

Maine Law Review

Volume 60
Number 2 *Symposium -- Nation-Building: A
Legal Architecture?*

Article 17

June 2008

The Role of Public Interest Groups In Nation-Building: A Maine Lawyer's Experience in Mongolia

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Recommended Citation

Richard A. Spencer, *The Role of Public Interest Groups In Nation-Building: A Maine Lawyer's Experience in Mongolia*, 60 Me. L. Rev. 547 (2008).

Available at: <https://digitalcommons.minelaw.maine.edu/mlr/vol60/iss2/17>

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THE ROLE OF PUBLIC INTEREST GROUPS IN
NATION-BUILDING: A MAINE LAWYER'S
EXPERIENCE IN MONGOLIA

Richard A. Spencer

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THE ROLE OF PUBLIC INTEREST GROUPS IN NATION-BUILDING: A MAINE LAWYER'S EXPERIENCE IN MONGOLIA

*Richard A. Spencer**

I. INTRODUCTION

In 2006, I spent three months in Ulaanbaatar, Mongolia working as an environmental lawyer with a small Mongolian human rights group called the Center for Human Rights and Development (CHRD). CHRD was working to stop human trafficking, promote human rights, and protect the environment in the face of extreme poverty, government secrecy, corruption, and a post-Soviet government dominated by former members of the Communist party.¹

During my time assisting the staff at CHRD, I felt I could hear the voice of James Madison echoing through the centuries and across the globe. In *The Federalist No. 10*, Madison suggested that the greatest threat to democratic government was the potential for violence against the minority by a majority faction that gains political power.² He observed that the causes of faction are rooted in human nature and for that reason cannot be eliminated. He suggested that the only way to protect democratic institutions from the violence of factions is to control their effects.³ In *The Federalist No. 51*, he set forth the essential challenge of nation-building as follows: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."⁴ Madison continued: "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."⁵ Madison argued that in approaching the task of nation-building, one must not only create democratic or republican institutions of government, but also adopt "auxiliary precautions" in order to hold those institutions in check.⁶

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1. For more information about CHRD, see Center for Human Rights and Developments, About Us, <http://www.owc.org.mn/chrd/english/index.htm> (last visited Mar. 24, 2008).

2. THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961) ("The friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice.").

3. *Id.* at 80 ("[T]he causes of faction cannot be removed . . . relief is only to be sought in the means of controlling its effects.").

4. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

5. *Id.*

6. *Id.*

In Western pluralist democracies, a vast array of non-governmental organizations (NGOs) have emerged as a means of countering undue concentrations of government and economic power. In most Western democracies, public interest NGOs play a critical role in electoral politics, in the legislative process, and in vindicating public rights through the judicial system. Virtually all Western democracies have broadened the rules of judicial standing to provide NGOs with greater access to justice.⁷

The contribution of NGOs to the successful functioning of democratic institutions is also gaining recognition at the international level. The Aarhus Convention, for example, whose signatories now include most European and Central Asian countries, requires its forty-one members to grant judicial standing to NGOs and to guarantee broad rights of public participation in governmental decision-making.⁸

The United Nations has also fostered the active participation of NGOs in the development of international law through its international forums.⁹ In areas such as human rights and climate change, these opposite and rival interests have often provided the real energy and leadership for change. As one participant in the 1992 United Nations Earth Summit in Rio de Janeiro put it to me: “the official governmental meetings were like funerals; the NGO meetings were like jazz concerts.”

The proliferation of NGOs at the national and international level is not only important to the process of nation-building, but can also offer remarkable opportunities for people who wish to contribute to that process. If my own experience is any guide, the NGO sector can be far more open, flexible, and welcoming than the governmental sector.

In 2005, Urantsooj, the Director of CHRD, and its Board of Directors concluded that environmental damage to Mongolia’s rivers had reached dangerous proportions and needed to be addressed. Much of the concern centered around Mongolia’s mining sector, which had rapidly expanded since the early 1990s. The mining boom began when Russia withdrew its support for the Mongolian economy and departed the country in the aftermath of a peaceful democratic revolution.¹⁰ Mongolia adopted a new democratic constitution and free market economic reforms.¹¹ Although Mongolia had what appeared to be quite progressive environmental laws,¹² in actual practice

7. HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT: PUBLIC PARTICIPATION IN THE SUSTAINABLE DEVELOPMENT OF MINING AND ENERGY RESOURCES 89-90 (Donald N. Zillman, Alastair R. Lucas & George (Rock) Pring eds., 2002) [hereinafter HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT].

8. Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, arts. 2 ¶ 5, 3 ¶¶ 6-9, June 25, 1998, 38 I.L.M. 517 (1999) (Aarhus, Denmark) [hereinafter Aarhus Convention].

9. HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT, *supra* note 7, at 470-75.

10. See MORRIS ROSSABI, MODERN MONGOLIA: FROM KHANS TO COMMISSARS TO CAPITALISTS 177 (2005). After the Russians departed Mongolia, a decision had to be made on what to do with the Lenin Museum which contained a monumental two-story bust of Lenin. Unlike the Iraqis who were seen on televisions around the world pulling down a statue of Saddam Hussein, the Mongolians turned the Lenin Museum into a pool hall. The two-story bust now looks down disapprovingly on a cadre of young Mongolians all diligently practicing their bank shots.

11. See *id.* at 53-55.

12. See, e.g., CONSTITUTION OF MONGOLIA, art. 16 ¶ 2 (1992) (amended 2001), reprinted in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., 1996) (guaranteeing the citizens of Mongolia “[t]he right to a healthy and safe environment, and to be protected against environmental

mining was occurring with few environmental controls, little enforcement, and sporadic, if any, reclamation of land.¹³ As a result of a combination of deforestation, climate change, and unregulated mining, Mongolia's rivers were not only being polluted by silt and heavy metals, they were also drying up. The impact on Mongolia's nomadic herders was severe. With polluted and diminishing supplies of water, many could not continue their nomadic way of life and were forced to relocate to Ulaanbaatar or other cities. In some cases, rural authorities would not give displaced families the requisite permits to leave their *soums* (local administrative districts); others, who made it to the cities, were often ineligible for social services and denied political rights. Against this background, CHRD concluded that protection of Mongolia's rivers had become one of the most important human rights issues facing Mongolia.

CHRD contacted Global Rights in Washington, D.C., one of its international partners, and Global Rights contacted the International Senior Lawyers Project (ISLP) in New York. Jean Berman, the Executive Director of ISLP, contacted me in Maine and asked if I would be interested in going to Mongolia to help a Mongolian human rights organization protect Mongolia's rivers. The question seemed to answer itself.

For six months before we left, I learned as much as I could about Mongolian history and law. I found English translations of Mongolia's Constitution and many of its statutes on the Internet. I discovered that 800 years earlier, in 1206, Genghis Khan completed the unification of the Mongol tribes and was one of the great nation-builders in human history.¹⁴ I also discovered that he laid a foundation for environmental law in Mongolia. He created Mongolia's first protected areas by declaring the Bogd Khan, Burkhan Khaldon, and Otgon Tenger Mountains to be sacred ground.¹⁵ He promulgated a safe drinking water law by making it an offense to put one's hand in a water supply.¹⁶ He also established Mongolia's first wildlife protection laws by prohibiting hunting of various species of animals and birds during their breeding season from March through October.¹⁷

I also found that during the period of Soviet domination in the mid-1900s, Mongolia had close relations with East Germany. The Soviets departed in 1990, and

pollution and ecological imbalance."); *see also* Environmental Protection Law of Mongolia (1995) (unofficial translation) (on file with author).

13. WORLD BANK, MONGOLIA: A REVIEW OF ENVIRONMENTAL AND SOCIAL IMPACTS IN THE MINING SECTOR 26-28 (2006).

14. *See generally* JACK WEATHERFORD, GENGHIS KHAN AND THE MAKING OF THE MODERN WORLD (2004). This book includes a fascinating description of the legal reforms and strategies Genghis Khan used to forge one nation out of Mongolia's then warring tribes. One strategy was to overcome tribal division by establishing bonds of "fictive kinship." *Id.* at 44-45, 51-53. To this end, he adopted an orphan from each of the tribes he conquered, whom his mother, Hoelun, then raised, not as a slave, but as a younger sibling to Genghis Khan. *Id.* These fictive kinship relationships eventually brought all of the Mongol tribes under Genghis Khan's protection and control as a single Mongol nation, which he referred to as "the People of the Felt Walls." *Id.* at 57.

15. Unesco.org, Mongolia, Sacred Mountains: Bogd Khan, Burkhan Khaldun, Otgon Tenger, <http://whc.unesco.org/en/tentativelists/936> (last visited Mar. 17, 2008).

16. Coldsiberia.org, The Yasa of Chingis Khan, <http://www.coldsiberia.org/webdoc9.htm> (last visited Mar. 17, 2008) ("He forbade them to dip their hands into water and ordered them to use some vessel for the drawing of water.").

17. WEATHERFORD, *supra* note 14, at 69.

Mongolia adopted a new civil code which was strongly influenced by the German civil code.¹⁸ Fortunately for me, Peter Murray, a neighbor who teaches at Harvard Law School, had just published a treatise on German law called *German Civil Justice*, which became a starting point for my understanding of Mongolia's system of civil justice.¹⁹ I also discovered that Donald Zillman, a professor and former Dean of the University of Maine School of Law, had edited a treatise published by Oxford University Press entitled *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*.²⁰ That volume contained chapters written by experts from all over the world on public participation in natural resource development. With Professor Zillman's encouragement, a number of the authors of chapters in that study agreed to participate in an e-mail group in support of my work in Mongolia. Through ISLP, I made contact with Ruth Greenspan Bell of Resources for the Future and her husband, Joseph Bell from Hogan & Hartson in Washington, who both have an ongoing interest in mining and natural resource development in Mongolia. I also made contact with Morris Rossabi who teaches Mongolian history at Columbia University and has published a comprehensive study of Mongolia during the post-Soviet period.²¹ All of these resources proved invaluable as I commenced my work in Mongolia.

II. MY EXPERIENCE IN MONGOLIA

We arrived in Ulaanbaatar late at night on March 25, 2006. It was cold and snowing. The air pollution and wood smoke burned our eyes and nostrils. We were driven into the city in a battered old Soviet car. The following day I met with the staff at CHRD. Urantsooj, the Director, was trained in Russia as a microbiologist; Tsende was an experienced trial attorney and also a grandmother; Chingee had come to CHRD at age twenty-seven after spending several years as the youngest law professor in the history of Mongolia; Deegii, a sociologist, directed CHRD's research programs. Deegii was also a master at dealing with government bureaucracy as we discovered when she liberated our baggage from the Mongolian Customs office without having to pay a prohibitive duty.

Starting early in the morning on the Tuesday following our arrival, CHRD had organized a three-day workshop for fifty Mongolian lawyers and judges on public interest law and strategic litigation. The presenters included litigation attorneys and support staff from Global Rights, Earthrights International, and CHRD. My topic was environmental public interest litigation in the United States. In preparation for the workshop, the lawyers at CHRD wrote a manual on public interest litigation as it might be employed in Mongolia. One of the goals of the workshop was to develop a group of private sector attorneys who would work with CHRD on a continuing basis to identify and pursue significant cases affecting the public interest. Although

18. Adb.org, Developing Mongolia's Legal Framework: A Needs Analysis: Appendices: 'Law and Development,' Activity in Mongolia Since 1991, http://www.adb.org/documents/papers/mongolia_legal_framework/appendix2.asp (last visited Mar. 17, 2008).

19. PETER L. MURRAY & ROLF STURNER, *GERMAN CIVIL JUSTICE* (2004).

20. HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT, *supra* note 7.

21. ROSSABI, *supra* note 10.

Mongolia's civil law system is not based on common law principles and does not formally recognize judicial precedents as legally binding, CHRD's Mongolian lawyers believed, nonetheless, that it was quite effective to cite legal precedent from prior cases and other countries.

On the third day of the workshop, the participants divided up into break-out groups with different areas of concern. There were separate groups on river protection, compensation for the victims of a recent fire at the Ulaanbaatar market, human trafficking, and citizens' right to land. Each group developed a strategic plan which included procedures for identifying public interest cases, enlisting allies, fundraising, and media relations. At the end of the workshop, a small group of the participating lawyers agreed to meet monthly with CHRD to identify and pursue appropriate cases for strategic public interest litigation. With support from Global Rights, CHRD also encouraged the law school at the National University of Mongolia to include the concept of public interest law as part of the law school curriculum.

With just a weekend to get settled in Ulaanbaatar, our next destination was Nukht, a conference center about twenty miles to the south, where CHRD was holding a four-day workshop on environmental advocacy for the leaders of Mongolia's river movements. The river movements were made up primarily of Mongolian herders who had joined together in different parts of the country to try to protect the rivers in their areas from unregulated mining and deforestation. The workshop included approximately fifty river activists from eleven different groups. They ranged in age from twenty to sixty years old. Only a few spoke English, but we had translators for each session of the workshop. The presenters again included representatives from CHRD, Global Rights, Earthrights International, and WWF-Mongolia. The workshop dealt with organizational development topics such as fundraising, mission statements and long-range planning, as well as environmental advocacy and strategic litigation. My assignment was to describe the role of environmental organizations in the United States and to give examples of successful environmental advocacy campaigns.²²

After the workshop for the river movements, CHRD arranged a six-day trip into the Gobi Desert for me to see the mining operations along the Ongii River and to meet with nomadic herders who were active in the Ongii River movement. We drove across the Gobi in Toyota Land Cruisers, often with no roads, for hours each day. We visited sites where the riverbed and flood plains at the headwaters of the Ongii River had been excavated by gold mining companies and left with open pits and large piles of gravel

22. One of the highlights of the advocacy workshop was the way the participants enforced the rules they had adopted at the beginning of the workshop. The rules included familiar admonitions such as not interrupting other speakers, turning off your cell-phones, and the like. They appointed a different committee each day to impose appropriate penalties on those who violated the rules. The favored penalty was requiring the violator to sing a Mongolian folk song to the group. Another highlight occurred when Aisha Bain, the Global Rights coordinator for India and Mongolia, announced to the group that she had a special exercise for them during one of the breaks. At six-feet and one-inch tall, she towered over the Mongolian herders attending the workshop. She got them to line up in rows that were eight across and six deep. Standing at the head of this column she announced that she was going to teach them how to do the Brazilian samba. She turned on the music and began to dance the samba. The Mongolians clumped along behind her in their heavy black boots and long dells. After several attempts, she turned around to assess how they were doing. She proclaimed her verdict: "Not sexy enough!" The Mongolians dissolved into gales of delighted laughter.

and rock. Stream channels had been blocked and diverted and there had been no efforts at reclamation or rehabilitation of the land. At one site, a mining company had run its dredges through the riverbed and left large open pits and mountains of sand and gravel where the river once flowed. In a scene reminiscent of a painting by Hieronymus Bosch, there were hundreds of independent Mongolian “ninja miners,”²³ including children, who were digging in the sand and gravel mounds, washing gravel in freezing cold water, and using mercury and other chemicals to separate out the gold. A whole village of small wooden shacks and *gers*²⁴ had sprung up next to the mining site where the ninjas and their families were living without sanitation, drinking water, or schools.

On the fourth day of the trip to the Gobi we arrived at Mandal Owoo *soum*, a small settlement near the spot where, until recently, the Ongii River flowed into a large inland lake. There was a small museum next to the *soum* administration office. Inside there were murals on the walls showing the lake with horses and camels along the shore, drinking water, and grazing on fields of grass. When we were taken to the site depicted in the murals, however, there was no river and no lake—just a flat limitless desert with tufts of dried grass stretching out to the horizon. As a result of mining in the headwaters of the river, deforestation, and climate change, the Ongii River dried up and the lake disappeared.²⁵

After six days in the Gobi, we returned to the CHRD office in Ulaanbaatar. Tsende had a case against one of Mongolia’s largest mining companies that was going to be heard the following week. The background of the case was that the mining company applied for a license to mine gold from the bed and the banks of a river using large mechanical dredges. The application for the mining license was discussed at a local *hural*²⁶ of the *soum*²⁷ and most of those present were opposed to the application. Following the meeting of the *hural*, the mining company approached the praesidium of the *soum*, which is a group of local officials elected by the *hural* to administer the *soum*. The praesidium approved the application and the mining company then obtained a license from the central government. When the company arrived at the mining site with heavy equipment, the local herders joined together in a human chain to prevent the company from excavating the riverbed where the mining was to occur. The *soum* governor issued a decision that the company had the right to proceed under its license and the herders were dispersed by police. The leaders of the local river movement

23. Mongolia’s artisanal gold miners are referred to as “ninja miners” because they often carry green plastic washtubs on their backs which they use for washing gravel to separate out the gold. The term “ninja” refers to their similarity in appearance to characters in the comic book *Teenage Mutant Ninja Turtles*.

24. *Ger* is the Mongolian term for a yurt made of felt and white canvas stretched over a wooden frame.

25. Although the purpose of the trip to the Gobi was to see first-hand the mining sites and the problems facing Mongolia’s herders, it was not all work. We visited the remains of Kharkorum, which was the thirteenth-century capital of the Mongol Empire, and we visited a site in the Gobi with dramatic red sandstone rock formations with dinosaur bones and dinosaur eggs lying on the ground. At each *ger* that we visited, we were treated to a large glass of fermented camel milk which both good manners and Mongolian custom required that we drink approvingly.

26. A *hural* is a body of citizens or their elected representatives with decision-making authority at the various levels of Mongolia’s government.

27. A *soum* is a governmental subdivision in Mongolia with administrative powers.

subsequently engaged CHR D to help them, and CHR D appealed to the administrative court for Arkhangai Province. The case was coming up for hearing and Urantsooj asked if I had any ideas that might help Tsende and CHR D with this case.

Although I prefaced my answer by pointing out that I did not speak Mongolian, had no real understanding of Mongolian law, and had never been in a Mongolian court, I suggested that the legal relationship between the *hural* and the praesidium might be similar to the relationship between a town meeting and a board of selectmen in a New England town. I mentioned some Maine cases that held that a committee of the town did not have authority to bind the town in the absence of a town meeting vote.²⁸ Urantsooj and Tsende had previously consulted with a Mongolian judge who had suggested that they make essentially this same argument. I also suggested the use of a moot court prior to the hearing, a concept that was unfamiliar to Urantsooj and others at CHR D.

For the next two days, CHR D's small conference room became a courtroom. Tsende represented the river movement and Chimgee became the lawyer for the mining company. Urantsooj and I sat as the judge. At first, Tsende and Chimgee stated their legal arguments in a perfunctory monotone. They did not describe why the case was important or what would happen to the river and the herders if the mining were allowed to proceed. They sounded just the way I had sounded when I first took the National Institute of Trial Advocacy course as a young lawyer. After several run-throughs, they began to get better. Tsende began to argue that the future of the nomads' way of life was at stake; that this case involved an important principle of law; and that if the river were damaged, the families in the valley would not be able to sustain their herds and would have to move to the city. She became more and more persuasive.

The hearing was held the next morning. By all reports, Tsende made an impassioned and persuasive argument. By coincidence, it turned out that the presiding judge had attended the workshop on public interest litigation that we had given a few weeks earlier. The judge ruled in favor of the river movement, concluding that the praesidium had no authority to overrule the *hural* and that the mining company's license was invalid.²⁹

28. See, e.g., *Stewart v. Inhabitants of York*, 117 Me. 385 (1918) (holding that a Special Committee appointed by the town did not have power to employ counsel for the town, or bind the town, and that it was the plaintiff's duty to ascertain its extent of power).

29. Decision of the Administrative Court, Arkhangai Province, No. 4 (May 2, 2005) (Jargalsaikhan, J.) (Mong.) (unofficial translation) (on file with author). The following paragraphs from the official translation of the court's decision provide some indication of the language difficulties routinely encountered in Mongolia by those (like me) who do not speak Mongolian:

1. The government policy of the utilization and protection [sic] of the entrails of the earth, the legislation of the Entrails of the Earth, the decision [sic] of the government and are supervised above their fulfillment.
2. The soum Governor will be implement the following full rights about the utilization and protection [sic] of the entrails of the earth . . . to be implement the government policy about the utilization and protection [sic] of the entrails of the earth in its local, in the range of legislation of the Entrails of the Earth, the decision [sic] of the government and is supervised above its fulfillment of Citizens representative meeting of the soum and district.

Id.

Victory is sweet. We celebrated the next morning in CHRD's office and everyone drank toasts to Tsende with vodka and fermented horse milk. According to Urantsooj, it was the first time that a Mongolian court had decided a case in favor of one of the river movements and against a mining company and the local authorities. The outcome of the case made the news on Mongolian television and was widely reported in the press.

Tsende's victory, however, was short-lived. The following week the praesidium announced that the issue of the mining license would be taken up again at another meeting of the *hural*. Representatives of the mining company and the members of the praesidium met with each of the families who were eligible to participate. Tsende was told by some of the families that they could only vote against the mining license if they were allowed to vote by secret ballot. Tsende was not permitted to attend the meeting of the *hural* and a secret ballot was not permitted. The vote was taken by a show of hands and the mining license was approved.

CHRD tried to take comfort in the fact that the system had worked at least briefly. A Mongolian court had invalidated a mining license. CHRD had proved at least that once that it was possible for a river movement made up of Mongolian herders to stand up to a mining company and obtain justice in a Mongolian court.

The setback in Arkhangai province did not diminish CHRD's willingness to embrace new legal strategies. When I was researching Mongolian law before the trip, I had come across a provision of the Mongolian Law on Land that provided that the *hural* of a local *soum* had authority to establish a "special needs area" and limit the uses of land permitted in that area.³⁰ I had also found a provision of the Mongolian Law on Minerals which provided that if a special needs area were subject to a previously-issued mining license, the license could be terminated upon payment of appropriate compensation to the license holder.³¹ If the parties could not agree on the amount of compensation, it was to be determined based on the conclusion of an "authorized independent body."³² Because this law sounded like a promising tool, I asked CHRD's lawyers whether it had ever been used to prohibit mining in environmentally sensitive areas. They were not aware of any situations where this law had been used for that purpose and did not know who the "authorized independent body" would be.

On our trip to the South Gobi, I had asked the governor of Mandal Owoo *soum* if they had ever considered using the special needs law to protect the river bed and the flood plain of the Ongii River and the bed of the former lake at its mouth. He surprised me by pulling out a map that showed that Mandal Owoo *soum* had not only designated the shoreline of the river and lake as a special needs area, but had also designated

30. Law of Mongolia on Land, art. 20 § 20.1 (unofficial translation) (on file with author). The Statute provides:

Citizens' representatives, Khurals of aimags, the capital city, soums and districts shall exercise the following common authorities with respect to land issues: . . . to take land for special needs of aimags, the capital city and soums upon [such proposals] by corresponding level governors; determine their size and boundaries and approve procedures for their use[.]

Id.

31. Law of Mongolia on Minerals (Revised), art. 14 § 14.4 (unofficial translation) (on file with author).

32. *Id.* art. 14 §14.5.

another area in the *soum* that contained rare plants, dinosaur bones, and the archaeological remains of the compound of an early Mongolian king. He said that this second special needs area was subject to a mining exploration license but that the *soum* did not have the funds to negotiate for the termination of the license.

When we got back to Ulaanbaatar, I mentioned this to Urantsooj and asked whether it might make sense for CHR D to try to negotiate with the license holder on behalf of Mandal Ovoo *soum* for termination of the mining rights in the special needs area with the dinosaur bones and rare plants. I thought that if the mineral rights were not too expensive, it might be possible to raise some money in the United States for the required compensation. Urantsooj agreed and over the next week, she and Deegii went to the National Cadastral Office to do research. They spoke with the Director of that office who agreed to support them in the negotiations.

With encouragement from Urantsooj, I drafted a proposed agreement between CHR D and the Mandal Ovoo *soum* regarding the termination of the mineral rights. Under the terms of the proposed agreement, Mandal Ovoo *soum* designated CHR D as its agent to negotiate an appropriate level of compensation for terminating the mineral rights. CHR D agreed to try to raise ninety percent of the necessary funds and Mandal Ovoo *soum* agreed to contribute ten percent. If the mineral rights were terminated, Mandal Ovoo *soum* agreed to maintain the special needs status of the area in perpetuity and not to approve another mining license in that area. I prepared the agreement in English. It was translated into Mongolian and then approved by the praesidium and hural of Mandal Ovoo *soum*. We had a signing celebration at CHR D headquarters with photographs, and of course, a toast with vodka and fermented horse milk. As far as I could tell, the procedures for authorizing a contract with a Mongolian *soum* were similar to the procedures for authorizing a contract with a town in Maine—just as a vote by a town meeting authorizes a board of selectmen to bind a Maine town, a vote by the *hural* would authorize the praesidium to bind the *soum*.

Once the contract was signed, CHR D did further research at the National Cadastral Office and found that there were actually two mining licenses that overlapped the special needs area. They found that the license holders had not yet expended any funds on mineral exploration activities within the special needs area, and that the licenses were scheduled to expire in November of 2006. With encouragement from the National Cadastral Office, CHR D decided that the best strategy would be to wait until the licenses were up for renewal and then negotiate for the exclusion of the special needs area from the license renewal areas, a plan that was implemented after I departed Mongolia. The license holders agreed to exclude the special needs area from their renewal applications and CHR D and Mandal Ovoo *soum* were not required to pay any compensation for termination of the mineral rights.

On another front, I worked with Deegii on the English version of a paper that CHR D was preparing under a contract with the United Nations Development Program (UNDP). This paper was intended to be the basis for a conference to be held under the auspices of the United Nations Human Rights Theme Group. The stated purpose of the conference was to encourage the free exchange of ideas among stakeholders and to try to develop consensus for the protection of the environment and human rights in the context of sustainable development of Mongolia's mineral resources—a tall order.

In preparing this paper, researchers from CHR D assembled information about mining and the environment in Mongolia. According to their report, forty-five percent

of the land area in Mongolia was subject to mineral exploration or exploitation licenses; the adverse impacts of mining had become the country's most significant environmental issue; Mongolia's limited water resources were being polluted and diminished; and the country's best crop lands and pasturelands were being irreversibly damaged.³³ The CHRDR researchers interviewed mining company personnel, ninja miners, nomadic herders, local officials, representatives of the national ministries, judges, and others. I prepared a chart comparing Mongolia's laws and mining practices to best practices in other parts of the world on issues relating to public participation in decision-making, environmental impact assessments, applicable environmental standards, rehabilitation requirements, and bonding requirements. The discussion paper included a wide range of recommendations including many that would require new legislation.

During this time, I was also working with Chimgee on proposed amendments to Mongolia's mining laws. The proposed amendments included stricter environmental standards, stronger land reclamation measures, more effective enforcement procedures, public access to environmental information, and authority for local governments to negotiate agreements with mining companies to ensure local economic benefits as part of the licensing process.

While we were working on CHRDR's discussion paper and proposed legislation, the issues relating to mining and the environment seemed to rise to the top of Mongolia's national agenda. A group of protestors set up their *gers* outside the Parliament building and announced that they were going on a hunger strike until the government agreed to include them in negotiations regarding the licensing of a large copper mine being proposed for the South Gobi.³⁴ Issues relating to mining and the environment began receiving a great deal of attention in the Mongolian media. In response to all this public concern, President Enkhbayar decided to conduct a National Forum on Mining and the Environment (National Forum).

The planned UNDP conference was folded into the National Forum, and CHRDR was invited to present its paper at a session on mining and human rights. In conjunction with the National Forum, the World Bank released a multi-year study of mining and the environment in Mongolia which addressed many of the same issues and made similar recommendations as CHRDR's paper.³⁵ Although the first day of the National Forum was quite formal and tightly controlled, the second day turned into a verbal free-for-all. It was remarkable to hear current and former cabinet ministers and other officials from the Mongolian government bluntly discussing the environmental problems that were occurring, the failure of Mongolia's government to respond adequately, and the need for change.

Following the National Forum, I continued to work with Chimgee to complete CHRDR's proposed amendments to Mongolia's mining laws. We developed amendments to strengthen environmental standards and land reclamation requirements,

33. CENTRE FOR HUMAN RIGHTS AND DEVELOPMENT, DISCUSSION PAPER FOR THE NATIONAL DIALOGUE: MINING AND HUMAN RIGHTS IN MONGOLIA 3 (2006).

34. See Ganbat Namjil, *Mongolia Hunger Strikers Cease Protest*, BOSTON GLOBE, Apr. 24, 2006, available at http://www.boston.com/news/world/asia/articles/2006/04/24/mongolia_hunger_strikers_cease_protest/ (last visited Mar. 25, 2008).

35. WORLD BANK, *supra* note 13.

to close loopholes in the existing laws, to increase the transparency of the licensing process, and to provide greater economic benefits to local communities. As the work progressed, I asked Urantsooj what CHRD was proposing to do to encourage the Parliament to adopt CHRD's proposals. I also asked whether CHRD was planning to coordinate its legislative activities with WWF-Mongolia, the Asia Foundation, and other environmental stakeholders. Urantsooj gave me a look which suggested that there was little history of cooperation among these groups. With my usual disclaimers—that I did not know how things were done in Mongolia or what would work best there—I described to Urantsooj the types of legislative advocacy campaigns that I had worked on in the United States. I outlined what I consider to be the essential elements of a successful legislative strategy: first, build the broadest possible coalition of supporters; second, develop an “inside strategy” to persuade the legislative decision-makers as to the merits of your position; and third, organize an “outside strategy” to make sure that individual legislators are asked to support the legislation by their own constituents. I suggested that if we could not work together with the environmental groups that already agreed with our position, there was no chance that we would be able to build a legislative majority in support of the changes. Urantsooj agreed that we should try to organize an environmental coalition to support the amendments.

We spent the next few weeks organizing a legislative campaign. Urantsooj, Chimgee, and I met with the leaders of WWF-Mongolia, the Asia Foundation, and the river groups. We negotiated with these groups until we had general agreement on each of the proposed amendments to the Law on Minerals. With the help of the deputy director of WWF-Mongolia, I drafted *The Agreement on Responsible Mining*. The signatories to the agreement were CHRD, WWF-Mongolia, and the various river groups that had attended our workshop on environmental advocacy. The representatives of the river movements were all in Ulaanbaatar at a follow-up workshop sponsored by the Asia Foundation and they all agreed to participate in the coalition. Urantsooj, Chimgee, and Deegii then began meeting with members of Parliament, and contacting the leaders of the various political parties to persuade them to support the legislation.

Two months after my return to the United States, I learned that most of the environmental laws proposed by CHRD were not adopted by the Mongolian Parliament, but that three of CHRD's proposals were adopted. On July 8, 2006, the Great Hural passed a revised version of the Law on Minerals which included a freedom of information provision that, for the first time, opened the environmental impact statements for mining licenses to the public.³⁶ The revision to the Law on Minerals also included a provision which authorized the local *soum* authorities to negotiate economic benefit agreements with mining companies as part of the mining licensing

36. Law of Mongolia on Minerals (Revised), art. 57 § 57.4 (unofficial translation) (on file with author). The statute now provides that “[t]he State central administrative agencies in charge of the environmental [sic] and geology and mining shall publicize and disseminate electronic copies of information on environmental impact assessment, environmental protection plan and report information about hazardous chemicals and other substances that may negatively affect human health and the environment.” *Id.* Prior to passage of this law, there was no public access to the environmental impact assessments and environmental protection plans required to be submitted as part of the application for a mining license.

process.³⁷ The revision also included a provision which authorized the soums to elect an independent person to monitor a mining company's compliance with requirements for job creation and environmental protection.³⁸ CHRDR is now working with those new provisions to try to increase public participation in the mining licensing process and to ensure that local communities in Mongolia derive more of the economic benefits resulting from mining activity in their areas.³⁹

III. CONCLUSION

Although I was focused primarily on environmental issues during my time in Mongolia, it was apparent to me that CHRDR was playing a critical role in helping Mongolia to develop institutions that might someday meet the aspirations of Mongolia's people for a more viable democratic government and the even-handed administration of justice. Against all odds, the lawyers at CHRDR were hopeful about the future. Their sturdy optimism in the face of adversity was one of the most striking aspects of my experience.

As I observed the staff at CHRDR working long hours on a daily basis to protect the rights of Mongolian citizens, to persuade the courts to administer justice, and to encourage the Parliament to protect the environment, it seemed clear to me that James Madison was right: in approaching the task of nation-building, one must focus not only on creating democratic or republican institutions of government, but also on the "auxiliary precautions" which are needed to hold those institutions in check. CHRDR was playing exactly that role—an opposite and rival interest dedicated to the proposition that Mongolia's government could be made to respond to the needs of Mongolia's people and to serve their interests.

37. *Id.* art. 42 § 42.1. The statute now provides that "[a] license holder shall work in cooperation with the local administrative bodies and conclude agreements on issues of environmental protection, mine exploitation, infrastructure development in relation to mineral development and jobs creation." *Id.*

38. *Id.* art. 42 § 42.3.

39. CHRDR has drafted a model *Participation Agreement* to ensure that the local communities receive some of the benefits from licensed mining activities conducted in their areas. As of this writing, CHRDR has negotiated participation agreements with two mining companies—one located in Dornod Aimag, Bayandun *soum*, and one in Uvurhangai Aimag, Bat-Ulzii *soum*.