

**Synthesis report**

**FOREST LAW AND REGULATIONS:  
OBSTACLES TO IMPROVEMENT**

**Richard Tarasofsky  
Lead Consultant**

**7 August 2000**

## TABLE OF CONTENTS

TABLE OF ABBREVIATIONS.....	3
<b>I. INTRODUCTION.....</b>	<b>4</b>
<b>II. OVERVIEW OF THE LEGAL PROVISIONS ON FORESTS IN MALAWI, NEPAL AND MEXICO.....</b>	<b>4</b>
A. OWNERSHIP.....	4
B. MANAGEMENT APPROACH .....	5
C. CONSERVATION AND SUSTAINABLE MANAGEMENT.....	6
D. INSTITUTIONS.....	6
<b>III. REVIEW OF LAW-MAKING EXPERIENCES ON FORESTS IN MALAWI, NEPAL AND MEXICO.....</b>	<b>7</b>
A. LEGAL REQUIREMENTS RELATING TO THE LAW-MAKING PROCESS .....	7
B. WHICH GOVERNMENTAL ACTORS WERE INVOLVED? .....	9
C. AVAILABILITY OF FINANCIAL RESOURCES FOR THE LAW-MAKING PROCESS .....	10
D. INFLUENCE OF OTHER RELEVANT LAWS AND THE PROCESS BY WHICH ANY INCONSISTENCIES WITH OTHER PIECES OF LEGISLATION WERE IRONED OUT .....	10
E. EVALUATION OF FEASIBILITY OF SUBSTANTIVE OR INSTITUTIONAL ASPECTS OF THE PROPOSED LEGISLATION.....	11
F. ROLE OF FOREIGN DONORS AND EXPERTS .....	12
G. PROCESS FOR IDENTIFYING PROBLEMS AND DETERMINING LEGISLATIVE SOLUTIONS.....	13
H. CONSULTATION OF STAKEHOLDERS.....	14
I. PRIMARY AND SECONDARY LEGISLATION .....	15
<b>IV. ASSESSMENT OF HOW THE LAW-MAKING PROCESS INFLUENCED THE QUALITY OF FOREST LEGISLATION IN MALAWI, NEPAL AND MEXICO.....</b>	<b>16</b>
<b>V. RECOMMENDATIONS ON IMPROVING THE LAW-MAKING PROCESS ON FORESTS IN MALAWI, NEPAL AND MEXICO .....</b>	<b>18</b>
A. GOVERNMENT ACTIVITY.....	18
1. Malawi.....	18
2. Nepal.....	19
3. Mexico.....	19
B. PUBLIC CONSULTATION .....	20
1. Malawi.....	20
2. Nepal.....	20
3. Mexico.....	20
C. TECHNICAL DRAFTING PROCESS.....	21
1. Malawi.....	21
2. Nepal.....	22
3. Mexico.....	22
D. ROLE OF FOREIGN DONORS.....	22
1. Malawi.....	23
2. Nepal.....	23

## **Table of Abbreviations**

ACPD	Assistant Chief Parliamentary Draftsman
CBD	Convention on Biological Diversity
CEL	IUCN Commission on Environmental Law
DOF	Department of Forests
DOL	Department of Lands
DFO	District Forest Officer
FUG	Forest User Group
FAO	UN Food and Agriculture Organization
IUCN	The World Conservation Union
LGEEPA	Ley General del Equilibrio Ecológico y la Protección al Ambiente (General Environmental Law) – Mexico
NOMs	Normas Oficiales Mexicanas (Regulatory Standards) – Mexico
NGO	Non-governmental Organisation
SECOFI	Secretaría de Comercio y Fomento Industrial (Ministry of Commerce and Industrial Promotion) – Mexico
SEMARNAP	Secretaría de Medio Ambiente, Recursos Naturales y Pesca (Ministry of Environment, Natural Resources and Fisheries) – Mexico
VNRMC	Village Natural Resources Management Committee

## **I. Introduction**

This report will synthesise the findings and recommendations of the country reports done under this project on law making for forests in *Malawi*, *Nepal*, and *Mexico*.

The report on *Malawi*<sup>1</sup> examines the law-making process leading up to the 1997 Forest Act, and subsequent regulations; the report on *Nepal*<sup>2</sup> examines the law-making process leading up to the 1993 Forest Act and subsequent regulations; and the report on *Mexico*<sup>3</sup> examines the extensive amendments made to the Forest Act in 1997 and the regulations adopted in 1998.

## **II. Overview of the legal provisions on forests in *Malawi*, *Nepal* and *Mexico***

The following is a summary of the main findings of each report on the substance of the forest statutes. Each legislative regime proved highly complex, covering a number of areas including the following:

### **A. Ownership**

All three statutes contain rules regarding ownership of forests and resources.

Under the Forest Act in *Malawi*, ownership of resources in forests depends on who (persons or communities) plants or protects the trees (whether planted or naturally grown). If the tree is natural, then the owner can use it in a sustainable manner. Where the tree is planted, the owner, i.e. "the person/community that planted it", has the right to harvest and dispose of it freely. In the case of leasehold forests, use and transport of naturally occurring timber requires a permit, whereupon the revenues from such permit fees accrue to the Village Natural Resource Management Committee (VNRMC), even if the reversion is freehold or public land.

In *Nepal*, ownership rules are also specified in the Forest Act. Five categories of public land are provided for: community forests, leasehold forests, government-managed forests, protected forests and religious forests; specific management and use rules are provided for each classification. A further category of private forests also exists.

---

<sup>1</sup> Background paper and workshop report prepared by Gracian Banda

<sup>2</sup> Background paper prepared by Narayan Belbase.

<sup>3</sup> Prepared by Maria Fernanda Sanchez Pardo, translated by Alejandro O. Iza

Article 3 of *Mexico's* Forest Act clearly vests ownership of forest resources in the hands of the commons, communities, natural persons and corporations who own the land where the resources are located. The Forest Act specifically states that its procedures will not alter the ownership regime of this land. Notwithstanding this, in order to use the timber resources, the owner must get governmental authorisation and submit a programme of forest management. As to use of forest resources generally, holders of ownership or use rights (or those with whom they have contracted), should respect the provisions of the Forest Law, the Regulation of the General Environmental Law (LGEEPA) and of the Land Act.

### ***B. Management approach***

The experiences in *Malawi* and *Nepal* reveal a strong movement towards decentralisation of forest management, particularly towards community management. In *Malawi*, the new legislation provides for the execution of forest management agreements between the government and communities, thereby providing an opportunity for an enhanced role for Village Natural Resource Management Committees (VNRMCs).

In *Nepal*, the 1993 Forest Act sets out extensive procedures for handing over state-owned forests to Forest User Groups (FUGs), representing communities, as well as for leasehold and religious forests. Depending on the applicable property regime, the Act places limitations on the use of the forests (e.g. in cases of community forests, the Act places some prohibitions on specified activities, while providing for conservation and management of the forests according to an approved workplan).

In *Mexico*, the legislation provides mechanisms for future decentralisation of forest management by, for example, authorising the Ministry of the Environment to conclude agreements with the Governments of the Mexican States, the Governments of the Federal District as well as with communities and the private sector. However, in reality this has not taken place perhaps owing to a lack of incentive to take such action, and the lack of training and economic resources to exercise these functions. For forest governance to be more assertively mandated, the Federal Public Administration Act (*Ley de la Administración Pública Federal*) will probably have to be amended (to reduce federal administrative powers (such as supervision, monitoring and drafting of regulations).) Such an amendment would have to be co-ordinated with further amendment of the Forest Act, as well as of the LGEEPA, to more explicitly define and authorise the powers of Mexican States and municipalities.

### **C. Conservation and sustainable management**

All three statutes include rules on conservation and sustainable management, in varying degrees of specificity.

The *Malawi* Forest Act includes, for the first time, provisions on deforestation, vegetation cover and loss of biodiversity. It also provides for the creation of protected areas by the Department of Forests and the Department of Physical Planning, although no coordination between the two bodies is specified.

In *Nepal*, specific provisions on conservation apply on public land, depending on the classification. For example, specific prohibitions are placed on community forests, mainly aimed at preventing serious degradation of the forests, and must be respected in the work plan to be prepared by each FUG. However, the precise extent of these prohibitions has been controversial in practice. With regard to leasehold forests, specific activities are permitted, upon application. In religious forests, even more stringent limitations apply. By contrast, lesser limitations apply in the case of private forests.

In *Mexico*, the Forest Act sets out rules concerning the use of forest resources, reforestation, agroforestry and non-timber forest products. Specific instruments, such as licences (including environmental impact assessments) and technical regulations (for non-timber resources, as well as for reforestation, agroforestry and activities aimed at domestic use). The Act addresses transportation and transformation of forest raw materials, as well as preventing and combating fire and pests. The Act also provides for use of planning instruments, including a forest development programme, a forest plantation development programme and a national reforestation programme.

### **D. Institutions**

Each of the new statutes contains provisions relating to governmental institutions.

The Forest Act in *Nepal* does not create new government institutions (relying mainly on the Ministry of Forests and Soil Conservation and the Department of Forests), but does establish the legal basis for the FUGs. It also grants considerable power to the Department of Forests to decide whether or not to hand over forests to FUGs, as well as the power to cancel the registration of an FUG. Because in practice these provisions are not subject to appeal, they clearly impact on the extent to which community forestry actually is practised.

In *Malawi*, the statute supplements the structure of the Department of Forests, by providing for a management board. The Forest Act also creates the VNMRCs for community based forest management. The Act sets forth functions for the Department of Parks and Wildlife, but does not address coordination with the Department of Forests.

The Forest Act in *Mexico* creates the National Technical and Consultative Forest Council – an entity whose specific purpose is to promote stakeholder/civil-society participation. The Council is a consultative body under the Environment Ministry. The Forest Act retained provisions (enacted in 1992) for regional forest councils. These Councils are consultative bodies to address all areas defined by the Act (and in those where the Ministry requires their opinion), including, *inter alia*, the following:

- technical criteria for the compilation of information and organisation of the national forest inventory
- participation in the drafting of regulatory measures (NOMs, or “Normas Oficiales Mexicanas”) for prevention, combat and control of fires, and of forest pests and diseases
- establishment of logging-bans, and
- elaboration of economic programmes.

### **III. Review of law-making experiences on forests in *Malawi, Nepal and Mexico***

#### ***A. Legal Requirements relating to the law-making process***

Although each country has a general procedure that is followed in the preparation of laws, only *Mexico’s* legislative structure specifically addresses the procedure to be followed in preparing amendments. This procedure includes inter-ministerial and public consultation, although there is no set process for incorporating public inputs into the actual drafting. (These procedures are Constitutionally required for every amendment of legislation in *Mexico*). In addition, a policy established by the Ministry of the Environment specifically discusses the integration of public consultation and consultation with the Congress with regard to the amendment of laws in this area.

The steps are as follows:

1. A diagnostic of the problem is prepared by any of the Parliament Houses or by the Executive (via any Government Ministry). In case of the 1997 Forest Act and Regulation, the diagnostic was prepared by the Ministry of the Environment, Sub-Ministry of Natural Resources, Directorate General for Forests.
2. A first draft is prepared containing the opinions of experts in relevant government departments.
3. A *ruling* on the regulatory impact (*dictamen de impacto regulatorio*), including a cost-benefit analysis, is submitted to the Ministry of Commerce and Industrial Promotion (SECOFI). All the Government Ministries are obliged to submit this kind of ruling to the SECOFI. This ruling is so important that if SECOFI does not approve it the whole amendment process will terminate.
4. At this point, a consultation process could be initiated via Regional Forums, and sectoral consultation processes (as was done in the case of the 1997 Forest Act. Other Government Ministries, however, do not provide for public participation.)
5. The Mixed Drafting Commission begins work, integrating the different sectors through the establishment of drafting commissions representing the different sectors and authorities
6. This draft is sent to the responsible commissions in the House of Representatives and the Senate.
7. From there, the draft is sent to the legal department of the Ministry of the Environment, Natural Resources and Fisheries, as well as to the Federal Procurator for the Protection of the Environment.
8. The revised draft is next sent to the Ministry of Commerce and Industrial Promotion for comments and proposals.
9. The draft is sent to the Legal Unit of the Presidency of the Republic, where its legal form, but not its content, is analysed.
10. Finally, the draft is sent either to Parliament as a Bill or Decree (for approval and its subsequent publication) or is published in the Official Journal of the Federation if it is a regulation.



### ***B. Which governmental actors were involved?***

In each country, a specific governmental entity initiated the law-making process and varying degrees of inter-ministerial consultation took place.

In *Nepal*, the process of drafting the statute was undertaken by the Ministry of Forests and Soil Conservation, led by the Department of Forests (within the Ministry), and assisted by a lawyer from the Ministry of Justice operating from within the Ministry. At times, the process involved the Minister directly. Different interviewees had differing views about the extent of inter-ministerial consultations during the law-making process, but all agreed that it was insufficient.

In *Malawi*, the work on the Forest Act proceeded under the auspices of the Ministry of Natural Resources. A key actor in the process was the Permanent Secretary for Natural Resources, who worked closely with the Assistant Chief Parliamentary Draftsman. It was reported that the Department of Forests was involved, but not intensely (even claiming ignorance of some amendments made before the draft was presented to cabinet). There was no formal consultation with any other departments. However, various officials had involvement through a series of workshops on the draft bill, and the Department of the Environment's Principal Environmental Officer (Legal) and the Policy Advisor were also consulted on specific aspects.

In *Mexico*, the initiative came from the Adviser of the Sub-Ministry of Natural Resources. The Ministry of Environment, Natural Resources and Fisheries set up a process that involved the Commission for Forests and Rainforests of the House of Representatives and the Commission on Sylviculture and Hydraulic Resources (also of the Senate.) Input was then obtained from the State Technical Consultative Forest Councils and the Legislative Committee of the National Consultative Council for Forests, although other relevant committees (e.g. on forest plantations and incentives) were not consulted.

### ***C. Availability of financial resources for the law-making process***

Law making can be both a lengthy and expensive process, particularly when it involves legislation as complex as for forests. Yet information on financial resources made available, or even budgeted, is difficult to discern. In neither *Nepal* nor *Malawi* has it been possible to precisely quantify the availability of financial resources. In both cases, the law-making process was done on a tight budget. However, there was no single funded project that carried the entire enterprise – rather, the funding was piecemeal and ad hoc. In *Mexico*, no specific budget was allocated.

### ***D. Influence of other relevant laws and the process by which any inconsistencies with other pieces of legislation were ironed out***

Given that forest issues are cross-sectoral, it is self-evident that legislation on forests will be related to other pieces of national legislation. A key challenge during the law-making process is to iron out potential inconsistencies.

In *Malawi*, the ACPD considered a variety of related statutes directly relevant to forest management, however not all, such as the Electricity Act 1998, Post and Telegraph Act 1995, Public Roads Act 1962, and National Roads Authority Act 1998 and the National Construction Industry Act 1996. These statutes all have an impact on the conservation and sustainable use of forests. In addition, no assessment was done of the relevance of traditional law, even though this law is very relevant to forests. Implementation of applicable rules of international law was captured by a general provision giving the Minister the power to specify implementation measures. However, it appears that the Act reflects some provisions in the Desertification Convention and the Convention on Biological Diversity (CBD), but not all those with relevance to forests. It also appears that that DOF did not view the CBD as being very significant as regards their mandate.

In *Nepal*, it does not appear that all related statutes were considered, since many inconsistencies exist. Examples of legislation that allow for the taking of land, including forests, include the Public Roads Act 1974, Water Resources Act 1992, Electricity Act 1992 and Land Acquisition Act. In addition, the Local Self-Governance Act 1998 includes provisions on the entitlements of Village Development Committees that are inconsistent with the community forest provisions of the Forest Act. There is, however, a provision in the Forests Act that provides that in case of inconsistency, unless otherwise specified, the Forest Act prevails. While this provision helps clarify the primacy of the Forest Act in some instances, there is some related legislation, such as the Nepal Mines Act 1966, that also includes similar provisions. Nonetheless, the Supreme Court has held that the Forest Act 1961 is a special Act that implies that it prevails in respect of forest management issues. It also does not appear that international law was considered very profoundly during the drafting process; in part this may be due to problematic inter-departmental coordination within the Ministry of Forest and Soil Conservation, in that different parts of the department are the focal points for different international instruments.

The various legislative documents affecting forests in *Mexico* lack internal consistency. While there are provisions intended to integrate Forest Act and the LGEEPA, with regard to those environmental principles and concepts most relevant to forests, there are two different interpretations: one that says that the amendments do not reflect an integrity with the provisions of LGEEPA, and another says that as a result of efforts to be fully compatible with the LGEEPA, the drafters of the Forest Law were unable to effectively integrate concepts of productive and commercial uses of forests.

### ***E. Evaluation of feasibility of substantive or institutional aspects of the proposed legislation***

As indicated above, all the pieces of legislation contained provisions which both substantially revised the existing rules and either created new institutions or amended the mandates of existing institutions. In other words, the new laws heralded significant changes, in some cases even sweeping changes. Yet, none of the countries performed feasibility studies in any formal sense or any kind of evaluation of likely practicability of these changes. In *Mexico*, however, the Ruling on Regulatory Impact (Dictamen de Impacto Regulatorio) is worth mentioning. Since 1998, this law has made it obligatory for every Government Ministry to submit a cost-benefit analysis to the Deregulation Unit of the Ministry of Commerce and Industrial Promotion (SECOFI), with regard to every new piece of legislation or legislative amendment.

## ***F. Role of foreign donors and experts***

In some developing countries, foreign donors and experts are significant actors in the development of law and policy on forests.

However, in *Mexico*, no foreign inputs took place directly on the current forest legislation, because it was judged that the domestic expertise was sufficient and that forest issues were considered to be internal matters. It must be noted, though, that foreign inputs did take place earlier in relation to other forest policy initiatives in *Mexico*. By contrast, in the other two countries, foreign donors did play significant roles in the law-making process on forests.

In *Malawi*, foreign input was somewhat limited and ad hoc. Two consultancy projects were funded in 1989/90 on forest legislation and forest policy. Although a draft Forestry bill 1993 was produced, the law-making process stalled until 1996. The resurgence of activity took place as a result of pressure from donors funding various projects in forestry, who were concerned about the impact of forest legislation on their projects. As a result, several donor projects at that time had a legislative component.

It should be noted, however, that there was little or no donor pressure for *Malawi* to adopt provisions in its policy and legislation that the country did not want. What was apparent, however, was that if a donor had specific interest in promoting a particular principle or strategy for forestry or environmental management (e.g. community management or decentralisation) more emphasis would be placed on this in its project document such that the departmental officials may have felt that this element was part of the conditionality.

In *Nepal*, foreign donors played key roles in the law-making process on forests, following a tradition of extensive donor support for the forestry sector. Rather than a single donor project financing the entire law-making effort, different aspects were funded out of different projects at various points in time.

Donors in *Nepal* also played another crucial function during the law-making process – in addition to providing funding. Through their field projects, they acted as intermediaries between the government and the grassroots, so as to allow the latter some input into law-making process. They solicited comments from FUGs, NGOs and individual experts on the draft Forest Regulations and provided their own inputs through participating in working groups. Although this more substantive role of donors was somewhat controversial (i.e. there were those who were concerned about the implications for Nepalese sovereignty), it was largely perceived as effective. Donor input was channelled by the government in a manner that allowed the government to keep control. Donor input may also have been instrumental in specific references in the regulations concerning foreign assistance (e.g. to FUGs).

### ***G. Process for identifying problems and determining legislative solutions***

In *Malawi*, this process was not as systematic as it might have been. General departmental experiences were gathered, but not in a structured manner. It is difficult to gauge the effect of this, since there was no official record of how these were used. Rather, the findings of the country-consultant were based on anecdote. However, a set of studies was done in the process of preparing the 1993-94 World Bank/FAO Forest Sector Review and the 1994 National Environmental Action Plan. In addition, several study visits were made to other countries, although not by the ACPD, who actually did most of the drafting. The National Forest Policy was a substantive input, but key parts were not reflected in the legislation. In addition, not all environmental policy initiatives were influential, even though they were relevant.

In *Nepal*, the Master Plan for the Forest Sector provided the basis for identifying legislative obstacles. The Master Plan reviewed various pieces of legislation and made several recommendations, some of them sweeping, on how to improve the legal landscape.

As mentioned above, Mexican law requires a formal process for identifying problems and determining solutions as part of the law-making process. This was done by the General Directorate for Forests, albeit in the face of political opposition from some quarters resistant to change.

## **H. Consultation of Stakeholders**

There were differing views about the level of consultation of stakeholders in *Nepal*, both as regards the statute and the regulations. Some interviewees indicated that a broad range of consultations was held with journalists, lawmakers, foresters associations and district Forest Officers. Others indicated that only three institutions received early drafts, only communities near Kathmandu were consulted, and only senior officers in the Ministry and Department of Forests were consulted. Differing views also were expressed about the level of consultation with NGOs. Whatever the case is, it certainly appears that no fixed consultation strategy was established or followed, at least in the case of the statute. The consultative process was more extensive for the regulations. However, there was no process for resolving conflicts among the stakeholders. And, uniquely, the donor forestry projects were actively involved in certain aspects of the law-making process, especially regarding the regulations.

In *Malawi*, no extensive public consultation took place either. Three regional workshops were held for traditional leaders, but only on the theme of community based forest management. No funds were available to conduct grassroots consultations, e.g. local meetings in all forest communities, although limited consultations were conducted as part of the World Bank/FAO sponsored forest sector review. A national workshop was held in 1996 on the draft Bill with some, but not all, stakeholder groups. But it appears that the impact of that workshop was limited, since proposals made at the workshop regarding enforcement were not taken up in the final draft Bill. In addition, no record of the workshop was directly supplied to the ACPD. No consultation has taken place in regard to developing the secondary legislation.

In *Mexico*, five regional forums were convened for approximately six Mexican states, all taking place in capital cities. The location limited the extent of actors that could participate. Most participants were from the government sector. Documents upon which the forums were based were not distributed in advance, and in general there was a lack of effective public access to relevant information. It is asserted in the report from *Mexico* that the conclusions and minutes of the forum did not match the actual discussions that took place. One debated issue was “to whom should the proposed changes be submitted?” The options were either (i) to the drafting committee of the National Technical Consultative Council for Forests or (ii) directly to the Parliament. As the latter option was more popular, this is what took place. The report from *Mexico* concludes from this that the organisers of the consultation process had pre-conceived notions on the specific amendments from the beginning.

A separate forum was convened to discuss the Forest Regulations (Reglamento Forestal) under the auspices of the Commission on Forests and Rainforests of the House of Representatives and under the Drafting Commission of the National Technical Consultative Forest Council. This commission was better organised and the process was more transparent. It produced a number of proposals, as well as consensus on their integration into the regulatory documents.

### ***I. Primary and secondary legislation***

Normally the decision about what should go into primary and secondary legislation is based on the principle that general and fundamental aspects of the regime should be codified in the statute, while the details subject to change should be in the regulations. Among the reasons for this are differences in the manner in which regulatory decisions and amendments are made; amending secondary legislation is often easier and quicker than amending a statute. This is because one does not want to have to go back to Parliament with every small change, when it can be more easily dealt with by Cabinet. There are certain grey areas, however, when smaller changes can in practice imply fundamental changes.

In *Nepal*, it appears that some key conflicts, especially relating to community forestry, could not be resolved during the process leading up to the adoption of the statute, and thus were left to be resolved through the regulations. The result was ambiguous wording in the text, which continues to be controversial. This is particularly relevant in respect of the precise entitlements of FUGs to use forest resources, which, to a significant extent, have been defined by secondary legislation. On the more positive side, the development of regulations on community forest management had a relatively high degree of public input.

In *Malawi*, the process of deciding what went into the Act was partly due to not having complete information, e.g. about pricing and marketing of forest produce, at the time of preparing the Act – therefore it was left to the regulations. It also appears that relatively more involvement by communities took place in developing the regulations that concerned them, because of the information that only they had.

In *Mexico*, the Act is very vague, offering no clear indication as to what regulations are permitted or required. As a result, much pressure was brought to bear in the drafting process, in some instances, leading to an amendment process that was sometimes haphazard. Here also, treatment of polemic issues contrary to the SEMARNAP policy were put off, under the justification that they would be considered in the Regulation, something that in most of the cases did not happen.

#### **IV. Assessment of how the law-making process influenced the quality of forest legislation in *Malawi*, *Nepal* and *Mexico***

Each of the pieces of legislation examined yielded problems potentially attributable to deficiencies in the law-making process.

In *Malawi*, these problems include:

- Problems relating to inappropriate institutional mandates being granted may have been due to insufficient interdepartmental consultations. Examples include not granting the DOF some power to deal with afforestation on leasehold land (which is now exclusively the responsibility of the DOL), and the powers of institutions under other statutes to take actions that affect forests.
- The rule that revenues from fees from freeholders or leaseholders for using natural trees should go to VNRMCs is problematic, in that it is why the revenues should accrue to VNRMCs and that no provision is made for the case where a VNRMC does not exist. This could have been avoided with more effective consultation with the private sector and NGOs during the drafting process.
- Confusion exists about the legal authority for creating VNRMCs, i.e. whether they are created by agreement under Section 31 between the Director and a management authority or elected by stakeholders of a village forest area under Section 2. In addition, it is unclear whether a village headman is such a management authority. This was likely exacerbated by lack of consultation with local communities.
- There is a lack of precision regarding the rules for community management on government-owned land or on customary land, as well as whether there can be co-management of forest reserves. This is possibly due to insufficient consultation with local communities, as well as bureaucratic intransigence in giving up control.



- The lack of harmony between the Forest Act and legislation on other sectors that affect forests is either because information from prior multi-sectoral reviews was not made available to the drafters or because the problems were ignored.
- There is incongruity between the Forest Act and legislation governing local authorities -- such as the Local Government (Urban Areas) Act and the Local Government (District Councils) Act and the Local Government Act 1998 -- regarding the role of local authorities in forest management. This is possibly due to lack of information by the draftsman and lack of consideration of overall government policy trends towards decentralisation
- The Forest Act 1997, like its predecessor, relies mainly on penal sanctions with low penalties for enforcement. This approach has, however, proven ineffective in *Malawi* and is in contrast to more innovative approaches in other pieces of legislation. This possibly reflects not taking account of multi-sectoral reviews carried out by related agencies.
- Even though the Constitution affirms that customary law is part of the law of the land, it appeared that these rules were not taken account of by the drafters.

In *Nepal*, these problems include:

- A lack of coherence between the Forest Act and other pieces of legislation affecting forests, both outside the sector (e.g. mines, public roads) and related laws (e.g. environment). This is most likely due to lack of coordination between government ministries.
- A provision of only usufruct rights to FUGs, not full ownership rights, with the perception by the author of the country study that proper financial incentives for sustainable management are not as strong as would have been the case with full ownership. This may be due to insufficient consultation with FUGs. It should be noted that not all reviews of this country study agreed with the author that the problem exists in reality.
- One CEL member reports that the problems arising from applying the community forestry provisions are the result of conflicting views on this as between donor agencies and the Forest Department.

In *Mexico*, these include:

- A lack of congruity exists between the General Law on Ecological Balance and the Protection of the Environment and the Forest Act, in that the latter does not really take into account the conservation and use of non-timber species and associated fauna . This demonstrates the lack of a cohesive process in the development of the legal orders, as the various proposals submitted by the different actors were not taken into account.
- There are no clear rules regarding the use of certain forest resources or undertaking of certain forest activities. This is partly because the law-making process did not take on board many specific proposals made from those consulted.
- *Mexico* also shares with *Nepal* and *Malawi* the problem of lack of coherence between the Forest Act and other statutes that affect forests.

## **V. Recommendations on improving the law-making process on forests in *Malawi*, *Nepal* and *Mexico***

Each report yielded several concrete recommendations, which are presented below in a clustered format.

### ***A. Government activity***

Several recommendations were made as to how government, as the initiator and leader of the law-making process, should act efficiently and effectively. These arise because of the perceived need in all case studies that those in government charged with the law making could have been more effective. The recommendations below are aimed partly at strengthening the relevant institutions and partly at improving the way law making is carried out.

#### 1. *Malawi*

- The Planning Unit in the Department of Forestry should be strengthened and the Forestry Research Institute of *Malawi* be properly utilised to ensure researched policy articulation.
- The Department of Forests (DOF) should consider employing its own lawyers rather than relying solely on consultants or the Ministry of Justice.

- Where new institutions are being created, such as for the promotion of community involvement, pilot projects should be established to inform the law reform process.
- The focal point for the drafting process of forestry legislation should be the DOF and not the mother Ministry of Natural Resources, so as to involve the actual professionals who face the problems on a day-to-day basis and ensure the inclusion of all relevant legal norms into the Act.
- A department that sponsors any new legislation should circulate drafts to other concerned institutions for their comments well before workshops are held to discuss those comments. Any such workshops should as much as possible build consensus with regard to principles, obligations, mandates among the various stakeholders through airing of comments.
- The department should assess and evaluate past legislation

## 2. Nepal

- An official record should be kept of the inter-ministerial consultation and review processes, as well as all drafts.
- It is necessary to involve DFOs and other district level line staff in the process – i.e. bring on board the views of those who deal with implementation issues on a day-to-day basis (although this is not meant to suggest that consultation with DFOs is a substitute for consultations with the local communities).
- Appropriate levels of financial resources should be allocated for the law-making process, especially to allow more effective consultation.

## 3. Mexico

- There should be inter-ministerial legal participation in drafting process, including representation on the drafting committee.
- A specific budget for information dissemination and consultation should be established.
- The Forestry Committee within the Federal Legislative Congress should play a key role during the consultation process, including during the compilation and systemisation stage, as well as in bringing together different parties.

## ***B. Public Consultation***

A second cluster of recommendations, in fact the majority, concentrated on how public consultation during the law-making process could be made most effective. This reflected a clear conviction by most of the interviewees and participants in the workshops that public consultation is a central component of effective law making.

### *1. Malawi*

- Public participation in legislation should be properly designed and planned. Public inputs should be sifted and synthesised by the Planning Unit in the DOF and discussed by representatives of various stakeholders including traditional leaders, politicians, NGOs and others. Records of proposals and recommendations should be kept.
- Donors should provide support for civil society to engage in the lobbying process so as to help ensure that important change is not derailed in Parliament.

### *2. Nepal*

- Public involvement needs to be assured through the creation of an iterative public forum that would systematically feed into the law-making process. This would involve a legally mandated committee with representation from different interest groups. A process of negotiation should be facilitated so that all stakeholders can participate effectively on an equal footing, and include a conflict resolution function. Documents should be circulated in advance and prepared for the target audience. Consultation should take place of grassroots (based on a sampling, staff members of district level government agencies, and central level experts).
- A public record should be kept of the consultations, hearings, seminars and workshops that take place as part of the consultation process.

### *3. Mexico*

- To ensure effective consultation, develop a methodology containing: objectives, strategies, rules for participation, compiling and vetting of proposals and recommendations, and the procedure to be followed.

- Inform those consulted about relevant policy developments taking place under other ministries (e.g. deregulation under commerce ministry).
- Create a record of the drafting process, including results of the consultation process and an annotated draft that justifies and explains the content.
- The consultation process should encompass several stages:
  1. Preliminary consultation of strategic sectors prior to the elaboration of solutions of (legal) problems
  2. Elaboration of a first draft of reforms based on preliminary consultation
  3. Field visits to obtain views of the local population in relation to forest-related problems
  4. Specific questionnaires directed to social organisations and a sample of individual producers
  5. Regional forums established to discuss specific strategically selected issues
  6. A drafting committee established with balanced representation, including Ministries and government authorities
- Integrate relevant pieces of environmental information from all sources in a digestible manner for those being consulted.
- Consultations should follow two parallel tracks: one for the type of resource and another for the sector.

### ***C. Technical Drafting Process***

A further cluster of recommendations relates to how the drafting process itself could be improved. Some of these recommendations relate to actions to be taken during the process, whereas other recommendations express more substantive regulatory objectives.

#### 1. Malawi

- International comparisons should be conducted on how other countries have dealt with similar substantive issues.
- Compare traditional legal norms with new legislative proposals.

## 2. Nepal

- More efforts to incorporate international and other relevant national legal norms should take place.

## 3. Mexico

- Ensure that reforms reflect a long-term policy outlook and can be sustained over a long period.
- Establish a global strategy for medium and long-term regulatory needs.
- Create an integrated legal framework for the management of natural resources.
- Consider not only standards and rules, but also compliance mechanisms, e.g. audits.
- Establish forest protection committees to prevent and detect illegal acts and to undertake restoration.
- Establish certification mechanisms for rendering of technical forestry services.
- Regulatory strategy should be such as to maintain minimum control and monitor compliance, but to allow the sector to operate with minimum costs and maximum efficiency.

### ***D. Role of Foreign Donors***

A final cluster of recommendations relates to channelling international donor support. These recommendations are drawn from the two countries where donors played important roles. They reflect the reality that as major actors, international donors can facilitate or hinder effective law making.

## 1. Malawi

- Foreign consultants should be engaged to bring in expertise on innovative and technical aspects of forestry legislation, but they should work closely with local consultants who must carry on and finalise the process after the expiry of the mission of the foreign consultant.
- Donors should not force the pace of legislation development that involves a number of natural resources sectors as this risks creating gaps and duplication between the individual pieces of natural resources legislation. This arises out of the experience in *Malawi*, where some donors required that their projects relating to improving the Forest Act be completed before multisectoral reviews could be undertaken. The result was a piece of legislation that has greater problems than other statutes where a multisectoral review did take place.

## 2. Nepal

- Donors should help ensure that sufficient resources are available for the law-making process.
- Donors can help bring the views of local people to the attention of central government through supporting workshops and other exchanges of information and views.