beyond a PIM programme but nevertheless may have a significant impact on WUO sustainability. In particular it is important to

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120 See further Schleyer, 2002.

121 This issue may be dealt with in a subsequent Legislative Study.

122 Until such time as a WUO federation is established.

"sell" the idea that strong WUOs can be valuable customers for such organizations but at the same time it is important that such organizations have an internal structure that is conducive to this end.

5.5.3 Water legislation

Finally, the sustainable operation of WUOs relies on the effective management of water resources in general and the secure allocation of water to the irrigation sector in particular. To this end it is important to enact and implement basic water legislation, in the form of a modern water code or water resources law. The key issue here is water rights. A full discussion of the importance of water rights is beyond the scope of this paper[123] but, to give a concrete example, unless a bulk irrigation water supplier holds secure long term water rights it is difficult, impossible even, for that supplier to enter into a long term water supply contract with WUOs. Without such water security, as outlined above, the sustainability of WUOs can be threatened.

5.5.4 Tax legislation

Finally, once legislation has been adopted so as to allow the establishment of WUOs as a specific type of organizational form it is also important to ensure that a suitably supportive tax regime is put in place. At the very least such a regime should exempt WUOs from the duty to pay profit tax and land/property tax. It may also be appropriate to exempt WUOs from the duty to charge value added tax (VAT) on the services that they provide although this will depend on whether or not a WUO also has to pay VAT in respect of bulk water deliveries. The key point here is that such issues are typically addressed in specific tax legislation and experience shows that attempts to include such provisions in WUO legislation are not likely to be successful.

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123 See FAO, 2006. *Modern water rights*, by S. Hodgson, Legislative Study No. 92, Rome, available at www.fao.org/legal.

5.6 Translating legal rules into local rules

In purely legal terms the process of translating rules contained in a WUO law into the local rules of a WUO boils down to the drafting of a governing document and operating rules.

The operating rules are technical and are best drawn up at a sub-legal level meaning that while a WUO law and the governing document should expressly provide for the adoption of such rules as well as the fact that they are binding on WUO participants (in other words that they have legal effect), following their adoption by the general assembly there is not usually any need for further formal legal approval. Nothing more will be said about them here. This is not in any way to diminish the importance of operating rules. At a practical level such rules, which typically address such issues as the procedures for paying fees and charges and (in the context of irrigation WUO) the ordering and delivery of water are on a daily level likely to play a hugely important role in the functioning of a WUO. But such rules are at the same time essentially technical and local: they are adopted by the general assembly and, as necessary, amended by the general assembly. Of course they may not contradict either the WUO law or the WUO governing document. But otherwise they have little formal contact with the formal legal system and formal law.

The other local rules are those of the governing document. As the approval of the governing document is typically a pre-requisite for WUO establishment, the governing document has a far greater connection with formal law. Although, as seen in the previous Part, in order to be effective a WUO law has to be quite detailed there are still a significant number of issues that have to be decided in establishing a WUO. Apart from such matters as the name of the WUO, these issues, which are translated into local rules include:

- the scope and location of the service area;
- whether or not a representative assembly should be established and if so the number of representative zones, the number of representatives per zone and, the procedures whereby the representatives should inter-act with those that they represent;

- the size of the management board and whether or not particular positions are to be reserved to representatives from particular representative zones; and
- the dispute resolution procedures to be adopted.

These kinds of issues are typically addressed in the governing document of each WUO. Depending on how these issues are dealt there can be wide variations in the internal form of WUOs, as the Kyrgyz examples in Box M (above) show.

In practice, model governing documents are often used. Indeed it would be strange if this were not the case. After all, lawyers invariably use precedents in drafting a range of legal instruments, including the governing documents of companies, cooperatives and associations. Where possible, no-one starts from scratch.

On the other hand, some care needs to be used in connection with WUO establishment particularly in those cases where a model governing document, approved by say the government, is too rigid and does not provide for alternative solutions. In such circumstances any flexibility offered by a WUO law is lost and the "blue print" model will re-emerge. Consequently it is important to draft a model governing document in a flexible format, through the use of alternative articles and wording so that the most suitable text can be selected for the given circumstances (or provide the basis for further elaboration).

6. CONCLUSION

With the benefit of hindsight the need for specific WUO legislation in connection with the reforms undertaken in the transition countries seems obvious. Ultimately an organizational form is an artificial construct, a legal "tool" to assist in the achievement of a particular objective of the society in question. Like any other tool, an organizational form should be used for the purpose for which it was created. Just as trying to cut grass with a hammer will usually be unsuccessful (better to use a sickle) using an inappropriate organizational form is just as unlikely to lead to success.

While the use of "standard form" legal entities permitted the establishment of legal persons described as WUOs it did not create a suitable space for

them to develop. Such space as was created through the use of these forms did not clearly position WUOs within the overall legal framework, or society for that matter: their precise role and purpose were very often unclear. Nor could it provide sufficient internal support to facilitate effective governance and transparency. In short it was both an ill-defined and a somewhat empty space, given the specific governance challenges faced by WUOs.

A search for legal solutions showed that in the countries with a long formal tradition of WUOs with proven sustainability, four key elements make up an effective legal space: (a) WUOs are a specific legal form; (b) WUOs are established on the basis of specific legislation; (c) the relative detail of such legislation; and (d) the fact that WUOs are established on the basis of public law. As a result of these elements a number of specific benefits arise. These include clarity as to the nature and purpose of WUOs as well as the possibility of conferring a number of substantive benefits upon WUOs including the power to impose compulsory measures.

As described in Part Five having made the case for reform, similar legislation was developed in the transition countries taking account of the apparent novelty of the WUO concept. Issues that were taken into account in that process, the substantive issues addressed in these WUO laws, are described in some detail in the rest of Part Five in order to share and disseminate that experience.

The fact that legislation was adopted in the transition countries does not, of course, mean that all of the problems faced by WUOs have been resolved. In Bulgaria, for a range of reasons including the manner in which the state water agency was reformed as well as wider questions of land reform, it appears that the adoption of new legislation may have come too late. Early successes in Albania have faded resulting in the need for new legislation, legislation which is only now being implemented. In some of the other countries (Armenia, Azerbaijan, the Kyrgyz Republic and Romania for example) there are signs of real progress although it is still far too early to claim that sustainable WUOs have been established. After all it is only some twenty years since the start of the land and agrarian reforms. Nevertheless, the effect of the legal reforms has by and large been to remove the legal obstacles to progress. And, realistically, it is doubtful that much more can be asked of the law. The creation of an appropriate legal space for WUOs does not remove the fact that functioning infrastructure, training and capacity building and

ultimately markets for agricultural goods are all equally important factors in WUO success. Law is but one of the necessary elements after all.

Finally, to pick up the question left hanging in Part One, what is the relevance of the experiences described in this Study to other countries around the world? Certainly the specific drivers for reform may be different although, having said that, the re-orientation of the agricultural sector from a collective to an individual (private) basis has been undertaken in recent years in several socialist countries, including China and Vietnam, as well as a number of African states. Such policy shifts have inevitably led to land tenure reforms that have not been so dissimilar to those seen in the transition countries. And indeed in the context of WUOs establishment on new irrigation systems land tenure issues and tensions are quite likely to arise.

In developing countries where the main drivers for IMT have been primarily fiscal (namely the need to reduce government expenditure by transferring responsibility for the operation and maintenance of irrigation systems to WUOs), land tenure reform issues may typically play less of a role. However, even here there are likely to be many similarities. Farmers may be reluctant to work together, conflicts may exist, and variations may exist in the size of land holdings and so forth. In other words the same or similar kinds of legal challenge may arise.

But a further similarity is that many countries have taken the same legal path by seeking to establish WUOs using existing organizational forms. To take a range of countries attempts have been made to establish WUOs on the basis of cooperative laws in Burkina Faso, in Iran and in Vietnam. The legal problems of using this particular form in Iran are quite well documented and the fact is that WUOs established in the context of development projects using this legal form in Iran, just as in Vietnam, have invariably failed once donor support came to an end. It is possibly a jump too far to blame all of the weaknesses of these WUOs on the lack of an appropriate legal framework but, to give an example, one of the problems in Vietnam has been that farmers have not always been very clear what the difference is between the new "WUO-cooperatives" and the old farming cooperatives. After all a cooperative is a cooperative. In Burkina Faso, Irrigation Committees have been established on the basis of a Decree of the

Council of Ministers[124] and the Law on Cooperatives[125]. Sounds like a familiar approach? The problems these committees are already facing will also sound familiar: farmers refusing to join and/or refusing to pay. In other words the legal problems faced by the first transition country WUOs do not seem to be unique.[126]

What about the argument that the transition countries are European or share (in the case of the former soviet countries of Central Asia and the Caucasus) a European legal heritage? Well there is some truth in that. However, for historical reasons, it is fair to say that most countries in the world share a formal legal heritage as the main legal traditions – the civil law tradition and the common law tradition – inform the legal systems of most if not all of the world's countries. While the substantive content of parts of the legislation may be guided by notions of, say, Islamic law or customary law, much of the structure and even the content of law continues to be from the shared heritage of the two main legal traditions which can both trace their roots back to Europe. The same kinds of argument could be made in respect of companies, cooperatives and associations, yet these organizational forms are found in the legal systems of most, if not all, countries together with, obviously, the legislation that creates the particular legal space needed for them.

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[124] Decree No. 2006-453-PRES/PM/MARH/MATD on the establishment, competences, organization and functioning of committees of irrigators on the irrigated perimeters.

[125] Law No. 014/99/AN dated 15 April 1999, regulating cooperative societies and farmer groupings in Burkina Faso.

[126] And at the time of writing, the Ethiopian Government is proposing the establishment of WUOs on the basis of regulations adopted pursuant to a brief reference to WUOs in the water law and provisions in the Civil Code.

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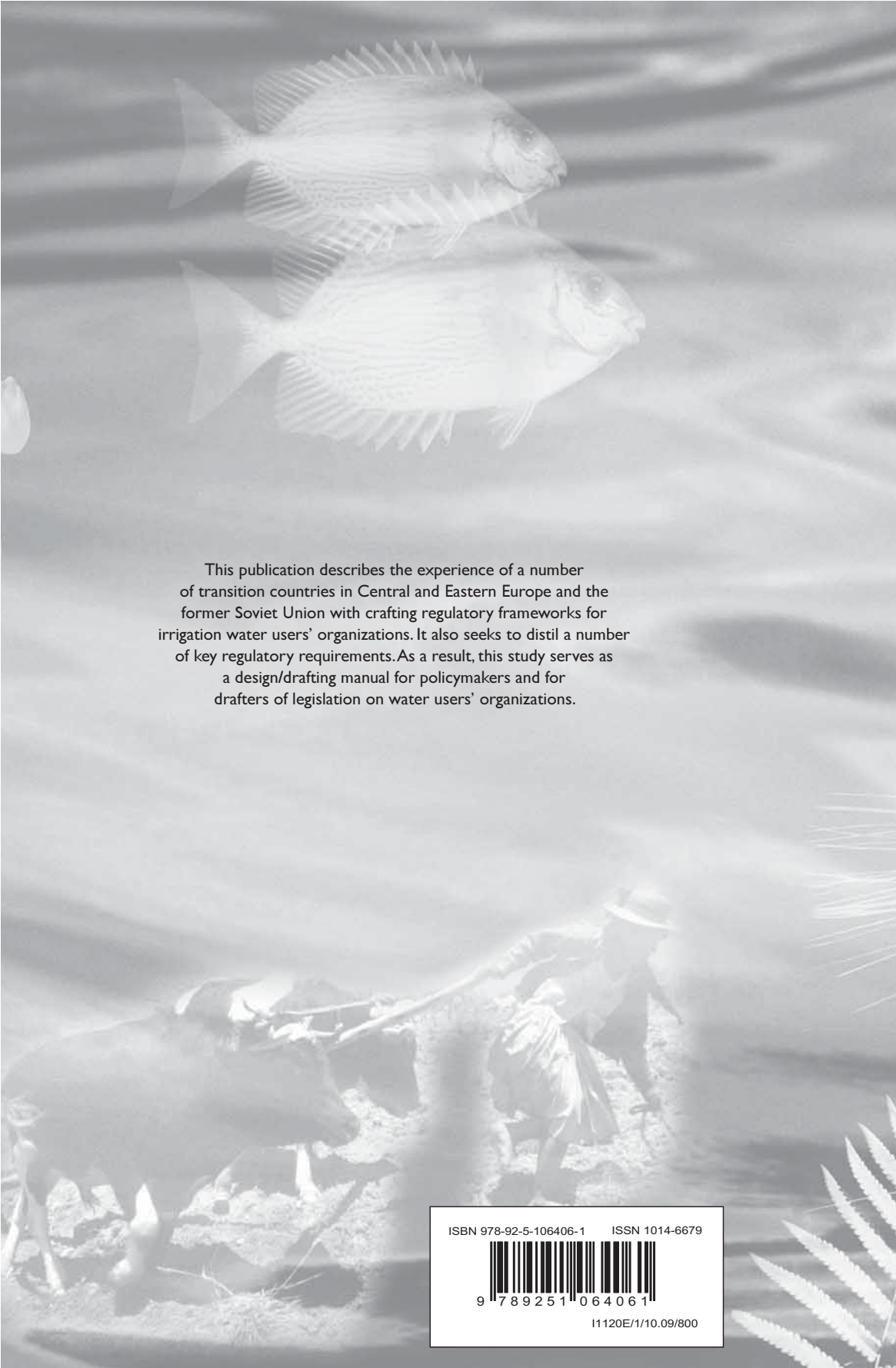

This publication describes the experience of a number of transition countries in Central and Eastern Europe and the former Soviet Union with crafting regulatory frameworks for irrigation water users' organizations. It also seeks to distil a number of key regulatory requirements. As a result, this study serves as a design/drafting manual for policymakers and for drafters of legislation on water users' organizations.

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