

IUCN Environmental Law Centre

**Addendum to Final Report:  
FOREST LAWS AND REGULATIONS: OBSTACLES TO IMPROVEMENT**

NRI-funded Project R7339 ZF0116  
(May 1999 – August 2000)

**INTRODUCTION**

On December 22, 2000, NRI submitted several questions (the “NRI Review”)<sup>1</sup> to the IUCN Environmental Law Centre (IUCN-ELC) relating to the Final Report in the above-captioned Project. Those questions began by stating that the overriding objective of this project was

*to identify the needs of developing countries for research to support improved forest laws and associated regulations.*

The Review noted with concern that the report focused only on the (“subservient”) specific objective of the contract –

*[to p]resent a survey and analysis of obstacles facing developing countries in improving forest legislation and regulations and develop a set of recommendations to overcome them which outlines:*

- a) the involvement of stakeholders in the consultation process leading to new laws and regulations, and*
- b) the role of donor agencies*

This Addendum addresses the concerns expressed in those questions, and seeks to satisfy the general objective of the Project.<sup>2</sup> The Lead Consultant having been released from his contract by ELC in the time between completion of the project<sup>3</sup> and receipt of the NRI Review, it falls to IUCN-ELC’s current professional staff<sup>4</sup> to call upon their collective experience in these matters to address these issues.

**ORGANIZATION OF THIS ADDENDUM:**

This addendum is intended to address the issues raised in the NRI Review, and particularly to provide recommendations relating to the above-described “overriding objectives” of this project. It will do so in three parts, beginning with a discussion the role and scope of legislative analysis,

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<sup>1</sup> These comments were received by e-mail entitled “R7339 ZF0116 REVIEW,” dated December 22, 2000, received from Mr. Duncan Macqueen, Deputy Programme Manager, DFID-FRP, NRI. Throughout this Addendum they will be referred to as the “NRI Review.”

<sup>2</sup> While IUCN-ELC is happy to accede to NRI’s request in seeking additional recommendations, we would note that a reasonable reading of the contract would suggest that it was the objective of the project to undertake the survey and analysis (the “specific objective”) as one step in helping *NRI* to achieve the General Objective. Hence we do not believe that our lead consultant should be faulted for assuming that his mandate was to undertake the specific project described by the specific objective, recognizing that it would ultimately be a part of the larger work of NRI toward achievement of the General Objective.

<sup>3</sup> August, 2000.

<sup>4</sup> Brief biographical statements of the IUCN-ELC officers directly involved in authorship of this addendum are attached.

following with discussion of specific points raised in the NRI Review, and concluding with a series of recommendations and suggestions regarding further legal/legislative research and analysis, which can integrate with the work of other disciplines to achieve the general objective of the project.

## **I. ROLE OF LEGAL/LEGISLATIVE ANALYSIS IN TECHNICAL ASSISTANCE PROJECTS**

The anonymous reviewer who provided the “external review” of the Final Report of this Project, refers to this report as a “social science study of the environment.” This statement suggests that some exposition is necessary as a prelude to the Final Report, to clarify the difference between “social scientific research”, and legal research.<sup>5</sup> This explanation will identify the parameters of the current report and, in addition, set the context for the legal component of future research (recommended in part III.)

Calling on the collaboration of a great many disciplines, international assistance programs are designed to achieve a number of purposes. Their overarching objective, however, is the development and implementation of policies and programmes to conserve and sustainably use natural resources, improve lives and lifestyles (especially through the alleviation of poverty, improvement of health care, etc.), and generally to contribute to sustainable development of economic and social systems, all within developing countries. Legal/legislative research and analysis is only one specifically focused component (albeit an important one) in achieving these objectives. In considering the contribution of a legislative expert<sup>6</sup> to this overall work, it is essential to be aware of the nature of the services and experience that the legal expert brings to the table.

### **A. NATURE OF LEGISLATIVE SUMMARY AND ANALYSIS**

One of the primary tools of legal/legislative consulting is the “legislative summary and analysis” (hereafter shortened to “legislative analysis.”) While the particular components of such an analysis are generally agreed, its depth and scope can vary dramatically depending on the mandate given to the legal expert, and on the time and resources available to him or her for its completion.

In general, a legislative analysis consists of two general components: (i) Technical evaluation of legislative documents (laws, regulations, rules, and other documents of law or administration), and (ii) experiential evaluation of the operation and effectiveness of administration within their regulatory scope.

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<sup>5</sup> While law might be considered a “social science” under the broadest use of that term, it appears that the reviewers, both internal and external, were expecting the report to approach its subject from sociological, political, and economic perspectives, rather than as a legal analysis.

<sup>6</sup> This paper will describe these persons using the term “legal expert” or “legislative expert” to describe the range of legislative analysts, legal researchers and other legal consultants. In this regard it is important to realize that, although nearly all lawyers deal with legislation and legislative documents in every aspect of their practice, only a very small minority of these individuals are particularly capable or experienced in legislative draftsmanship and analysis, and an even smaller group is sufficiently versed in the comparative operations of legislation in a sufficient variety of countries to provide competent services as an “international expert” in legislative or regulatory development.

## **1. TECHNICAL EVALUATION**

Within particular projects, the technical evaluation of legislative documents is bounded by several restrictions/decisions. The following is a brief discussion of the three most important of these.

### **a. Substantive Scope**

Typically, the project requires a legal expert to evaluate legislation in a particular substantive area. The breadth or narrowness of this area is a major factor in determining how complete and detailed the technical evaluation will be. In the present project, the scope of analysis was tightly focused – legal obstacles to improvement of national forest regulatory schema, with particular attention to the roles of mechanisms for public participation and of donor agencies.

### **b. Limitations**

In some cases, there may be limitations on the substantive categories of law that may be included in the analysis. For example, research on forest-related legislation may be limited to legislation developed by the Forest Ministry. This may happen directly by provision in the Terms of Reference. More often, it happens indirectly, where the agency providing documentation does not have access to or knowledge of relevant legislation in other sectors. This is one of several reasons that it is usually necessary for the legislative analyst to visit the country and collect legislation in person.

In the absence of this type of restriction, it is well accepted that legislative analysis must examine relevant legislation from all substantive areas.<sup>7</sup> Only in this way can the legal/legislative researcher and those who rely on his work have any reliable baseline analysis concerning many elements of national legislative, administrative and judicial orientation which have a direct bearing on how legislation is created, how it is perceived, how it is applied, how it is enforced, how it is interpreted, and how it is changed or repealed.

In the present project, the minimum appropriate scope of review was broadened by the juxtaposition of three distinct substantive groupings – forest-related law; law of public participation; and legislative/regulatory process.

### **c. Levels of Government**

Governments typically operate at a number of levels, in both federal and non-federal systems. With formal legislation, or informal rules and procedures found at all levels. In general, the vertical scope of a legislative analysis is a function of the amount of money and time that can be devoted to the analysis. The impact of this scoping decision varies widely and unpredictably.<sup>8</sup> While in some countries an analysis limited to the national level gives a clear picture of the problems and issues of concern, in others it may bear no relevance to them at all.

In the present project, although time and financial constraints required that the work be focused on central levels, the nature of the subject matter (public participation) appears to have motivated each of the national consultants to conduct research and to call upon relevant experience with regard to provincial, district and local issues, as well.

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<sup>7</sup> “Desktop” consultancies are sometimes undertaken to provide legal analyses or legislative drafting, however their value is often questionable, owing to the need for a more complete contextual understanding.

<sup>8</sup> Factors such as legal system, literacy, communication infrastructure, etc., do not appear to bear a reliable relationship to whether a national-level-only analysis will yield a useful and sufficient picture of the nature of the legal/legislative situation under study.

## 2. EXPERIENTIAL (OPERATIONAL) EVALUATION

Having amassed and reviewed the relevant body of legislation, the legal analyst is still lacking a significant informational input necessary to properly “analyze” its content. An evaluation of the words on paper can only tell the reader how the analyst, if he were called to sit on the national judiciary, would interpret these documents for purposes of juridical decisions (guilt/innocence; liability/exculpation; authorization/non-authorization; etc.)

The law, however, has a broader role in society, which is much more important than its narrow construction in a courtroom. It is intended to be a guide for actions and implementation throughout the range of socially or politically mandated government or interpersonal relations in a given sector. It is impossible, by technical examination alone, to determine how a legislative regime or any part of it fulfills this mandate, or how it can be used altered or strengthened to improve its performance. To fill this gap, the legislative analysis should properly also examine “operations” and “effectiveness” (or “coverage”) of the existing legislative system.

### a. Operations

The legislative analysis must be based on specific facts about the country, including its political divisions, legal system, cultural history, and other matters that can help to analyze the kinds of laws used, and the options available for addressing problems and creating legislative programs. Beyond this, more specific operational information must be gathered administrative experiences in applying the current legislative/regulatory scheme, and judicial and quasi-judicial interpretations of it. This analysis is based on a compilation of relevant input from a broad range of sources – government officers and members of the various affected communities (the regulated public, impacted communities, and other “stakeholders”), as well as judicial documents (if available) or interviews with participants in trials, hearings, permit decision-making processes, and other direct procedures applying existing legislation.

In the present project, this factor appears to have been brought out primarily through the national workshops (Malawi and Mexico) and formal interviews (Nepal).

### b. Effectiveness/Coverage

The most difficult component of the legislative analysis is the examination of the effectiveness of existing laws and/or of the appropriateness of their current level of coverage. Although lawyers sometimes find this difficult to admit, the fact is that *no one can ever actually know whether or to what extent a particular law or legal system affects the activities, conditions, or relationships it addresses*. A community that embodies a particular social or cultural ethic may not need any law to encourage them to relate to one another and to their environment in a public-spirited manner that allows that society to thrive and to operate cooperatively. By contrast, a community that lacks such an ethic may find itself sinking into political decay and see a general rise in unacceptable or illegal activity, even though it is regulated by state-of-the-art legal provisions implemented by the most dedicated and selfless enforcement officials.

In evaluating the effectiveness and/or coverage of a legal regime, the legal expert is called upon to address factual questions, and to put them into the context of legislative recommendations. The primary questions posed in this portion of the research are

- ◆ What are the most significant problems encountered in this area?<sup>9</sup>
- ◆ How and to what extent are these matters addressed by legislation? (the “effectiveness” question)

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<sup>9</sup> This inquiry is often, but not always, limited to enforcement/governance problems.

- ◆ Why and to what extent are these matters outside the scope of existing legislation? (The “coverage” question.)

Typically, the legislative expert’s mandate is to offer suggestions and recommendations for addressing problems based on his/her experience, to identify other countries or fora whose legal experiences may be relevant, and to explain these recommendations in terms of contextual and other factors.

Here also, “effectiveness” and “coverage” information appears to have come into the current project through the national workshops and formal interviews, as well as through the process of review and comment by the IUCN Commission on Environmental Law.

## **B. NATURE OF LEGAL/LEGISLATIVE EXPERTISE**

In evaluating the role of the legal analysis, it is important to keep in mind the nature of legal expertise. In all of the capacities in which he might act, the legal professional’s work is directed at six general types of activity:

- ◆ Analyzing factual (“real life”) problems and determining how (or whether) the law or legal process are or may be used or revised to address them;
- ◆ Creating legal relationships and seeking to maximize the possibility that they will operate without obstruction, misunderstanding, or abuse;
- ◆ Representing individuals, entities and/or institutions, in the role of fiduciary, negotiator, or impartial referee;
- ◆ Participating in the adjudicatory and mediation systems by which obstructions, misunderstandings and abuses are interpreted, adjudicated, and enforced, terminated, punished, vindicated, compensated or remedied;
- ◆ Advising concerning the possible existence and/or probable outcomes of problems, relationships, and claims as described above;
- ◆ Advocating particular choices or objectives (selected by client or employer) in negotiations or before parliamentary or other governmental or pseudo-governmental bodies, and advising these bodies on how those choices or objectives can best be documented/implemented within the relevant legal system;
- ◆ Conducting reviews, comparisons, and analyses of any of the above.

Contrary to its perception as an opinion-based profession, the law is relatively rigorous in focusing on analytical/factual matters. In the context of law, an “opinion” refers to a reasoned analysis of facts and law, ending with a prediction of the outcome or legality of a particular event, situation, or activity, and/or a recommendation of a future course.

It is a profession focused on finding a way to an objective, rather than on choosing or evaluating those objectives themselves. Only when the lawyer steps beyond the bounds of his/her role and training may he do so. For this reason,

- selection of policies and objectives (politics, policy analysis, philosophy);
- inquiry into root causes of behavior (sociology, psychology); or
- evaluation of financial or political causation and/or outcomes (economics, anthropology, political science)

must be considered outside the scope of the lawyer’s professional expertise, in most instances.

IUCN-ELC is not generally mandated to work in other disciplines besides law, and legal issues in policy. It frequently does identify areas in which such work is needed, however, and/or work in tandem with professionals specializing in other disciplines.

## II. SPECIFIC ISSUES RAISED IN THE REVIEW

Before providing our recommendations and suggestions concerning further research to support improved forest laws and associated regulations, we must give some attention to three of the questions raised in NRI's internal and external reviews. We hope that these answers will not disappoint, even where they appear to explain the lack of direct answers rather than to provide them.

### A. CONCLUSIONS IN THE REPORTS

The most telling comment in NRI's review is its first specific comment – that the Final Report of the project is rather thin on conclusions.<sup>10</sup> Certainly, the Lead Consultant's general conclusion that “there is a correlation between the quality of the law making process and the resulting legislation”<sup>11</sup> states not so much the endpoint, but the beginning of the analysis. This appears to have been the starting point for each of the national reports, which document the extent of participation, identify gaps in participation, and suggests ways for maximizing participation, all with the clear objective of thereby improving not only the quality of the resulting legislation, but also its acceptance by the regulated public (often cited as the most important factor in the success of such legislation.)

NRI's comment underscores two weaknesses in the initial structure of this project:

- ◆ *Lack of integration of the work of the three countries:* To support the goal of synthesis of the three national reports, it would appear that the three national consultants should not have worked completely independently of one another. At a minimum, all three (and the Lead Consultant) should have participated in all three of the national workshops.<sup>12</sup> As a consequence of this weakness, the national reports were internally directed, and their conclusions focused only on particular recommendations for alteration in their own countries' national legislative and administrative processes and provisions.
- ◆ *Selection of countries:* The complete disparity among the three subject countries – geographical, juridical, social, political, bio-ecological, etc. – and among the forest issues addressed by their legislation made it virtually impossible that useful comparisons could be drawn between them, other than at random.

The Lead Consultant's response to the problems posed by these design flaws was consistent with his perception of his mandate – to complete a specifically described legal analysis. As a result, he opted to base his overall conclusions on the specific recommendations contained in the national reports. He therefore notes the similarities and differences among these three sets of national recommendations, rather than attempting to draw from their full contents a series of more-overarching conclusions concerning forestry legislation and legislative processes. This addendum (at part III) attempts to fill this gap.

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<sup>10</sup> NRI Review, ¶ 4.

<sup>11</sup> Id.

<sup>12</sup> The Lead Consultant participated in one workshop (Malawi), and conducted some of the informal interviews that were substituted in Nepal when no workshop was found to be possible.

## **B. UNDERLYING CAUSES**

The NRI review further expresses the concern that the report does not “identify the underlying causes of the disease”<sup>13</sup> *i.e.*, that it does not identify the root causes underlying the legislative problems identified in the national reports. This comment demonstrates the truism that legal analytical processes need to be coupled with socio-economic-political analyses. In the typical legislative analysis – directed at preparing the ground for the development of new or revised legislation – a socio-economic-political evaluation is usually present in the form of a pre-existing policy-analysis and/or policy development – typically the product of the work of several professionals from a combination of disciplines.

In the current project, however, the policy under scrutiny is a component of the political-legal system itself – the manner in which legislation is adopted or revised. In addressing this topic, an initial legal analysis was necessarily the first step. This initial legal analysis cannot, however, give final or satisfactory answers to questions, posed in the Review, such as

- ◆ Why is legal drafting so poor?
- ◆ Why don’t governmental law-making bodies engage in greater collaboration?

The lawyer’s answer to the first question may be either (i) because there are few well-trained legal draftsmen; or (ii) because the forestry legislation has been changed only rarely, if at all, in many years prior to the current revision, so that the legal specialists within forest ministries have not had occasion to develop this special expertise. (*See* footnote 6, *supra.*) Each of these answers would lead the sociologist to another “why?”

To the second question, the answer may be (as is frequently the case) that, under existing administrative mechanisms, the ministries are required to operate as separate units. Legal alternatives to the “independent ministry” system have always existed, and in recent years many legal/legislative mechanisms for improving inter-ministerial cooperation have been developed. It is not within the lawyer’s mission, however, to ask why a particular mechanism for dividing governmental responsibilities was adopted, only to suggest mechanisms for addressing the particular problems arising from the ministerial system that is in place.

If NRI feels that these questions of underlying causation need to be addressed, it would be possible for IUCN-ELC to develop, on the basis of the national reports under the current project, a program for further inquiry, however, the actual performance of such an inquiry would require a political scientist or the sociologist. We would note, however, that such inquiry would be an examination of the structure underlying the whole of each studied country’s national government and its relationship to the country’s social and cultural underpinnings. Although intellectually interesting, we suspect that such a study would not result in outputs of practical value.

## **C. THE PROBLEM OF “TESTABLE RESEARCH HYPOTHESES” IN THE CONTEXT OF LEGAL ANALYSIS (¶¶ 11-12)**

The NRI Review requests that IUCN-ELC identify “key researchable constraints (in order of priority) each with a testable research hypothesis.” He further notes NRI’s organizational goal of “fund[ing] research which tests hypotheses, leading to new knowledge which can then be applied to solve problems.”

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<sup>13</sup> NRI Review, ¶ 5.

IUCN-ELC is strongly of the opinion that further legal research relating to the questions studied in Project R7339 ZF0116 could be of inestimable value, providing information on legislative mechanisms and experiential evaluations of their use in a variety of situations.

Our concern in offering the recommendations in Part III, however, relates to the requirement of “testable research hypotheses.”<sup>14</sup> In order for a “research hypothesis” to be “testable,” it must, among other things, be replicable. Moreover, the phrase “testable research hypothesis” implies the use of an empirical methodology which is frankly inconsistent with the methods and subject matter of legislative research and analysis.

Legal research is, by nature, focused on governmental systems, of which there are in total, at the national level, some 200 in existence. Under close scrutiny, few if any of these systems will be found to be similar enough in all relevant parameters to be considered comparable for purposes of experimental replication. Moreover, it is not possible to make the standard empirical leap from the specific to the general, by utilizing provincial or local governmental systems as test subjects for theories of national governance.

A greater difficulty relates to the nature of legal conclusions. While it is certainly possible to analyze and opine concerning the quality of legal draftsmanship and the legal sufficiency of particular enactments or sectoral regimes, it is virtually impossible to determine whether and to what extent such documents are, in fact, effective,<sup>15</sup> owing to two basic obstacles:

- legislation is a single component within an overall system, which includes cultural, social, political, economic and historical factors too numerous to list. Identification of the effect of a specific legislative enactment is, at best, a supported “guess” – hardly an acceptable outcome for research into a “testable hypothesis.”
- once a change has been made in the law, it will be several years before its actual effectiveness and results can be measured, even in the best of circumstances (where legal changes have been effectively communicated to a literate population, and are fully explained to local authorities who have capacity to enforce them.) At best, it is difficult to say whether or to what extent legislative changes have been a contributing cause of an identified positive effect. In a field such as forestry law, this problem is further compounded by long growing cycles, and other variables, which increase the difficulty of assessing changes to the resource itself.

While an increase or decrease in the number of enforcement actions (a measurable factor) may sometimes be attributable to legislative changes, that is not always the case. In addition, more (or fewer) enforcement actions may not necessarily be indicative of the success of a law. To demonstrate effectiveness, one would instead have to (i) demonstrate a higher rate of *compliance* with the law (difficult to measure) and (ii) prove that enhanced compliance was a result of the change in law, rather than other factors such as improvement in local economy, increased environmental education, depopulation of forest areas (urbanization of younger generations), etc.

For the above reasons, we have given somewhat less of our attention to the development of “testable research hypotheses,” instead focusing on identification of research objectives and

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<sup>14</sup> The discussion of empiricism and methodology which follows is generated from our recollection of our personal experience as physical-scientific and social-scientific researchers, while we were undergraduates and graduate students. It is said that “old men forget,” and in compiling this brief statement we have found that middle-aged men and women forget as well. We apologize for any inaccuracies in this discussion, and hope that its main message is not obscured by them.

<sup>15</sup> A corollary issue – whether better drafting or more inclusive provisions, etc. would result in greater effectiveness is similarly difficult or impossible to determine.



enumeration of the particular values that the research results might have in addressing problems of forest-related legislative development.

### **III. RECOMMENDATIONS RE: THE “NEEDS OF DEVELOPING COUNTRIES FOR RESEARCH TO SUPPORT IMPROVED FORESTRY LAWS AND ASSOCIATED REGULATIONS”**

IUCN-ELC<sup>16</sup> offers the following recommendations for areas in which we believe that there is a need for research, and that such research will result in outputs that will be of inestimable substantive value for developing countries seeking to address problems of forestry governance and management through legislation.<sup>17</sup>

These recommendations focus primarily on the issue of participatory legislative and administrative processes as used or needed within the forest sector, given that this was the focus of the current project. In a few instances, related projects outside of this narrow focus are identified, where they are suggested by the project reports, or by the NRI Review.<sup>18</sup>

We have not limited our suggestions to the three countries, nor have we focused only on multi-country projects. Except where specifically mentioned, we have not attempted to specify particular countries, in light of our understanding that donor criteria will be specified with regard to the selection of countries, as they were for the current project.

The IUCN-ELC’s recommendations fall generally into three categories

- issues relating to donor participation;
- issues relating to matters commonly thought to be within the mandate of the forest sector, and
- issues more commonly thought of as “governance.”

While the specific distinction between these categories are largely blurred – more so because these suggestions are all focused on “forest aspects” even with regard to donor and governance issues – these recommendations are divided based on where the bulk of the research (and local counterparts) would be located in conducting the suggested research.

Although rarely mentioned below, the possibility of work in tandem with projects involving foresters, economists, political and social scientists, is inherent in many of these proposals.

**Note on Priority:** We suggest that proposals A, C.1, B.1, B.2, B.3, and C.2, should be given the highest priority, in that order. We would emphasize however that any of the projects described are potentially achievable, valuable and timely. Moreover, in several cases, it appears that two or more of the suggestions below might easily be combined into a multi-activity project or series of

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<sup>16</sup> Given that the authors of this Addendum were not directly involved in the substantive work of this project, our evaluation of priority may be based on factors outside of the Project’s scope.

<sup>17</sup> We have been informed that, for NRI’s purposes, additional case studies are “not a substitute for research hypotheses.” However, for purposes of legal research, we must note the difference between “case studies” and basic legislative analysis. The latter is a necessary prerequisite to any research regarding existing laws and legal issues. We must underscore, the need to begin any of the following research projects with an appropriate legislative analysis, or a painstaking review of existing analyses to ensure that they are correct, current, complete, and directed at the issues under study. If any follow-up project is to be undertaken in Mexico, Malawi or Nepal, IUCN-ELC recommends that the country studies be further elaborated into complete and sufficient legislative analyses, under the supervision of international legislative experts.

<sup>18</sup> IUCN-ELC will be happy to provide a broader list of areas in which legislative research could be undertaken that would “support improved forest laws and associated regulations.”

projects. Such a combination approach may be advisable if NRI proposes to go forward with more than one of the following concepts utilizing some or all of the same countries as “subjects,” given that the cost of replicating or supplementing existing legal analyses can be reduced if the initial work identifies legislation relevant to all proposed project areas.

## **A. PARTICIPATION OF DONORS IN LEGISLATIVE DEVELOPMENT**

One of the specific objectives of this Project was to evaluate “the role of donor agencies” with regard to the improvement of forest legislation and its influence of sustainable forest management. Given the increasing focus on intended and unintended incentives that impact natural resource management and conservation, in-depth inquiry into the manner in which donor financing of legislative processes affects the outcomes of those processes appears a timely and critical subject for in-depth examination.

**Brief Background:** Each of the country reports in this Project noted particular concerns relating to donor participation in forest legislative processes. Not surprisingly, these comments included both strongly worded criticisms of the nature and level of involvement of donors in a process that is expected to be national, democratic and independent, as well as statements of the need for additional (outside) funding for participation and for legislative development more generally.

It is indisputable that bi- and multi-lateral assistance programs as well as international financial organizations have played a significant role in advancing the process of national legislative development. Less information is currently available on

- whether and how the objectives of the donors aligned with or differed from those of the regulatory bodies proposing such legislation, the parliamentary bodies enacting it, and the regulated community;
- the extent to which that involvement has influenced or altered the legislative development process and/or the output (legislative content),
- whether such alterations were warranted and effective in achieving national and sectoral objectives of such legislation.

Forest legislation offers an excellent opportunity for examination of this question, given that its objectives offer a blend of two or more components (often conservation and commercial development are primary concerns) about which international concerns and domestic concerns will not align perfectly.

**Research Proposal:** Identify two or more countries whose particular experience in legislative development or revision was largely financed or requested by external donors (IFOs or aid agencies) within the last 5-10 years.<sup>19</sup> The project would examine all available records concerning the legislative development and donor financing processes, with particular attention to how the donor-funded legislative process (including participation by various interested parties, communities, governmental sectors, etc.) compared to more conventional legislative development processes. It would also examine the substantive issues were addressed, and how those issues were raised, affected or dealt with. This basic examination of the former process would then be supplemented with a review of the particular problems of concern to the various components of the national forest sector, and affected communities and groups at the time of the legislative process. The third component of the project would be an examination of the current state of those

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<sup>19</sup> Both Malawi and Nepal would qualify for such a project. Although little in the initial country studies directly addresses donor involvement, those studies could provide a basis for further work on this issue.

problems and objectives and how they have been altered or affected in the time since the legislation has passed.

**Objective:** To analyze and compare experiences of donor-financed or –mandated legislative processes or administrative reorganization in the forest sector, regarding the extent to which donor involvement affects the substantive content of the legislation or other revision, and to provide a basis for recommending changes in the mechanisms of donor involvement, where appropriate to ensure that national legislative processes increasingly meet national needs and concerns, and are enhanced (rather than subsumed) by international participation.

## **B. FOREST-SECTOR ISSUES**

### **1. CROSS-SECTORAL FACTORS**

An important and frequently overlooked component of the participatory process is the participation of other governmental units, agencies and ministries. Concerns regarding the lack of inter-ministerial cooperation and in some cases, direct competition were expressed throughout the country reports.

**Brief Background:** As participatory management principles become more expansive in the forestry sector, they increasingly come into contact (or conflict) with the plans, legislation, and administration of other sectors. Standard legal mechanisms for addressing, avoiding or resolving inter-sectoral conflict or confusion are frequently ineffective. In a few legal systems, specific participatory processes have been developed, which are intended to provide both a mandate and an incentive for cross-sectoral cooperation.

**Research Proposal:** Examine two or more legal systems which utilize participatory process mechanisms for (1) involving other sectors in forestry decision-making; and (2) preempting future complaints from such bodies when the legislation involved conflicts with other sectoral proposals or objectives. The countries or regions studied should have had such mechanisms in place and operation for at least 5 years. In this work, special attention should focus on the systemic and cultural underpinnings that support or undermine the effectiveness of such a system, and the extent of consequent or counteracting legislative processes by other sectors.

**Objective:** To provide a basic understanding of the role of mandatory inter-agency participation mechanisms (including SIA) in fostering the development and improvement of forestry legislation, and minimizing inter-sectoral conflicts and overlaps.

### **2. MECHANISMS FOR LOCAL ENFORCEMENT AND IMPLEMENTATION**

Concerns were expressed in all three country studies concerning the ability of local and district officials to implement and enforce forest legislation.

**Brief Background:** Regardless of the level of governance at which forest legislative and administrative programs are created, the primary instrument of their implementation and enforcement is nearly always the most decentralized level of government official.<sup>20</sup> The most significant decisions relating to forests are frequently those within such officials' discretion, such as whether and when to cite or prosecute violators, evaluation of compliance with permit conditions, etc. Funding issues for specific forest-related activities at the local level often raise

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<sup>20</sup> This statement is true whether the individual official is directly employed by the federal or central government, given that he or she is usually stationed in an outpost office in the region for which he is responsible. Only in very small (usually island) countries can one find a single central forest office which directly implements and enforces relevant law.

additional concerns. Participatory legislative and administrative processes are often undertaken on a problem-by-problem basis, and often solutions do not (or cannot) make any allowance for the ability or inability of local officials to bring them to fruition. Modern forest legislation evidences an unquestionable trend toward greater flexibility in implementation, which by implication requires a higher level of participation at this “ground” level of enforcement. While the logic behind this approach is presently unquestioned, its level of effectiveness is dubious in many situations – often blamed on lack of appropriate local implementation.

**Research Proposal:** Examination of one or several instances in which lack of empowerment, legislative conflict or other legal/legislative/administrative obstacles are cited as the reason that recently adopted or revised (*i.e.*, less than 10-year-old) forest legislation has not been successful. Identification (from legislative database and other research materials<sup>21</sup>) of various legal, legislative, institutional and financial mechanisms for surmounting this type of obstacle, and evaluation of the probable applicability and effectiveness of each in the context of particular situations examined.

**Objective:** To provide an initial researched basis for the development of legislative and institutional solutions to problems of inadequate local enforcement of modern forest legislation.

### 3. COMMUNITY FORESTRY AND LAW – DEVELOPING LEGISLATIVE AND ADMINISTRATIVE PROGRAMS “BY DOING”

All three of the country studies noted some increasing emphasis on community involvement in forestry, including community forest management programs.

**Brief Background:** Even more than general forest legislation, legislation relating to community<sup>22</sup> forest management must necessarily be both (a) carefully tailored to address a range of factors (social, political, cultural, economic, historical, definitional etc.) and (b) responsive to new issues and problems that arise both in the regulation of CFM activities and in development of commercial and management capacity within community groups to enable them to participate effectively in the full range of forest management. Legislation and administrative/institutional development form an important component of this process. In a few recent instances, an iterative legislative development process has been undertaken focusing primarily on participation by forest communities in developing and implementing rules and plans, which are put into operation in advance of being memorialized as legislation.

**Research Proposal:** Examine at least one instance of the use of iterative participatory processes in the development of community forest programs and legislation. Focus of the examination should include (i) the legal bases on which the process was created and implemented; (ii) the extent and procedures for public participation; (iii) substantive processes and issues; (iv) (if possible based on the existence of or conduct of sociological research) level of acceptance and implementation of the resulting regulatory program. Compile a document of “lessons learned” in those processes. Identify (from legislative database and other research materials) particular difficulties encountered in the development of legislative and institutional frameworks for CFM in other countries, and evaluate the potential for application of iterative participatory processes as a mechanism for developing solutions in those countries.

**Objective:** To provide an analytical basis for utilizing recent experiences in iterative participatory legislative development processes, in the context of CFM development.

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<sup>21</sup> In this Addendum, “legislative database” and “other research materials” refer to IUCN-ELC’s extensive Legislation Library and Literature Library, respectively. More information on the contents of these valuable research resources will be provided on request.

<sup>22</sup> Even the most basic definition of community has come to be problematic in addressing these issues.

#### 4. INTERESTS OF FOREST HOLDERS

One forest legal issue which has been the subject of a substantial body of research is the issue of forest ownership<sup>23</sup> and its relationship to forest management and sustainable use. Within the studies undertaken to date, however, there has been little direct examination concerning the relationship between forest ownership and participation in forest governance. In two of the country studies, issues of forest tenure were specifically mentioned.

**Brief Background:** Arguably, some of the stakeholders most impacted by legislative and institutional changes in forest management and administration are the holders of legal interests in forests or forest lands, as well as those who have been occupying or cultivating forest lands over significant time periods. Various approaches to participatory legislative development may give these individuals a greater or a lesser voice in the eventual development of legislation.

**Research Proposal:** Beginning with a literature search, examine the various issues of forest management that are thought to be most directly affected by land tenure arrangements (“tenure-related issues.”) Identify one or more subject countries in which participatory processes have been used in the development or revision of legislation in the last 5-10 years. For each subject country, determine the method used to foster/encourage/conduct the participatory process, and the extent to which forest owners were represented therein, in comparison to other groups. Identify particular issues raised by the participatory process and how they were addressed in the resulting legislation. Compare results looking for correlation between the level of participation by forest owners, and the methods used to address the tenure-related issues.

**Objective:** To provide analytical guidance concerning the representation of forest owner groups in participatory processes.

### C. BROADER GOVERNANCE ISSUES

While the following issues are primarily issues of “governance,” with implications that extend well beyond forests, these proposals and suggestions focus entirely on the relevance of these governance and administration issues within the forest sector.

#### 1. CONTROLS AND MANDATES ON GOVERNMENT: EVALUATING THE ROLE OF SECTORAL AGENCIES IN DEVELOPMENT OF LEGISLATION WITHIN THEIR SECTOR

As a reviewer correctly noted during the “IUCN and CEL Review” component of this Project, “Because the law-making process [creating the Nepal Forest Act], was lead by the Forest Department, [the resulting forest legislation] contains are very few checks and balances on the behavior of the Forest Department. The law has allowed the Department to use delaying tactics and to manipulate the system so that the opportunities for using forest to alleviate poverty have been missed.”<sup>24</sup> As forest management and governance become increasingly technical, however, many countries’ legislative bodies are guided almost exclusively by sectoral forest agencies in legislative development.

**Brief Background:** Participatory process offers one mechanism by which the “forest department monopoly” on the process of developing forest legislation can be controlled or influenced. However, in many cases, that process, too, is controlled and managed by the forest department.

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<sup>23</sup> For these purposes, the term “forest ownership” can refer to any right-based possession or use of forest lands.

<sup>24</sup> Bill Jackson, Director, IUCN Global Forest Program, Gland, Switzerland. Letter dated 27 June, 2000.

**Research Proposal:** Identify (from legislative database and other research materials) the components of forest legislation most commonly directed at controlling of forest officials, and mandating governmental actions (“sectoral-governance controls”). Select two or more study countries, whose legislation was developed in a process primarily conducted and controlled by the forest department, and two or more study countries whose process was primarily conducted and/or controlled by another arm of government (the Ministry of Justice, or other body.) For each study country, (i) evaluate the legislative development process, in terms of the number, relevance and sufficiency of checks on and inputs into this process, and the degree to which its requirements were met, and (ii) evaluate the resulting legislation in terms of the sufficiency of its provisions in the areas of sectoral-governance controls. Compare and draw conclusions about the results of this research.

**Objective:** To provide an analytical basis for creating procedures for the development of forest legislation which ensure that appropriate attention is given to controlling and mandating the activities of forest departments and officers.

## 2. COSTS OF GOVERNANCE

**Brief background:** The financing of participatory governance is a matter of critical importance to the improvement of public participatory process, and the consequent improvement of forest legislation. A number of important limiting issues typically arise relating to the cost of the participatory process. While some of these are legal issues (such as the mechanisms used, and the legal basis and mandate underpinning this use of funds), questions concerning the “comparative costs of different levels of collaborative decision-making,” the sources of law-making budgets, and the political choices regarding this use of government funds<sup>25</sup> and/or the creation of national or sub-national “forest funds,” appear to be matters for the economist, economic strategist, or political scientist to determine.

**Research Proposal:** Examination of the legal bases for three or more legislative models regarding the financing of forest governance, focusing on the need to pay the costs of forest management planning, strategic and environmental impact assessment, legislative development (at all levels, particularly in cases of strong mandate for decentralization of forest governance), monitoring and evaluation, and procedures for public participation in each of these processes.

This analysis could focus on a countries with similar governance system and mandates (*e.g.*, countries in transition to market economies; countries whose historical form of governance is tribal- or family-based (where that system continues to exert influence on an informal level); pre-colonial countries whose legal system is based on common law (or civil law); etc.)

**Objective:** To analyze and compare different systematic legal/legislative approaches to financing participatory processes in the forest sector, including analysis of their administrative implementation and functioning, with a goal of identifying common problems and evaluating the advantages and disadvantages of particular solutions, in various contexts.

**[NOTE:** This proposal could be undertaken in concert with, as a prelude to, or as a follow-up to economic/policy research relating to the following policy and practical issues – comparative costs of different mechanisms for participatory forest governance, sources of funding for forest legislative development (and other governance), political support for this allocation of funding, etc.<sup>26</sup>]

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<sup>25</sup> NRI Review, ¶ 6

<sup>26</sup> These issues were identified in the NRI Review at ¶ 6, and are presumably issues in which NRI is interested.

### 3. METHODOLOGIES OF CONFLICT RESOLUTION

**Brief Background:** As forest governance has transformed from its former focus on resource extraction and commercial development into a mechanism for addressing a complex of interrelated concerns, it has become more complex to administer. Still, however, the basic determining factor regarding the success of forest legislation remains the same – public acceptance. In the absence of this factor, governmental forest enforcement can never be sufficient to protect forest from illegal and harmful activities of all types. In this regard, the use of more complex legislation and institutions increases the possibility that members of the public will be dissatisfied with regulatory decisions. Similarly, increased government regulation of land uses and use restrictions multiplies the bases for concern. For this reason, the need to develop conflict resolution mechanisms relative to forest governance and management is increasingly recognized.

**Research Proposal:** Identify (from legislative database and other research materials) countries whose forest governance system includes specific mechanisms for conflict resolution. Select two or more such countries for in-depth study, both of the system as created legislatively, and of its operation in fact. Prepare a comparative analysis of the legislation and practices studied in-depth, supplemented by discussion of other types of mechanisms included in or applicable to forests, based on the initial research.

**Objective:** To develop a basic understanding of the options for forest-related conflict resolution mechanisms. In this connection, it should be noted that the need for conflict resolution mechanisms is also recognized with regard to the environment, more generally. Forests, which present a classic combination of objectives (biodiversity conservation, recognition and protection of ecological functions, resource development, poverty alleviation, etc.) may be an appropriate crucible in which to examine the value of such mechanisms.

### 4. REPRESENTATIVE VS. DIRECT PARTICIPATION

**Brief background:** Another critical issue relevant to the participatory process is the scope of participation. A critical underlying question here is whether such processes should attempt to involve all concerned individuals, or merely to ensure the representation of all relevant classes of stakeholders in the process. The increasingly “representative” (or as some would say “token”) approach to public participation is highly controversial. Although it is being discussed in many fora, this issue has not been sufficiently addressed in the forest context. From a legal perspective, each option offers unusual challenges. This issue is one of combined interest for the political scientist/strategist as well as the lawyer.

**Research Proposal:** Identify one or more countries which have utilized one of the various options for participation in development of legislation which has been adopted and in place for a period of not less than 4 years. Undertake a systematic study of (i) the extent of participation involved in the prior process, (ii) examine the mechanisms by which participation was solicited or encouraged; (iii) examine the functioning of the legal/administrative system through extensive contacts with all components (governmental and private) of the forest sector, addressing to the particular matters addressed by the revised legislation, including special attention to issues that were raised and addressed by the participatory process as well as other issues; (iv) (optional, if sociological researcher can be added to the project team) assess the extent of acceptance/buy-in of various stakeholder groups to the resulting legislative/administrative framework; and (v) develop an analysis or comparative analysis concerning how and to what extent various types and scopes of participatory processes affect the outcome of that process – *i.e.*, result in legislation that addresses known problems and concerns.

**Objective:** To provide an analytical basis of support for use in adopting, implementing or revising participatory governance programs, which provides functional analysis of existing programs in terms of the relationship between the scope and nature of participation and the acceptance and coverage of resulting legislative or other outputs derived through such participation.

**[NOTE:** To some extent, the question of scope and nature of participation is more a policy than a legal issue. Often a decision regarding the level of participation that will be mandated under participation laws is one of the trade-offs involved in securing support for the enactment of those laws.]



## TOMME ROZANNE YOUNG

Tomme R. Young is Legal Officer at the IUCN Environmental Law Centre in Bonn, Germany. Throughout her 19 years as a lawyer, she has developed a specialised expertise in many areas of environmental law and policy. She has worked in many diverse locations around the globe. Internationally, Ms. Young has served as a special advisor on environmental and sustainable development issues to foreign governments, under the auspices of several UN agencies. She has advised the governments of 16 countries in Europe, Africa, Asia, Oceania and the Americas, on legislative drafting and negotiations and regulatory development. She has participated in negotiation of international and regional agreements, and prepared advisory white papers on the Biodiversity Convention, forest legislation and administration, sustainable development, environmental protection, resource development and conservation, and coastal zone management, for the United Nations. In addition to this, she has represented numerous international corporate clients.

In the field of forest law and administration, Ms. Young has focused particularly on the legal issues relating to the sustainable management of forests, and related resources. She has undertaken in-depth national analyses of legal, legislative, administrative and policy issues relating to forest management and sustainable use in 10 countries in Africa, Asia, Europe, Oceania and the Caribbean. She has written comparative analyses of legal and administrative issues relating to forests including

*Trends and Innovations in Forestry Legislation in Asia and the Pacific (FAO 1998)*

*Trends and Innovations in Forestry Legislation in Anglophone Africa (FAO, 1999)*

*China, Mongolia, Myanmar, Vietnam: the Transition of Forestry Activities to Market Oriented Operation (FAO 1998)*

Other recent forest-related legal publications include: *Evaluation of Commercial Forest Plantation Resources of Trinidad and Tobago (1994)*; *Evaluation and Analysis of Tongan Forests Conservation and Environmental Legislation, with Proposals for its Revision (1996)*; *Legal Issues Relating to Strengthening National Forest Fire Management Capacity in Indonesia (1996)*; *Legislation and Legal Assistance for Conservation and the Establishment and Management of Regulations and Programs for Sustainable Forest Management and Conservation in Bhutan (1997)*; *Harmonisation of Legislation and Strategy for Forestry Sector Formation in Slovakia, in the Wake of Transition to Market-oriented Operations (1999)*

Ms. Young's other international publications include legislative reports and analyses addressing national and regional legislative status and particular issues of conservation, environmental protection, pollution prevention, coastal and marine management, access and IPR issues and environmental compliance and enforcement.

Ms. Young was in private practice in San Francisco (USA) for nine years, specialising in environmental and transactional law, as well as energy, land-use planning and financial instruments. She has served as an adjunct professor in several institutions, including at the University of San Francisco School of Law. She was co-author of the treatise Managing Environmental Risk in Transactions (West Group, looseleaf), which she updates annually. She has written numerous articles in periodicals as diverse as the AGC Construction Manual, World Conservation, Distressed Real Estate Law Alert, Environmental Law for Lenders, and The Flood Report. She is a member the ABA Sections Section on International Law and Policy, where she has chaired the International Environmental Law Committee, served as liaison to the ABA Standing Committee on Environmental Law, and the Subcommittee on Transboundary Movement of Hazardous Waste, and developed the ABA policy for the Earth Summit. She is a frequent speaker on environmental and business issues.

Ms. Young is a graduate of Hastings College of the Law (1981), and the University of Southern California (1978). She was as an editor of the Hastings International & Comparative Law Review.

## **CHARLES E. DI LEVA**

### **Biographical Details**

Charles E. Di Leva is the Director the IUCN Environmental Law Programme, based in Bonn, Germany. Prior to this position, he served since 1992 as Senior Counsel for the Environment and International Law Unit of the World Bank Legal Department in Washington, D.C. There, he advised the Bank and client countries throughout the Bank's regions on environment-related legal and policy issues pertaining to World Bank-financed operations and activities.

Mr. Di Leva's work at the Bank included advising on forestry- and forestry-law-related projects in Africa, Asia and Latin America, including assisting with drafting such legislation. He also worked extensively on Forest Issues related to indigenous and community forestry, resettlement and environmental assessment. Most recently, he has worked in Cambodia on that countries new draft Forestry Law.

Prior to joining the World Bank, Mr. Di Leva served as Trial Attorney with the U.S. Department of Justice, Environment and Natural Resources Division (1984-86, 1990-92), and as both the Environmental Advocate for the State of Rhode Island Department of Attorney General and Legal Counsel with the Rhode Island Department of Environmental Management (1979-1984). From 1986 until 1989 he worked in private practice with a large national environmental law firm. He has also served as Senior Program Officer stationed in Nairobi, Kenya in the Environmental Law Unit of the United Nations Environment Programme (1989-90).

Since 1993, Mr. Di Leva has also taught as an Adjunct Professor, offering courses in Comparative Environmental Law at American University's Washington College of Law, and International Environmental Law at the George Washington University School of Law.

Mr. Di Leva is a graduate of Vermont Law School (1978) and the University of Rhode Island (1975).