



# CROSSING THE TRACKS

THE LEGAL IMPLICATIONS OF ESTABLISHING A WILDLIFE FRIENDLY CORRIDOR  
ALONG THE TRANS-MONGOLIA RAILWAY

Report by:



Support and Collaboration:





MONGOLIA

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ESTABLISHING A WILDLIFE  
FRIENDLY CORRIDOR ALONG  
THE TRANS-MONGOLIA  
RAILWAY

2022

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# Foreword

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Mongolia's Gobi-Steppe Ecosystem (GSE) is considered the largest intact grassland in the world, providing important habitat for the largest population of several large ungulates, such as the Mongolian gazelle, Asiatic wild ass, goitered gazelle, and argali sheep. The GSE is characterized by erratic rainfall and scattered primary production, which makes nomadic movements a key survival strategy of large herbivores as they track resources over a vast area. A growing human population, intensifying exploitation of natural resources, and the development of infrastructure in the region place increasing pressure on these species and their habitats. In particular, the fences along the Trans-Mongolian Railway (TMR), intended to prevent train-livestock collisions, fragment large parts of GSE and have limited the movements of these species for almost 70 years. Wildlife-fence interactions are frequent and often result in mortality of hundreds to many thousands of animals.

Mitigation of the TMR fence via redesigning or partially removing it faces challenges due to uncertainties in the legal obligations. To date, the TMR fences have been opened at only three locations but evidence show these gaps are frequently used by wildlife and livestock. This study was initiated to improve our understanding of the legal obligations and implications related to establishing a wildlife friendly corridor along the Trans-Mongolia Railway. It provides the facts relied on for the legal analyses and conclusions in the separate chapters that follow, including a discussion of the international and national legal basis for establishing a wildlife friendly corridor along the TMR, required safety measures, liability for damages, and liability for train strikes.

Having a balance between the needs of economic development and the protection of wildlife and their habitat can be a challenging task. However, we hope governmental and non-governmental organizations find this document useful and that this report can be used as a reference to scale existing initiatives to mitigate impacts, not only of the TMR but also planned railway lines to ensure they maintain the landscape permeability of the GSE.

# Executive Summary

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**E**stablishing a wildlife friendly corridor for the TMR is a story about two sides of the tracks, as much for Mongolia's wildlife as it is for its laws. Looking at its laws, on one side is a strong international basis and a national legal system that not only recognizes this but has started on the path to implementing it. But this legal journey is not yet complete, and on the other side are long-standing railway practices and a regulatory system directed at safety and designed to prevent crossing.

**The question is not whether there is an immediate legal foundation for establishing a wildlife friendly corridor.** There is. As detailed in the body of this report, such a foundation exists with few unanswered questions. At the international level, the Convention on Migratory Species (CMS) provides the primary basis, asking Parties to avoid migratory species becoming endangered<sup>1</sup> and more specifically encouraging them to maintain a network of suitable habitats, to eliminate obstacles that may hinder or impede migration, to provide new or reintroduce to favorable habitat, as appropriate, and finally to provide emergency procedures for species whose conservation status is seriously affected.<sup>2</sup> These provisions apply to the species of concern in this report – Argali sheep (*Ovis ammon*), Asiatic wild ass (or khulan) (*Equus hemionus hemionus*), goitered gazelle (*Gazella subgutturosa*), and Mongolian gazelle (*Procapra gutturosa*). All of them have been included in CMS instruments that require consideration of the foregoing and that Mongolia has signed. Further, Mongolia's national legal system already recognizes both the foundations of the CMS (through its Constitution and Law on International Agreements), as well as the unfavorable status of these migratory species (through its Law on Fauna, List of Rare Species, Protected Areas Law, and Law on Buffer Zones).

**However, Mongolia has yet to fully implement these obligations whether in its national laws or as a matter of practice.** As a function of law, Mongolia's legal system offers an implied basis, but little direct support, at least for imposing a requirement on pre-existing infrastructure. Of the nine (9) laws identified as having relevant content, the Law on Fauna comes the closest to an explicit requirement. In relevant part it states that 'animal protection' includes keeping migration routes clear. This is one of the few provisions expressly directed at migratory species and routes, and the only one that would appear to apply to pre-existing structures like the TMR. The remaining laws either provide indirect support (e.g., protections against ecological imbalance) or apply to future projects, not pre-existing infrastructure. On the practical side, Mongolia has made

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<sup>1</sup> CMS Art. II(2).

<sup>2</sup> Id. at Art. V(5).

significant strides in increasing the footprint of its protected areas, which contributes to maintaining ‘a suitable network of habitats.’ However, it has not yet addressed the needs of migratory species. Fencing along the TMR is increasing at an unprecedented rate, directly contrary to the instruction to ‘remove barriers to movement’ and only small areas have been opened allowing movement that would effectively ‘reintroduce species to favorable habitat.’

**The question is whether these yet incomplete legal requirements are enough.** So far, the laws on other side of the legal tracks seem to present a determined barrier. They not only focus almost exclusively on keeping the tracks clear and therefore safe for transport, but they also look at liability exclusively as a function of transport sector violations. This includes not only the Railway Law, where it would be expected, but also the Criminal Code and Law on Infringements. Indeed, there are multiple avenues for imposing liability on the transport sector for damages they may cause. For example:

- Violation of the Law on Railway Transportation (herein Railway Law), may trigger liability under the Civil Service Law, Criminal Code, or Law on Violations, depending on the status of the perpetrator.
- Violating an ‘obligation’ under the Railway Law requires the violator to ‘reimburse expenses and damages sustained’ and to ‘assist in eliminating the consequences of situations.’
- Liability may be imposed under the Law on Infringements, specifically for failure to take measures to prevent railway crashes, accidents and defects, or failure to instruct railway employees in accordance with established procedures
- Liability may also be independently based on the Civil Code to the extent damages involve the violation of a protected right.

This strong safety orientation is also the status quo since the railroad was constructed. In other words, where there is a conflict between the laws advocating for a wildlife friendly corridor and those intended to guarantee safety (and limit liability), it seems unlikely that administrative staff would side with wildlife.

**This purely safety-oriented thinking is changing, however, and the legal environment, despite appearances, is not entirely against the transport sector.** In 2021, Mongolia created a temporary order setting limited safety standards for wildlife passages in areas where fencing was removed along existing rail lines. This small, but important step, opens the door to the reconsideration of existing legal mandates. One of these should be to better understand what the potential for liability actually is. Under most of the laws cited (Civil Service Law, Law on Infringements, and Criminal Code), the transport sector faces liability only for violations of safety standards that it sets. In other words, it can change, adapt, or implement these to match the needs and realities of wildlife-friendly infrastructure, and limit its own exposure to liability. Furthermore, the forms of liability are limited to penalties paid to the State. These are not undetermined amounts paid to individuals for the full amount of any harm caused. Indeed, liability based on the Civil Code may be the only form that could theoretically be tied to the harm suffered by an individual with a remedy designed to provide redress for that harm, e.g., compensate the individual for losses to livestock. But even here, it is not entirely certain that such a remedy would be available, as the individual will have entered or allowed entry to the safety zone in contravention of the Railway Law. In this instance, that person

would be responsible for their own losses, a precedent already well established in the transport sector.

**Finally, none of these forms of liability would be triggered by train strikes with wildlife.** The principal basis for the imposition of liability against the transport sector is dependent on the victim type being either ‘property’ as defined by the Civil Code (and further referenced in the Criminal Code and Law on Infringements) or a human being. Both domestic livestock and vehicles would fit the definition of property, while passengers and non-passengers would be covered under harm to humans. Wildlife do not fall within either type, making liability for harm to wildlife dependent on interpretations for which there is no existing precedent.

**That said, there may be room to argue that accidents (i.e., train strikes) involving wildlife can still result in liability.** This is primarily based to the Law on Infringements establishing liability for the Law on Railway Transportation when there is a failure to take measures to prevent crashes and accidents. Because the language is broad, it may cover all accidents regardless of the person, property or thing involved. This means the provision may be triggered when there is a crash or accident caused by the train colliding with another vehicle, livestock, or wildlife. The provision is not dependent on the object of the collision, only the failure to take ‘measures’ to prevent the incident from happening. While this is not a direct form of liability and it does not stem from wildlife protection, it may be fair to say that wildlife simply being involved in an accident may trigger a form of liability.

**In sum, Mongolia is legally well-positioned to take the next steps in establishing a wildlife friendly corridor along the TMR.** There is already a strong legal basis, including regulatory efforts to shift the purely safety-oriented status quo. What is needed at this point is partly a change in thinking and partly the adaptation of laws to manage wildlife friendly infrastructure, including but not limited to monitoring open sections and ensuring that liability of those that misuse such infrastructure is equally well described in the law.



# Introduction

## FACTS PRESENTED

The introduction provides facts related to the Trans-Mongolia Railway (e.g., the protected areas, wildlife, and habitats) that have been used to inform the analyses of the legal obligations and implications associated with establishing a wildlife friendly corridor along the Trans-Mongolia Railway.



# Introduction

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Facts drive every legal matter. They are the starting point for research, help formulate which legal questions are or may be at issue, and ultimately support the interpretation and application of law. Whether, for example, the Convention on Migratory Species (CMS) or the Convention on Biological Diversity legally require a wildlife friendly corridor along the TMR will depend on several factual inquiries, including but not limited to:

- whether identified migratory species are listed by the CMS
- their current conservation status
- population trends
- the status and location of protected areas
- the location of migratory routes
- documented impacts of the TMR

Still other facts would help with the analysis of the safety requirements and liability for train strikes.

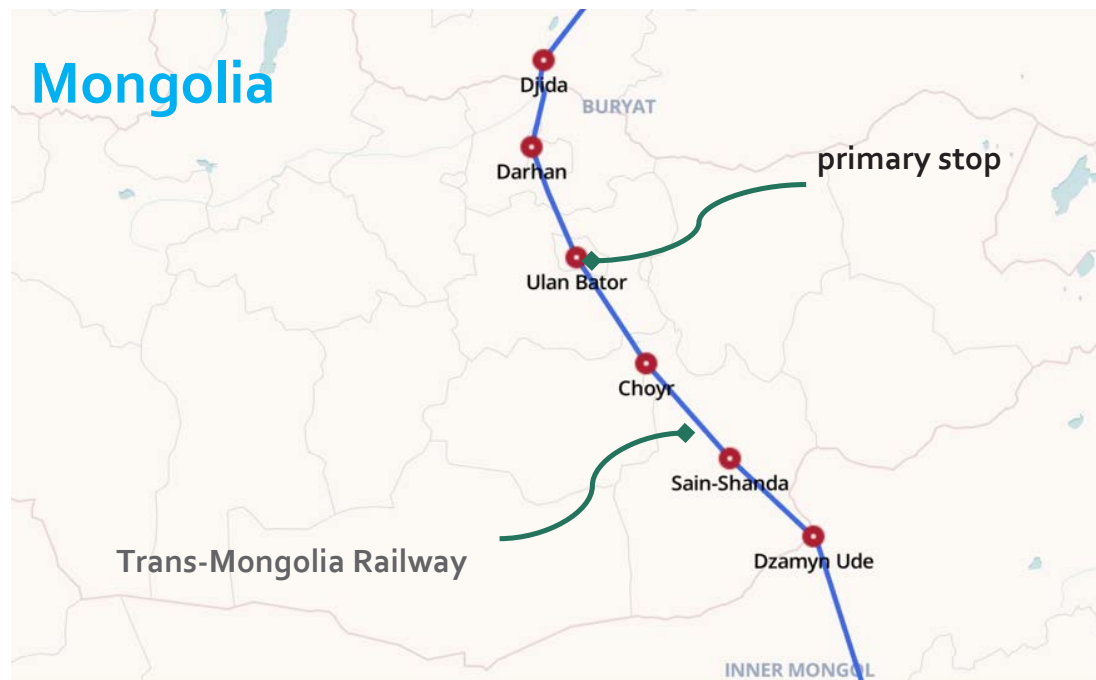
This brief has been written so that those unfamiliar with the Trans-Mongolia Railway (TMR) and the selected migratory species will have a concise picture of the facts used (or of potential use) in the legal analyses and conclusions contained in the briefs that follow. This should be understood as a snapshot of the facts that matter, facts that will ultimately change, impacting the validity of the legal analyses presented.

Information compiled here is **intended solely as a reference** to support the legal analyses, not as an exhaustive restatement of TMR, protected area, and species related data. There are numerous reports discussing linear infrastructure impacts and the migratory species of concern in this brief. Where relevant, these have been referenced. A few maps have also been reproduced as simple illustrations of relationships between species range, protected areas and the TMR, not as precise representations.

# The Trans-Mongolia Railway (TMR)

Part of the much larger Trans-Siberian railway network, the TMR bisects Mongolia on a mostly north-south axis crossing territory sparsely inhabited by people for most of its 7,621 kms. Although it passes through several towns along the way, its only stop is in Ulaanbaatar (transliterated as Ulan Bator on the map), Mongolia's capital city.

**Map 1. Trans-Mongolia Railway route**



Completed in 1955, the TMR was constructed long before most of Mongolia's protected areas were formally gazetted or there was much understanding of the impact of linear infrastructure on migratory wildlife.<sup>3</sup> As a result, it not only bisects the country, but also the range and migratory routes of some of Mongolia's more iconic wildlife, e.g., Mongolian gazelle (see maps in the following section). Other than the recent test sites,<sup>4</sup> none of its length was designed or constructed to allow the free movement of wildlife. Instead, primary concerns at the time were the safety of passengers and the protection of private property (e.g., livestock) from harm caused by collision.<sup>5</sup> This is beginning to change with the promulgation of formal plans and two regulatory instruments governing wildlife friendly passages on the TMR.<sup>6</sup>

3 Protected areas that pre-date the TMR include Bogd Khan Uul (National Park), est. 1778; Togoo Tulga Uul (National Monument), est. 1948; and Khorgo Terkh Zagaan Nuur (National Park), est. 1952

4 In 2019, a partnership between WCS Mongolia and the Ulaanbaatar Railroad Authority launched a fence-removal pilot project to allow the resumption of migrations, with the funding from Oyu Tolgoi LLC. Approximately 1,200 m of fences were removed at two locations and more than 100 remote cameras were installed to monitor the use of fence-gaps by wildlife.

5 As described in literature and supported by the legal analysis in other briefs in this series. Brief 3 in this series discusses TMR safety requirements; Brief 4 looks at damages for proximately caused; and Brief 5 covers questions of liability for train strikes (collisions).

6 MNS 6515:2015 and Ulaanbaatar Railway, Mongolian–Russian Joint Society Chairman's Order, No: A/944, Dec 22, 2021.

## Barrier Effects and Impacts

The TMR has multiple barrier effects, directly impacting Mongolia's species whose migratory and survival instincts push them to climb, cross, or circumnavigate. Features of the rail line that create barrier effects include the embankment height and grade, as well as the rail bed and tracks.<sup>7</sup> Traffic volume is not considered an issue as trains pass infrequently, about one train per hour.

The most significant concern is the barbed-wire fencing that runs parallel to the tracks,<sup>8</sup> which was designed to create a safe transport corridor referred to in Mongolia law as the 'railway strip'<sup>9</sup> and the 'the railway safety zone.'<sup>10</sup> This fencing acts not only as a complete or near-complete barrier to wildlife but poses the risk of entanglement to wildlife that attempt to cross. The TMR fencing has heightened risks of entanglement due to poor construction and infrequent maintenance in loose wires and leaning posts.<sup>11</sup> Entanglement can result in non-lethal injuries and direct mortality both of which contribute to reduced population levels. Along the TMR, there is an estimated 2,240 km of barbed wire fencing.

## Train Strikes

Train strikes (collisions between trains and animals, other vehicles, and people) are also a concern but limited by the barriers currently in place. It is unknown whether this risk has increased in those areas where fencing has been removed on a test basis to allow wildlife to cross. Creating a wildlife friendly corridor is generally expected to increase this risk, as more areas would be opened. Train strikes not only cause harm to those involved, often causing mortality, but can also cause damage to the machinery, including the train and rail tracks. The risk of strikes can also be increased by weather, terrain, speed, frequency of traffic, number of species in the area, migration seasons, and the shape of the track. To reduce strikes there are crossing points for people and vehicles, but not wildlife.

A sampling of train strike (More recent not available) show a variety of construction and maintenance crew related accidents, but few actual train strikes. Of the 13 accidents reported, only one involved a train strike with a person<sup>12</sup> and another involved a train strike with a car.<sup>13</sup> There are no reports of either animals or wildlife being involved in train strikes, although this is likely a function of a lack of accessible reporting.

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7 CMS Linear Infrastructure Guidelines, pg 20.

8 Legal Atlas, CMS Report, pg. 21.

9 Mongolia, Law on Railway Transport, Art. 3.1.11.

10 Id. at Art.

11 CMS Report on Linear Infrastructure, pg. 23.

12 On July 9, 2018, at 10:05 a.m., there was an accident when the driver-driver of the 4th Division of the road, the 11th section of the road, when he entered the shore area of the road-Uud-2 station to clean shoes, and was hit by a TEM18DM-3012 locomotive.

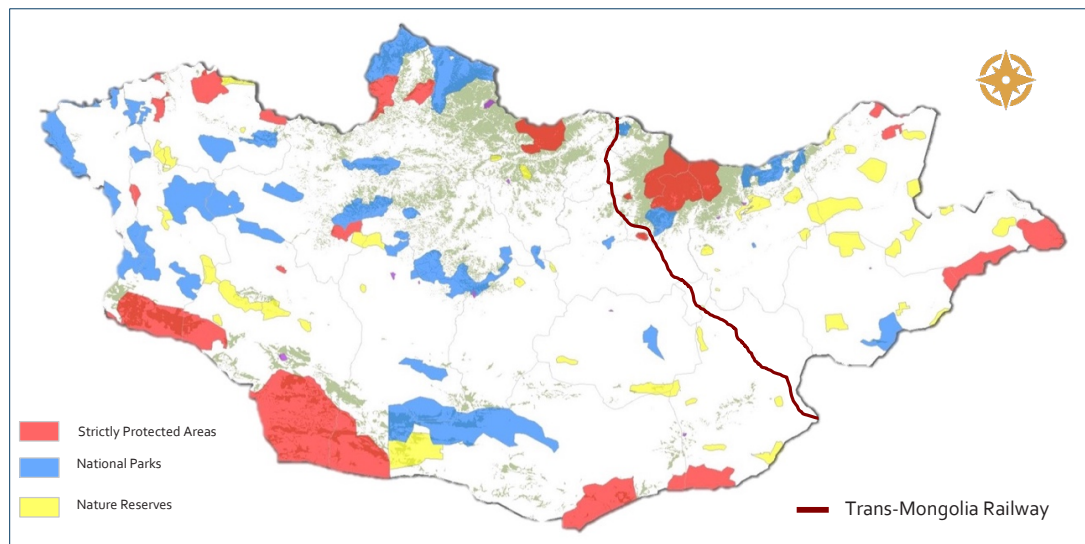
13 On August 27, 2018, at 10:10 a.m., there was an accident in which "B" died after being hit by a train by the engineer of the 5th section of the 3rd Division line of the signaling network.



# Mongolia's Protected Areas

The establishment of protected areas reflects the impact of the TMR, with sites identified on either side of it but none that recognize migratory routes that cross it. Most protected areas near the railway (n = 10 of 14) are also smaller and have a lower protection category (i.e., Nature Reserve). There are five types of nature reserve, one of which is dedicated to the protection of rare fauna.<sup>14</sup> Those established near the TMR are primarily dedicated to fauna conservation. By law, all Nature Reserves allow traditional economic activities that do not negatively impact flora and fauna.<sup>15</sup> Buffer zones may also be established for Mongolia's protected areas, but no map was available for review showing where they have been established. To the extent they exist, the law requires that they not impact migration routes but does not require them to be established as additional protection for the same.<sup>16</sup>

Map 2. Mongolia's protected areas and the TMR route



**Source:** Conservation Standards, accessed at <https://conservationstandards.org/2021/03/01/protected-area-planning-guidance-for-mongolia/>

<sup>14</sup> Mongolia, Protected Areas Law, Art. 20(2).

<sup>15</sup> Id at Art. 21(1).

<sup>16</sup> Mongolia, Law on Buffer Zones, Art. 4.1(4.1.1).

# Migratory Species and the TMR

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The southern part of the TMR crosses through semi-arid and arid environments that are home to at least four (4) migratory species of concern, all of which are listed in CMS Appendix II.<sup>17</sup> These are:

- 1) Argali sheep (*Ovis ammon*)
- 2) Asiatic wild ass or khulan (*Equus hemionus hemionus*)
- 3) Goitered gazelle (*Gazella subgutturosa*)
- 4) Mongolian gazelle (*Procapra gutturosa*)

The following sections provide background for each of these species relevant to the legal assessments that follow.

## 1. Argali sheep (*Ovis ammon*)

The Argali sheep is assessed as ‘Near Threatened’ by the IUCN Red List of Endangered Species (herein IUCN Red List) under criteria A2de. It has also been listed in CITES Appendix II, restricting international trade; and in CMS Appendix II,<sup>18</sup> for which the CMS encourages Range States ‘to conclude global or regional Agreements for [their] conservation and management.’ At the national level, Mongolia identifies it as ‘Rare’ in its Redbook of Endangered Species (herein Redbook), includes it in its ‘List of Rare Fauna,’ and restricts hunting under the Law on Fauna to ‘special purposes’ limited by an annual quota.<sup>19</sup>

Argali is also the subject of a CMS International Single Species Action Plan. The plan covers the period 2014 to 2024 and includes populations in 11 countries, inter alia, Mongolia.<sup>20</sup> Objective 2 of the Plan is ‘[t]o maintain and restore intact argali habitat and migration routes.’ The plan expressly identifies threats posed by linear infrastructure, including roads and railways. However, it goes on to state that while this type of infrastructure can restrict or prevent movement of wild animals, so far it has not been reported as negatively impacting argali populations, other than the Karakoram Highway in Pakistan. That said, it also states that ‘secure, well-maintained, high fences can present an impassable barrier to argali with especially serious effects when this disrupts movements to seasonal pastures.’<sup>21</sup> TMR fencing is on both sides and therefore obstructs the movement of Argali, however, other impacts on the species are unknown at this time.

Of note is the number of argali populations that effectively straddle, are immediately adjacent to, or are within a short distance of the TMR. While detailed information on Argali movement patterns is not available, it is presumed they are nomadic like other ungulates such as the Khulan and Mongolian gazelle.

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<sup>17</sup> The CMS provides two lists of migratory species for which it requires special protection, Appendix I and II. No species of interest in Mongolia has been listed in Appendix I.

<sup>18</sup> UNEP/CMS/COP16 Resolution Conf. 12.11 (Rev. CoP16)

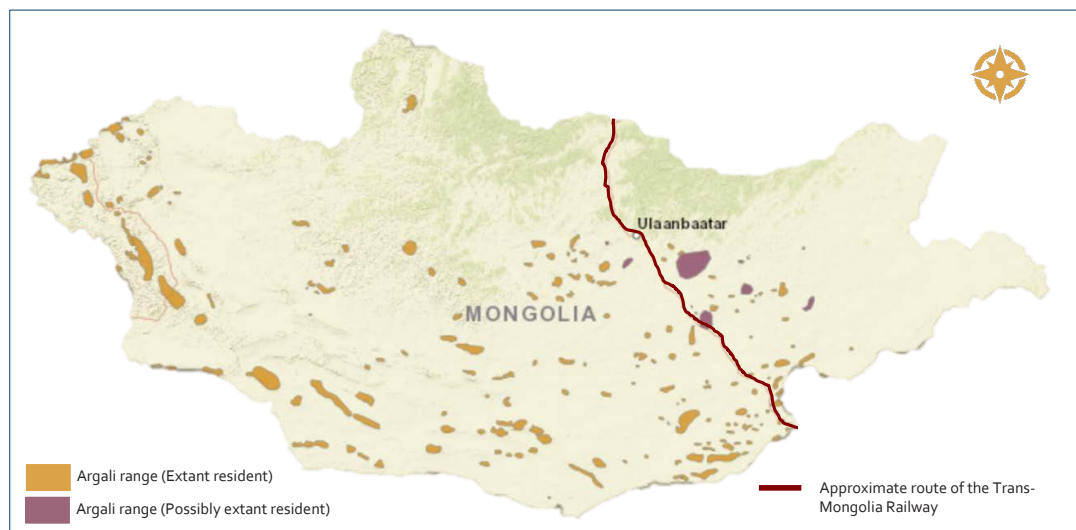
<sup>19</sup> Mongolia, Law on Fauna, Art. 7.5.

<sup>20</sup> International Single Species Action Plan for the Conservation of the Argali (*Ovis ammon*) contained in UNEP/CMS/COP11/Doc.23.3.3, and as adopted by Resolution 11.24 of the CMS COP11. Covers the following jurisdictions: Afghanistan, China, India, Kazakhstan, Kyrgyzstan, Mongolia, Nepal, Pakistan, Russian Federation, Tajikistan, and Uzbekistan

<sup>21</sup> Id.



Map 2. Argali sheep (*Ovis ammon*) home range in Mongolia and the TMR route



**Source:** IUCN (International Union for Conservation of Nature) 2020. *Ovis ammon*. The IUCN Red List of Threatened Species. Version 2021-3

Not shown on this map are the roughly 14 federally protected areas that have populations of argali, with approximately 23% of its range falling within these protected areas.<sup>22</sup> The species' range is also protected in dozens of locally protected areas but no map of these was available for review. Those argali populations to the west of the TMR at least partially overlap with protected areas. However, those to the east of the TMR may have local protection but limited relation to federal protected areas. There are also no known protected migration routes or corridors connecting argali populations and protected areas.

## 2. Khulan (*Equus hemionus hemionus*)

The population of khulan in Mongolia is classified by the IUCN Red List as 'Near Threatened.' It is also listed in CITES Appendix I, prohibiting all commercial international trade. Contrary to numerous reports, the species is not yet fully protected under national law. It is included in Mongolia's list of 'Rare' species,<sup>23</sup> a group of species for which the Mongolian Law on Fauna restricts but does not fully prohibit hunting.<sup>24</sup>

CMS lists the species in its Appendix II and Resolution 11.13 of the CMS COP11 recommends cooperative action (rapid measures to assist the conservation of species listed under Appendix II). The khulan is also covered by CMS's Central Asian Mammals Initiative (CAMI). The key activities defined in the CAMI include 1) increasing scientific knowledge on movements and migration corridors and 2) promoting the creation of protected areas in key habitats and migration routes.

<sup>22</sup> CMS Argali Action Plan.

<sup>23</sup> Mongolia, List of Rare Species, Art. 1, 2012.

<sup>24</sup> Mongolia, Law on Fauna, Arts. 7.5 and 9

Map 2. Khulan (*Equus hemionus hemionus*) home range in Mongolia and the TMR route



**Source:** Kaczensky, P., P. Lkhagvasuren, O. Pereladova, M.-R. Hemami, A. Bouskila. 2015. IUCN Red List assessment of *Equus hemionus* 2015. *Equus hemionus*. The IUCN Red List of Threatened Species. Version 2021-3

The Khulan's primary home range is found in Mongolia's South Gobi Desert along the border with China. The most significant population is adjacent to the TMR which, as indicated in the map, acts as a complete barrier to movement. The CMS Linear Infrastructure Guidelines describes khulan migration patterns as 'nomadic,' meaning movement is dependent on several conditions, including year-round search for food and wintertime avoidance of snows that impede movement or access to food.<sup>25</sup> Although typically found within certain geographical areas, khulan can nonetheless move long distances, covering as much as 70,000 sq km over a few weeks.<sup>26</sup>

The implication for the TMR is that if the Khulan is present near the corridor, mitigation strategies will likely need to be dispersed along the railway to match the nature of its migratory needs.

### 3. Goitered gazelle (*Gazella subgutturosa*)

Assessed as 'Vulnerable' in IUCN's Red List since 2006, under criterion A2, the goitered gazelle is listed in CMS Appendix II but is not listed in CITES. Mongolia's Red Book of Endangered Species lists it as Rare. Under Mongolian law, the species is also listed as 'Rare'<sup>27</sup> and hunting is restricted by the Mongolian Law on Fauna.<sup>28</sup>

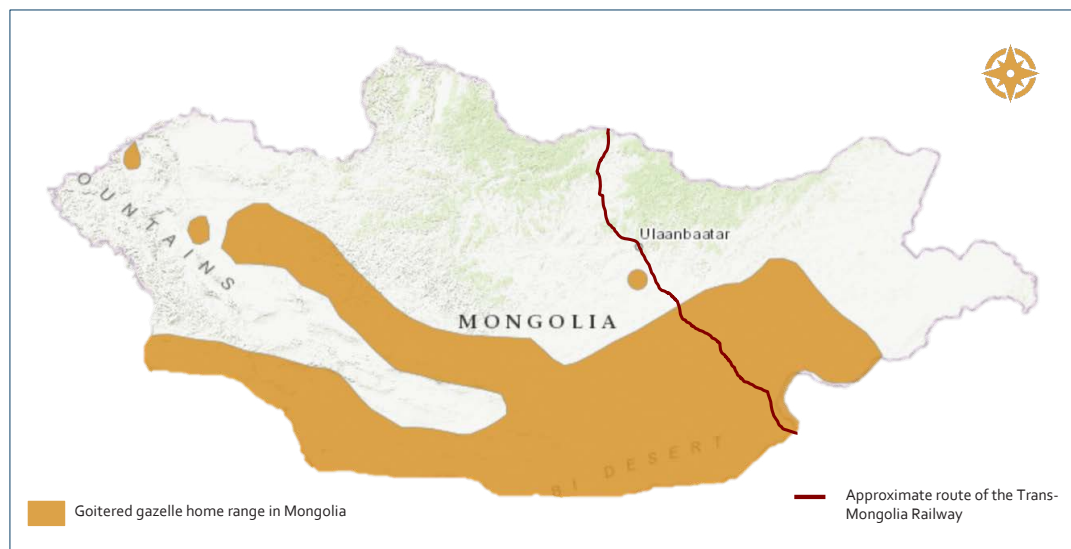
<sup>25</sup> Id.

<sup>26</sup> Wingard, J. et al, CMS Linear Infrastructure Guidelines, citing unpublished data from P. Kacenzky.

<sup>27</sup> Mongolia, List of Rare Species, Art. 1, 2012.

<sup>28</sup> Mongolia, Law on Fauna, Art. 7.5.

Map 3. Goitered gazelle (*Gazella subgutturosa*) home range in Mongolia and the TMR route



**Source:** IUCN (International Union for Conservation of Nature) 2017. *Gazella subgutturosa*. The IUCN Red List of Threatened Species. Version 2021-3.

The goitered or black-tailed gazelle (*Gazella subgutturosa*) has a wide distribution range, covering roughly 20 countries, in the Arabian Peninsula across the Middle East and Asia to Kazakhstan, Mongolia, China and Pakistan. The recent estimates suggest that the global population number is about 120,000 – 140,000 animals with the largest share in Mongolia (around 40% – 60% of the global population). Population numbers have decreased significantly over the last decade with key threats including illegal hunting and habitat loss. Even in Mongolia, where the Gobi Desert supports the largest population of goitered gazelles, the population is now less than 30,000, while it was estimated at 60,000 in the early 1990s.<sup>29</sup> Approximately 15% of the species' range in Mongolia occurs within protected areas.

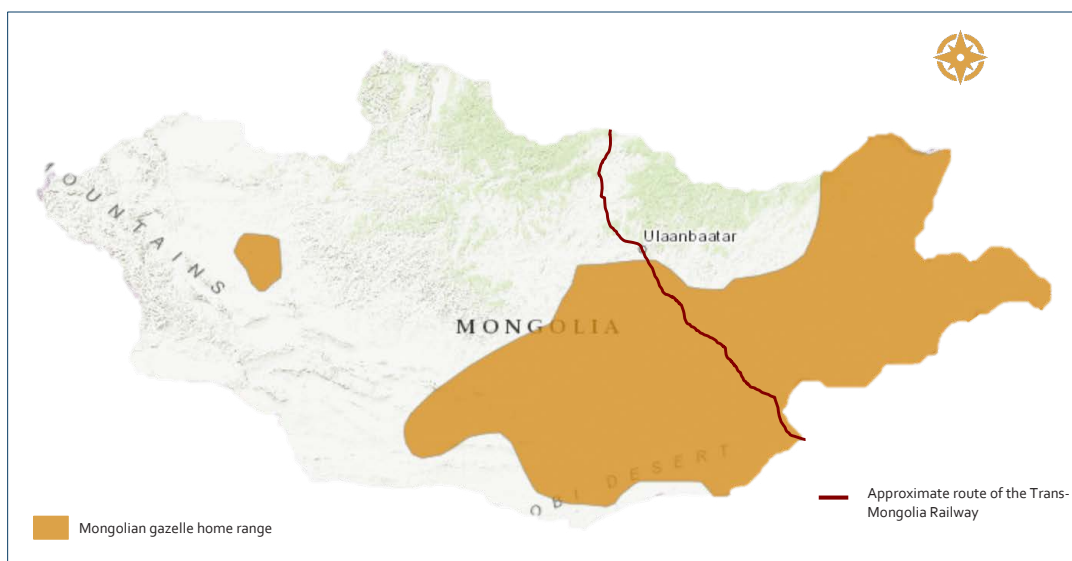
The Goitered gazelle migrates long distances seasonally for food and water. This species is primarily threatened by expanding infrastructure which has disrupted their habitat creating a patchy population distribution. This species is also hunted for both meat and as a trophy.

## 4. Mongolian gazelle (*Procapra gutturosa*)

Listed as 'Least Concern' by the IUCN Red List of Endangered Species. The species is listed under the CMS Appendix II and is recommended for cooperative actions (rapid measures to assist the conservation of species listed under Appendix II) by Resolution 11.13 of CMS COP11. It is also included in the Central Asian Mammals Initiative (CAMI). The key conservation activities for Mongolian gazelle under CAMI Programme of Work focus on addressing impacts from linear infrastructure and maintain landscape permeability. The CMS Infrastructure Guidelines also seeks to provide solutions for mitigating impacts from linear infrastructure.

<sup>29</sup> Buuveibaatar et al., 2016

Map 4. Mongolian gazelle (*Procapra gutturosa*) home range and the TMR route



**Source:** IUCN 2008. *Procapra gutturosa*. The IUCN Red List of Threatened Species. Version 2021-3.

Mongolian gazelles (*Procapra gutturosa*) are one of Asia's last large populations of ungulates and their 275,000 km<sup>2</sup> steppe habitat is considered the largest remaining example of a temperate grassland ecosystem.<sup>30</sup> They undertake long-distance nomadic movements and move constantly over their range, except during the rut and birth seasons. In just one year, an individual Mongolian gazelle can range over 32,000 km<sup>2</sup>. Most of the population of the Mongolian gazelle occurs outside of the existing protected areas.

The Mongolian gazelle does not engage in a traditional migratory movement based on seasons. Instead, it engages in nomadic movements, traveling long-distances in search of food and to avoid inclement weather. Border fences and fences along railways have become a major impediment with hundreds to many thousands of gazelles found dead along the fences every year. The gazelle population have declined due to heavy harvesting in World War II and the blocking of seasonal movements by the fenced TMR.<sup>31</sup>

30 Olson, Kirk A, "Ecology and conservation of Mongolian gazelle (*Procapra gutturosa* Pallas 1777) in Mongolia" (2008). Doctoral Dissertations Available from Proquest. AAI3325270. <https://scholarworks.umass.edu/dissertations/AAI3325270>

31 CMS Linear Infrastructure Guidelines, pg. 10.



# CHAPTER 1

## INTERNATIONAL LEGAL BASIS

This Chapter reviews the international legal basis for establishing a wildlife friendly corridor along the Trans-Mongolia Railway. It examines the terms of the Convention on Migratory Species and the Convention on Biological Diversity.





# Question Presented

Is there an **international legal basis** for requiring the establishment of a wildlife friendly corridor?

*This question has been reviewed independent of how international law is recognized and implemented by Mongolia in its national legal system. This is a separate question and a function Mongolia's national laws. It has therefore been answered in Chapter 2 assessing the National Legal Basis.*





# Short Answer

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**Yes.** Although there is no explicit use of the term *wildlife friendly corridor* under the international treaties reviewed, there is a legal basis for requiring such for linear infrastructure projects in Mongolia.

This conclusion is based primarily on the Convention on Migratory Species (CMS) and, in particular, on four (possibly five) interrelated obligations.<sup>32</sup> The other major international agreement reviewed, the Convention on Biological Diversity (CBD), has more generalized requirements that would support the creation of a wildlife friendly corridor, but which do not have language that is similarly specific to the question of migratory species and linear infrastructure.

Under the CMS:

- one obligation applies to all CMS listed migratory species (and therefore the four (4) species identified in this brief), and
- another three (3) obligations (potentially four) apply to Appendix II listed species, which includes the species of concern, as a function of requirements for CMS ‘agreements,’

For all migratory species, CMS Art. II(2) asks Parties to avoid migratory species becoming endangered. In the context of CMS recognized ‘AGREEMENTS,’ Art. V(5) more specifically encourages parties to maintain a network of suitable habitats,<sup>33</sup> to eliminate obstacles that may hinder or impede migration,<sup>34</sup> to provide new or reintroduce to favorable habitat, as appropriate,<sup>35</sup> and finally to provide emergency procedures for species whose conservation status is seriously affected.<sup>36</sup>

While the species identified are not yet the subject of an ‘AGREEMENT,’ as defined by the Convention,<sup>37</sup> they have been included in other CMS instruments (referred to as ‘agreements’ in lower case) that are based on the same considerations listed in Art. V(5)<sup>38</sup> and that Mongolia has voluntarily agreed to implement.<sup>39</sup> These are the Central Asia Mammal Initiative, which applies to the four (4) species of concern in this brief and that Mongolia approved as a Party to the CMS; and the International Single Species Action Plan for Argali Sheep, which falls under CAMI.

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32 The Suvd Report references a requirement in the CMS applicable to Appendix I species, but not for CMS Appendix II species, which are the ones of concern.

33 CMS, Art. V(5)(f).

34 Id. at Art. V(5)(h).

35 Id. at Art. V(5)(g).

36 Id. at Art. V(5)(m). As per information received from WCS, there no emergency procedure exists. What has been observed during disease outbreaks has actually worked against movement rather than in favor of it. For instance, during the foot-and-mouth disease (FMD) outbreak that occurred in Mongolian gazelle populations, the national emergency management agency tried to block all potential crossing points along the TMR to restrict gazelle movements with aim of reducing disease spread by the gazelles.

37 CMS Article I, paragraph 1 (j) refers to AGREEMENT(S) concluded in accordance with the basic principles governing such instruments as included in Article IV, paragraph 3, and Article V.

38 UNEP/CMS/Resolution 12.8, Implementation of Articles IV and V of the Convention

39 Personal comm. with CMS Legal Advisor.

Together, these four (4) (potentially five) obligations are further supported by the official CMS Linear Infrastructure Guidelines, which recognize the impacts of rail lines and fencing on migratory species and outline principles and methods the application of which in the context of the Trans-Mongolia Railroad (TMR) would result in a wildlife friendly corridor. However, the Guidelines are primarily forward looking, drafted to apply to projects that have not yet been implemented (e.g., covering screening and scoping procedures), as opposed to pre-existing infrastructure. There are nonetheless several considerations that may apply to reforms or to pre-existing projects; among these are the mitigation principles listed on pg. 44. In addition, methods for the wildlife friendly construction of fencing can be found on pg. 59 of the Guidelines, including among others, removing unnecessary fencing, using virtual fences and wildlife friendly fences.

## Detailed Answer

### Introduction

This review considered two (2) major international agreements and two (2) sub-agreements that fall under the CMS. More international instruments were reviewed but eliminated from the analysis as they do not provide a sufficient basis applicable to the question presented.

The international agreements selected either directly or indirectly apply 1) to the conservation of wildlife and their habitat (including migratory species and routes), or 2) to project development (including linear infrastructure, such as rail lines). All agreements have also either been signed or ratified by Mongolia.

The agreements and their status in Mongolia are as follows:

Table 1. List of international agreements reviewed

International Agreement	STATUS		
	eligible	signed	ratified
Convention on Migratory Species			40
• CMS Central Asia Mammal Initiative		41	
• CMS International Single Species Action Plan for the Argali		42	
Convention on Biological Diversity			43

40 CMS ratification 01.11.1999

41 Memorandum of Understanding, signed 2010

42 Published in 2014; CMS Technical Series No. XX April 2014

43 CBD ratification 09.30.1993

## Convention on Migratory Species

The only applicable wildlife-related international agreement is the CMS,<sup>44</sup> and there is a strong argument that a ‘wildlife friendly corridor’ is required where appropriate to the needs and circumstances of CMS listed migratory species.

### EXPRESS VS IMPLIED REFERENCE

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The CMS does not use the term ‘wildlife friendly corridor.’ This lack of explicit language, however, is not dispositive of the issue. The CMS does not explicitly mention any technique or method in its text. Instead, it uses terms and requirements that are broad enough to include any technique that would achieve its objectives. Among its requirements are, for example, 1) maintaining ‘networks’ of habitat,<sup>45</sup> and 2) eliminating ‘obstacles that hinder or impede migration.’<sup>46</sup> Neither of these requirements enumerates specific methods for their implementation, any number of which might be used, e.g., establishing a system of linked protected areas to maintain networks of habitat<sup>47</sup> or designing mitigation systems for linear infrastructure to eliminate obstacles.<sup>48</sup>

Instead, the conclusion that a ‘wildlife friendly corridor’ is required is based on a combination of the following:

- CMS obligations applicable to all migratory species
- CMS obligations applicable to Appendix II listed species
- Principles and methods outlined in the CMS Linear Infrastructure Guidelines

### OBLIGATION APPLICABLE TO ALL MIGRATORY SPECIES

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CMS has at least four (4) obligations that together can be fairly interpreted as a strong foundation for requiring a wildlife friendly corridor associated with the TMR.

The first of these is the overarching requirement to 1) ‘**avoid any migratory species becoming endangered.**’<sup>49</sup> This applies to all Parties and all migratory species listed by the CMS for which they are range states. Mongolia is a Party to the CMS and a range state for each of the species of concern.

All species referenced in this brief currently have an unfavorable conservation status, as documented by more than one international and national instrument and are experiencing decreasing population trends caused by habitat fragmentation, development, and the expansion of human populations. Recognizing conservation threats and population trends, the IUCN assesses two (2) species (argali and khulan) as near threatened and one (1) as vulnerable (goitered gazelle) (see Table 2). Recognizing the threats posed by international trade, CITES lists khulan in Appendix I and argali in Appendix II. Recognizing conservation status and threats to migration, CMS lists all four (4) species in its Appendix II.

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<sup>44</sup> Other wildlife related agreements were reviewed and determined to have no content relevant to this assessment., e.g., the Convention on International Trade in Endangered Species and Ramsar.

<sup>45</sup> CMS Art. V(5)(f).

<sup>46</sup> Id. at Art. V(5)(h).

<sup>47</sup> UNEP/CMS/Resolution 11.24, Central Asia Mammals Initiative.

<sup>48</sup> UNEP/CMS/COP11/Doc.23.3.2, Guidelines on Mitigating the Impact of Linear Infrastructure and Related Disturbance on Mammals in Central Asia, 18 September 2014.

<sup>49</sup> CMS Art. II(2); requires Parties to avoid any migratory species becoming endangered.

While Mongolia does not use the same terminology, it similarly recognizes the unfavorable status of three (3) of the four (4) species. The Mongolian Redbook lists the khulan as ‘Very Rare’ and the argali and goitered gazelle as ‘Rare.’ These same three (3) species are also legally protected as ‘rare’ species<sup>50</sup> and hunting is restricted.<sup>51</sup> Mongolian gazelle is the only species not afforded a special protected status under Mongolian law, although hunting is legally controlled, and several reports document the impact of the TMR on its migrations.

In sum, the requirement to avoid migratory species becoming endangered is a concern for each of these species as documented by international and national laws and other formal assessments. If the current trends continue, there is concern that these species could become endangered in the near term.

Table 2. Conservation status of selected migratory species

Species	IUCN	CITES	CMS	Mongolian Redbook	Mongolian Legal Status	Hunting
Argali sheep ( <i>Ovis ammon</i> )	NT	II	II	Rare	Rare	Restricted
Khulan ( <i>Equus hemionus hemionus</i> )	NT	I	II	Very Rare	Rare	Restricted
Goitered gazelles ( <i>Gazella subgutturosa</i> )	V		II	Rare	Rare	Restricted
Mongolian gazelles ( <i>Procapra gutturosa</i> )	LC		II	Not listed	Not listed	Permitted

Although the Convention uses the term ‘avoid,’ implying the prevention of future harm, the term is equally applicable to current and ongoing harms such as those represented by the TMR. As constructed, the TMR cuts through the known migration routes of all four species, although with varying degrees of impact for each species and likely requiring different remedies. For all of them, however, the CMS expressly identifies the need to address the impact of linear infrastructure on migratory routes. For both goitered gazelle and Mongolian gazelle, for example, CAMI key activities are related to the mitigation of the effects of linear infrastructure on their habitat.<sup>52</sup> For the khulan, CMS-CAMI key activities include increasing scientific knowledge on their movements and migration corridors and promoting the creation of protected areas in key habitats and migration routes. For argali, transportation linear infrastructure has not yet been shown to have a significant impact, although fencing is a concern.<sup>53</sup> For most of its length, the TMR has fencing<sup>54</sup> intended to exclude free-ranging livestock to prevent collision, but which impacts wildlife movements as well.

In other words, for all these species, preventing them from becoming endangered is directly and consistently associated with addressing the impacts of the TMR.

<sup>50</sup> Note the Mongolian Redbook does not confer a legal protected status on species. This category is defined by the Mongolian Law on Fauna and the list of rare species is approved by a Cabinet Ministry Resolution, titled ‘List of Rare Species’ which is updated periodically. The most recent was in 2012.

<sup>51</sup> Mongolia, Law on Fauna, Art. 7.5.

<sup>52</sup> CMS Central Asia Mammal Initiative accessed <https://www.cms.int/en/publication/central-asian-mammals-initiative-saving-last-migrations>.

<sup>53</sup> Single Species International Action Plan for Argali Sheep Conservation, p. 16.

<sup>54</sup> Estimated length is TMR fencing is about 2,440 km.

## OBLIGATIONS APPLICABLE TO APPENDIX II SPECIES

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For Appendix II species, the CMS further requires member states to conclude ‘Agreements’ with particular attention to providing for:

1. the ‘maintenance of a network of suitable habitats appropriately disposed in relation to the migration routes,’<sup>55</sup>
2. the removal of barriers that impede or hinder migration,<sup>56</sup> and
3. new or the reintroduction to favorable habitat, as appropriate.<sup>57</sup>

There is also a strong argument that, given the railway lines connecting with TMR have been progressing with unprecedented speed, there is a need to implement emergency measures to timely respond to mitigate impacts.

Each of these considerations has a direct link to the TMR and the creation of a wildlife friendly corridor.

## CMS ‘AGREEMENT’ REQUIREMENT

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The first question, however, is whether the species of concern are the subject of a CMS ‘agreement,’ which would make these binding considerations. The answer is, yes, pursuant to the rules of interpretation agreed to by the Parties under Resolution 12.8.

The CMS only defines one type of ‘AGREEMENT’ directly in its text, which it references using all caps in the body of the convention.<sup>58</sup> It defines these as ‘international agreement[s] relating to the conservation of one or more migratory species as provided for in Articles IV and V of this Convention.’

However, other ‘agreements’ are also mentioned in the text, using lower case letters. These lower-case ‘agreements’ refer to formal instruments not otherwise labeled as an AGREEMENT, e.g., Memoranda of Understanding, Action Plans, Initiatives. Parties are encouraged to conclude ‘agreements’ for species that cross one or more national jurisdiction boundaries. To clarify the use and interpretation of these agreements, Resolution 12.8 recommends that Parties implement the convention using instruments, ‘other than AGREEMENTS *in accordance with Article V* (emphasis added).’ In other words, these other instruments are bound by the same considerations as formal AGREEMENTS.

The species of concern in this brief are the subject of two CMS instruments that constitute ‘agreements’: 1) the Central Asia Mammal Initiative, and 2) the International Action Plan for the Conservation of the Argali. Both of these include the same considerations outlined in Art. V(5) in their text and Mongolia has agreed to both instruments. In sum, while the requirements may not apply through an AGREEMENT, they do apply to the CMS-CAMI and Action Plan pursuant to Resolution 12.8, and Mongolia has voluntarily agreed to be bound by them.

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<sup>55</sup> CMS, Article V(5)(f).

<sup>56</sup> Id. at Art. V(5)(h).

<sup>57</sup> Id. at Art. V(5)(g).

<sup>58</sup> Id. at Art. I(1)(j).

## 1. NETWORK OF HABITATS

Concerning the first requirement for Appendix II species (**maintaining a suitable network of habitats**), Mongolia has made significant strides in increasing the footprint of its protected areas and ensuring that critical wildlife habitat is well represented. However, it has not yet addressed the needs of migratory species, despite a requirement in the Law on Fauna to keep migration routes clear.<sup>59</sup>

To better understand what the CMS requires, Resolution 12.7 clarifies the ‘Role of Ecological Networks’ for the conservation of migratory species, wherein ‘network’ refers to ‘any route used by wildlife.’<sup>60</sup> More specifically, it encourages the consideration of migratory species needs in migratory ranges and network-scale conservation. Mongolia’s protected areas law makes no reference to migratory species. In practice, Mongolia’s protected areas are individual areas within which the range of migratory species falls, but only partially (e.g., Argali – 23%; khulan – 41%; goitered gazelle – 15%; Mongolian gazelle – 12%) and none are defined or dedicated to protecting migratory routes. Most of the protected areas near the TMR are Nature Reserves, and, while appropriate for wildlife conservation, are generally much smaller than Strictly Protected Areas and National Parks, have fewer protections, and none are large enough or have been established to protect migratory routes.

## 2. REMOVING BARRIERS TO MOVEMENT

However, beyond improving the purpose, size, and placement of protected areas is the still unresolved need to allow migrations to cross the TMR. Regardless of how well individual protected areas may be defined with respect to migratory species, they still run up against this impediment. The second requirement (**removing barriers to movement**) addresses this concern and as explained in Resolution 12.7, it is also a critical part of network-scale conservation.<sup>61</sup>

Under **CAMI**, infrastructure development as a barrier to movement was listed as a high priority key objective for 2014-2020.<sup>62</sup> CAMI further highlights the impact of fences and railroads for the Mongolian and Goitered Gazelle, both of which are key to this study. In particular, it calls for the mitigation of impact from existing fences and incorporating landscape permeability concepts for railroad development.<sup>63</sup>

The **Argali Action Plan** also recognizes the challenges that barriers create to movement. Barriers to migration, including fences and linear infrastructure, are known to impact Argali reducing populations and access to seasonal habitats. Of particular concern are fences, which result in mortalities when animals become entangled or injured.<sup>64</sup> The Action Plan further recognizes that barriers to migration have not yet been addressed in a way that will achieve long-term conservation.<sup>65</sup>

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<sup>59</sup> Mongolia, Law on Fauna, Art. 6.

<sup>60</sup> CMS Resolution 12.7.

<sup>61</sup> UNEP/CMS/Resolution 12.7 (Rev.COP13)

<sup>62</sup> CAMI 2014-2020 plan pg. 6.

<sup>63</sup> CAMI 2014-2020 plan pg. 11-12.

<sup>64</sup> Argali Action Plan pg. 5.

<sup>65</sup> The Argali Action Plan pg. 6.



### 3. REINTRODUCING TO FAVORABLE HABITAT

The third requirement (**providing new or reintroducing to favorable habitat**) is potentially also applicable to the extent creating a wildlife friendly corridor satisfies the requirement to provide new or reintroduce to ‘favorable habitat.’ The CMS does not define what constitutes favorable habitat, a question that is in any event species specific.

The TMR acts as a complete or nearly complete barrier and has effectively excluded at least three of the four migratory species from large parts of their historic range for roughly 70 years.<sup>66</sup> In this context, creating a wildlife friendly corridor that allows these species to cross the TMR would be the equivalent of ‘reintroducing’ them to habitat they historically occupied, i.e., favorable habitat.

### CMS LINEAR INFRASTRUCTURE GUIDELINES

The CMS specifically cites the need to reference and apply the CMS Linear Infrastructure Guidelines, which recognize the impacts of rail lines and fencing on migratory species. To this end, the Guidelines describe principles and methods the application of which in the context of the Trans-Mongolia Railroad (TMR) would result in a wildlife friendly corridor. Mongolia is a member of CMS and therefore these guidelines, although not expressed as requirements, play a role in fulfilling its international obligations, at minimum as a function of ‘good faith’ compliance as required by international law and Mongolia’s Constitution (see Legal Brief 2: National Legal Basis for a discussion).

However, for the most part, these principles and methods are forward looking, drafted to apply to projects that have not yet been implemented (e.g., covering screening and scoping procedures). Methods for the wildlife friendly construction of fencing can be found on pg. 59 of the Guidelines, copied here for reference. While the Guidelines are framed in terms of future linear infrastructure development, some of the principles listed are directed at pre-existing structures, and all others would be equally valid for pre-existing structures.

Excerpt from CMS Linear Infrastructure Guidelines:

*‘The foremost principle in this section is that while fences may be necessary along some linear infrastructure (e.g. roads or rail lines) to prevent collisions that can endanger animals as well as people, their use should always be carefully designed to avoid or mitigate barrier effects.*

*The following should also be considered:*

- ii. Remove all fencing that is obsolete and no longer needed.*
- iii. Construct the least amount of fencing required to achieve management objectives.*
- iv. Fence design should respond to the following:*
  - a. local topography;*
  - b. local weather conditions (e.g. heavy snows or rains);*
  - c. wildlife present in the area or likely to use the area during migration, ensuring that both adults and young can safely cross;*
  - d. daily and seasonal movements of wildlife in the area.*
- v. Legally require wildlife-friendly fence designs. Even if intended as a complete barrier, for example to prevent access to a transportation corridor, fences can be constructed so they do not trap animals. Wildlife-friendly fences that allow passage should be highly visible to wildlife and allow them to pass from one side to the other*

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<sup>66</sup> The TMR constitutes the absolute eastern border of the khulan range, while the population size of goitered gazelle and argali are in much less in eastern part of the TMR.

- easily without injury and without damaging the fencing structure.*<sup>67</sup>
- vi. *Wherever feasible, alternatives to standard fencing should be considered a priority. Among the growing list of options are:*
    - a. **Virtual Fences.** *Technology to develop a ‘virtual fence’ is now available that allows a border to be remotely monitored.*
    - b. **Normandy Fences.** *Normandy fences are steel structures designed to prevent vehicles from crossing, but that still allow animals to pass. Tests have shown that Normandy-style fence can successfully stop a 4,500 kg vehicle moving at 65 km/hour.*
    - c. **Other vehicle barriers.** *Other vehicle barriers include bollards. These are steel or wooden posts anchored into the ground using concrete and spaced so that cars cannot pass, but which provide ample room for wildlife to cross.*
  - vii. *Whether constructed to prevent animals from accessing a transportation corridor or for other non-wildlife related purposes, fences should be designed to prevent wildlife mortality.*
  - viii. *Loose fencing materials and posts are more difficult for wildlife to navigate. Fencing should therefore be designed to ensure it remains upright.*
  - ix. *Fence maintenance must be regularly scheduled and the necessary budget included in fence design to prevent deterioration of the structure that can lead to wildlife mortality.*
  - x. *If constructed to exclude wildlife from a transportation corridor, fencing must nonetheless be accompanied with safe crossing opportunities. Studies have shown that where safe crossings are not provided, are too few, small, or far apart, wildlife is likely to break through, damaging the structure and reducing its effectiveness.*
  - xi. *Animals may end up in between the fences that line a transportation corridor after finding or creating gaps. Fences should therefore always be accompanied with escape opportunities for animals that end up in between the fences. Escape opportunities can be created through the use of:*
    - a. **Jump-outs** or “**escape ramps**” *consisting of sloped mounds constructed at regular intervals on the inside of the corridor, effectively lowering the height of the fence and enabling animals to jump to the other side.*
    - b. **One-way gates** *are gaps constructed in fencing allowing animals to pass only in one direction, in this instance from the inside to the outside of a fenced transportation corridor.*
  - xii. *Wild animals will move along a fence until they find a gap or the fence ends. This means that there can be a concentration of animals at the end of fences and consideration should be given to managing crossing and potential collisions in these areas.*
  - xiii. *Any constructed fences and gaps should be accompanied with other measures to facilitate safe passage of animals across the intrusion. These may include one or more of the following depending on local conditions:*
    - a. *Overpasses*
    - b. *Underpasses*
    - c. *Wildlife warning signs*
    - d. *Crosswalks for wildlife*
    - e. *Mandatory or advisory speed limit reductions*
    - f. *Animal detection systems*<sup>68</sup>

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67 Citing Paige (2008).

68 CMS Linear Infrastructure Guidelines, p. 59.

## Convention on Biological Diversity

As with the CMS, there is no explicit requirement in the CBD to establish a wildlife friendly corridor along railways or other linear infrastructure. However, the broad language of the CBD provides additional support for an implied requirement.

### RELEVANT REQUIREMENTS

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The Convention on Biological Diversity is directed at protecting the environment as a whole, including wildlife. The language most relevant to this analysis is contained in Article 8, which states that each party ‘shall’:

1. develop guidelines for the selection, establishment, and management of protected areas;<sup>69</sup>
2. promote the protection of ecosystems and maintenance of viable population of species;<sup>70</sup>
3. promote ‘sustainable development’ in areas adjacent to protected areas.<sup>71</sup>

### GUIDELINES FOR PROTECTED AREAS

The CBD’s first requirement (**protected areas**) directs parties to ‘develop guidelines for the selection, establishment and management of protected areas.’ In compliance with this requirement, Mongolia has a Law on Protected Areas that outlines four (4) types of protected areas, their purposes and management regime.<sup>72</sup> Three (3) protected area types have one or more criteria for their establishment that consider the environment as a whole, or wildlife conservation specifically – Strictly Protected Areas (SPAs), National Parks (NPs), and Nature Reserves (NRs). SPAs and NPs act as Mongolia’s larger landscape level regimes established for the overall protection of pristine areas,<sup>73</sup> and by default, include wildlife populations. Gobi Gurvan Saikhan National Park, for example, includes important habitat for khulan, goitered gazelle and Mongolian gazelle. NRs tend to be smaller but have one sub-type expressly directed at wildlife conservation.<sup>74</sup> Ikh Nart Nature Reserve is an example, created expressly for argali conservation.

What Mongolia does not yet have either in its Law on Protected Areas or other regulatory instrument are requirements or guidelines for the establishment of protected areas in relation to migratory species or migratory routes. As noted in the brief on Facts Presented – Map 2, none of the protected areas currently established were designed to respond to the spatial needs of migratory species.

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69 CBD, Art. 8(b).

70 Id at Art. 8(d).

71 Id at Art. 8(e).

72 Mongolia, Law on Protected Areas, Art. 3.

73 Id. at Art. 7 and Art. 13, respectively.

74 Id. at Art 20(2).

## MAINTAINING VIABLE POPULATIONS

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Relevant to the second requirement (**maintaining viable populations**), there is the dual question of what constitutes a viable population and what it means to ‘maintain’ the same.

While there is no single measure or definition of what constitutes a viable population, what is known is that three (3) of the (4) species of concern are on a downward trend. They all have an unfavorable conservation status (see Table 2, p. 5), are directly impacted by the TMR. The CMS reports, Linear Infrastructure Guidelines, and other research consistently indicate that maintaining viable populations will require addressing the TMR’s impacts.

Analyzing the other element (**to maintain**) may seem like reading the CBD too closely but, in a legal context, time matters and to ‘maintain’ something is a time-oriented reference. As there is no definition or further explanation, this brief can only ask whether the requirement to ‘maintain’ is already violated for species that are on a downward trend,<sup>75</sup> but for which no determination has been made that the population has passed some viability threshold. If this is the case, this requirement has already been triggered and provides further support for establishing a wildlife friendly corridor now, not later. If this is not the case, this provision may still have persuasive value but would not provide a foundation for a claim of non-compliance.

## DEVELOPMENT ADJACENT TO PROTECTED AREAS

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Finally, for the third requirement (**sustainable development in areas adjacent to protected areas**), Mongolia promulgated a Buffer Zone Law in 1997 that applies to activities that occur immediately adjacent to protected areas.<sup>76</sup> The overarching purpose of these areas is ‘to minimize, eliminate and prevent actual and potential adverse impacts to SPAs and NPs, to increase public participation, to secure their livelihood and to establish requirements for the proper use of natural resources.’<sup>77</sup> The language of the law (in Mongolian and in the translated version) is somewhat vague appearing to require the establishment of buffer zones around (i.e., outside) SPAs and NPs, but also possibly *inside* NPs, and making their use fully discretionary for NRs and Natural Monuments, with no indication of whether the buffer zone may overlap partially or even entirely.<sup>78</sup>

Specific to migratory species, the law requires consideration of the range, distribution, and migratory routes of Very Rare and Rare species<sup>79</sup> (as defined in the Law on Fauna and the Rare Animals List). Buffer zones are also required to have management plans, which must include measures for reducing the influence of such zones on migration routes.<sup>80</sup> This is not the same as the affirmative requirement to protect migration routes, merely avoid negative impacts that might occur because of the buffer zone. In other words, buffer zones should consider the migration routes of Very Rare and Rare species and cannot negatively impact such routes, but they have no requirement to provide additional protection for them. This weighs against an interpretation that buffer zones

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<sup>75</sup> This would therefore apply to the species of concern, other than khulan whose population is assessed as stable.

<sup>76</sup> Mongolia, Law on Buffer Zones, Art. 1.

<sup>77</sup> Id. at Art. 3.1.

<sup>78</sup> Id. at Art. 3.2 and 3.3.

<sup>79</sup> Id. at Art. 4.1.1.b. and c.

<sup>80</sup> Id. at Art. 8.

in the vicinity of the TMR would or must lend further support to the establishment of a wildlife friendly corridor.

As a practical matter, the SPAs and NPs near the TMR are include the Khan Khentii Strictly Protected Area, Gorkhi Terelj National Park, Tuijin Nars National park, Bogd Khan uul Strictly Protected Area, Ikh Nart Nature Reserve, Choiriin Bogd Uul Nature Reserve, Burdene Bulag Nature Reserve. None of these overlap with the migratory routes of the species of concern. To date, out of seven (7) listed SPAs, two (2) have buffer zones as required by law on Buffer Zones. As noted in the Brief on Facts Presented, protected areas near the TMR in the southern region, the area that coincides with the ranges of the migratory species of concern, are all Nature Reserves. Establishing buffer zones here is discretionary.

## Conclusion

In conclusion, the CMS provides a strong basis for requiring the establishment of a *wildlife friendly corridor* along the TMR. For all migratory species, CMS Art. II(2) asks Parties to avoid migratory species becoming endangered. In the context of CMS recognized ‘AGREEMENTS,’ Art. V(5) more specifically encourages parties to maintain a network of suitable habitats,<sup>81</sup> to eliminate obstacles that may hinder or impede migration,<sup>82</sup> to provide new or reintroduce to favorable habitat, as appropriate,<sup>83</sup> and finally to provide emergency procedures for species whose conservation status is seriously affected.<sup>84</sup> These requirements apply to the species of concern, all of which have been included in CMS instruments that require consideration of the foregoing and that Mongolia has voluntarily agreed to implement.

However, Mongolia has yet to fully implement these obligations. While Mongolia has made significant strides in increasing the footprint of its protected areas, which contributes to maintaining ‘**a suitable network of habitats**,’ it has not yet addressed the needs of migratory species, despite a requirement in the Law on Fauna to keep migration routes clear.<sup>85</sup> Fencing along the TMR is increasing at an unprecedented rate, directly contrary to the instruction to ‘**remove barriers to movement**.’ And only small areas have been opened allowing movement that would effectively ‘**reintroduce species to favorable habitat**.’

The national legal basis for recognizing and implementing these requirements is discussed in the following Chapter.

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<sup>81</sup> CMS, Art. V(5)(f).

<sup>82</sup> Id. at Art. V(5)(h).

<sup>83</sup> Id. at Art. V(5)(g).

<sup>84</sup> Id. at Art. V(5)(m). As per information received from WCS, there no emergency procedure exists. What has been observed during disease outbreaks has actually worked against movement rather than in favor of it. For instance, during the foot-and-mouth disease (FMD) outbreak that occurred in Mongolian gazelle populations, the national emergency management agency tried to block all potential crossing points along the TMR to restrict gazelle movements with aim of reducing disease spread by the gazelles.

<sup>85</sup> Mongolia, Law on Fauna, Art. 6.



# CHAPTER 2

## INTERNATIONAL LEGAL BASIS

This Chapter reviews the national legal basis for establishing a wildlife friendly corridor along the Trans-Mongolia Railway. It examines the applicable provisions in 20 national laws and regulations.





# Questions Presented

1. If there is an **international legal basis**, is this **recognized and applied** under Mongolian national law?
2. Is there an **explicit legal requirement** in national law to establish a wildlife friendly corridor for the TMR?
3. Is there an **implicit legal requirement** to establish a wildlife friendly corridor for the TMR?
4. Is there a national-level mandate **to protect connectivity**? If so,
  - a. are such connectivity protections a function of species-specific legal instruments or more general mandates, and
  - b. whether the foregoing is species specific or general, would such a mandate apply to Asiatic wild ass or khulan (*Equus hemionus hemionus*), Mongolian gazelle (*Procapra gutturosa*), goitered gazelle (*Gazella subgutturosa*), and Argali sheep (*Ovis ammon*).
5. Is it illegal to indirectly have a negative effect on the status of a species by taking **no action**.
6. Are there **other legal bases** that imply a requirement to establish a wildlife friendly corridor?



# National Legal Framework

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Before answering the questions presented, this section lists the national legal framework that regulates wildlife conservation and movement in Mongolia. This framework has been reproduced and is accessible in the [Legal Atlas® platform](#).

The compiled legal includes the following:

1. Constitution of Mongolia, 1992
2. Convention on Migratory Species, ratified 1999
3. Convention on Biological Diversity, ratified 1993
4. Criminal Code (2020 Amendment), 2015
5. Civil Code, 2002
6. Law on Environmental Protection, 1995
7. Environmental Protection Law (2005 Amendment)
8. Law on Environmental Impact Assessments (revised), 2012
9. Environmental Measures Decree, 2005
10. Law on Special Protected Areas (2021 Amendment)
11. Special Protected Areas (State Protection) Decree, 2011
12. Protected Areas Management Planning Methodology, 2021
13. Law on Special Protected Area Buffer Zones, 1997
14. Law on Fauna, 2012
15. Law on Animal Health, 2018
16. List of Rare Animals, 2012
17. Law on Railway Transport, 2007
18. Law on Infringements, 2017
19. MNS 6515:2015 re: 'Passages for wild ungulates along the highways and railways in steppe and Gobi areas', 2015
20. Safety Regulation Temporary Rule, 2021

Of the twenty (20) laws listed, two have already been discussed in the preceding brief on the **International Legal Basis**, the Convention on Migratory Species (CMS) and the Convention on Biological Diversity (CBD). They are mentioned again in this brief as they form part of Mongolia's national legislation pursuant to the Constitution and the Law on International Treaties. The application of international law is discussed here, but the conventions themselves are not further analyzed other than to cross-reference as appropriate.

This list also differs from prior reports on the topic. This review includes, for example, the CBD, as it contains requirements specific to protected areas and the maintenance of viable populations of wildlife. This list also includes the List of Rare Animals, Criminal Code, Civil Code, and Law on Environmental Impact Assessments, all of which are relevant to the implementation of CMS requirements (e.g., avoiding migratory species from becoming endangered), the construction or reformation of linear infrastructure, and questions of liability (discussed in the following reports). Finally, it includes the Safety Regulation Temporary Order, which was only issued in 2021, four (4) years after the prior report. Not included here, but mentioned by the prior report, is the Law on Administrative Territorial Units and their Governance. This review did not find any content relevant to the analysis and eliminated it from further review.



# Assessment of Prior Reports

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This analysis is not in complete agreement with the findings of the prior report on this topic, although the quality of the translation and limited argumentation makes it difficult to assess. The prior analysis concludes that Mongolia's wildlife has a right to migrate freely based on the following:

- Wildlife is under State protection (Constitution, Art. 6).
- Mongolian citizens have a constitutional right to be protected against ecological imbalance (Constitution, Art. 16(2)).
- Mongolia is obligated to implement the Convention on Migratory Species, which protects Appendix I species.
- Migratory routes must be kept free (Law on Fauna, Art. 6.1.3), and
- There is a specific standard applicable to the creation of safe passages for ungulates in the Gobi and Steppe regions of the country.

The report is largely conclusory in nature, i.e., it does not offer support for its findings (e.g., definitions, court rulings, interpretations), nor does it apply the law to relevant facts, or weigh any potential counterarguments. In the absence of supporting law or interpretation, it cannot be assumed, for example, that wildlife has a right to move and migrate freely because 1) it is under state protection and 2) Mongolian citizens have a right to be protected against ecological imbalance;<sup>86</sup> or that this right to movement would then provide a sufficient legal basis for removing fencing or altering the TMR to allow wildlife to cross.<sup>87</sup> To be fair, the cited report goes a little further than this but in no instance does it provide support or explain how it arrived at the findings presented.

It may be that other legal arguments have been subsumed within these conclusions but for clarity and to understand the strength of the legal basis, there is no substitute for a fuller analysis. This brief examines all potential national legal bases, including the recognition of international law in national law, the application of identified legal provisions to known facts (e.g., wildlife population status, use of protected areas), and the identification and assessment of counterarguments, open questions, and weaknesses in the legal analysis.

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<sup>86</sup> Suvd Law Firm report, p. 8.

<sup>87</sup> Id.

# Application of International Law

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## Short Answer

1. If there is an international legal basis, is this recognized and applied under Mongolian law?

**Yes.** Mongolia's national legal system explicitly recognizes the application of international instruments it has signed and ratified. In Art. 10, Mongolia's Constitution states the following:

- (2) *Mongolia fulfills in good faith its obligations under international treaties to which it is a Party.*
- (3) *The international treaties to which Mongolia is a Party become effective as domestic legislation upon the entry into force of the laws on their ratification or accession.*
- (4) *Mongolia may not abide by any international treaty or other instruments incompatible with its Constitution.*<sup>88</sup>

Mongolia has signed and ratified the CMS and CBD, and, as explained in the Detailed Answer that follows, the requirements of both are compatible with the Constitution.<sup>89</sup> They are therefore automatically part of Mongolia's domestic legislation<sup>90</sup> and, pursuant to the Law on International Treaties, take precedence over national laws other than the Constitution.<sup>91</sup> Finally, Mongolia self-imposes a good faith obligation to fulfill its commitments under the international treaties it has ratified.

In sum, Mongolia recognizes the requirements of the CMS and CBD with respect to its migratory species as part of its national legal system. Under the terms of the CMS, this includes preventing any migratory species from becoming endangered, maintaining a network of suitable habitats, removing barriers to movement, and, where appropriate, reintroducing them to favorable habitat.

The open question is whether the CMS or CBD provisions cited are 'requirements' in a strict sense such that they would outweigh countervailing national law, e.g., safety requirements.

## Detailed Answer:

The following sections analyze how Mongolia's Constitution incorporates the CMS and CBD requirements cited in the preceding brief covering the international legal basis.

Mongolia's national legal system explicitly recognizes the application of instruments it has signed and ratified. In Art. 10, Mongolia's Constitution states the following:

- (2) *Mongolia **fulfills in good faith** its obligations under international treaties to which it is a Party.*

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<sup>88</sup> Mongolia, Constitution, Art. 10.

<sup>89</sup> Id. at Art. 10(4).

<sup>90</sup> Id. at Art. 10(3).

<sup>91</sup> Mongolia, Law on International Treaties, Art. 2(2).

(3) *The international treaties to which Mongolia is a Party become **effective as domestic legislation** upon the entry into force of the laws on their ratification or accession.*

(4) *Mongolia may not abide by any international treaty or other instruments **incompatible with its Constitution**.*<sup>92</sup>

Mongolia has signed and ratified the CMS and CBD, and this review concludes that the requirements of both are compatible with the Constitution, making them effective as domestic legislation.<sup>93</sup>

## COMPATIBILITY WITH MONGOLIA'S CONSTITUTION

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Taking the last point first (**compatibility with the Constitution**), Mongolia follows a standard practice in legal systems by establishing its constitution as the highest form of law. Any law, whether national or international, that contradicts its provisions is invalid. This hierarchy is confirmed with respect to international agreements by Art. 10 of the Constitution.<sup>94</sup>

There is a strong, although not fully conclusive argument that the CMS and CBD requirements are compatible with Mongolia's Constitution. At the same time, there is at least a potential argument supporting incompatibility. The question of compatibility has not been adjudicated and, to the extent there are plausible competing interpretations, it remains an open question.

The analysis that follows nonetheless concludes that both treaties are compatible and that arguments in favor of incompatibility are not well-supported.

## COMPATIBILITY OF CMS REQUIREMENTS

Without the benefit of court decisions to confirm, this review nonetheless finds that the CMS and CBD requirements cited in the brief on International Legal Basis are not likely to contradict the Constitution. On the contrary, there are **constitutional provisions** that would more likely be interpreted **in support of the establishment of a wildlife friendly corridor** and at a minimum grant the State the authority to do so at its discretion including:

- exercise of sovereign rights over all 'natural resources,'<sup>95</sup>
- reservation of all ownership rights to the State for 'animals,'<sup>96</sup>
- authority to exercise eminent domain for environmental protection,<sup>97</sup>
- the duty to protect citizens from 'ecological imbalance,'<sup>98</sup> and
- the authority to take measures to protect the environment and restore natural resources.<sup>99</sup>

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92 Mongolia, Constitution, Art. 10.

93 Id. at Art. 10(4).

94 Id.

95 Mongolia, Law on International Treaties, Art. 6(1).

96 Id. at Art. 6(2).

97 Id. at Art. 6(4); 'eminent domain' is the authority of the State to reclaim privately held land for specific purposes and usually with guarantees of fair compensation.

98 Id. at Art. 16(2).

99 Id. at Art. 38(4).

The Constitution does not define the term ‘natural resources,’ but it would be commonly understood to include wildlife, and to this extent secures Mongolia’s sovereign rights over the same. The term ‘animals’ is also not defined in the Constitution but is defined by the Law on Environmental Protection. A standard rule of statutory interpretation would require reading related laws as a whole and therefore recognize animals as including ‘any mammal, bird, amphibian, fish, reptile, crustacean, insect, mollusk, protozoon, or other invertebrate that temporarily or permanently inhabits the territory of Mongolia.’<sup>100</sup> This definition is broad enough to cover all species of concern in this brief. ‘Eminent domain’ is usually understood as the authority of the State to expropriate private property for public use, usually limited to specific purposes and with guarantees of fair compensation. In Mongolia’s case this power is used as a basis for bringing public land under special protection, which in some instances can limit private rights of use. Mongolia’s Constitution does not limit this power but does expressly allow for its use for purposes of environmental protection.<sup>101</sup> In addition, the government has the affirmative constitutional duty to protect its citizens from ‘ecological imbalance.’ Once again, the term is not defined in the Constitution or other law, but it is used in the Law on Environmental Protection, which requires the protection of animals (and other resources) from ‘any adverse impacts to prevent ecological imbalance.’<sup>102</sup> In other words, the constitutional right to be protected from ecological imbalance is connected to the protection of fauna, even if the term is not otherwise defined. Finally, under the Law on Fauna, wildlife protection includes, *inter alia*, keeping migratory routes clear.<sup>103</sup>

In sum, the Mongolian government not only has plenary powers (sovereign, ownership, and eminent domain) to dictate the management of its natural resources, including wildlife, it has the affirmative duty to protect its citizens from adverse impacts to the same. This would include the CMS and CBD requirements to prevent migratory species from becoming endangered, to maintain suitable habitats, to remove barriers to movement, and to reintroduce wildlife to favorable habitat; all of which fit within Mongolia’s constitutionally defined rights, as further supported by the Environmental Protection Law and Law on Fauna.

## POTENTIAL INCOMPATIBILITY OF CMS REQUIREMENTS

One of the prior reports appears to suggest that another provision in the Constitution, the **right to a safe environment** might be argued in favor of passenger safety.<sup>104</sup> This argument, as a function of constitutional law, is not further developed in the report, which instead focuses on a listing of the safety requirements associated with the TMR. If confirmed, however, it would have the potential to weigh against the conclusion that the CMS requirements are compatible with the Constitution. In other words, the argument is that if the Constitution guarantees a right to a safe environment with respect to train passengers, and creating a wildlife friendly corridor threatens that environment, then the CMS requirements would be incompatible with the Constitution and therefore not part of Mongolia’s national legal system.

This argument, while plausible, has less support than the one in favor of compatibility. Primarily, it would require an interpretation of the right that moves beyond the reasons

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100 Mongolia, Law on Environmental Protection, Art. 3(2)(4).

101 Mongolia, Constitution, Art. 6(4).

102 Mongolia, Law on Environmental Protection, Art. 3(1)(5).

103 Mongolian, Law on Fauna, Art. 6.

104 Suvd Law Firm report, pg. 5, fifth paragraph.

for which it was created. The right to a safe environment is an extension of the previously expressed right to a healthy environment. Most often included in a single provision, as it is in Mongolia's Constitution, the combination is intended to establish a rights-based approach to environmental and social protection, but not necessarily a guarantee of human safety in all instances. Its historical application in various international instruments supports this assessment. So far, it has been used in relation to, *inter alia*, an environment free from pollutants,<sup>105</sup> an adequate standard of living (including access to safe food and water),<sup>106</sup> safeguarding the function of reproduction,<sup>107</sup> and safety in working conditions.<sup>108</sup> Other than safety in working conditions, there is no instance in the international treaties reviewed of its application requiring safety in human-built environments generally or with reference to linear infrastructure specifically.

Still, this right has not yet been interpreted by Mongolia's courts and its use at least in some human environments is not unprecedented (e.g., safety in the workplace). Further supporting such an interpretation, the prior report seems to claim that the Railway Transportation law also references the Mongolia's constitutional safety guarantees with respect to its railway safety provisions.<sup>109</sup> This review was unable to find this reference, although there may be in regulations that were not available for review. In any event, the Railway Transportation law is clearly safety oriented, and indeed reinforces this by stating that for 'railway corridors, dangerous and safe zones [that] overlap with other special regime areas, the strictest regime established for them shall apply.'<sup>110</sup> To this extent, it remains a plausible interpretation and therefore an open question.

Potentially countering such an interpretation, however, are the recent changes in purely safety-oriented thinking supported by three (3) relatively new instruments – the 'Ulaanbaatar Action Plan on Wildlife-Friendly Infrastructure,'<sup>111</sup> the legal standard (MNS 6515:2015), and the Safety Regulation, all of which are directed specifically at creating wildlife passages along roads and railways.

- The **Action Plan** is focused on improving the conservation of migratory large mammals and their habitats. It contains recommendations for planning and monitoring of road and railroad infrastructure with a major goal being to conserve the Mongolian gazelle migration. One objective is to address key threats and issues not sufficiently covered including infrastructure development and barriers to movement. The declaration of intent from the plan includes implementing, 1) the removal of fences along railways where possible, 2) making railways wildlife friendly, 3) developing green bridges, and 4) ensuring laws contain environmental standards for infrastructure.
- In 2015, the National Standardization Council Resolution (**MNS 6515:2015**) approved standards for the construction of wildlife passages along railways.<sup>112</sup> This regulatory instrument is entirely dedicated to the safe passage of wildlife and contains requirements for the types of passage, dimensions, and a list of what must be considered in their construction.<sup>113</sup> Note, however, that it applies to

105 Rio Declaration, Principles 1 and 4.

106 Agenda 21

107 Convention on the Elimination of All Forms of Discrimination Against Women

108 International Covenant on Economic, Social and Cultural Rights

109 Suvd Law Firm report, paragraph 2.1, p. 9.

110 Mongolia, Law on Railway Transportation, Art. 27.9.

111 Issued pursuant to a CMS backed International Workshop on "Implementing Wildlife-friendly Measures in Infrastructure Planning and Design in Mongolia in August 2015.

112 National Standardization Council, Resolution No. 6, 2015.

113 Id. at Art. 6.

new construction, not pre-existing, and that some of the elements of the Action Plan are not carried forward in the NSC Resolution, e.g., requirements to remove fencing.

- The **Safety Regulation**, a temporary order (1 year) issued by the Chairman of the Mongolian-Russian Joint Society, was issued to ensure the safety of railway and train movement after the removal of fencing to allow wild animals to cross the railway. The order is limited to the modified fencing area of the Ulaanbaatar Railway and includes: 1) the removal of thorny fencing, 2) obligation to stop trains to prevent animal strikes, and 3) procedures for notifying relevant parties of railway delays due to animal crossings.

Combined, these three (3) instruments provide a counterweight to any interpretation that the railway safety requirements would automatically render the CMS incompatible with the Constitution. They not only demonstrate growing recognition of the need to protect wildlife, but legally secure the idea that a wildlife friendly corridor is not incompatible with either the railway law, or by extension the Constitution.

## INTERNATIONAL LAW AS DOMESTIC LAW

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To the extent the terms of the CMS and CBD do not conflict with the Constitution, they are part of Mongolia's national legal system. The Constitution states that any international agreement becomes domestic legislation upon ratification.<sup>114</sup> This approach is referred to in legal theory as a monist legal system, where international and national law are treated as a single body of law, and the act of ratification gives the international law immediate effect without the need to translate or implement its terms in national law.<sup>115</sup> In legal systems that follow the monist legal approach, ratified international laws may be directly invoked by citizens (i.e., there is no need for an additional basis in national law other than the ratifying instrument), and may be directly applied by a national judge.

## RESOLVING CONFLICTS OF LAW

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Where there is a conflict between the terms of an international and a national law (other than the Constitution), Mongolia's Law on International Treaties states that the provisions of the international treaty prevail.<sup>116</sup> As a practical matter, this means Mongolia's judges have the authority to declare a national law or provision invalid if it contradicts an approved international law. As stated, this would apply even to later promulgated legislation, which, following the principle of *'lex posterior derogate priori'* would normally nullify contradictory terms in prior laws. Mongolia otherwise uses this principle where applicable to settle conflict of law between national laws, and indeed is referenced by the prior report in two instances.<sup>117</sup> The Law on International Treaties, however, requires resolution in favor of the terms of the treaty, an important regulatory statement considering the CMS and CBD were ratified many years before most of the laws in the legal framework presented.

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<sup>114</sup> Mongolia, Constitution, Art. 10(3).

<sup>115</sup> For reference and comparison, jurisdictions that treat international and national legal systems as separate and that require international law be translated into national law are referred to as 'dualist' legal systems.

<sup>116</sup> Mongolia, Law on International Treaties, Art. 2(2).

<sup>117</sup> Suvd Law Firm report, paragraph 1.3, p 9.



However, this approach, as strong as it is, does not mean that the international law is automatically and immediately implemented; nor does it mean that no questions will arise concerning the competency of the international law versus a national law.

The potential for conflict is always present. It is not uncommon to have overlap between laws where the same physical spaces and/or subject matters are regulated by more than one law. In this case, the CMS and CBD together directly overlap with several of Mongolia's laws, including, but not limited to, the Railway Transportation Law, Law on Fauna, Law on Special Protected Areas, Law on Buffer Zones, and Law on Environmental Impact Assessments. The question of which legal provision prevails (international or national) for given questions is likely to arise when establishing a wildlife friendly corridor along the TMR.

In this regard, the first point to remember is that International Agreements often contain few specific requirements, with much of the content phrased as aspirational goals (e.g., parties are 'encouraged' to implement) or recommendations (e.g., parties 'should'), but not as requirements. The CMS requirements cited in the preceding brief are not worded as strict obligations. With respect to migratory species generally, Parties to the convention '*acknowledge* the need to take action to avoid any migratory species becoming endangered [*emphasis added*].' For Appendix II species, the CMS uses similarly aspirational language; 'Each Agreement *should*...';<sup>118</sup> and '*where appropriate and feasible*, each AGREEMENT *should*...' <sup>119</sup> In none of these provisions does the convention say 'parties shall' take such action, as it does in other provisions, e.g., parties '*shall* prohibit the taking of animals belonging to' Appendix I.<sup>120</sup> Standard rules of statutory construction<sup>121</sup> (i.e., judicial interpretation) would conclude that, had the convention intended to create an obligation in one instance, it would have used the same language that creates an obligation in other instances in the same law.<sup>122</sup> In other words, the protection provisions in the CMS that 'acknowledge the need to take action,' or say that parties 'should,' 'where appropriate and feasible,' are not absolute requirements.

When there is a conflict between laws, other rules of interpretation would require ruling in favor of the more specific or more explicit statute. There is a fair argument that the safety provisions in Mongolia's railway law are both more specific and more explicit, i.e., worded as obligations and supported further by the requirement that, in cases of overlap the stronger protection regime is the one to apply.<sup>123</sup> This is an untested area of law in Mongolia and therefore remains an open question – will the courts favor the international law based on their primacy (even though they are worded as recommendations) over the more specific and explicit safety requirements of the Railway Transportation law?

## GOOD FAITH COMPLIANCE

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Despite the potential for conflicting legal regimes, Mongolia is still under the obligation to comply 'in good faith' with the terms of the international agreements it has ratified,

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118 Id. at Art. V(4).

119 Id at Art. V(5).

120 CMS, Art. III(5).

121 The process of determining what a particular law (statute) means so that a court may apply it accurately.

122 The rule of statutory construction relied on in this instance reads 'Where different words are used in different parts of a law, it is presumed that a different meaning was intended to apply to each word.'

123 Mongolia, Law on Railway Transportation, Art. 27.9.

both as a principle of international law<sup>124</sup> and under the terms of its own Constitution.<sup>125</sup> Without getting into long details, the ‘good faith’ principle imposes a standard of honesty, loyalty, and reasonableness in legal relationships.<sup>126</sup> While useful, it is not an inflexible requirement. It emphasizes the intent to do everything reasonable to comply with promises made, especially important in the absence of a supranational authority responsible for enforcement.

It may also have some additional meaning in this context, as Mongolia has voluntarily agreed to implement the CMS obligations that apply to ‘agreements’ when it agreed to the Central Asia Mammals Initiative and the International Single Species Action Plan, both of which identify the impacts associated with linear infrastructure to the species of concern. Indeed, the Action Plan on Wildlife-Friendly Infrastructure, MNS 6515:2015, and Safety Regulation may all be interpreted as evidence of Mongolia’s attempts at good faith compliance with its CMS obligations, further shifting the weight of interpretation in favor of compatibility and resolving conflicts for the creation of a wildlife friendly corridor.

## Explicit National Legal Requirement

### 2. Is there an explicit legal requirement in national law to establish a wildlife friendly corridor for the TMR?

**No.** There is no explicit requirement to establish a ‘wildlife friendly corridor’ in relation to linear infrastructure generally, or the TMR specifically.

### Law on Fauna

The closest to an explicit requirement that might be applicable to the TMR is found in the Law on Fauna, which states that ‘animal protection’ includes keeping migration routes clear<sup>127</sup> (нүүдлийн замыг чөлөөтэй байлгах).<sup>128</sup> This is one of the few provisions expressly directed at migratory species and routes, and the only one that would appear to apply to pre-existing structures (i.e., the TMR), as the language is not restricted to projects or future events. To this extent, it might be interpreted to require the creation of a wildlife friendly corridor along the TMR but so far has neither been applied in practice, nor interpreted by the courts. In any event, the language of the law is insufficient to consider this an explicit legal requirement.

### MNS 6515:2015

MNS 6515:2015 contains explicit standards for wildlife passages but applies to new projects and not the pre-existing TMR infrastructure.<sup>129</sup> It also does not require the implementation of wildlife friendly structures, instead providing the standards in the

124 According to Art. 26 of the Vienna Convention on the Law of Treaties of 1969, ‘[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.’

125 Mongolia, Constitution Art. 10(2).

126 Uçaryılmaz, T. (2019). The Principle of Good Faith in Public International Law, Oxford Institute of European and Comparative Law, Bilkent University Faculty of Law, [http://dx.doi.org/10.18543/ed-68\(1\)-2020pp43-59](http://dx.doi.org/10.18543/ed-68(1)-2020pp43-59)

127 Mongolia, Law on Fauna, Art. 6.1.3.

128 Id. at Art. 7.

129 Mongolia, MNS 6515:2015, Art. 1.

event they are used or required by another instrument (e.g., an environmental impact assessment).

## Safety Regulation

The Safety Regulation does not provide an explicit mandate to create a wildlife corridor. Instead, its focus is on ensuring uninterrupted transport along the railway by reducing animal strikes. To this end, it provides instructions for monitoring and safety requirements when fencing has been removed to permit wildlife crossings. This order is also limited in time and to the areas where fencing is removed.

# Implicit National Legal Requirement

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### 3. Is there an implicit legal requirement to establish a wildlife friendly corridor for the TMR?

**Yes.** A wildlife friendly corridor is not mentioned or defined but Mongolia has at least nine (9) laws with language that implies a requirement for a wildlife friendly corridor. This interpretation rests in part on the strength of three (3) laws, as well as the rule of statutory construction that requires reading statutes that relate to the same subject together, as a unified whole. The three (3) laws with a strong foundation for an implied requirement are the Law on Fauna, MNS 6515:2015, and Safety Regulation. The other laws supporting this interpretation include the Constitution, Criminal Law, Environmental Protection Law, Protected Areas Law, Buffer Zone Law, and Law on Land.

## Law on Fauna

The Law on Fauna **requires ensuring migration routes are clear**<sup>130</sup> In a plain language reading of the provision, if the TMR and any accompanying barriers (e.g., fences, berms) block a species migration route, this provision would require the routes be restored. While it does not specify how this needs to be accomplished, as a practical matter there is no way to comply without removing barriers. The question is whether this requirement alone can be equated with what would be required to achieve a wildlife friendly corridor.

## MNS 6515:2015

The MNS 6515:2015 is far more direct, establishing **specific standards for wildlife passages along roads and railways in the Steppe and Gobi regions**. There is no question that its application would result in a wildlife friendly corridor. It is, however, only applicable to future projects and absent a triggering event (e.g., upgrades) of some kind, does not provide the legal basis for a wildlife friendly corridor along the pre-existing TMR.

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<sup>130</sup> Mongolia, Law on Fauna, Art. 6, 2000.

## Safety Regulation

The Safety Requirement Temporary Order does not provide an express reference or mandate; however it could be read as a response to the Law on Fauna and CMS requirements on keeping migration routes clear. The order **allows for certain areas of railway fencing to be removed** specifically to facilitate wild animal crossing. While it does not call for the creation of a corridor, it provides the safety and monitoring requirements to ensure uninterrupted transit and prevent wildlife strikes.

Providing additional support for an implied requirement are the following:

- Mongolia's **Constitution** grants citizens the right to be protected from ecological imbalance.<sup>131</sup>
- The **Environmental Protection Law** specifically prohibits activities that would result in ecological imbalance.<sup>132</sup>
- The **Protected Area Law** is in part intended to protect 'very rare' and 'rare' wildlife, which includes the species of concern in this assessment. It also permits the creation of buffer zones.
- The **Buffer Zone Law** directs such zones be established for areas that contain the range and migration routes of 'very rare' and/or 'rare' species,<sup>133</sup> and that the zone itself not have a negative impact on migration routes.
- The **Criminal Law** prohibits the disruption to the natural balance including fauna.<sup>134</sup>
- The **Law on Land** requires companies obtain permission to undertake activities that can have a negative effect on 'the ecological balance' and 'health of livestock and wild animals.'<sup>135</sup>

Separate statutes must be read together, when possible, to achieve a harmonious regulatory scheme. In this case, and without considering the more directly applicable provisions of the CMS, the combined reading of the laws would lead to the conclusion that a wildlife friendly corridor is required. All the laws discussed either require some degree of protection for migratory routes (Law on Fauna, MNS 6515:2015, Protected Areas Law, Buffer Zone Law), or specifically include the mitigation of landscape features that impede movement (Law on Fauna, MNS 6515:2015, and Safety Regulation), or more generally require the protection of wildlife to protect 'ecological balance' (Constitution, Environmental Protection Law, Criminal Law, Land Law).

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131 Mongolia, Constitution, Art.

132 Mongolia, Environmental Protection Law, Art. 3, 1995.

133 Mongolia, Buffer Zone Law, Art. 4, 8 (1997)

134 Mongolia, Criminal Code, Art. 24.9, 2015.

135 Mongolia, Law on Land, Art. 51.2 (2002).

# Protecting Connectivity

## 4. Is there a national-level mandate to *protect connectivity*?

- i. If so, are such connectivity protections a function of species-specific legal instruments or more general mandates.
- ii. Whether the foregoing is species specific or general, would such a mandate apply to Asiatic wild ass or khulan (*Equus hemionus*), Mongolian gazelle (*Gazella*), goitered gazelle (*Gazella subgutturosa*), and Argali sheep (*Ovis ammon*).

**No.** There is no direct mandate to protect connectivity. Other than two references in MNS 6515:2015, Mongolia's laws do not define or use the term 'connectivity,' nor do they provide mandates that cover the concept as otherwise defined for purposes of wildlife conservation. According to other sources, 'connectivity' is defined as "the degree to which the landscape facilitates or impedes movement."<sup>136</sup> As defined more broadly by the CMS, connectivity refers to 'unimpeded movement of species that sustain life on Earth'.<sup>137</sup> For wildlife, this means the ability to engage in movements based on seasonal conditions, access to food, and reproduction. According to Ament et al, '[t]here are two ways to increase connectivity:

- 1) focus on conserving areas that facilitate movement, and
- 2) mitigate landscape features that impede movement, such as roads.<sup>138</sup>

The Ament report concludes that '[b]oth strategies together produce the most effective results'.<sup>139</sup> Mongolia's laws provide a partial basis for the second method, but do not yet address the first.

Ignoring the potential application of the CMS provisions, the most applicable laws are the Law on Fauna, MNS 6515:2015, and the Safety Regulation. The Law on Fauna requires migration routes be kept clear,<sup>140</sup> language that arguably is directed at mitigating landscape features. MNS 6515:2015 is entirely concerned with this issue. While the Safety Regulation does not explicitly mandate the protection of connectivity, it requires monitoring of gaps near rail lines caused by the removal of fencing to allow animal movement across tracks.

## Law on Fauna

The Law on Fauna is broader as it is not limited to a particular area or feature type, nor is it only applied in the context of new projects, as is MNS 6515:2015. It is, however, limited to the extent it is not followed by any explanatory or implementing regulations, and says nothing about connectivity other than the requirement to keep migration routes clear.

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<sup>136</sup> Taylor, P. D., L. Fahrig, K. Henein, G. Merriam. 1993. Connectivity is a vital element of landscape structure. *Oikos* 68:571-573.

<sup>137</sup> <https://www.cms.int/en/topics/ecological-connectivity>

<sup>138</sup> Ament, R., R. Callahan, M. McClure, M. Reuling, and G. Tabor. 2014. *Wildlife Connectivity: Fundamentals for conservation action*. Center for Large Landscape Conservation: Bozeman, Montana.

<sup>139</sup> *Id.*

<sup>140</sup> Mongolia, Law on Fauna, Art. 6(3) 2000.

## MNS 6515:2015

The Standard is more instructive, providing precise guidelines on what must be done to mitigate features, but only applies to future projects and not the mitigation of existing features. It does, however, require consideration of connectivity, specifically recommending a ‘regional landscape assessment of wildlife connectivity needs around a nationwide or provincial road system or regional transportation corridor,’ when determining the location and frequency of wildlife crossings.<sup>141</sup> To our knowledge, no assessment of this kind has ever been conducted. It further states that ‘[l]inkages and potential wildlife crossing locations should be prioritized based on future transportation investments, scheduling, ecological criteria and changing climate regimes to form a regional or ecosystem-level strategic mitigation plan.’<sup>142</sup> Finally, it states that ‘[c]onstru[cting] overpasses or underpasses should be considered only after all options to restore connectivity using natural means have been exhausted.’<sup>143</sup>

## Safety Regulation

The Safety Regulation fosters connectivity by removing fencing in designated areas along the railway, but is focused on setting guidelines for railway safety during animal crossings. The standards set in the temporary order do not ‘protect’ connectivity, rather they protect the infrastructure and movement of trains when barriers are removed allowing animal movement. It requires machinists, for example, to ‘take measure to stop train without hitting wild animals when wild animal crosses railway.’ The Regulation also sets standards for monitoring the railway before train movement to ensure normal and safe operations.

Still, no law addresses the need to conserve areas that facilitate movement. This is not a requirement of the Protected Areas Law and only a partial consideration of the Buffer Zone Law. The latter requires consideration of migration routes of very rare and rare species but is not intended to protect migration routes per se. Further, buffer zones can also only be established around existing protected areas which, again, are not established with migratory species as a required consideration.

To the extent there is a basis to protect connectivity (express or implied), they are a function of general, rather than species specific mandates. The Law on Fauna is broad enough to cover the species of concern; the Standard expressly identifies ungulates that occur in the Steppe and Gobi zones; and the Safety Reg theoretically applies to any species that cross the TMR in the identified locations.

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141 Mongolia, MNS 6515:2015, Art. 6.1.

142 Id. at Art. 6.2.

143 Id. at Art. 6.3.



# Prohibiting ‘No Action’

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## 5. Is it illegal to indirectly have a negative effect on the status of a species by taking no action.

**Unlikely.** There is a basis in criminal law for imposing liability for omissions (i.e., no action or the failure to act) that include crimes related to fauna. An omission is actionable under Mongolia’s Criminal Code. Specifically, the Code criminalizes ‘**socially dangerous acts or omissions**.’<sup>144</sup> It also states that negligent acts or omissions shall be considered a crime.<sup>145</sup> Both provisions limit their applicability to crime types recognized in the ‘Special Section’ of the law. In that section, the law specifically prohibits the ‘unauthorized damage or destruction of fauna,’ and ‘other forms of damage to ecosystems.’<sup>146</sup> The question is whether either of these (damage to fauna or damage to ecosystems) could be interpreted as criminalizing impacts that ‘negatively effect the status of a species.’

This result seems unlikely. The first crime type, unauthorized damage or destruction, appears to be directed at specific incidents that affect individual animals. Damage and destruction can both be broadly construed in law, but they are also most often applied to specific incidents and items, rather than an extended class of things. In other words, the damage is the specific harm or loss that results from an identified injury to a person or a thing. Without a formal interpretation or legislative history indicating a broader intent, it would be more reasonable to assume that the more specific damage is the one intended.

The second crime type, damage to ecosystems, is ostensibly broader and at least raises the question of applicability. But it is also not defined and under standard rules of construction, the more general term would be interpreted to include only those things that are similar in nature to the specific terms also used in the same provision. To this end, the additional crime types in the same provision are instructive. These are directed at ‘poisoning land, subsoil’, etc. A plain language interpretation would read these as also implying specific damages (poisoning) caused by specific incidents, rather than a more generalized harm, e.g., degrading the quality rating of an aquifer. In other words, the damage types for ecosystems would be similarly limited to specific harms associated with specific incidents.

This does not mean that an argument supporting a broader interpretation cannot be made; just that there is no clear support for the argument and the rules of interpretation likely weigh against such a finding.

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<sup>144</sup> Mongolia, Criminal Code, Art. 2.1.

<sup>145</sup> Id. at Art. 2.2.

<sup>146</sup> Mongolia, Criminal Code, Art. 24.9, 2015.

## Other Legal Bases

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### 6. Are there other legal bases that imply a requirement to establish a wildlife friendly corridor?

**Unlikely.** The previous sections identify legal bases in the following laws:

- **Constitution** – right to protection against ecological imbalance
- **Environmental Protection Law** – protection of fauna is a means of preventing ecological imbalance
- **Law on Fauna** – protecting wildlife includes requirement to keep migration routes clear
- **Protected Areas Law** – includes protected area types specifically for wildlife conservation but does not yet expressly identify or provide additional protections for migratory species.
- **Buffer Zone Law** – establish buffer zone in areas that contain very rare and rare species and that such zone does not impact migration routes.
- **Transportation Law** - does not mention wildlife but does include environmental protection obligations and requirements for corridors generally. The law requires EIA's and says the state administrative body will consider adverse environmental effects from railway related activities. This law further involves international obligations by allowing the administrative body to implement them through competent authorities.
- **MNS 6515:1015** – establishes standards for the construction of wildlife passages in the Steppe and Gobi regions.
- **Safety Regulation** – establishes a temporary order to promote uninterrupted transportation by reducing train strikes in areas where fencing is removed to allow animal crossing.
- **Criminal Law** - prohibits the disruption to the natural balance including fauna.<sup>147</sup>
- **Law on Land** - requires companies obtain permission to undertake activities that can have a negative effect on 'the ecological balance' and 'health of livestock and wild animals.'<sup>148</sup>

Research did not uncover any further legal bases.

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<sup>147</sup> Mongolia, Criminal Code, Art. 24.9, 2015.

<sup>148</sup> Mongolia, Law on Land, Art. 51.2 (2002).

# Conclusion

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Mongolia's national legal basis for requiring the establishment of a wildlife friendly corridor has numerous facets but its strongest footing in the Constitutional and other legislative recognition of its international obligations.

Under the CMS, this includes preventing any migratory species from becoming endangered, maintaining a network of suitable habitats, removing barriers to movement, and, where appropriate, reintroducing them to favorable habitat. Despite a potential counterargument, this analysis finds that the terms of the CMS are compatible with the Mongolian Constitution and therefore become part of its domestic legal framework. And while the CMS terms are not worded as clear requirements, Mongolia self-imposes a good faith obligation to fulfill its international commitments.

Mongolia's other national laws offer an implied basis, but no direct support. Of the nine (9) laws identified as having relevant content, the Law on Fauna comes the closest to an explicit requirement. In relevant part it states that 'animal protection' includes keeping migration routes clear. This is one of the few provisions expressly directed at migratory species and routes, and the only one that would appear to apply to pre-existing structures. It is also the reason cited by WCS staff for some of the current efforts to remove fencing to allow wildlife migrations. The remaining laws either provide indirect support (e.g., protections against ecological imbalance) or apply to future projects, not pre-existing infrastructure.

# CHAPTER 3

## TMR SAFETY REQUIREMENTS

This Chapter reviews the national safety requirements applicable to allowing wildlife, livestock, and humans to cross the TMR.





# Questions Presented

1. Are there safety requirements for barriers, such as fences or walls placed to reduce wildlife movement near tracks?
  - a. International law
  - b. Domestic Law
2. Is there a legal requirement that an UBRA employee be assigned to monitor any physical gap along the TMR?





# Commentary on Prior Report

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One of the prior legal reports maintains that ‘the regulations regarding rail traffic safety exclusively referred [to] paragraph 1 of the Constitution of Mongolia, Article 16 “the matter of human’s security’ and established regulations regarding railway security fence.”’ This research has been unable to find this reference in the Constitution. The extent to which these references may impact constitutional compatibility has been discussed in Brief 2: National Legal Basis.

Both this report and the prior report find that fencing is an integral part of the railroad infrastructure, by definition (under Art 3.1.2) and as an obligation to ‘block and protect railway corridors and dangerous areas’ (under Art. 27.5). Fencing is not, however, mentioned further in the main law, requiring reference to applicable regulations to understand its application. To this end, and presumably pursuant to a variety of safety requirements (not just Art. 27.5; see Annex – Excerpts from the Law on Railway Transportation), the Chief of the Railway Administration issued an Order referred to as the Railway Danger Regime, which regulates the use of security fencing and establishes a ‘restricted area.’



However, the prior report questions whether this Order is still in effect. Applying the principle of *lex posterior derogate priori*, it argues that the Order, promulgated in 2009, may have been superseded by the 2012 amendments to Railway Transportation law, which grant the authority to issue regulations for this zone to the Ministry.<sup>149</sup> What the report thinks this means legally is hard to discern from the analysis. On the one hand, the report clearly concludes that the 2009 regulations have not been removed and therefore remain valid; but at the same time the 2012 amendments grant the power to issue such regulations to a different government agency. The analysis seems to suggest that the 2009 requirements are therefore in a sort of legal limbo, still valid but unable to be implemented, presumably because the power to do so no longer sits with the issuing party. By implication, this conclusion would mean that there is currently no express safety requirement applicable to the use of security fencing along the TMR.

If this is the argument, it is a misunderstanding of the principle *lex posterior derogate priori* and probably other norms of statutory interpretation. With respect to the first principle, amendments to a law do not automatically invalidate pre-existing regulations. The principle is only applied when there is a conflict between successive laws or provisions, not merely because they may have some degree of overlap. In this instance, the cited provision changes who can issue regulations, not what the regulations contain. Another principle of interpretation is that laws must be interpreted to avoid absurd results. Leaving a regulation in place but denying the authority to implement it because a new agency is responsible, would be an absurd result. This brief would argue that unless there is a new regulation or conflict with some other 2012 amendment, the 2009 version remains valid and in effect.

## Safety Requirements

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1. **Are there safety requirements for barriers, such as fences or walls, placed to reduce wildlife movement near tracks, under:**
  - a. **international law?**
  - b. **domestic law?**

*The question presented is understood as requiring a review of safety requirements from two perspectives –*

- 1) *the use of barriers to make the transport corridor safe for human uses, and*
- 2) *the use of barriers that are safe for wildlife or ‘wildlife friendly.’*

*Under international transportation agreements, there are numerous construction standards designed to ensure transport corridor safety for humans. However, a detailed review of these was deemed a side issue. Mongolia already has this type of safety standard, and the more important concern is how these play against national and international standards for making a corridor safe for wildlife.*

*Therefore, the analysis that follows reviews international standards solely for wildlife safety, and national standards for both corridor and wildlife safety.*

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149 Mongolia, Law on Railway Transportation, Art. 27.8.

## Short Answer:

At both the international and national level, the question of making linear infrastructure safe for wildlife is a relatively new concern. For the most part, safety standards are directed at making the transportation corridor itself safe for transport, including the use of components that 1) prevent access by anything other than permitted vehicles and 2) infrastructure that facilitates vehicle and pedestrian crossing in controlled areas.

In international law, there are no **requirements** for wildlife safety, per se (see Brief 1. International Legal Basis), although there are some **recommendations** created by the CMS. By way of brief review, the CMS *encourages* protection of migratory species from becoming endangered and, among other things, removing barriers to movement. To implement these, it references the need to apply the CMS Linear Infrastructure Guidelines. While the guidelines should be implemented at least as a function of ‘good faith’ compliance pursuant to Mongolia’s Constitution, it would still be a stretch to call them requirements.

At the national level, there are multiple safety related provisions directed at the transport corridor and newer standards for creating safe passages for wildlife applicable to new projects. In 2021, Mongolia created a temporary order setting limited safety standards for wildlife passages in areas where fencing was removed along existing rail lines. These safety measures are primarily focused on infrastructure management and not focused on wildlife safety by itself. Further, the instructions are not expansive and primarily focus on ensuring the rail line is clear and that trains take necessary precautions to allow wildlife movement and reduce strikes. What Mongolia does not yet have are safety standards for wildlife passages applicable to pre-existing infrastructure. However, the Safety Regulation does provide limited instruction on ensuring railway movement safety while removing (and modifying) screen fencing allowing animals to cross Ulaanbaatar Railway.<sup>150</sup>

## Detailed Answer:

### INTERNATIONAL LAW

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Of the two treaties reviewed, the only one addressing the use of wildlife friendly barriers is the Convention on Migratory Species (CMS). The CMS specifically cites the need to reference and apply the CMS Linear Infrastructure Guidelines, which recognize the impacts of rail lines and fencing on migratory species. Construction standards for the wildlife friendly construction of fencing can be found on pg. 59 of the Guidelines, including among others, removing unnecessary fencing, using virtual fences and wildlife friendly fences. Relevant portions of this can be found in Brief 1: International Legal Basis in the section on CMS Linear Infrastructure Guidelines, pp. 8-9.

Their application to the TMR is potentially limited as the principles and methods contained in the guidelines are framed in deliberately broad terms and mostly forward looking, i.e., drafted to apply to projects that have not yet been implemented. To this end, much of the content is not specific to safety requirements, but to overarching goals (e.g., the mitigation hierarchy) planning, assessments, and monitoring.

The orientation of the Guidelines is also entirely directed at wildlife and therefore do not contain or mention requirements for human safety.

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<sup>150</sup> Mongolia, Safety Regulation (2021).



As indicated under the Questions Presented, this section considers safety requirements from two perspectives – 1) those directed at maintaining the safety of the transportation corridor, and 2) those directed at making the linear infrastructure safe for wildlife.

## TRANSPORT CORRIDOR SAFETY REQUIREMENTS

Mongolia's Railroad Transportation Law has several provisions directed at human safety, starting with the purpose of the law, which is concerned with transport operations and traffic safety.<sup>151</sup> The rest of the law reflects this orientation mentioning the term 'safe' or 'safety' no fewer than 49 times in what is otherwise a short law (14 pages).

That safety requires creating a highly controlled corridor is supported by a combination of provisions. This comes from several definitions directed at the rail line and immediately associated with safety concerns, e.g., railway object,<sup>152</sup> 'railway strip,'<sup>153</sup> railway safety zone,<sup>154</sup> and railway danger zone.<sup>155</sup> It is also a function of other requirements. For example, all actors involved in the railway sector have an obligation to 'block and protect railway corridors and dangerous areas.'<sup>156</sup> Where railway corridors, dangerous and safe zones overlap with other special regime areas, the strictest regime is to be applied.<sup>157</sup> Railway infrastructure owners (i.e., the railroad transport agency) must 'ensure technical safety of its own infrastructure and create conditions for normal operation'.<sup>158</sup> There are several more safety oriented powers and obligations all of which reflect these primary requirements (see Excerpts from Law on Railway Transportation, p. 10). In essence, there is a clearly identified railway corridor for which safety is a major concern, access to which all involved entities are required to block, and for which there are multiple obligations to ensure safety.

In all of this, fencing is the only expressly identified measure. As defined in the law, infrastructure includes the railway line **and fences**.<sup>159</sup> The law does not define what constitutes fencing or provide any standards for its use, construction, monitoring, or maintenance. It is also silent on other barriers, although it hints at their existence. When it mentions fences, the law is referring to 'technical kit, such as,' which would normally mean that other forms are also included. The question is what other barrier types would fit within the category of 'technical kit such as prohibition fence', (хориг хамгаа зэрэг техник технологийн иж бүрдлийг).<sup>160</sup> In any event and at a minimum, fencing is a key measure associated with the safety requirements.

Fencing is otherwise regulated by the Railway Danger Zone Regime, an Order issued in 2009. Specifically, this regulation requires a 'security fence along the pathway between

151 Mongolia, Law on Railway Transportation, Art. 1.

152 Id. at Art. 3.1.1; that 'strip of land, infrastructure, roads, areas, rolling stock and other equipment and property related to railway transport safety.'

153 Id. at Art. 3.1.11; that area of land (including all forms of infrastructure and equipment) 'related to railway transport safety

154 Id. at Art. 3.1.13; 'land intended to reduce damage to legal entities and citizens from accidents and catastrophes that may occur on the railway and to ensure safe conditions.'

155 Id. at Art. 3.1.14; a territory where trains, shifts, loading and unloading operations are performed.

156 Mongolia, Law on Railway Transportation, Art. 27.5.

157 Id. at Art. 27.9.

158 Mongolia, Law on Railway Transportation, Art. 19.2.1 (2007).

159 Mongolia, Law on Railway Transportation, Art. 3.1.2 (2007).

160 Id. at Art. 11, Powers of aimag, capital city, soum and district governors

train stations [that] shall protect from any object to enter the restricted zone.<sup>161</sup> The prior report includes the excerpt from this regulation, but a full copy was not available for independent review. From the excerpt alone, it cannot be determined whether there are standards applicable to the construction of the fencing, although this seems unlikely. What is clear is that the fence is required to extend from one station to another, effectively the entire length of the rail line, creating a complete barrier.<sup>162</sup> If this is the case, this one provision carries substantial weight and presents a potential case of conflict with the CMS and MNS 6515:2015 which support opening the fenced area, as well as other laws that afford protection for wildlife (e.g., the Law on Fauna).

The prior report argues that the Railway Danger Zone Regime is still valid but can no longer be implemented because of amendments to the Law on Railway Transportation. Applying the principle of *lex posterior derogate priori*, it argues that the Order (2009) has been superseded by amendments to Railway Transportation law (2012), which grant the authority to issue regulations for this zone to the Ministry.<sup>163</sup> On the one hand, the report concludes that the 2009 regulations have not been removed and therefore remain valid; but at the same time the 2012 amendments supersede them because they grant the power to issue such regulations to a different government agency.

This is a misunderstanding of the principle *lex posterior derogate priori* and other norms of statutory interpretation. With respect to the first principle, amendments to a law do not automatically invalidate pre-existing regulations. The principle is only applied when there is a conflict between successive laws or provisions, not merely because they may have some degree of overlap. In this instance, the cited provision changes who can issue regulations, not what the regulations contain. Another principle of interpretation is that laws must be interpreted to avoid absurd results. Leaving a regulation in place but denying the authority to implement it because a new agency is responsible, would be an absurd result. This brief would argue that unless there is a new regulation or conflict with some other 2012 amendment, the 2009 version remains in effect.

The Safety Regulation provides limited standards for transportation safety for one year. While the regulation primarily focuses on maintaining the safety of the corridor for linear infrastructure, the purpose and language implies the safety of wildlife is being considered. The temporary order removes sections of fencing along a railway to help wild animals cross. The purpose is to ensure train safety and continued movement while allowing animals to cross in a wildlife -friendly manner. Focusing on monitoring and communication, the order requires regular instruction to workers with technical guidelines. Machinists are ordered to take measures to stop the train without hitting crossing animals and notify relevant parties of delays. If the railway is hindered, the order calls for measures to ‘eliminate hindering animals and object.’ Monitoring includes regular inspection to ensure normal movement and consistent reporting with the railway unit.

## WILDLIFE SAFETY REQUIREMENTS

There is nothing in the Law on Railway Transportation specific to wildlife. There is however, one provision that requires that railway safety measure ‘not adversely affect the environment.’<sup>164</sup> This provision is supported by requirements found in other laws, as restated in the following sub-sections.

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161 Mongolia, Railway Danger Zone Regime, Art. 5.4.

162 Id.

163 Mongolia, Law on Railway Transportation, Art. 27.8.

164 Id. at Art. 24.1.5.



## WILDLIFE LAW:

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Wildlife law often includes liability for harm done to protected species. Mongolia's law takes a similar approach by creating liability for violations of the Act and damage caused to fauna. Article 7 creates an obligation to protect rare and extremely rare species in the construction of railways, and Article 25 creates liability for ecological damage caused to fauna. These provisions could be interpreted to create an obligation for TMR to ensure the barriers are safe for wildlife.

## ENVIRONMENTAL LAW:

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Mongolia imposes a duty on companies that have an adverse environmental impact to include and implement funding for reintroducing animals and requires companies to pay compensation for environmental damage.<sup>165</sup> While these requirements are not explicitly about barrier safety, they could be interpreted to show an obligation exists for TMR to ensure wildlife safety from the barriers used along the railway.

## LAW ON LAND:

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When companies develop and use land, there are typically legal requirements to ensure some level of protection and safety for either the environment or animals in the area. In Mongolia, the law on land provides this requirement through EIAs and general protections. Companies in particular need permission to undertake activities that can have a negative impact on the health of wild animals and have an obligation to protect and preserve rare and endangered animals.<sup>166</sup>

# Monitoring Physical Gaps Along The TMR

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## 2. Is there a legal requirement that an UBRA employee be assigned to monitor any physical gap along the TMR?

**Yes.** There are a few provisions in the Law on Railway Transportation that could be interpreted as a requirement to monitor physical gaps, but which do not constitute an explicit requirement. With respect to monitoring or inspection of railway infrastructure, the Law on Railway Transportation requires the Supervision Service to:

- 1) monitor the implementation of legal mandates for railway safety;<sup>167</sup>
- 2) check railway infrastructure for compliance with safety standards, regardless of location;<sup>168</sup> and
- 3) monitor for train traffic safety.<sup>169</sup>

Among the train safety standards are those directed at the safe passage of wildlife in the Gobi, under MNS 6515:2015. While no passages have yet been implemented, a

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<sup>165</sup> Mongolia, Environmental Protection Law, Art. 31(4) & 37 (1995).

<sup>166</sup> Mongolia, Law on Land, Art. 50.1 & 51.2 (2002).

<sup>167</sup> Mongolia, Law on Railway Transportation Safety, Art. 13.5.1.

<sup>168</sup> Id. at Art. 13.5.2.

<sup>169</sup> Id. at Art. 13.5.3

reasonable expectation would be that the Railway Transportation provisions just cited would trigger the requirement to monitor such gaps for railway safety, regardless of their location.

The Safety Regulation orders the monitoring of areas along the rail line where fencing has been removed to allow wildlife movement across the tracks. This responsibility is given to shifts and guards with resources such as salaries and equipment provided by WCS. That the law does not expressly reference monitoring physical gaps is probably not an issue. Common experience in law tells us that, to the extent potential liability is a driving force, there is greater reason to expect implementation of any practice reasonably designed to limit liability. Monitoring physical gaps would fit the more generally worded obligations listed.

The question is whether this can be done using technology rather than stationing personnel when resources are a concern and direct monitoring has limits, e.g., the difficulty in simultaneously monitoring large areas or multiple areas, and the inability to monitor effectively at night. These issues have been addressed in numerous jurisdictions using cameras adapted for wildlife monitoring, so-called wildlife traffic cameras. These are remote camera systems that continuously stream data through structured Web systems that can be used to study wildlife movement around transportation corridors. Systems have been developed that can be used in any area with wired, wireless, or cellular system connectivity, including using the system in conjunction with existing traffic camera infrastructure and adding wildlife monitoring to the data stream. The US Border Patrol uses a system that allows as many as 250 cameras to be connected to a single feed.





# Conclusion

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In international law, there are no ***requirements*** for wildlife safety, per se (see Brief 1. International Legal Basis), although there are some ***recommendations*** created by the CMS.

At the national level, there are multiple safety related provisions directed at the transport corridor and newer standards for creating safe passages for wildlife applicable to new projects. In 2021, Mongolia created a temporary order setting limited safety standards for wildlife passages in areas where fencing was removed along existing rail lines. However, these safety measures are primarily focused on infrastructure management and not focused on wildlife safety by itself. Further, the instructions primarily focus on ensuring the rail line is clear and that trains take necessary precautions to allow wildlife movement and reduce strikes.

**What Mongolia does not yet have are safety standards for wildlife passages applicable to pre-existing infrastructure.** However, the Safety Regulation does provide limited instruction on ensuring railway movement safety while removing (and modifying) screen fencing allowing animals to cross Ulaanbaatar Railway.<sup>170</sup>

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<sup>170</sup> Mongolia, Safety Regulation (2021).

# CHAPTER 4

## TMR SAFETY REQUIREMENTS

This Chapter reviews the national safety requirements applicable to allowing wildlife, livestock, and humans to cross the TMR.





# Questions Presented

1. Is the transport sector liable for damages to individuals that are the proximate result of measures that allow movement of wildlife across railroads?
2. Is the transport sector liable for damages to property that are the proximate result of measures that allow movement of wildlife across railroads?
  - a. for damages to TMR Property
  - b. for damages to Private Property
3. Are 'transport sector' third parties liable for damages to individuals and property that are the proximate result of measures that allow movement of wildlife across railroads?

*For all questions presented, some understanding of the potential 'measures' would help with the legal assessments. It is hard to apply the law in a vacuum, indeed impossible where its application requires an understanding of facts that give rise to one or more potential claims. The measures referred to in the questions presented are essentially the wildlife passages and, as these may take several different forms, the assumption is they also represent different forms of potential damage and therefore influence the types of harm and liability.*

*However, it appears that the measures and their impacts (proximately caused damages) have not been studied in the Mongolian context. Therefore, to inform the first draft of this brief, 'measures' have been framed as general concepts (e.g., barriers) rather than specific interventions (e.g., vehicle fencing) with reference to the generalized problems they represent. The following list is necessarily tentative and should be reviewed to determine whether the impacts listed are realistic, as well as whether there are other forms of impact, and whether specific interventions should be considered (e.g., wildlife overpasses) as they result in different impacts.*





# Causation - the Basics

In law, causation basically consists of two parts – ‘*cause-in-fact*’ and ‘*proximate cause*.’

## Cause-in-Fact

The first part, ‘**cause-in-fact**,’ is the direct causal relationship between an act and an alleged harm. It is something that can be determined based on science and fact, even if the causal chain is somewhat complicated, e.g., cigarette smoke causes cancer. These types of inquiries are familiar to all of us and, if we have sufficient knowledge of the subject at issue, we can usually agree on the analyses that support findings of causation

## Proximate Cause

The second is referred to as ‘**proximate cause**,’ which is where things become more complex. In its simplest form, proximate cause refers to those acts (or omissions) that are:

- 1) within the scope of a law,
- 2) and sufficiently related to a harm, such that the law accepts them as the legal cause.

## Law Considers Both Forms of Causation

Both parts (‘cause-in-fact’ and ‘proximate cause’) play a role in resolving questions of liability. Indeed, there is no legal responsibility to pay for or redress harms for which there is no legal requirement. In this sense, the courts in all legal systems, including Mongolia’s, always deal with questions of ‘cause-in-fact’ – i.e., is the harm in fact caused by the alleged acts; – and questions of ‘proximate cause’ – i.e., is there a legal basis for accepting such acts (or omissions) as the legal cause of the harm, such that liability may be imposed?

### A Quick Example

To illustrate causation, consider this set of facts:

A and B share a house in the countryside and work in a smoke-free office writing legal briefs. They enjoy a healthy life and long walks in the fields near their house. A is a smoker and B is a fitness fanatic. After 30 years of living together, B is diagnosed with lung cancer and later succumbs to the disease. An autopsy performed by Dr. C determines that the cause of the cancer was exposure to cigarette smoke and that lung cancer was in fact the cause of death. Is A liable to B (or B’s family) for causing B’s illness and death?

The **cause-in-fact inquiry** would examine the causal relationship that, in this scenario, has at least been partially established by Dr. C. – clearly cigarette smoke caused B’s lung cancer and untimely death. Another cause-in-fact question, however, is whether B was exposed solely to A’s smoking or whether there are other sources, and therefore possibly other causes. What if B frequented a smoke-filled bar, for example? The court of course would examine all questions of fact related to causation. For simplicity’s sake though let us assume there is no other source; B was exposed only to A’s smoke.

At this point, the **proximate cause inquiry** is whether A’s act (smoking in the vicinity of B for 30 years) is the proximate or legal cause of the harm. In other words, did A have a legal obligation to prevent B’s exposure to second-hand smoke? There is no answer to this hypothetical other than to say that both actual cause (cause-in-fact) and a legal obligation (proximate cause) must exist before liability may be imposed.

# Global Practices

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Complexity is the norm rather than the exception. Laws that establish forms of liability, whether administrative, civil, or criminal in nature, tend to be highly refined tools. It is rarely true that a simple violation translates directly into certain liability. Depending on the jurisdiction, there may be more or less distinction between the concepts of cause-in-fact and proximate cause, different tools used to apply them, and differing levels of jurisprudence documenting their application.

There can be, for example, legal tests applied to the cause-in-fact inquiry. A common one is the ‘but for’ test, which would hold someone liable if, as a function of factual causes, the harm would *not* have occurred ‘but for’ the defendant’s act. This is a useful tool in cases with more than one potential cause and the legal question is, in effect, whether the defendant’s act needed to happen for a harm to result.

Legal obligations (proximate causes) similarly have multiple expressions and bases. They can, for example, be strict (e.g., a given act is prohibited and any violation results in liability), or they can rest on qualifying elements (e.g., a given act is prohibited but only those that act intentionally may be held liable). They can also be based on explicit statements in the law or on general principles that apply to any harm, e.g., negligence.

Mongolia has some of these embedded in its laws that govern liability for harms caused by the transport sector. While it does not use the terms ‘cause-in-fact’ or ‘proximate cause’ it does have provisions in the Civil Code and Criminal Code that are typically associated with this dual approach to assessing causation and imposing liability.

## Under Mongolian Law

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This section looks at how Mongolia’s legal system structures these concepts based entirely on wording associated with civil and criminal liability. It does not consider administrative law, case law, or formal interpretations by the Supreme Court, all of which may add to our understanding.

### Civil Liability

#### CAUSE IN FACT

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For questions of civil liability, cause-in-fact is defined in the negative, i.e., by what releases a legal person from civil liability: “[i]f the legal person proves that that damage did not occur as a result of his/her own fault, he or she shall be released from liability for the damage except as provided by law.”<sup>171</sup> The inverse of this provision then outlines cause-in-fact under Mongolia’s Civil Code. In other words, cause-in-fact for civil liability is direct damage, which is a result of a legal person’s (including a corporation’s) fault.<sup>172</sup>

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<sup>171</sup> Mongolia, Civil Code, Art. 497.2, 2002.

<sup>172</sup> See Mongolia, Civil Code, Art. 497.2, 2002.

While ‘fault’ is a potentially a legal question, and therefore a function of proximate cause, as used here it is understood as solely an actual cause inquiry. The Civil Code does not associate this provision with anything other than a basic cause-in-fact inquiry. For comparison, the Criminal Code defines ‘fault’ as a function of the perpetrators mental state, limiting liability, for example, for lack of foreseeability. (see section on Criminal Liability, p. 5) This approach is a form of proximate cause to be distinguished from the approach in the Civil Code.

## PROXIMATE CAUSE

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Proximate cause under Mongolia’s Civil Code is predicated on whether an alleged harm is the result of the violation of a defined civil right.<sup>173</sup> In other words, there is no liability of any kind in civil law unless a protected right has been violated. Among the rights defined are “[damage to others’ rights, life, health, dignity, business reputation or property](#).”<sup>174</sup> Rights may also be defined by other Mongolian laws that impose civil liability<sup>175</sup> or pursuant to ‘commonly accepted norms.’<sup>176</sup> There is no explanation of what these ‘commonly accepted norms’ would be and no analysis of these is offered in this brief.

## Criminal Liability

### CAUSE IN FACT

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For questions of criminal liability, cause-in-fact is defined in the Criminal Code as “[t]he [direct consequences of a crime](#).”<sup>177</sup> The Code instructs that these direct consequences, or causes-in-fact, “[shall be considered as criminal damage](#).”<sup>178</sup> This formula is common in law but not defined by the Criminal Code. Solely to provide a generalized understanding, this approach is usually understood as an “[effect that is an immediate result of an event, incident, or occurrence](#).”<sup>179</sup> This can include multiple forms of harm including personal injuries, loss of life, on-site business interruption, immediate remediation costs, and damage to property and infrastructure, as well as to the environment.

What direct damages usually do not include are those that are removed from the immediate alleged act and harm, i.e., where there is an intervening force of some kind. In these instances, the chances that the harm will be recognized diminishes with each step in the chain.

## PROXIMATE CAUSE

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Mongolia covers proximate cause for criminal liability through a combination of provisions including:

- Criminal liability must be based on a defined legal provision.<sup>180</sup>

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173 Mongolia, Civil Code, Art. 9.1, 2002.

174 Mongolia, Civil Code, Art. 497.1, 2002.

175 Mongolia, Civil Code, Art. 4.1, 2002.

176 Mongolia, Civil Code, Art. 4.2, 2002.

177 Mongolia, Criminal Code, Art. 2.5(1), 2015, as amended 2020.

178 Mongolia, Criminal Code, Art. 2.5(1), 2015, as amended 2020.

179 The IT Law Wiki

180 Mongolia, Criminal Code, Art. 1.2, which states that ‘[a] crime and criminal liability imposed on it shall be determined by this law.’

- Criminal penalties shall not be imposed if a person has caused damage or harm through no fault of their own.<sup>181</sup> A person shall be deemed to have caused harm through no fault if they:
  1. did not realize the social danger of his or her actions or omissions,
  2. could not be aware of the circumstances of the case,
  3. could not foresee or should not have known of the socially dangerous consequences.<sup>182</sup>
- Culpability (and therefore liability) may be based on acts that are ‘intentional’ or ‘negligent.’<sup>183</sup>
  4. A crime is ‘intentional’ if the person knew their acts or omissions were illegal and acted anyway, causing harm.
  5. A crime is ‘negligent’ if the act is unintentional.
  6. A crime may also be based on ‘mixed guilt,’ where the act is intentional, but the infliction of harm is unintentional.<sup>184</sup>

In other words, legal obligations must be expressly defined in the Criminal Code, must be based on a recognized form of ‘fault’, and may be further qualified by the mental state of the perpetrator.

## ACTUAL HARM

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A part of any inquiry into liability is the question of harm itself. Just as there can be no liability if there is no causation and legal obligation, there can be no liability if there is no actual harm. Mongolia’s Criminal Code recognizes this stating in relevant part that ‘[a]n act or omission that contains the nature of a crime specified in a special section of the Criminal Code but does not cause actual harm or harm to the interests protected by this Law, shall not be considered a crime.’<sup>185</sup>

# Damage to Individuals

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1. **Is the transport sector liable for damages to individuals that are the proximate result of measures that allow movement of wildlife across railroads?**

*The question presented is understood as requiring a review of damages other than direct train strikes, as these are covered in Brief 5: Liability for Train Strikes. As stated in the Questions Presented section, research did not obtain records or documentation of actual damages related to damages proximately caused. Some forms have been included to facilitate analysis.*

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181 Id. at Art. 1.4(2).

182 Id. at Art. 1.4(3).

183 Id. at Art. 2.3.

184 Mongolia, Criminal Code, Art. 2.4 (2020).

185 Id. at Art. 11 (2020).

## Short Answer:

Yes.

There are multiple avenues for imposing liability on the transport sector for damages proximately caused. However, not all of these are relevant to damages to individuals or form a basis for a claim by an individual.

- Pursuant to the **Law on Railway Transportation** (herein **Railway Law**), violations of its terms trigger liability under the Civil Service Law, Criminal Code, or Law on Violations (aka Law on Infringements), depending on the status of the perpetrator.<sup>186</sup>
- As an ‘obligation’ under the **Railway Law** to ‘reimburse expenses and damages sustained’<sup>187</sup> and to ‘assist in eliminating the consequences of situations.’<sup>188</sup>
- For violation of the **Law on Violations** under the terms of Art. 14.10, specifically failure to take measures to prevent railway crashes, accidents and defects, or failure to instruct railway employees in accordance with established procedures
- Liability may also be independently based on the **Civil Code** to the extent damages involve the violation of a protected right.<sup>189</sup>
- Similarly, liability may be based on the **Criminal Code** to the extent the alleged harm is defined in a legal provision of the Code.<sup>190</sup>

In all of these, liability based on the Civil Code is the only form that would be tied to the harm experienced by the individual with a remedy designed to provide redress for the harm caused, e.g., compensate for losses to livestock. Under all other laws cited (Civil Service Law, Law on Violations, and Criminal Code), liability may be related to harms caused (i.e., the alleged act has caused harm to an individual) but are imposed specifically for violations of the railway law, the Criminal Code, or the Law on Violations (Art. 14.10) and result in penalties that run to the State, *not the individual harmed*.

## Detailed Answer:

This part of the brief does not further analyze cause-in-fact for any form of liability. Although this is always a concern, there are insufficient actual or hypothetical facts presented to support much analysis. All answers therefore focus exclusively on questions of proximate cause (whether there is a legal obligation) and use the assumed factual elements solely as a means of understanding how the law might apply and to what types of damage.

### LIABILITY FOR VIOLATION OF THE RAILWAY LAW

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The Railway Law expressly recognizes two (2) legal paths for the imposition of liability depending on whether the perpetrator is a government official, individual, or legal entity. The first is for officials that violate the law and liability must be based on the Civil Service

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186 Mongolia, Law on Railway Transportation, Art. 34.

187 Mongolia, Railroad Transportation Law, Art. 25.8 (2007).

188 Mongolia, Railroad Transportation Law, Art. 25.7 (2007).

189 Mongolia, Civil Code, Art. 9.1, 2002.

190 Mongolia, Criminal Code, Art. 1.2



Law, unless the alleged act is of a criminal nature.<sup>191</sup> Although not stated, presumably in the latter case liability would be based on the Criminal Code independent from the railway law. The second path is for individuals and legal entities, for whom liability may be imposed based on the Criminal Code or Law on Violations.

Regardless of which path is taken, a violation of the railway law is a prerequisite. It acts in this sense as a ‘predicate offense’ that triggers potential liability under one of the laws cited. A predicate offence is used in criminal law whereby the commission of one crime is treated as a component of a more serious crime, e.g., the act of trading illegal gold or wildlife can result in additional criminal liability for money laundering. It is a common approach in the context of money laundering, terrorist financing, and organized crime laws, all of which require the commission of an underlying crime before their terms apply. Mongolia’s railway law uses a comparable approach, with a major difference being the absence of any specifically defined crimes or violations in its own provisions. Instead, it makes a general reference to any violation of its terms<sup>192</sup> and states that liability will be imposed pursuant to the other laws mentioned.

This has two discernible impacts. The first is that there is **no liability solely for violation of the Railway Law**. Liability must be based on the violation of two laws – the railway law and either the Civil Service Law, Criminal Code or Law on Violations,<sup>193</sup> depending on the actor. The second impact is that the **other laws cited are intended to penalize the perpetrator, not redress damages caused to individuals**. The cited laws impose liability for the following acts:

- The **Civil Service Law** (Төрийн албаны тухай хууль) establishes a legal basis for ensuring a professional and responsible civil service, define their status, and establish a central civil service authority.<sup>194</sup> This law does not explicitly list out liability on the transport sector, however, to the extent civil servants within the sector they would also be required to follow obligations set forth in this law. Punishment placed upon a civil servant includes reprimands, reduction of salary, temporary dismissal, and legal action.<sup>195</sup> On a general basis, under this law civil servants are obligated to ‘[respect and enforce the Constitution of Mongolia and other laws](#)’.<sup>196</sup>
- The **Criminal Code** offers only a limited basis for imposing liability on a transport sector actor. Specifically, it imposes liability on employees ‘responsible for ensuring the safety of railway [...] transport and traffic and operation procedures [that have] caused serious damage to human health or loss of life due to improper performance of his/her duties.’<sup>197</sup> Penalties include fines, imprisonment, and travel restrictions.<sup>198</sup> The application of these provisions to harms caused by wildlife crossings would be a reasonable interpretation to the extent the transport sector has a general obligation to eliminate situations that can cause harm. However, it does not provide a basis for liability that would compensate an individual for harm caused.

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191 Mongolia, Law on Railway Transportation, Art. 34.1.

192 Id.

193 The Law on Violations is translated as the Law on Infringements in the Legal Atlas® platform.

194 Mongolia, Law on the Civil Service, Art. 1. (2017).

195 Mongolia, Law on the Civil Service, Art. 48.

196 Mongolia, Law on the Civil Service, Art. 37.1.1.

197 Mongolia, Criminal Code, Art. 27.2 and 27.3 (as amended 2020)

198 Id.

- The **Law on Violations** has numerous provisions directed at violations of general traffic safety<sup>199</sup> (which include some relevant to railway safety) and railway traffic safety.<sup>200</sup> Under general traffic safety, individuals and legal entities can be fined for polluting or leaving mud on railway crossings.<sup>201</sup> In addition, individuals (but not legal entities) can be fined for violating railway crossing rules.<sup>202</sup> Under railway traffic safety, one set of violations is directed at the transport sector operator and include:
  - failure to prevent railway crashes, accidents, and defects<sup>203</sup>
  - failure to instruct railway employees in accordance with established procedures<sup>204</sup>
  - violation of the general set of rules, standards, relevant norms<sup>205</sup>
  - violation of the railway danger zone regime<sup>206</sup>
  - violation of the railway corridor or security zone regime<sup>207</sup>

These provisions appear equally applicable to harms caused by measures taken to facilitate wildlife crossings to the extent they are directed at safety requirements. As with the Criminal Code, however, none of the violations listed are intended to identify harms caused to individuals, set fine levels that consider the harm caused, or compensate individuals for such harms.

#### LIABILITY AS AN OBLIGATION UNDER THE RAILWAY LAW

Despite the limitations of the liability section in the railway law, there may be an independent basis for liability under the railway law. The provisions in the railway law that support this include:

- railway organization obligation to **reimburse expenses and damages sustained** by railway organizations, owners of public and exclusive roads, and citizens.<sup>208</sup>
- business entity obligation to assist in **eliminating the consequences of situations** that may cause damage to human health, life, cargo, luggage and traffic safety.<sup>209</sup>

These obligations appear to be entirely separate from the provisions that impose liabilities specifically for violations of the law. The stated obligations do not mention violations of any kind, rather they focus solely on who is responsible (railway organizations or business entities) for certain kinds of damage (those sustained by citizens, or caused to human health, life, cargo, luggage). The natural conclusion is that they are intended to operate independently, establishing a basis for liability solely as an obligation under the terms of the railway law.

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<sup>199</sup> Mongolia, Law on Violations, Art. 14.7.

<sup>200</sup> Mongolia, Law on Violations, Art. 14.10.

<sup>201</sup> Mongolia, Law on Violations, Art. 14.7(16).

<sup>202</sup> Id. at (40).

<sup>203</sup> Mongolia, Law on Infringements, Art. 14.10(1).

<sup>204</sup> Id.

<sup>205</sup> Id. at (2).

<sup>206</sup> Id. at (3).

<sup>207</sup> Id. at (4).

<sup>208</sup> Mongolia, Railroad Transportation Law, Art. 25.8 (2007).

<sup>209</sup> Mongolia, Railroad Transportation Law, Art. 25.7 (2007).

They are also worded generally, referencing ‘expenses and damages sustained’ and ‘consequences of situations’ without qualification. To this extent, they could legitimately be interpreted to include malfunctions or accidents caused by TMR infrastructure, including wildlife passages. However, there are no accessible cases presenting damages on this basis at this point.

Damages would appear to be broadly construed. The first obligation (reimburse expenses and damages sustained) mentions those ‘sustained by ... citizens,’ without further qualification. The second lists the objects damaged, which include human health and property. However, again there is no limiting language in the law. The assumption is that the determination of damages would be created by legal standards in the Civil Code (see following section).

## LIABILITY FOR VIOLATION OF A PROTECTED CIVIL RIGHT

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Mongolia’s Civil Code recognizes a basis for liability both as a function of the preceding obligations and based on the violation of a protected right.<sup>210</sup> There are potentially two legal strategies for imposing liability through the Civil Code:

- As a protected civil right created by the railway law
- As a protected civil right expressly recognized in the Civil Code

The basis for each of these follows, including some discussion of allowed damages.

## PROTECTED RIGHTS IN THE RAILWAY LAW

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The railway law offers one strategy to the extent its obligations are forms of civil liability recognized by the Civil Code. The Civil Code recognizes rights defined by other laws that impose civil liability. Specifically, it states that ‘[n]orms of other laws regulating similar relations shall be applied, if the Civil Code lacks norms regulating a particular relationship.’<sup>211</sup>

The railway law *regulates relations that are similar to* the Civil Code to the extent it establishes obligations that include the same rights protected by the Civil Code. The railway law requires reimbursement of ‘expenses and damages sustained by [...] citizens’<sup>212</sup> and the elimination of situations that ‘may cause damage to human health, life, cargo, luggage and traffic safety.’<sup>213</sup> The first obligation has no limiting language and, as specific terms prevail over general terms, may be interpreted as the same as the specific rights defined by the Civil Code, i.e., ‘damage to others’ rights, life, health, dignity, business reputation or property.’<sup>214</sup> The second obligation uses language that is the same for at least three of the right types mentioned – life, health and property. In other words, the railway law and Civil Code are concerned with protecting individuals from the violation of the same or similar rights, and therefore regulate the same relationships.

There are of course questions presented by the interplay between the railway law and the Civil Code that are difficult to resolve here. The most important question for this part of the analysis is whether the railway law can indeed operate as a fully independent basis

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210 Mongolia, Civil Code, Art. 9.1, 2002.

211 Mongolia, Civil Code, Art. 4.1, 2002.

212 Mongolia, Railroad Transportation Law, Art. 25.8 (2007).

213 Id at Art.

214 Mongolia, Civil Code, Art. 497.1, 2002.

for the imposition of liability. This strategy would avoid potential limitations presented by the Civil Code's more specific definition of rights but seems unlikely. The norms of other laws are only applied if the Civil Code 'does not regulate a particular relationship'.<sup>215</sup> As detailed in the following section, the Civil Code contains an entire section covering liability for damages resulting from the transportation sector and. The relations regulated are substantially the same. As such, they would likely supersede.

## TRANSPORTATION LIABILITY IN THE CIVIL CODE

The Civil Code expressly recognizes forms of liability for damage caused by use of transportation means.<sup>216</sup> There are four provisions relevant to the railway sector, which together may obviate the need to apply the obligations defined in the railway law. Because of its central role in this brief, the relevant provisions have been reproduced at the end of this section in their entirety. In brief:

- The first provision imposes liability on the owner of the transportation means for damage to passengers.<sup>217</sup> The specific list of damages that must be remedied is similar to, if not precisely the same as those listed in the railway law.
- The second releases the owner from liability in instances of damage caused by force majeure.<sup>218</sup> Not defined in the Civil Code, the common meaning of 'force majeure' in law is an extraordinary event that directly prevents one or both parties from performing.
- The third extends liability for the acts of others using the transportation means without consent.<sup>219</sup>
- The fourth requires owners and possessors to share liability for damage caused by others who acted with consent.<sup>220</sup>

Excerpts from the Civil Code covering liability for damages caused by the transport sector:

499.1. An owner of the transportation means shall bear responsibility of the harm to others life, health and damage, loss or destruction of their property in the course of using a passenger or freight forwarding transportation mean.

499.2. No liability specified in Item 499.1. shall be imposed in case damage caused as a result of force majeure during the use of the transportation mean other than aircraft.

499.3. The owner or possessor of the transportation mean shall be liable for the damage caused by another party by using the transportation means without the consent of the owner or possessor which will be not released from the responsibility for allowing to use the transportation mean by own default.

499.4. The owner or possessor of the transportation mean shall be held liable on equal basis for the damage to others if they assigned or transferred the transportation mean to the violator.

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<sup>215</sup> Mongolia, Civil Code, Art. 4.1, 2002.

<sup>216</sup> Mongolia, Civil Code, Art. 499, 2002.

<sup>217</sup> Id. at Art. 499.1.

<sup>218</sup> Id. at Art. 499.2.

<sup>219</sup> Id. at Art. 499.3.

<sup>220</sup> Id. at Art. 499.4.

## DAMAGES AND CAUSAL LINKS

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Unless a company can prove their acts or omissions did not cause the harm or damages, they may be civilly liable. If liability is established, there are various provisions an individual may use to seek compensation for harm done to livelihood and property. First, the responsible party can be held liable for restoring the designated ‘right’, such as life, health, or property, to its original condition. If it cannot be restored to original condition, harm can be compensated in cash.<sup>221</sup> With no record of possible harms available, this brief offers the following for discussion:

For herders, the following:

- Lost income or livelihood opportunities due to:
  - Decreased access to pasture, resulting from areas reserved for wildlife crossing
  - Increased competition with wildlife for grazing land causing reduced domestic herd
  - Decreased labor capacity due to increased size of required grazing area
- Additional expenses caused by:
  - Forced relocation due to presence of wildlife
  - Forced relocation due to placement of new barriers
  - Increased need for vaccinations due to exposure to wildlife (PPR)

For passengers and transport sector personnel, the following:

- Personal injury caused by train malfunction or TMR equipment caused by WFC infrastructure

All of these are among the types of harm that the party responsible can be liable for by paying monthly support and care.<sup>222</sup> Specifically, when looking at labor harm, if the victim is professionally incapacitated and must acquire a new profession, compensation costs will apply.<sup>223</sup>

## VALUATION OF DAMAGES

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The Civil Code further regulates the scope of liability for those responsible for harm. The size of harm is to be determined based on the victim’s interest, circumstances in which the harm occurred, and the degree of guilt from the responsible party.<sup>224</sup> Once the size of harm is determined the responsible party must compensate both the ‘[actual damage to the property](#)’ and the ‘[income to be earned](#)’.<sup>225</sup> For private individuals, this could entail compensation for the animals that died and the income they earn from having a herd. Responsible parties may also be held liable for non-material harm caused to the victim.<sup>226</sup>

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221 Mongolia, Civil Code, Art. 228.1, 2002.

222 Mongolia, Civil Code, Art. 228.3, 2002.

223 Mongolia, Civil Code, Art. 228.5, 2002.

224 Mongolia, Civil Code, Art. 229.2, 2002.

225 Mongolia, Civil Code, Art. 229.1, 2002.

226 Mongolia, Civil Code, Art. 230, 2002.



# Damage to Property

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## 2. Is the transport sector liable for damages to property that are the proximate result of measures that allow movement of wildlife across railroads?

As property is part of the damages identified and for which compensation is required under the Railway Law and the Civil Code, the entirety of the analysis in the preceding section is applicable to this question. There is one additional law and a few provisions in the laws already discussed that are more specific to property damage that are included here.

### Answer:

Yes.

Liability for damage to property is supported by Mongolia's legislation. The legal basis is only slightly different than the one that applies to damages to individuals, and includes liability:

- as established in the **Railway Law** for violations of its terms (which includes the protection of property), which triggers liability under the Civil Service Law, Criminal Code or Law on Violations, depending on the status of the perpetrator.<sup>227</sup> As per the preceding analysis, damages under these laws would be paid to the State and with no provision for compensation for the victim of the violations.
- based on the **Civil Code** to the extent damages involve the violation of a protected right as recognized in the railway law or expressly in the Civil Code, which includes property.<sup>228</sup>
- based on the **Criminal Code** to the extent the alleged harm is defined in a legal provision of the Code.<sup>229</sup>
- based on the Law on Land for damages caused by construction.

In all of these, liability based on the Civil Code and the Law on Land are the only forms that would be tied to the harm with a remedy designed to provide redress for the harm caused. Under all other laws cited (Civil Service Law, Law on Violations, and Criminal Code), liability may be related to harms caused but are imposed specifically for violations of the railway law, the Law on Violations, or the Criminal Code with penalties paid to the State, not the individual harmed.

The additional legal bases for property protection under the railway law and land law are provided in the following sections.

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<sup>227</sup> Mongolia, Law on Railway Transportation, Art. 34.

<sup>228</sup> Mongolia, Civil Code, Art. 9.1, 2002.

<sup>229</sup> Mongolia, Criminal Code, Art. 1.2

## ADDITIONAL PROPERTY LIABILITY UNDER THE RAILWAY LAW

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Under Mongolia's railroad transportation law, the railway organization is obligated to reimburse owners of 'exclusive roads and areas' for the mitigation of disasters, accidents, and other damages.<sup>230</sup>

Establishing this form of liability will depend on whether an individual owns land near the rail line and would not apply to ownership of domestic herds. It is not known to what extent this provision would impact the TMR.

## PROPERTY LIABILITY UNDER THE LAND LAW

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Supplementing the laws already reviewed, the Law on Land offers a potential avenue for claims based on damages to land from construction. Under Mongolia's Law on Land, railway companies are responsible for paying damages to the land, including erosion, damage from digging, construction, and other activities.<sup>231</sup> It is not clear to whom compensation must be paid. It would also be a legal strategy with no direct connection to harm to wildlife or individuals specifically.

# Third Party Liability

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3. Are transport sector third parties liable for damages to individuals and property that are the proximate result of measures that allow movement of wildlife across railroads?

For purposes of this review, third parties are defined as individual or legal entities operating in the transport sector but who are not a transport sector principal, i.e., they have no direct ownership or legal interest in the TMR but may, pursuant to license or agreement, have operations (transportation means) that use the transportation infrastructure.

## Answer:

Yes.

The **Civil Code** recognizes liability for damage caused by third parties using transportation means.<sup>232</sup> Pursuant to its terms, 'transportation owners' have primary responsibility for harm to others caused by their use of transportation means.<sup>233</sup> Further, owners and those in possession of transportation means (e.g., a subcontracted company or a driver) have liability for damages caused by a third-party operating without their consent.<sup>234</sup> Finally, owners and possessors have liability 'on an equal basis' for damages caused by third parties who acted with their consent.<sup>235</sup> The first provision says one 'or' the other shall be liable, which, without more, would mean that either the owner or possessor could be held liable for the entire amount (several liability). The second provision appears to establish

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230 Mongolia, Railroad Transportation Law, Art. 25.8 (2007).

231 Mongolia, Law on Land, Art. 50.1.2 (2002).

232 Mongolia, Civil Code, Art. 499, 2002.

233 Id. at Art. 499.1.

234 Id. at Art.499.3

235 Id. at Art. 499.4.

joint liability, which refers to formats where a share of liability is assigned to two or more parties; in this case, in equal amounts.

To understand how this responds to the question presented, the differing uses of the term ‘third party’ between the Mongolia’s Civil Code and the question presented first need a brief explanation. In the cited Civil Code provisions, ‘third party’ refers to individuals outside the primary relationship described by the provision, i.e., between the owner of a transportation means and ‘possessors’ of transportation means, i.e., directly contracted entities or individuals. As used in the question presented, the ‘third party’ is the ‘owner’ of the transportation means so long as this individual or legal entity is not the same as the owner of the linear infrastructure. In other words, they are a ‘third party’ with respect to ownership interests in the TMR. Using the term as understood in the question presented, liability runs directly to a third-party operator (the owner of a transportation means) for harms caused using their transportation means, including harms caused by contractors (‘possessors’ in the Civil Code) and sub-contractors (‘third parties’ in the Civil Code).

To understand how far this liability may extend would require a better understanding of who in fact operates in the TMR, what those operations involve, and what it means to ‘use’ transportation in this context. In any event, it seems unlikely the concept of ‘use’ would be construed so broadly as to include harms caused by the linear infrastructure, but which are independent from a claimant’s use (e.g., general impacts on livestock or livestock operations).

# Conclusion

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There are multiple avenues for imposing liability on the transport sector for damages proximately caused. However, not all of these are relevant to damages to individuals or form a basis for a claim by an individual.

- Pursuant to the **Law on Railway Transportation** (herein railway law), violations of its terms trigger liability under the Civil Service Law, Criminal Code, or Law on Violations, depending on the status of the perpetrator.<sup>236</sup>
- As an ‘obligation’ under the **Railway Law** to ‘reimburse expenses and damages sustained’<sup>237</sup> and to ‘assist in eliminating the consequences of situations.’<sup>238</sup>
- For violation of the **Law on Violations**, specifically failure to take measures to prevent railway.<sup>239</sup> crashes, accidents and defects, or failure to instruct railway employees in accordance with established procedures
- Liability may also be independently based on the **Civil Code** to the extent damages involve the violation of a protected right.<sup>240</sup>
- Similarly, liability may be based on the **Criminal Code** to the extent the alleged harm is defined in a legal provision of the Code.<sup>241</sup>

In all of these, however, liability based on the Civil Code is the only form that would be tied to the harm experienced by the individual with a remedy designed to provide redress for the harm caused, e.g., compensate for losses to livestock. Under all other laws cited (Civil Service Law, Law on Violations, and Criminal Code), liability may be related to harms caused (i.e., the alleged act has caused harm to an individual) but are imposed specifically for violations of the railway law or the Criminal Code and result in penalties that run to the State, *not the individual harmed*.

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236 Mongolia, Law on Railway Transportation, Art. 34.

237 Mongolia, Railroad Transportation Law, Art. 25.8 (2007).

238 Mongolia, Railroad Transportation Law, Art. 25.7 (2007).

239 Mongolia, Law on Violations, Art. 14.10(1).

240 Mongolia, Civil Code, Art. 9.1, 2002.

241 Mongolia, Criminal Code, Art. 1.2



# CHAPTER 5

## GENERAL LIABILITY FOR TRAIN STRIKES

This Chapter examines liability associated solely with train strikes, i.e., accidents involving trains and either persons, vehicles, or animals crossing the rail line.



# Questions Presented

1. Is there liability for train strikes or other damage caused by vehicle(s) under a railway company's control for harm to:
  - a. domestic livestock
  - b. wildlife
  - c. vehicles
  - d. humans (passengers and non-passengers)

*This review considers the question of train strikes principally from one perspective, those caused by the railway company. For train strikes caused by the person involved, including vehicles and livestock controlled by a person, the Railway Safety Law is essentially silent. While it establishes safety regimes, zones, and practices and imposes liability for their violation, these provisions are directed at violations caused by the railway company. This is also true under the Criminal Code. For a brief discussion of personal liability, see the note that follows the Short Answer.*



## Short Answer

If caused by the transportation or railway company, yes, harm to livestock, vehicles, and humans can result in liability. For wildlife, liability is unlikely.

### Livestock and Vehicles:

- Mongolia's **Civil Code** imposes liability for damage to property. Property is defined as an 'asset that is subject to somebody's ownership' and is classified as 'immovable and movable'.<sup>242</sup> Both livestock and vehicles are 'subject to somebody's ownership.' Livestock are bought and sold in both formal and informal markets, just as vehicles are. Confirming that livestock are property the Civil Code makes reference to 'owners' of livestock.<sup>243</sup> While there is no similar reference for vehicles, its treatment as personal property is as common in Mongolia as it is elsewhere.

To the extent both livestock and vehicles are property, the Civil Code provides various forms of liability for harm. This would include liability for legal persons who damage property deliberately or negligently,<sup>244</sup> and a general prescription for damage to others property<sup>245</sup>. The specifics of these forms of liability are discussed in further detail below.

- Mongolia's **Criminal Code** imposes liability if there is injury to people or property. While the Code does not define the term property, Article 17.5 mentions livestock, stating in relevant part that 'a person who has caused a small amount of damage by knowingly misappropriating payment transactions, erroneous parcels, **property, lost property, or lost livestock in the possession or possession of others.**' Similar to livestock, vehicles are also not defined however common practice would consider personal vehicles property.

If vehicles and livestock are property under the law, the Criminal Code, the most relevant to this brief is liability for the destruction and damage of property.<sup>246</sup> There is also liability for the failure (negligence) to protect other people's property due to 'improper performance of duties,<sup>247</sup> careless destruction, damage to or loss of other's property,<sup>248</sup> and negligence. The specifics of these forms of liability are discussed in further detail below.

- Mongolia's **Law on Infringement** imposes liability for damage or destruction to property.<sup>249</sup> While it does not define the term, it does treat both livestock and vehicles as such. Specifically, the law references both 'livestock owners'<sup>250</sup> and 'vehicle owners'.<sup>251</sup> However, this provision only comes into effect if criminal liability has not been imposed.<sup>252</sup>

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242 Mongolia, Civil Code, Art. 84 (2002).

243 Mongolia, Civil Code, Art. 101.3 (2002).

244 Mongolia, Civil Code, Art. 497.1 (2002).

245 Mongolia, Civil Code, Art. 75.2.4 (2002).

246 Mongolia, Criminal Code, Art. 17.8 (2015).

247 Mongolia, Criminal Code, Art. 17.9 (2015).

248 Mongolia, Criminal Code, Art. 17.11 (2015).

249 Mongolia, Law on Infringement, Art. 8.8 (2017).

250 Mongolia, Law on Infringement, Art. 13.9 (3) (2017).

251 Mongolia, Law on Infringement, Art. 14.6 (4) (2017).

252 Id.



## Humans:

Liability for harm to humans has multiple bases.

- Mongolia's **Civil Code** imposes liability for passengers and non-passengers injured by transportation vehicles owned by railway companies.<sup>253</sup> It also holds railway companies liable for passengers and non-passengers injured by third parties who are using transportation vehicles owned by railway companies.<sup>254</sup>
- Mongolia's **Criminal Code** punishes both railway employees and citizens for train strikes that injure people, either passengers or non-passengers.<sup>255</sup> Under this Code there are various actions that may result in liability. First, affecting the safety of the infrastructure through dangerous actions can result in a fine, restriction on travel or imprisonment.<sup>256</sup> Second, the intentional creation of conditions for an accident affecting the safety of the infrastructure can be punished by fine or imprisonment.<sup>257</sup> In some instances, negligent acts will receive a similar form of liability.<sup>258</sup> Third, when operating infrastructure such as railway rolling stock the inability of the operator to control his/her actions endangering humans or property can receive a form of liability.<sup>259</sup> In all three instances, the Criminal Code adds that liability can be established if those actions threatening safety also cause 'serious damage' to human health or loss of life or inflict 'significant damage' to the property of others.
- Mongolia's **Law on Railway Transportation** imposes criminal liability for failing to ensure passenger safety.<sup>260</sup> This transportation law also implies that railway companies would be liable for harm to non-passengers, but it is not explicit or specific to train strikes.<sup>261</sup>
- Mongolia's **Law on Infringement** primarily sets out obligations of passengers instead of the obligations companies or railway officials owe to the individual. While there is not an explicit obligation for prevent harm to humans, it may be inferred from other language. Specifically, owners of public or specialized roads can be fined for 'failure to take measures to prevent railway crashes, accidents and defects.' This includes failure to instruct railway employees with established procedures.<sup>262</sup> This provision uses broad language and does not clarify who or what can be harmed. Whether train strikes are considered a crash or accident and what defines a measure to prevent such incidents are discussed in depth below.

## Wildlife:

The legal basis for liability for wildlife strikes is primarily indirect and subject to significant counter arguments. While all the laws reviewed discuss harm in some form, none directly mention wildlife in this context. This analysis reviewed multiple laws including the Law on Fauna, Law on Infringement, the Criminal and Civil Code, and the Law on Railway Transportation. Of these, only the laws on Infringement and Railway Transportation potentially create some form of indirect liability for accidents involving wildlife.

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253 See Mongolia, Civil Code, Art. 499, 2002.

254 See Mongolia, Civil Code, Art. 499, 2002.

255 See Mongolia, Criminal Code, Art. 24, 2015, as amended 2020.

256 Mongolia, Criminal Code, Art 27.1 (1), 2015, as amended 2020.

257 Mongolia, Criminal Code, Art 27.1 (2), 2015, as amended 2020.

258 Mongolia, Criminal Code, Art 27.1 (3), 2015, as amended 2020.

259 Mongolia, Criminal Code, Art 27.2 (1), 2015, as amended 2020.

260 See Mongolia, Law on Railway Transportation, Art. 24, 2007.

261 See Mongolia, Law on Railway Transportation, Art. 25.8, 2007.

262 Mongolia, Law on Infringement, Art. 14.10(1) (2017).

- Mongolia's **Law on Railway Transportation** does not explicitly provide a form of liability for train strikes to free-roaming wildlife. However, there is general requirement that railway organizations and other organizations pay expenses and damages for disasters, accidents, and damages.<sup>263</sup> Under this law, accidents are not defined but train strikes and collisions are often among the more commonly discussed forms of accidents related to rail lines.<sup>264</sup> Assuming the reference to accidents includes strikes and collisions, liability would still have to be based on accidents generally, and not specifically from accidents involving wildlife.
- Similarly, there is an obligation for railway organizations to take immediate measures to 'eliminate the consequences of disasters, accidents and defects.'<sup>265</sup> This provision could also create a form of liability but not one specific to incidents involving wildlife. This failure to provide an express reference do not, however, necessarily mean that incidents from wildlife are *excluded* from the measure.
- Mongolia's **Law on Infringement** imposes liability for harm to property, a concept that does not apply to free-roaming wildlife. Specifically, owners of public or specialized roads can be fined for 'failure to take measures to prevent railway crashes, accidents and defects.' This includes failure to instruct railway employees with established procedures.<sup>266</sup> Similar to the law above, if train strikes are considered accidents like the literature suggests then the primary issue is property.

Compared to liability for property (including vehicles and livestock) and humans, liability for harm to wildlife from train strikes has little to no basis. The Law on Fauna and the Criminal and Civil Codes do not impose liability for train strikes harming free-roaming wildlife. Each of these laws only extend liability for harm to property. While some forms of wildlife may be considered property, such as captive bred animals, this concept is unlikely to apply to free-roaming wildlife. The Law on Fauna also does not mention train strikes or accidents involving railways in any form. While the Criminal and Civil Codes extend liability for train strikes causing harm to humans and property, they omit wildlife or animals unless they constitute a form of property. Because these laws provide a form of liability for train strikes in certain situations, the omission of others may create a stronger defense to liability. In Contrast, the laws highlighted above speak more generally and therefore may allow a more successful inference to wildlife.

**NOTE:** The only provisions dealing with the violation of railway safety requirements in the Criminal Code are directed at those that drive railway stock<sup>267</sup> or are responsible for ensuring safety.<sup>268</sup> This does not include individuals or drivers not associated with the transport sector. There are other provisions directed at drivers who violate traffic safety rules<sup>269</sup> and these may indeed be the provisions used to hold individuals involved in train strikes liable for accidents they cause. The stated bases for imposing liability include 1) intoxication, 2) unlicensed driving, and 3) causing serious damage to human health.

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263 Mongolia, Law on Railway Transportation, Art. 25.8 (2007).

264 S. Santos, F Carvalho, A Mira, 'Current Knowledge on Wildlife Mortality in Railways' *Railway Ecology* (2017).

265 Mongolia, Law on Railway Transportation, Art. 25.6(2007).

266 Mongolia, Law on Infringement, Art. 14.10(1) (2017).

267 Mongolia, Criminal Code, Art. 27.2.

268 Id. at Art. 27.3.

269 Id. at Art. 27.10



# Detailed Answer

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Research for this Brief included a review Mongolia's Civil Code, Criminal Code, Law on Infringements, Law on Fauna, environmental law, and other transport-related laws. Laws were examined for explicit or implicit statements that could be used to hold an individual or a company liable for harm caused by vehicle(s) under their control. Potential civil liability and criminal liability for harm to domestic livestock, wildlife, vehicles, and humans are discussed in detail below.

Because the legal basis for the imposition of liability differs most depending on the victim involved (e.g., domestic livestock, vehicles, humans, and wildlife), the following responses have been organized accordingly. For each type of victim, each section examines the set of laws that may apply.

## Domestic Livestock

Despite the need to interpret at least two key terms, there is a strong argument that liability exists for train strikes that harm domestic livestock pursuant to the Criminal Code, Civil Code, and Law on Infringements. The first key term, 'property,' is a concern in all three laws, specifically whether it includes livestock. The second term, 'accidents,' is a concern only in the Railway Transportation law, the question being whether it includes train strikes. This analysis finds that a legitimate argument can be made that the first includes livestock and the second includes train strikes. While not without a potential counterargument, there is a plausible basis for liability for train strikes that harm livestock under all three laws.

### CIVIL LIABILITY

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Mongolia's Civil Code contains both a **general liability** provision for damage to property and a **specific liability** provision for damage to property when that damage is caused by a transportation vehicle.

Under the general liability provision, "[a] legal person who caused damage to others' rights, life, health, dignity, business reputation or property . . . shall compensate for that damage."<sup>270</sup> By defining property ownership as possession, Mongolia's Civil Code includes it within the 'right' to property, the violation of which forms the basis for a claim for compensation.<sup>271</sup>

The Civil Code also expressly includes a liability provision for "damage caused by use of transportation means."<sup>272</sup> This provision explicitly states that the owner of the transportation vehicle, i.e. the railway company or licensed operator in the case of train strikes, "shall bear responsibility of the . . . damage, loss or destruction of their property in the course of using a passenger or freight forwarding transportation mean."<sup>273</sup> Even if a third party were to use the transportation vehicle without the owner's consent, the owner of the vehicle would still be civilly liable for damage to others' property.<sup>274</sup> Another

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<sup>270</sup> Mongolia, Civil Code, Art. 497, 2002.

<sup>271</sup> See Mongolia, Civil Code, Art. 9.1, 2002.

<sup>272</sup> Mongolia, Civil Code, Art. 499, 2002.

<sup>273</sup> Mongolia, Civil Code, Art. 499, 2002.

<sup>274</sup> Mongolia, Civil Code, Art. 499, 2002; see also Brief 4.

form of general liability can be applied to a legal person who damages others property deliberately or through negligence (inaction).<sup>275</sup>

All provisions just mentioned depend on livestock being considered a form of property. Under the Code, property is defined as an ‘asset that is subject to somebody’s ownership’ and is classified as ‘immovable and movable’.<sup>276</sup> Although the Civil Code does not contain an express list of moveable property, there is an explicit definition of immovable property: “[l]and and assets that cannot be used for their original purpose when they are in separation with land shall be classified as immovable property.”<sup>277</sup> Livestock would therefore be classified as moveable property, as then can be separated from the land and still used for their original purpose (moved to another area to graze, used for consumption, animal products, etc.). Further, both livestock and vehicles are ‘subject to somebody’s ownership.’ Livestock are bought and sold in both formal and informal markets, just as vehicles are. Confirming that livestock are property the Civil Code makes reference to ‘owners’ of livestock.<sup>278</sup> While there is no similar reference for vehicles, its treatment as personal property is as common in Mongolia as it is elsewhere.

## CRIMINAL LIABILITY

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Criminal liability for harmed livestock may potentially be imposed via Mongolia’s Criminal Code or Law on Land. If liability is found under Mongolia’s Law on Land, this law explicitly mandates criminal liability.<sup>279</sup>

### CRIMINAL CODE

Liability for train strikes under Mongolia’s Criminal Code is similar to the Civil Code. There is no direct reference to ‘train strikes’ or ‘wildlife.’ Unlike the Civil Code, it does not provide clarification as to what is considered property. However, livestock is clarified as property under both the Civil Code and the Law on Infringement and therefore is likely to be property under the Criminal Code as well (discussed above). If domestic livestock is property, there are a few provisions that may be applicable:

- Most relevant to this brief is liability for the **‘illegal destruction and damage to property.’**<sup>280</sup>
- There is also liability for the failure to protect other people’s property due to **‘improper performance of duties.’** (applying a negligence standard)<sup>281</sup>
- Finally, the Criminal Code penalizes the ‘careless destruction, damage, or loss of property of others.’<sup>282</sup>

However, in all these provisions, the Criminal Code only extends liability to railway employees. It does not appear that the railway corporation itself can be held liable in the same way. Liability for railway employees includes fines, imprisonment, or restrictions on travel.<sup>283</sup>

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275 Mongolia, Civil Code, Art. 497.1 (2002).

276 Mongolia, Civil Code, Art. 84 (2002).

277 Mongolia, Civil Code, Art. 84, 2002.

278 Mongolia, Civil Code, Art. 101.3 (2002).

279 See Mongolia, Law on Land, Art. 63, 2002.

280 Mongolia, Criminal Code, Art. 17.8 (2015) as amended 2020.

281 Mongolia, Criminal Code, Art. 17.9 (2015).

282 Mongolia, Criminal Code, Art. 17.11 (2015).

283 Mongolia, Criminal Code, Art. 27, 2015, as amended 2020.

## LAW ON INFRINGEMENT

Mongolia's **Law on Infringements** imposes liability for damage or destruction to property.<sup>284</sup> More specifically, it imposes liability for 'failure to take measures to prevent railway crashes, accidents and or defects.'<sup>285</sup> While it does not define the term property, it treats livestock as such, specifically referencing 'livestock owners'<sup>286</sup> However, the broad language and lack of any known interpretations makes the application of this provision uncertain. It is unclear, for example, what 'measures' a company would have to take to prevent an incident and avoid liability. And while a crash or accident would likely include a train strike, this too would have to be argued. It is not, for example, entirely clear whether the law is imposing liability for the accident or only for the failure to take measure to prevent accidents. Additional information on what measures companies are required to take (e.g., wildlife fencing or barriers to movement), would help advance the analysis.

Finally, this provision only comes into effect if criminal liability has not been imposed.<sup>287</sup>

## Vehicles

Train strikes to vehicles may result in liability imposed under the Criminal Code, Civil Code, and the Law on Infringements. As discussed above, liability for vehicles due to train strikes is not explicit in any of those regulations. Implying the liability requires both vehicles to be considered property and terms such as accident and disaster to include 'train strikes.'

## CIVIL LIABILITY

Damage to vehicles may result in liability under Mongolia's Civil Code vehicles only if they are considered property. Vehicles fit squarely into the Civil Code's broad definition of property as "material wealth" and an "[a]sset that is subject to somebody's ownership."<sup>288</sup> More specifically, vehicles are 'moveable property'; an asset that can "be used for their original purpose when they are in separation with land."<sup>289</sup> If this is the case, then the same provisions discussed for harm to domestic livestock (the **general liability provision** for damage to property and the **specific liability provision** for damage to property when that damage is caused by a transportation vehicle) would apply for damage to vehicles.<sup>290</sup> Third parties operating vehicle(s) owned by railway companies and causing damage to others' vehicles would also result in liability for railway companies due to the expansive scope of civil liability for damaged property.<sup>291</sup>

## CRIMINAL LIABILITY

If the judiciary determines that vehicles constitute property under the Civil Code, railway employees can be held criminally liable for damaging property caused by failing to follow the railway's safety protocol or traffic rules.<sup>292</sup> While it is likely that vehicles would be

284 Mongolia, Law on Infringement, Art. 8.8 (2017).

285 Mongolia, Law on Infringement, Art. 14.10(1) (2017).

286 Mongolia, Law on Infringement, Art. 13.9 (3) (2017).

287 Id.

288 Mongolia, Civil Code, Art. 83 & 84, 2002.

289 See Mongolia, Civil Code, Art. 84, 2002.

290 See Mongolia, Civil Code, Art. 497 & 499, 2002.

291 See Mongolia, Civil Code, Art. 499, 2002.

292 Mongolia, Criminal Code, Art. 27, 2015, as amended 2020.

considered property, only railway employees are liable under this provision of Mongolia's Criminal Code.

## LAW ON INFRINGEMENT

**Law on Infringements** does not define property, however it does treat vehicles as property by stating 'vehicle owners' have obligations to safety.<sup>293</sup> The analysis stated in the section on liability for livestock applies here. The broad language and lack of any known interpretations makes the application of the provision uncertain. It is unclear, for example, what 'measures' a company would have to take to prevent an incident and avoid liability. And while a crash or accident would likely include a train strike, it is not entirely clear whether the law is imposing liability for the accident or only for the failure to take measure to prevent accidents. Additional information on what measures companies are required to take (e.g., wildlife fencing or barriers to movement), would help advance the analysis.

Finally, this provision only comes into effect if criminal liability has not been imposed.<sup>294</sup>

## Humans

Mongolia explicitly imposes liability for train strikes or other harm to passenger and non-passengers under both the Civil Code and Criminal Code. In addition, Mongolia's Law on Railway Transportation explicitly imposes criminal liability for harm to passengers. There is the potential for criminal liability for non-passengers under the Law on Railway Transportation.

## CIVIL LIABILITY

In Mongolia's civil law, liability for harm to both passenger and non-passenger humans is **explicit**. The same provisions in Mongolia's Civil Code that have the potential to impose liability for harmed domestic livestock expressly mandate liability for harm to human life. Under the general liability provision, "[a] legal person who caused damage to others' rights, life, health, dignity, business reputation or property . . . shall compensate for that damage."<sup>295</sup> Train strikes which result in injury to passengers or non-passengers inevitably cause damage to others' life, health, or dignity and, as such, incur civil liability. The Civil Code also contains a specific liability provision for damage to human life when that damage is caused by a transportation vehicle: "[a]n owner of the transportation means shall bear responsibility of the harm to others life, health . . . in the course of using a passenger or freight forwarding transportation mean."<sup>296</sup> This provision expands civil liability to include any instance in which a passenger's or non-passenger's life or health is damaged by vehicle(s) owned by a railway company, regardless of the railway company's control over the vehicle(s) when the damage occurred.<sup>297</sup> Civil liability for train strikes or other damage to humans is not only explicit but also broad in its scope.

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293 Mongolia, Law on Infringement, Art. 14.6(4) (2017).

294 Id.

295 Mongolia, Civil Code, Art. 497, 2002.

296 Mongolia, Civil Code, Art. 499, 2002.

297 Mongolia, Civil Code, Art. 499, 2002.



## CRIMINAL LIABILITY

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Mongolia's Criminal Code and Law on Railway Transportation have the capacity to impose criminal liability for harmed humans. Similar to liability under the Civil Code, liability under the Criminal Code for harm to passengers and non-passengers is explicit, albeit narrow in scope. Explicit criminal liability is also found under the Law on Railway Transportation for passengers.

### CRIMINAL CODE

In Mongolia's criminal law, liability for harm to both passenger and non-passenger humans is **explicit**. The same provision in Mongolia's Criminal Code that punishes railway employees for injuring property also punishes railway employees for injuring people.<sup>298</sup> Liability under this provision extends only to railway employees, and the harm they cause is punishable via fines, imprisonment, or restrictions on travel.<sup>299</sup>

In addition, Mongolia's Criminal Code punishes citizens for tampering with the railway or railway vehicles and harming humans due to this tampering.<sup>300</sup> Punishment includes fines, imprisonment, or restrictions on travel, and if liable citizens are found to have a mental state of "recklessly," they may be punished with an increased fine, community service, or restrictions on travel.<sup>301</sup>

### LAW ON RAILWAY TRANSPORTATION

In Mongolia's transportation law, liability for harm to passengers is **explicit**. There is an express requirement in Mongolia's Law on Railway Transportation to ensure the safety of passengers.<sup>302</sup> Violations of this requirement are enforced through Mongolia's Criminal Code, discussed above, or the Law on Infringements.<sup>303</sup>

Non-passenger liability may be implied through a provision that requires railway owners "to take immediate measures to eliminate the consequences of disasters, accidents and defects," as well as compensate for these accidents.<sup>304</sup> However, 'accident' is not defined in Mongolia's Law on Railway Transportation.<sup>305</sup> Since 'accident' is undefined, it is not clear whether this term includes train strikes, and if it does, whether train strikes affecting wildlife, domestic livestock, or non-passengers are included.

The insurance requirements in the law weigh in favor of limiting liability. In contrast to other countries' transportation laws, Mongolia does not require railway companies to carry general liability insurance,<sup>306</sup> only liability insurance for railway employees who are testing railway equipment.<sup>307</sup> Railway companies may optionally hold liability insurance

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298 Mongolia, Criminal Code, Art. 27, 2015, as amended 2020.

299 Mongolia, Criminal Code, Art. 27, 2015, as amended 2020.

300 Mongolia, Criminal Code, Art. 27, 2015, as amended 2020.

301 Mongolia, Criminal Code, Art. 27, 2015, as amended 2020.

302 Mongolia, Law on Railway Transportation, Art. 24, 2007.

303 Mongolia, Law on Railway Transportation, Art. 34, 2007.

304 Mongolia, Law on Railway Transportation, Art. 25, 2007.

305 See Mongolia, Law on Railway Transportation, Art. 3, 2007 (defining key terms in the law but not including a definition of 'accident').

306 Legally requiring liability insurance appears to be a common approach in transportation laws in the United States and Canada. See United States, Amtrak Reform and Accountability Act, Sec. 161, 1997; Canada, Transportation Act, Art. 92, 1996, as amended 2020.

307 Mongolia, Law on Railway Transportation, Art. 29, 2007.

for goods damaged during transport.<sup>308</sup> However, there is no requirement to insure against other forms of harm, an indication that such types of harm are not within the scope of the law.

## Wildlife

Mongolia does not explicitly impose liability—either civil or criminal—for train strikes or other harm to wildlife caused by vehicle(s) under an individual's or a company's control.

There is, however, some potential for criminal liability for harm to wildlife under Mongolia's infringement, environmental, and transportation laws, but liability under these laws is not necessarily connected to train strikes. As such, criminal liability for wildlife strikes is not guaranteed.

### CIVIL LIABILITY

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Mongolia's Civil Code defines property ownership as possession,<sup>309</sup> there can be no protected private property interest in free-roaming wildlife. For this reason, there is no civil liability for train strikes or other harm to wildlife caused by vehicle(s) under an individual's or a company's control.

### CRIMINAL LIABILITY

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Criminal liability for harmed wildlife may potentially be imposed via Mongolia's Environmental Protection Law or Law on Railway Transportation. Only criminal liability is available under the Law on Railway Transportation.<sup>310</sup> Either criminal or administrative liability may be imposed under the Environmental Protection Law. This law allows for administrative penalties, such as fines, to be imposed if criminal penalties do not apply.<sup>311</sup>

## LAW ON RAILWAY TRANSPORTATION

Mongolia's Railway Transportation Law sets safety standards for the owners of railway organizations and infrastructure owners. Primarily, there is an obligation to 'take measures' to eliminate the consequences of 'disasters and accidents' that 'interfere with railway activities.' However, this article does not explicitly mention train strikes or wildlife, which increases the burden in applying the law to this type of accident.

Train strikes may prove the easiest connection to make. Mentioned earlier in the brief, train strikes are generally considered one of the more common forms of rail line disasters and accidents. If this is the case, one must now show these accidents include wildlife. While the law fails to mention wildlife specifically, the broad language of the law may allow for a legal interpretation to include any accident, regardless of the cause. This could include infrastructure, technical failures, and collisions with foreign objects such as trees, animals or other objects blocking the rail line.

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308 Mongolia, Law on Railway Transportation, Art. 29, 2007.

309 See Mongolia, Civil Code, Art. 91, 2002.

310 See Mongolia, Law on Fauna, Art. 39, 2012; Mongolia, Environmental Impact Assessment Law, Art. 19, 2012; Mongolia, Law on Land, Art. 63, 2002; Mongolia, Law on Railway Transportation, Art. 34, 2007.

311 Mongolia, Environmental Protection Law, Art. 38, 1995, as amended 2005; Mongolia, Special Protected Areas Law, Art. 43, 1995.

Even if train strikes involving wildlife fall within the law's scope, there is still the issue of proving liability. The law says owners must take 'measures' to eliminate consequences. It fails to define, however, what qualifies as a measure or whether liability attaches for the accident itself, or the merely the failure to take measures.

## **LAW ON INFRINGEMENTS**

The Law on Infringements likely does not apply. It imposes liability for damage to or destruction of property. Although not defined in this law, there is a definition in the Civil Code and references in this law that would likely exclude wildlife.

## **STATE POLICY ON RAILWAY TRANSPORTATION**

Mongolia's State Policy on Railway Transportation explicitly requires railway companies to "tak[e] into account wildlife migration," which would likely include train strikes or other harm to wildlife.<sup>312</sup> However, this policy has no enforcement mechanism; it lacks a liability provision. This policy could favorably influence the courts' interpretation of "environmental balance" and could lead to holding railway companies liable for harm to wildlife under Mongolia's Law on Railway Transportation.

# Conclusion

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The principal basis for the imposition of liability is dependent on the victim type being either 'property' as defined by the Civil Code (and further referenced in the Criminal Code and Law on Infringements) or a human being. Both domestic livestock and vehicles would fit the definition of property, while passengers and non-passengers would be covered under harm to humans.

Wildlife do not fall within either type, making liability for harm to wildlife dependent on interpretations for which there is no existing precedent. That said, there may be room to argue that accidents (i.e., train strikes) involving wildlife can still result in liability. This is primarily based to the Law on Infringements establishing liability for the Law on Railway Transportation when there is a failure to take measures to prevent crashes and accidents. Because the language is broad it may cover all accidents regardless of the object. This means that the provision may be triggered when there is a crash or accident caused by the train colliding with another vehicle, livestock, or wildlife. The provision is not dependent on the object of the collision, only the failure to take 'measures' to prevent the incident from happening. While this is not a direct form of liability and it does not stem from wildlife protection, it may be fair to say that wildlife simply being involved in an accident may trigger a form of liability.

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<sup>312</sup> Mongolia, State Policy on Railway Transportation, Art. 3, 2010.

# Annex

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## Excerpts from Law on Railway Transportation

To ensure a comprehensive review, provisions mentioning safety relevant to this inquiry are as follows:

### Article 1. Purpose of the law

1.1. The purpose of this law is to define the principles of railway transportation operations and to regulate relations related to ensuring traffic safety.

### Article 3 Legal terminology

3.1. The following terms used in this law shall have the following meanings:

3.1.1. “Railway object” means a strip of land, infrastructure, roads, areas, rolling stock and other equipment and property related to railway transport safety;

3.1.11. “Railway strip” means land intended for carrying out technological activities along the railway line and ensuring transport safety;

3.1.13. “Railway safety zone” means land intended to reduce damage to legal entities and citizens from accidents and catastrophes that may occur on the railway and to ensure safe conditions;

3.1.14. “Size” means the size of the distance limit set for railway objects, rolling stock, buildings and structures located near the railway in accordance with traffic safety and security technical requirements;

### Article 5. Basic principles of railway transportation operations

The following principles shall be followed in railway transportation activities:

5.1.3 ensure access, quality and safety of services;

### Article 10. Powers of the state central administrative body in charge of railway transportation

The state central administrative body in charge of railway transport shall exercise the following powers:

10.1.8. To take measures to ensure the safety of railway transport;

### Article 11 Powers of aimag, capital city, soum and district governors

Governors of aimags, the capital city, soums and districts shall exercise the following powers:

11.1.4. If necessary, to organize compensation for equipment and human resource assistance from business entities, organizations and citizens of the territory to eliminate the consequences of disasters, accidents and defects and to ensure safety.

### Article 13. Railway transport inspection service and its powers

13.1. The Railway Transport Inspection Service (hereinafter referred to as “Supervision Service”) shall exercise administrative control over railway transport safety, service quality, labor protection and safety.



13.5.1. To monitor the implementation of legislation related to ensuring railway transport safety, conducting transportation activities and other decisions made on the basis of its implementation;

13.5.3 monitor the safety of train and shift traffic, and restrict or suspend the use of railway facilities in the event of a disaster, accident or defect;

#### Article 15. General rules of railway transportation

The following rules shall be established by the general set of rules of railway transportation:

15.1.10. Procedures for issuing certificates for certain objects and activities related to railway transport safety;

15.1.11. Procedures for placement, production, service and access to railway and other facilities in railway danger zones, railway corridors and safety zones;

#### Article 18. Organizations and citizens participating in transportation activities

18.1. "Participants in transportation activities" means owners, carriers, owners of public and exclusive roads and areas responsible for ensuring the safety of railway transport and organizing transportation in accordance with the legislation on railway transport and the general package of railway transport regulations. business entities, organizations and citizens.

18.4.4. To ensure railway traffic safety and comply with the ordinance related to train traffic management of the Unified Traffic Coordination Center;

18.4.6. To spend a certain part of operating income to ensure railway transport safety;

#### Article 19. Rights and obligations of infrastructure owner

The infrastructure owner shall have the following rights:

19.2.1. To ensure technical safety of its own infrastructure and create conditions for normal operation;

19.4. The infrastructure owner shall have a security guard responsible for protecting railway objects, transported cargo, luggage and cargo from criminal encroachment, and an internal control unit responsible for ensuring compliance with legislation, common set of railway transport rules and traffic safety.

#### Article 22. Basic requirements for railway objects

22.1. Infrastructure, exclusive roads, areas, rolling stock and other devices and facilities related to railway transport safety shall comply with railway traffic and technical safety, technological procedures, standards and requirements.

#### Article 24. Activities to ensure the safety of railway transport

24.1. Railway transport safety shall be ensured by the following activities of railway and other organizations and citizens:

24.1.1. To create conditions for safe travel of passengers;

24.1.2. To ensure traffic safety;

24.1.4. To meet safety requirements for railway employees;

24.1.5. Not to adversely affect the environment.

#### Article 25. Organization of work to ensure railway transport safety

25.7 Relevant state administrative and local authorities, business entities and citizens shall be obliged to assist in eliminating the consequences of the situation that may cause damage to human life, health, cargo, luggage, luggage and traffic safety.

Article 27. Railway corridors, dangerous and safe zones and their regimes

27.2 The regime and size of railway corridors and safety zones shall be determined by the Government, taking into account urban development and railway transport safety conditions and requirements.

27.4. If trees, shrubs, grasses and plants located on the railway corridor impede transportation safety, the railway organization shall ensure safety conditions by transplanting, cutting, cutting, nailing and burning them without causing fire.

27.9. If railway corridors, dangerous and safe zones overlap with other special regime areas, the strictest regime established for them shall apply.

Article 28. Regime of use of railway crossings

28.1 The State Central Administrative Body shall approve the procedure for opening, using and closing railway crossings, equipping and repairing security signals, signs and devices, as well as determining the rating of railway crossings in consultation with the police.

28.2 In determining the location of a railway crossing, the proposals of the local self-governing body and the railway organization shall be taken into account.

28.3 The infrastructure manager shall be responsible for the normal operation, operation, maintenance and safety of the railway crossing.

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