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POLICY BRIEF #4

FOREST RESOURCE RIGHTS IN AN EVOLVING POLICY ENVIRONMENT

PEOPLE, RULES, AND ORGANIZATIONS SUPPORTING THE PROTECTION OF ECOSYSTEM RESOURCES

POLICY ISSUE

Through a combination of agricultural, forestry, and mining concessions, it has been estimated that more than 23% of the land mass of Liberia has been granted to commercial entities for management by the Government of Liberia,¹ under the assumption that this land is owned by the government (Land Commission, 2012). However, much of Liberia's rural land, while categorized as government land, is traditionally held in customary ownership by the local population. The Community Rights Law of 2009 (CRL), and more recently the Land Rights Policy (LRP) recognize this customary ownership (see LRP §4.2) and, in the case of the CRL, ownership of forest resources (see CRL §2.2(a)). The passage of the Land Rights Law will further strengthen customary rights by codifying the means by which customary rights can be recognized and secured. While a welcome development, recognition of customary ownership of resource could trigger conflict in areas where there are existing concessions. This will be particularly controversial where concession agreements contain provisions that grant concession holders the right to clear land and sell any merchantable timber without payment of royalties or other payments to the Government of Liberia (GoL).

The case of the Gba Community Forest (CF) in the Arcelor-Mittal Liberia (AML) concession area in northern Nimba County serves to illustrate the potential issues and the inability of policy and law to adequately address ambiguities introduced by an evolving legal framework. The path followed by AML and the Gba Community to bridge the gap created by the absence of legislation or policy, serves as a potential model for the many other concessions in Liberia and future community forest claims therein. This policy brief draws upon this experience to suggest policy directions and questions for decision-makers to ponder as community rights are recognized more fully in Liberia.

BACKGROUND

Until 1956, under the Liberian legal system, customary land ownership could be secured through a process that began with the issuance of a tribal certificate. However, changes in the law since that time provide no legal means to recognize and register any new customary land claims². The new Land Rights Policy recognizes customary ownership as a legitimate land classification and once implementing legislation is enacted to

¹ This estimate was more than 50% of the land base when it included the recently cancelled Private Use Permits granted to commercial logging entities through Community Forest Management Agreements between 2010 and 2012.

² In 1923, the settlers agreed to recognize communal ownership of land according to customary boundaries, and allow local land administration to be governed by customary paradigms. This arrangement was legalized through the Hinterland Act passed in 1949. In 1956 the Liberian Government passed the Aborigines Law, which included reform on land ownership under Title 32 the Public Lands Law. The Public Lands Law overturned the Hinterland Act, and designated all land not under private ownership as "public land" and property of the state.

implement the policy, a path will be paved to secure customary rights to land for significant numbers of Liberia's rural population. In the interim, more than 2.3 million hectares of land and related resources are now managed by private concessionaires whose rights have been ratified by the legislature³ (Land Commission, 2012). Given that this represents more than 23% of the country's land base, it is inevitable that some, if not most of this land, could be considered customarily owned under the new LRP and access and rights to these resources could prove to be a source of conflict.

To mitigate these conflicts, it is important to recognize customary ownership claims to resources on concession lands, and to provide means by which communities can constructively engage with concessionaires and government to amicably resolve conflicts and access to benefits. Unfortunately, despite requirements in the Public Procurement and Concession Act of 2005 (PPCA) that require public stakeholder consultations as part of the concession allocation process (see PPCA §90), many concessions have been granted without this consultation (see LEITI, 2012). This is not without its challenges particularly as security of contract must be maintained to ensure continued investment in Liberia's developing economy.

THE CASE OF AML AND THE GBA COMMUNITY

AML's Concession Agreement

In 2005, Arcelor-Mittal Liberia (AML) signed a 25-year Mineral Development Agreement (MDA) with the government of Liberia (GoL)⁴. The concession agreement conveyed to AML "the exclusive right and license to conduct Exploration, Development, Production and marketing of Iron Ore and associated Minerals and products, and rehabilitation of the associated Infrastructure in the Concession Area" (MDA, Art. IV § 1). The concession area extends over 500 km² in northern Nimba County and covers almost all of the customary lands of the Gba community. The MDA also conveyed to AML the right to harvest and use timber resources "free of charge"⁵ (MDA, Art. IX §3b 1) and, consistent with the Mining Law (ML), surface rights (ML§6.7d)⁶. This right was one that the government could convey since at that time, forest resources were held in trust for the people of Liberia by the government.

The Gba Community and the CRL

In 2009, the Community Rights Law was passed, creating a means by which communities could secure limited ownership rights over forests through Community Forest Management Agreements (CFMA) with the Forest Development Authority (FDA). As outlined in the CRL Regulation (promulgated in 2011), community's with

BOX 1: QUESTIONS RAISED FROM AML CASE STUDY

Does a concession agreement ratified by the legislature that grants rights to forest resources override a subsequent Community Forestry Management Agreement signed by the Forestry Development Authority or other future mechanism granting recognition of customary rights under the Land Rights Law. If yes,

- Can a community receive payment for the economic loss of their forest resources?
- How does one value that loss and is it exclusive to the timber value?
- Would a provision exempting a concession from royalty payments extend to a community?

³ Agriculture concessions total 1,140,408 ha; Forest Management Concessions and Timber Sale Contracts total 1,072,266 ha. and Mining Concessions total 113,256 ha, (see Land Commission, 2012)

⁴ The MDA was signed on 17 August 2005 but was subsequently amended by the Sirleaf-Johnson government on 28 December 2006, and again on 23 January 2013.

⁵ Under the National Forestry Reform Law of 2006 (NFRL), the government normally would have the right to levy stumpage, land rental, and resource use fees for timber harvesting (NFRL §14.2(b)(i-iii)), however, these rights are clearly waived in the AML MDA. Provisions granting forest resources without royalty payment requirements are common in Liberian concessions, and will have a much bigger impact for agricultural concession areas where much more land is likely to be cleared to develop plantations and related infrastructure.

⁶ The Mining Law of 2000 (ML) does convey some *surface rights* to mining license holders including the right to cut timber for use in the construction of the mining site and for other defined purposes, ML § 6.7d(4). Specifically, this includes the right to "erection of habitation, office building, mill buildings, engine houses and store houses" ML§6.7d(1); "building of dumps, ditches for draining, roads within the surface boundaries of the Production Area" ML§6.7d(2); and "making trenches and open cuts constructed for, and necessary for, Mining Operation" ML§6.7d(3). These provisions do not convey ownership, but merely convey the right to harvest the timber within these circumscribed parameters.

customary claim to forestland, can legitimize that claim through the creation of representational governance bodies, demarcating and inventorying their forests, and entering into forest management agreements with the FDA. The CRL specifically states that “all forest resources on community forest lands, are *owned* [emphasis added] by local communities” (§2.2a) with forest resources defined as “[a]nything practical, commercial, social, religious, recreational, educational, scientific, subsistence or other potential uses to humans that exists in a community forest, including but not limited to flora, fauna, and microorganisms.” (§1.3).

In 2011, the Gba Community signed a Community Forest Management Agreement with the FDA following a forest resource inventory and the community’s organization of an elected Community Assembly and Management Body. Along with management and use rights, under the CRL this CFMA would appear to convey ownership rights to the forest resources in the Gba Community Forest (CF).

Clearing the Gba Community Forest

In 2013, AML shared their plans to develop a Tailings Management Facility (TMF) in their concession area that would cover approximately 1,100 acres including 510 acres in the Gba CF. Development of the facility is necessary for phase two mining operations and requires clearing all of the forestland in the proposed area to develop this infrastructure. This has given rise to a number of issues and questions and no small amount of legal ambiguity (see questions raised in text box below).

The Solution?

Rather than seek clarity through an overburdened judicial system, the Gba Community and AML with the assistance of FDA, have negotiated a MOU and a Definitive Compensation Agreement (DCA). This DCA recognizes both parties’ claims to the forest resources but provides the Gba Community an opportunity to inventory these resources (with assistance from the FDA) and receive benefits from the loss of these resources based on the commercial value of timber species found on the affected area. Specifically, AML has agreed to pay a fixed amount to the Gba Community that is based on an estimate of the value of merchantable timber on: 60 acres of the TMF area that requires immediate clearing, which will be done by AML and on the remaining 450 acres. In this latter area, AML will provide an access route that allows the Gba Community and the FDA to fell and haul all merchantable timber out of the area for commercial exploitation. In turn, consistent with the AML MDA, the government is not requiring the Gba Community to pay royalties on the value of these species.

POLICY OPTIONS

Negotiation of this agreement would not have been possible if there were not a clear mandate from the Gba Community Forest Management Body (CFMB) to represent their community in negotiations regarding their forest resources (CRL §4.2). Nor is it likely that AML would have had the confidence to work with an entity that was not legally empowered to transparently represent the interests of Gba community. Unfortunately, there are only ten Community Forest Management Agreements that are currently recognized as legitimate, in Liberia, and would be able to represent their community in similar circumstances. The fact that at least five of these CFMA areas overlap with concessions illustrates the prevalence of concessions on community lands and the potential for future conflict as more customary claims are legitimized.⁷

For those communities currently without a CFMA, the question of representation through a legally-recognized entity will need to be addressed in the forthcoming Land Rights Law. Because the proposed Land Rights Law will extend communal ownership to include all customary community lands (not just forests and forest resources), the powers of the CFMB will need to be extended or alternative governance institutions will be required.

Recommendation 1: Use the CRL as a Model for Customary Land Governance. The new Land Rights Policy and proposed law will provide processes and mechanisms for communities to secure their customary rights. The CRL has already established a process for communities to secure their forest rights and so, complementary, not competing institutions should be developed to manage customary lands. Policy makers

⁷ The Nitrian CF and Numopoh CF in Sinoe overlap with the Golden Veroleum oil palm concession, the Zor CF and Gba CF in Nimba overlap with AML’s concession, and the Zor-Gba CF overlaps with an exploration license issued by the Ministry of Lands, Mines and Energy.

should look to the processes outlined in the CRL and its implementing regulation to develop representative governance institutions at the community level that can equitably represent community rights over customary lands. Lessons learned from the CFMA organizing experience should be used to reform and streamline the organizing process.

Recommendation 2: Conduct a comprehensive inventory of customary rights in existing concession areas that grant forest rights to commercial entities. With over 2.3 million hectares of the country's land base under some sort of concession agreement, it is important that community's in these areas benefit from, and are involved in resource management. A review of existing concessions to determine what rights have been allocated should be undertaken and documented in order to prioritize community engagement and areas for the development of CFMA.

Recommendation 3: Create opportunities for communities to negotiate their forest resource rights. Following this, areas where forest resource rights have been allocated without adequate public consultations as required by the PPCA⁸ should be prioritized for post-award consultations so that communities understand the scope of the concession agreements. As a part of that process, these communities should be provided with information regarding their land and forest resource rights (both through the CRL and forthcoming Land Rights Law) and provided with adequate support to develop representative community institutions (CFMA or other entities) that are empowered to negotiate for access to forest rights.

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⁸ An analysis of the compliance with the public stakeholder consultation requirements in concession allocation was conducted by an independent auditor for the Liberia Extractive Industries Transparency Initiative (LEITI) in 2013.