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PROPERTY RIGHTS AND ARTISANAL DIAMOND DEVELOPMENT (PRADD) PILOT PROGRAM

POLICY REVIEW: LAND TENURE, NATURAL RESOURCES
MANAGEMENT (NRM), AND MINING LEGISLATION

NOVEMBER 2008

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COVER PHOTO:

A diamond mining zone vista, flush with land, vegetation, and water resources in their natural state. Courtesy of Dr. Kent Elbow.

PROPERTY RIGHTS AND ARTISANAL DIAMOND DEVELOPMENT (PRADD) PILOT PROGRAM

POLICY REVIEW OF LAND TENURE, NATURAL
RESOURCE MANAGEMENT (NRM), AND MINING
LEGISLATION THAT DETERMINES, REGULATES,
OR INFLUENCES PROPERTY RIGHTS IN
ALLUVIAL DIAMOND MINING ZONES IN THE
REPUBLIC OF GUINEA

NOVEMBER 2008

DISCLAIMER

The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government.

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ANNOTATED LIST OF ACRONYMS AND ABBREVIATIONS

ACGP	<i>Administration et Contrôle des Grands Projets</i> – Administration and Control of Major Projects
AFEME	<i>Association des Femmes, Mines et Environnement</i> – Association of Women, Mines and Environment
BNE	<i>Bureau National d’Expertise</i> – Guinean government agency that oversees diamond and precious gem exports
CECIDE	<i>Centre du Commerce International pour le Développement</i> – NGO based in Conakry focusing on defense of economic rights
CFD	<i>Code Foncier et Domanial</i> – Land Tenure Legislation adopted in Guinea in 1992.
CPDM	<i>Centre de Promotion et Développement Miniers</i> – Center for Mining Promotion and Development
CRD	<i>Communauté Rurale de Développement</i> – a local collective governed by an elected council: the <i>Conseil Rural de Développement</i> (Rural Development Council)
DCSP	<i>Direction Centrale de la Sécurité Publique</i> - Central Direction Agency for Public Security
DEA	<i>Division d’Exploitation Artisanale</i> – an agency within the MMG; contains SEEA
DND	<i>Direction Nationale des Domaines</i> – National Direction of Land Administration
DNE	<i>Direction Nationale de l’Environnement</i> – National Direction of the Environment
DNH	<i>Direction Nationale d’Hydraulique</i> – National Direction of Hydraulics
DNM	<i>Direction Nationale des Mines</i> – National Direction of Mines
DNFF	<i>Direction Nationale des Forêts et Faunes</i> – National Direction of Forests and Wildlife
DPDDA	<i>Droits de Propriété et Développement du Diamant Artisanal projet pilote</i> – PRADD in English
DPFMR	<i>Déclaration de la Politique Foncière en Milieu Rural</i> – a rural land tenure policy adopted in Guinea in 2001.
FAO	Food and Agriculture Organization
GOG	Government of Guinea
MATAP	<i>Ministère de l’Administration du Territoire et des Affaires Politiques</i> – Ministry of Territorial Administration and Political Affairs

MUH	<i>Ministère de l'Urbanisme et de l'Habitat</i> – Ministry of Urbanism and Habitat
MMG	<i>Ministère des Mines et de la Géologie</i> – Ministry of Mines and Geology
NGO	Non-governmental Organization
NRM	Natural Resources Management
PFR	<i>Plan Foncier Rural</i> – a methodology for taking account of all existing property rights – including customary rights – that includes conduct of a property rights inventory
PRADD	Property Rights and Artisanal Diamond Development Pilot Program
SNRFR	<i>Service National des Ressources Foncières Rurales</i> – National Service for Rural Land Tenure
UNDP	United Nations Development Program
USAID	United States Agency for International Development

EXECUTIVE SUMMARY

Completion of a review of legislation in Guinea that regulates or influences property rights to land and natural resources in alluvial diamond mining areas was identified as a priority and stage-setting activity to be included in the program designed to achieve the Property Rights and Artisanal Diamond Development Pilot Program (PRADD)¹ result 2: *A mechanism for identifying and recognizing property rights holders is established in the target zones*. Statutory policies are a significant part of the property rights context that the PRADD pilot project seeks to illuminate and strengthen. However, statutory rights in most African countries are best considered within a broad perspective.

The defining approach of the PRADD pilot project toward reinforcement of the property rights of actors in the artisanal diamond mining sector contains two fundamental steps:

- 1) Identify existing “legitimate” property rights, and
- 2) Establish or improve the legal guarantees and information systems that correspond to these rights.

Legitimate rights are those that are recognized and respected by relevant actors, and may be equally valid whether they arise from statutory or customary property rights systems. The process for identification of legitimate property rights assumes profound knowledge of both the statutory and the customary property rights systems that predominate in the targeted site and sector. This policy review serves as a major reference regarding statutory property rights to natural resources – including minerals – that are applicable within the diamond mining zones of Guinea.

In addition, this policy review of property rights to natural resources may serve an important purpose beyond current recognition of statutory rights. PRADD is also developing a knowledge base regarding legitimate property rights that are based in the customary property system. Where legitimate rights are informal, which is generally the character of rights based on customs, PRADD will seek ways to formalize the rights and to bring the rights holders into the statutory system. Strategies for accomplishing this will likely include recommendations for reform of statutory policies to accommodate legitimate customary claims. It is timely that Guinea is currently receiving assistance from the World Bank to revise its mining code. This policy review provides a solid base for development of recommendations that could result in formalization of legitimate customary property rights as well as their legal protection.

On October 20, 2008, a draft of this policy review was presented to thirty-three participants during a one-day workshop organized to complete, correct and finalize the review. Workshop participants included representatives of numerous agencies within four Government of Guinea ministries, including the Ministry of Mines and Geology (four agencies of this ministry were represented at the workshop), the Ministry of Urbanism and Habitat (land tenure administration and the land cadastre), the Ministry of Territorial Administration and Political Affairs, and the Ministry of Sustainable Development and the Environment (Forests and Wildlife). A number of non-governmental organizations (NGOs) and women’s group interested in mining issues and property rights to natural resources in mining zones were also represented at the workshop.

Following are the major conclusions and findings of the property rights policy review as confirmed by consensus during the workshop:

¹ PRADD is the *Property Rights and Artisanal Diamond Development* pilot project financed by the US government and implemented by ARD, Inc. PRADD/Guinea was officially launched in February 2008 at which time a project design validation workshop was successfully completed in the national capital, Conakry. A second launch and validation workshop was conducted in May 2008 in the “capital” of the diamond mining zone, Banankoro.

- Land tenure legislation in Guinea is oriented toward the urban milieu. Land property titles may be obtained through application and completion of a defined administrative process and payment of fees. Although land tenure commissions (commissions foncières) were created at the prefectural level by the 1992 land law, few have been established and access to land titles remains difficult for most rural actors. However, a national land tenure council (Conseil National du Foncier) has been established and is preparing to become operational. The more recent rural land tenure policy (Déclaration de la Politique Foncière en Milieu Rural) passed in 2001 lacks application texts and so is not yet functioning. In the meantime, unregistered rural land (terres vacantes et sans maître) – nearly all of the land that exists in rural areas – legally remains the property of the state.
- Current natural resource legislation is spread across many sectors (e.g., land, forests, water, minerals), often lacks adequate application texts, and is often little known to the general population and even to some of the technical agents responsible for its implementation. There are often inconsistencies and even contradictions across the policies of the different sectors. Sometimes inconsistencies exist within a set of policies of a single sector.
- Outside of classified forests, forest resources may be privatized or converted to become the property of the local collective, such as a village or commune. However, the process for doing so is somewhat bureaucratic and often not a priority for local populations.
- The trend toward increased participation in management of local resources has been reinforced as a result of the enactment of increasingly progressive decentralization laws, the most recent having been adopted in 2006. In addition, some sectoral legislation, such as the current forest code, promotes local participation on development of resource management plans.
- All minerals in the ground are the property of the state. Minerals may become private property through acquisition of a license or permit.
- Water is the property of the state, but access of all inhabitants to water for personal use is guaranteed. Non-personal use that has an impact on water resources is allowable where a permit has been obtained.
- Application of Natural Resources Management (NRM) policies is hindered by institutional instability. Technical agencies within ministries, and even ministries themselves, are routinely reorganized which often involves changing the institutional home base of individual agencies.
- Application of NRM policies is also complicated because of inadequate financial, human and material resources.
- In general, customary property rights remain dominant in rural areas because of problems in applying statutory policies to the letter. Customary rights are recognized within sectoral policies to varying degrees, but are generally limited to use rights and do not permit commercial activities. There is often a wide gulf between statutory policies and customary practices. It would be desirable to adjust policies by adopting strategies for bringing customary rights into the legal system. A specific example would be to create additional artisanal diamond mining zones at sites that today are host to significant clandestine artisanal diamond mining.

1.0 INTRODUCTION AND BACKGROUND

The present policy review focuses on *statutory* laws and policies regarding land and property rights in the Republic of Guinea. Completion of a review of legislation in Guinea that regulates or influences property rights to land and natural resources in alluvial diamond mining areas was identified as a priority and stage-setting activity to be included in the program designed to achieve PRADD Result 2: *A mechanism for identifying and recognizing property rights holders is established in the target zones*. This document is the final version of the PRADD pilot project statutory property rights review.

Prior to being finalized, the review benefited from the critical analysis of over 30 Government of Guinea (GOG) and private policy implementers and users during a one-day workshop conducted at Hotel Camayenne in Conakry on October 20th, 2008. Workshop participants included representatives of numerous agencies within four GOG ministries, including the Ministry of Mines and Geology (four agencies of this ministry were represented at the workshop), the Ministry of Urbanism and Habitat (land tenure administration and the land cadastre), the Ministry of Territorial Administration and Political Affairs, and the Ministry of Sustainable Development and the Environment (Forests and Wildlife). A number of NGOs and women's group interested in mining issues and property rights to natural resources in mining zones were also represented at the workshop. The present document reflects the consensus views of this workshop's participants.

1.1 STATUTORY PROPERTY RIGHTS ARE NOT THE ONLY CATEGORY OF PROPERTY RIGHTS IN GUINEA

Property rights, or “tenure,” refers to control over and access to resources. There are two primary types of property systems regulating access and use of natural resources in most African countries: statutory and customary. A statutory property rights system is based on national laws that define property rights, and an institutional system for enforcement of the laws. A customary system evolves on the basis of generally long-standing practices that have evolved into rules whose enforcement depends to some extent on socially-shared values and history. Both statutory and customary institutions strongly influence local patterns of control and access to land and natural resources.

Statutory policies are, of course, a significant part of the property rights context that the PRADD pilot project seeks to illuminate and strengthen. However, statutory and customary property rights systems may subtly interact, often overlap, and sometimes compete. The relations between statutory and customary property rights systems are also often very site-specific and may exhibit countless regional variations. As a result, the PRADD pilot project has adopted a methodology that focuses on the concept of “legitimate” rights.

Legitimate rights are those that are recognized and respected by relevant actors, and may be equally valid whether they arise from statutory or customary property rights systems. The process for identification of legitimate property rights assumes profound knowledge of both the statutory and the customary property rights systems that predominate in the targeted site and sector. That is why subsequent to this policy review, customary property systems operating in the PRADD intervention zone will be investigated through field studies. Nevertheless, this policy review serves as a major reference regarding statutory property rights to natural resources, including minerals, that are applicable within the diamond mining zones of Guinea.

In addition, this policy review of property rights to natural resources may serve an important purpose beyond current recognition of statutory rights. Beyond statutory rights, PRADD is developing a knowledge base regarding legitimate property rights that is based in the *customary* property system. Where legitimate rights are informal, which is generally the character of rights based on customs, PRADD will seek ways to formalize the rights and to bring the rights holders into the statutory system. Strategies for accomplishing this will likely include recommendations for the reform of statutory policies to accommodate legitimate customary claims. It is timely that Guinea is currently receiving assistance from the World Bank to revise its mining code. This policy review provides a solid base for development of recommendations that could result in formalization of legitimate customary property rights as well as their legal protection.

1.2 SCOPE OF THE POLICY REVIEW

The principal natural resource sectors, each of which is the subject of a body of law that attempts to regulate control and access to a natural resource in Guinea, include:

- Land;
- Forests and forest resources;
- Pastures;
- Minerals; and
- Water.

Each of the above-listed resources is not only present, but often essential to the conduct of alluvial diamond mining operations in Guinea. Obviously, access to land is a prerequisite to any type of mining, and land is often transformed in the process. Water is an essential input to mining operations. Miners use trees for fuel or as boundary markers, but a greater environmental impact results from trees and other vegetation being damaged or destroyed as byproducts. Of particular interest to the PRADD pilot project is that each of these bodies of legislation contains provisions that attempt to regulate access and control over the resource, i.e., that provide the framework for the statutory property rights regime.

1.3 SOME CHALLENGES TO STATUTORY PROPERTY RIGHTS IN THE GUINEAN CONTEXT

Because the individual laws are independently formulated and often address contrasting concerns, coordination across the entire range of natural resource policies is often a challenge. This is a common problem in West African countries, and the presence of the problem in Guinea is confirmed in the report of a recent biodiversity assessment conducted by Chemonics et al., which observes that “... *many of the provisions both within a given code and between codes are not consistent and, in some cases, contradict each other.*”²

However, in Guinea the larger challenge appears to be effective *implementation* of the laws. There are two levels of constraints: 1) laws that are incomplete in that they lack key implementing decrees; and 2) lack of material, financial, and human capacity for implementation. In Guinea, both types of constraints are acute. The second type is self-explanatory. The first type is perhaps somewhat less anticipated although it looms very large in natural resources legislation in Guinea. In the same biodiversity assessment referred to above, Chemonics et al. note that, “...*many of these* [NRM and decentralization]

² Guinea Biodiversity and Tropical Forests: 118/119 Assessment, EPIQ IQC: EPP-I-00-03-00014-00, Task Order 02, December 2007, p.7.

codes do not include texts d'applications, or instructions as to how they should be implemented."³

Land policy presents a striking example. The rural land policy, adopted in 2001, has enacted few laws or decrees to legally authorize its actual implementation.

It is perhaps not surprising that Guinea has found it difficult to maintain a focus on revising or completing land and natural resource legislation in recent years. The country has been in continual political crisis, punctuated by outbreaks of social unrest, at least since January/February 2007.⁴ Such circumstances do not favor conduct of business as usual in domains such as natural resources management.

1.4 THE BROAD TRENDS IN NRM POLICY

Guinea has established some broad policy trends. Since the early 1990's, land and mineral policies, in strong contrast to the period of the First Republic (1958-1984), have been decidedly protective of private property rights and promotional of international private investment. More recently, the new rural land policy provides explicit recognition of customary property rights and promises a forthcoming strategy to create avenues for the formalization of such rights and to bring them into the statutory system. At the same time, forest policy – and, more broadly, environmental legislation – has become much more participatory and less dependent on brute enforcement of long lists of rules. The trend towards increased participation in the management of local resources has been reinforced as a result of the enactment of increasingly progressive decentralization laws, the most recent having been adopted in 2006. Finally, one notes a trend that cross-cuts most categories of natural resource legislation toward much stronger recognition of the need for environmental protection.

1.5 CUSTOMARY PROPERTY RIGHTS

In general, customary property rights remain dominant in rural areas because of problems in applying statutory policies to the letter. Customary rights are recognized within sectoral policies to varying degrees, but are generally limited to *use* rights and do not permit commercial activities. In Guinea, there remains a distinct gulf between statutory policies and customary practices. In the view of workshop participants representing several Guinean ministries and civil society, it would be desirable to adjust policies by adopting strategies to bring customary rights into the legal system.

³ Ibid.

⁴ See, for example, the periodic reports compiled by International Crisis Group and available at, <http://www.crisisgroup.org/home/index.cfm?id=1236>.

2.0 LAND TENURE POLICY

2.1 LEGISLATION: THE BROAD PICTURE

With the adoption of the new, and still official, framework land tenure law (*Code Foncier et Domanial* [CFD]) in 1992, Guinea broke decisively from its socialist-leaning, post-independence policies that provided little protection or encouragement for private property. Suddenly, an elaborate land privatization and registration system came into existence, at least on paper. As recently as April 2008, a regional assessment of land policy in West Africa observed that the lands commissions established by the CFD and responsible for the implementation of much of the new legislation are *not active in rural areas*.⁵ Also of note is that the government remains the property owner for all unregistered land (which includes virtually all rural land) prior to its registration. In addition to lacking institutional capacity for registration of land and implementation of the CFD on a wide scale, the Guinean government is also extremely limited in its ability to actively manage the extensive government-owned land holdings established by the land code.

To respond to these shortcomings, a specifically *rural* land policy, the *Déclaration de la Politique Foncière en Milieu Rural*, was adopted in 2001. The new policy is surprisingly frank in its criticisms of existing land legislation and departs from the reigning policies in a number of ways. The new rural land policy explicitly recognizes customary property rights to land, and seeks to protect the rights of vulnerable or socially marginalized groups at the same time as it promotes productive investment. Indeed, the new policy promotes an approach to the registration of property rights that begins with an inventory of existing rights, both formal and informal.⁶ The new policy outlines an action plan that, among other things, targets specific articles of the CFD for revision, and addresses existing institutional shortcomings. However, the rural land policy remains just that, a *policy* and not formally a law. PRADD/Guinea has yet to obtain evidence that all or even part of the agenda outlined in the rural land policy has actually moved forward in the seven years since the adoption of the rural land policy.

2.2 LEGISLATION: KEY PROVISIONS

Private property rights are recognized and protected by the Guinean constitution. The state, as well as all physical and corporate legal entities, may hold titles to land as property (CFD, Article 1⁷). “Property” is defined as the free use and disposal of the resource in the most “absolute” manner, to be curtailed only in the event of a contrary general interest (Article 2). To become property, the resource must be registered in a land tenure plan that is maintained by a “public collective,” i.e., a decentralized governing unit vested with legal authority (Article 3). In addition, the property holder must register the land with the national land tenure registry (*la conservation foncière* – Article 3). Satisfaction of this second requirement confers legal property rights to the title-holder (Article 10). The registration process is defined in Articles 135-151 of the CFD. Some might call it an understatement to label the registration process as “rigorous.”

The curtailments that apply to private property rights include:

⁵ Land Policy Initiative: A Framework To Strengthen Land Rights, Enhance Productivity And Secure Livelihoods Regional Assessment On Land Policy In West Africa, Ouagadougou, Burkina Faso, 15 – 18 April 2008, p.41.

⁶ This approach, referred to in short hand as the *Plan Foncier Rural* (PFR), has been pioneered in neighboring countries such as Burkina Faso, Benin, and Côte d'Ivoire. See, for example, Hubert Ouédraogo et al., *Etude comparative de la mise en oeuvre des Plans fonciers ruraux en Afrique de l'Ouest : Bénin, Burkina Faso, Côte d'Ivoire*, Land Net West Africa (Ouagadougou), January 2004.

⁷ Unless otherwise specified, references to articles in this section refer to *Ordonnance 0/92/019 du 30 mars 1992 Portant code foncier et domanial*. This land tenure legislation is also referred to as the CFD.

- Expropriation, where a public interest has been established (Article 55);
- For purposes of urban or rural development (Articles 84-95); and
- Where a public interest justifies a restriction of a property rights (assumedly other than outright expropriation – Article 94).

These curtailments of private property are neither unusual nor exaggerated, and appear in nearly all legally defined private property systems throughout the world. Nor is initiation of the curtailments taken lightly in Guinea: expropriation in the public interest must adhere to a rigorous public process (see Article 57) and give rise to a “just and prerequisite indemnity” (Article 55). The bottom line is that legally established private property rights to land are quite well protected in Guinea.

While customary property rights are nowhere explicitly recognized in the CFD, Article 39 leaves an opening for customary land rights holders by including in its definition of *propriétaires* (property holders) those who continuously occupy a land holding. Such property rights may be formally registered, provided a level of investment has been maintained that conforms to local norms, and following completion of a public process to confirm that there are no contradictory claims on the holding (Article 39).

Article 49 establishes a land tenure commission in each prefecture, as well as in each commune within the capital city of Conakry. The commission is composed of seven members, of whom four are designated by the ministries of Urbanism, Agriculture, Interior, and Mines; the three remaining members are to be designated by a prefect or governor (Article 50). The land commissions are responsible for determining whether investment requirements have been satisfied by applicants for land title (Article 52). The same article states that in rural areas, “investment” is to consist of structures and infrastructure, irrigation development, plantations, and plant production.

Article 96 establishes a “public domain” and divides it into the categories of “natural” and “artificial.” The constituent elements of the natural and artificial public domains are identified in Articles 97 and 98. As a general statement, the public domain of government property is made up of natural and artificial areas that provide public services or are used by the public (Article 96). The property rights held by the state to the public domain are inalienable and not subject to statutory limitation (Article 101).

However, government property, whether national or local government, is not limited to the public domain since it may also be included within the private property domain (Article 95). An important element assigned to the private property domain of the state is composed of “vacant or unclaimed lands” (*vacants et sans maître* – Article 119).

In strong contrast to the CFD, the *Déclaration de la Politique Foncière en Milieu Rural* (DPFMR) – a rural land policy adopted in 2001 – is much less technically oriented and consists of both an analysis/critique of existing land legislation in Guinea, and a set of principles for its reorientation. The outline for the reorientation consists of:

- Improving the effectiveness of existing land tenure legislation;
- Clarifying and securing land tenure property rights;
- Decentralization of land tenure management and increasing the participation of local actors;
- Reinforcing the land tenure administration institutional framework; and
- Development of pilot programs.

In addition, the rural land policy recognizes customary rights and proposes a program (the *Plan Foncier Rural* [PFR]) to inventory existing rights, aims to protect the rights of vulnerable or marginal social groups, and seeks to harmonize property rights across existing bodies of natural resource legislation.

2.3 SOME IMPLICATIONS OF LAND TENURE POLICY IN GUINEA

2.3.1 Land legislation in Guinea is a work in progress

Land legislation in Guinea is incomplete. A variety of anticipated application decrees have yet to be developed, including, for example:

- A definition of a legal process for establishing property rights based on absence of contradictory claims;
- The implementation of the *land tenure plan*; and
- Rules regarding the establishment of development zones.⁸

Similarly, the more recently adopted rural land tenure policy is ambitious in the scope and scale of the legislation to follow in its wake. However, PRADD/Guinea has yet to obtain confirmation of the development or adoption of any of the anticipated legislation.

2.3.2 A relatively inaccessible process for the registration of property rights to land

The registration process is defined in Articles 135-151 of the CFD. The complexity and costs of land registration in Guinea pose a barrier to the majority of rural actors who might otherwise be interested in pursuing a legal title to their land holdings.

2.3.3 Tension between customary rights and the private property domain of the state

Practically speaking, there is little to no “vacant or unclaimed land” in Guinea, yet the CFD establishes that “vacant and unclaimed lands” are the private property of the state. This creates some tension between the possible legal interpretation that “vacant and unclaimed lands” are equivalent to unregistered land and an interpretation towards the validation of the customary property rights claims noted above, on the basis of continual occupancy (see remark above in reference to Article 39). This distinction, which is instrumental in the legal definition and extent of the private property domain of the state, could be important in mining areas. For example, the designation of an artisanal mining zone would be much more complicated if the pre-existing legal status of the affected land consisted of private property claims of individuals versus an overlapping government claim of private property of the state.

2.3.4 By default, customary land tenure systems regulate property rights to land in rural areas

Virtually all available documentation on the topic confirms that in Guinea access to land in rural areas is most often regulated by customary and non-formal land tenure systems. Nevertheless, customary land tenure systems are threatened and disempowered by existing land tenure law. This introduces tension between customary and statutory land property systems in rural areas. Among the objectives of the rural land tenure policy adopted in 2001 is to reduce this tension by recognizing customary property rights. However, little headway has been achieved in the implementation of the rural land policy.

⁸ Atkins International, Profil Environnemental de la Guinée, Rapport Final pour la Commission Européenne, September 2007, p.30.
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2.3.5 Significance of land law for PRADD

Based on a reading of the CFD, land tenure policy in Guinea appears to be remote and disconnected from the realities of rural land use, including in alluvial diamond mining areas. The CFD is oriented toward the urban milieu. Although land tenure commissions (*commissions foncières*) were created at the prefectural level by the 1992 land law, few have been established and access to land titles remains difficult for most rural actors. The rural land policy adopted in 2001 represents a significant and promising departure from the legislative environment established by the CFD. The ongoing World Bank sponsored initiative to revise existing mining legislation presents an opportunity to encourage progress in the direction established by the rural land tenure policy by promoting its contents in an effort to better harmonize mining and land legislation.

3.0 FORESTS, NON-MINERAL NATURAL RESOURCES, AND ENVIRONMENTAL POLICIES AND LEGISLATION

3.1 LEGISLATION: THE BROAD PICTURE

This legislative review focuses on statutory property rights to natural resources in order to bring into PRADD analysis the full range of legislated rights and restrictions that may apply in alluvial diamond mining areas, and particularly those that might be relevant to artisanal diamond mining operations. However, it is useful to progress toward a specific focus on property rights having first gained an appreciation of the overall NRM legislative and policy landscape. This introductory section is intended as a wide-angle snapshot with the objective of developing the NRM statutory context prior to zooming in on the specific topic of property rights.

The following is a non-exhaustive list of current environmental legislation, or of legislation that substantially impacts environmental management. It should be noted that most of the items below are placed at the high end of the statutory pecking order, and in most cases a significant stream of “application texts” has also been (or is also being) developed to clarify and implement the “codes.”

1. Water Code – *Loi L/94/005/CTRN Portant code de l’eau – 15 février 1994*
2. Forest Code – *Loi L/99/013/ AN du 22 juin 1999 portant code forestier*
3. Forest Code application text – *Projet de décret d’application de la Loi L/99/013/AN du 22 juin 1999 (2005)*⁹
4. Agricultural Policy: *Politique Nationale de Développement Agricole: Vision 2015*
5. Pasture Management Policy: *Loi L/95/51/CTRN DU 29 Août 1995, Portant code pastoral*
6. Environmental Protection – *Code de la protection et de la mise en valeur de l’environnement, Ordonnances N°045/PRG/87 et N°022/PRG/89*
7. Wildlife protection and hunting regulations: *Loi L/99/038/AN Adoptant et promulguant le code de protection de la faune sauvage et réglementation de la chasse*
8. Mining code: *La Loi L/95/036/CTRN du 30 juin 1995 portant “Code Minier” de la République de Guinée*

In addition to legislation, Guinea has developed and adopted a number of strategic policies and action plans targeting the management of natural resources. Guinea developed a national forestry policy in 1989, followed by the adoption of a national forestry action plan in 1990, a national environmental action plan in 1994, a national strategy for conservation of biological diversity and sustainable use of resources in

⁹ This piece of forest legislation is listed in a Food and Agriculture Organization (FAO) document but has not yet been acquired by PRADD/Guinea. See *Cadre politique, légal et institutionnel du secteur forestier: Informations de base* at internet address: <http://www.fao.org/forestry/media/14177/0/77/>

2002, and a national action plan to combat desertification and drought in 2006.¹⁰ Each of these statutes and action plans prioritize environmental protection and sustainable use of natural resources.

The natural resources policies, action plans, and legislation are implemented by an ever-shifting array of technical agencies.¹¹ In 1986, Guinea established a Ministry of Natural Resources, Energy, and Environment. Following a restructuring in 1993, a Ministry of Energy and Environment emerged. In 1996, the “Environment” was housed in the Ministry of Mining and Geology. In 2004, Guinea created the more specialized Ministry of the Environment. In 2007, the “Environment” moved to the Ministry of Agriculture, Livestock, Environment, Water, and Forests. Most recently (less than two weeks before the present document was drafted), on August 1st, 2008 Guinea created the Ministry of Sustainable Development and Environment.

In view of the above, it is not surprising that Chemonics et al. makes the following observation:

“According to the EU’s 2004 assessment of Guinea’s environmental management, recurrent institutional problems are responsible for the government’s inability to implement its National Environment Action Plan, created in 1994. In addition to frequent institutional changes, a number of sectoral ministries (agriculture, livestock, and environment) have independently developed environmental strategies and action plans. Unfortunately, these plans are developed in isolation, and a lack of coordination among ministries makes it very difficult to establish who is responsible for what.”¹²

Based on the preceding, our first general observation regarding the mass of NRM and environmental legislation in Guinea is that there appear to be immense difficulties in implementing it.

The second general observation is that the policies are quite progressive in terms of marrying environmental concerns with local development. Regarding the forest code adopted in 1999, Catterson et al. note:

“This new law explicitly recognized the need to engage the rural population in a participatory management process for both classified and community forests. Among other things, this legislation calls for the transformation of forest service agents from enforcers to advisors. It also recognizes the need for forest management plans (*plans d’aménagement*) to be prepared in collaboration with the local population. A forest management plan should balance the socioeconomic needs of the population with the need to protect resources, thus having both production and protection objectives.”¹³

A similar assessment that goes beyond the forest code in addressing the entire body of environmental legislation is found at a United Nations Development Program (UNDP) website:

“A common element across Guinean legislative texts that address environmental protection is a tendency to favor giving responsibility to local populations so that they can manage their own environment. Several types of popular participation are encouraged: associations, local collectives, informal groups, or simply citizens.”¹⁴

¹⁰ As noted above regarding protection-oriented natural resource statutes, this list of strategies and action plans in Guinea is also non-exhaustive.

¹¹ This paragraph closely follows a paragraph that appears in Chemonics et al, Guinea Biodiversity and Tropical Forests 118/119 Assessment, EPIQ IQC: EPP-I-00-03-00014-00, Task Order 02, December 2007, pp 6-7.

¹² Ibid.

¹³ Thomas M. Catterson et al, Programmatic Environmental Assessment of Co-Management of Reserved Forests in Guinea, Prepared for USAID/Guinea, April 2001.

¹⁴ The assessment/excerpt is from a website entitled, *Le PNUD en Guinée*, with the following address:

<http://www.gn.undp.org/energie/environnement2010.htm>. The original French text is as follows: Un élément commun aux textes législatifs guinéens relatifs à la protection de l'environnement est constitué par leur tendance à favoriser la responsabilisation des

It should be noted that the policy tendency toward shifting responsibility toward local populations as a formula for achieving sustainable development extends beyond the strictly speaking “environmental” legislation. It includes such examples as the rural land policy addressed in a preceding section of this paper, the decentralization law of 2006, and the agricultural policy adopted in July 2007.

3.2 LEGISLATION: KEY PROVISIONS AND PROPERTY RIGHTS

3.2.1 Forest code (Loi L/99/013/ AN du 22 juin 1999 portant code forestier):

The basic property rights structure regarding vegetative resources is defined in terms of the “forest domain” and its sub-domains. The “forest domain” consists of all areas containing vegetation that is not directed toward agricultural production or environmental restoration (Article 16). The forest domain is divided into:

- The state forest domain;
- The forest domain of local collectives, districts, and villages;
- The private forest domain; and
- The non-classified forest domain.

The state forest domain consists of classified forests and parks and is clearly the property of the state (Article 18). Likewise, the forest domain of local collectives consists of forests that have been designated as such (by decree), and are the property of the collectives (Article 19). Collectives are legally established bodies of government, particularly including urban communes and rural development communities (CRDs). The private forest domain is also defined by legal texts that assign property rights to specific individuals or associations (Article 20). Finally, the non-classified forest domain consists of the remainder of the “forest domain” (as defined above) that is not included in the above categories (Article 21). Although statistics are not currently available to PRADD/Guinea, our belief is that the vast majority of the forest domain – probably including much or most of the forested areas found in diamond mining areas – consists of the fourth of the above-defined sub-domains, i.e., the non-classified forest domain. However, each of the other sub-domains may also be present in the same zones.

It is important to note that the areas subject to each of the legal categories described above are not static. Article 23 of the forest code establishes a “forest classification commission” in each prefecture, which suggests that areas within the non-classified domain are potentially candidates for classification. The legal status of a given area should be verifiable since a forestry cadastre is maintained by the ministry in charge of forests and includes all legal documentation that establishes the three legally established domains noted above (Article 31).

Whatever the legal classification of the various parts of the general forest domain, exploitation of forest resources is subject to detailed regulations. Exploitation of a defined area within the state forest domain may be conducted by a third party who has been awarded a “forest management contract” (Article 35), or by a state agency that holds a permit based on a legal ministerial order (Article 38). In either case, the details of the contract or permit conform to a management plan that has been developed to achieve both environmental protection and socioeconomic goals (Articles 33 and 39-41). The management plan in turn must conform to the classification decree (Article 40).

populations, eu égard à la gestion de leur propre environnement. Diverses formes de participation populaire sont encouragées : associations écologiques, collectivités locales, groupements informels ou simples citoyens.

Similar to the state forest domain, the forest domain of local collectives, districts, and villages may be exploited by a third party based on a forest management contract. As is the case for state forests, such contracts must conform to management plans approved by the ministry in charge of forest management.

Article 52 states that the exploitation of private forests must conform to regulations included in an application decree of the forest code. PRADD/Guinea has not yet obtained this application decree.

Turning to the largest of the legal categories of forests, the non-classified forest domain, one notes that there are comprehensive controls over the forest products market. All marketing of forest products harvested in the non-classified forest domain is managed by the ministry in charge of forests, with prices being established by joint ministerial orders from the ministries of forests and finances (Article 54). Regarding production and harvesting, the non-classified forest domain may be exploited, subject to a cutting permit which specifies the quality and quantity of trees to be exploited (Article 55), or by a forest management contract (Article 56). The clearing of forests to establish agricultural fields, or to expand existing ones, is subject to the acquisition of a clearing permit (Article 74). The forest administration has the right to delimit the forest domain, and to forbid the granting of clearing permits within the established limits (Article 75).

In summary, where established, property rights to forest resources – whether private or central or local government – are subject to the conditions established in a government-approved forest management plan. In addition, all land owners and managers are required to take active measures to fight against bush fires (Article 84). These measures include the establishment and preparation of a specialized team, the creation of observation posts, and the establishment of fire breaks. Finally, the forest code confirms customary use rights of forest products, based on “traditional” use patterns, provided they do not involve any commercialization of the products (Article 94). Such rights depend on regeneration capacity and may be suspended as necessary by the minister in charge of forests (Article 97). However, such a suspension gives rise to a right of compensation for the customary user of forest resources (Article 97).

3.2.2 Pastoral Code (Loi L/95/51/Ctrn Du 29 Août 1995, Portant Code Pastoral):

“Natural pastures” consist principally of the portions of the forest domain that provide pasture resources, as well as fallow or post-season crop lands (Article 7). Although subject to environmental protection considerations, as well as to the permission of the property owner in the case of fallow agricultural lands, these areas are open to the pasturing of livestock (Articles 10-12).

3.2.3 Water code¹⁵ (Loi L/94/005/CTRN Portant code de l’eau – 15 Février 1994)

Water resources in Guinea are included in the “natural public domain” of the state (as defined in land law) and cannot be appropriated by private entities (Article 4). However, specific uses of water resources may be authorized on a temporary and limited basis (Article 4).

All individuals have an inalienable right to the use of water to satisfy personal needs (Article 6). This right should be exercised in view of conservation needs as well as the needs of other water users (Article 6). Any non-personal use of water requires a permit or concession (Article 7).

¹⁵ Effective water management and conservation in Guinea is of international interest. As pointed out in a recent Africa Development Bank grant proposal, *Guinea covers practically the entire upper basin areas of rivers flowing through several West African countries. Its hydrographic network is made up of 1,165 inventoried waterways, originating from the Fouta-Djalon highlands and the Guinean Dorsal. These water courses are grouped into 23 river basins, comprising nine national and 14 international basins. 26 rivers flow from the 14 international basins to neighboring countries, which explains why Guinea is known as Africa’s “Water Reservoir.”*

Article 26 of the water code requires that prior authorization be obtained from the ministries of hydraulics and transportation in order for any construction to be completed in a navigable waterway or flood plain. Article 27 forbids any action that would endanger dikes and protective structures, such as the extraction of soil or other disturbance of the dike.

3.2.4 Wildlife and hunting code (Loi L/99/038/AN Adoptant et promulguant le code de protection de la faune sauvage et réglementation de la chasse)

While recognizing hunting rights, this code targets the sustainable harvest of wildlife resources and the conservation of natural habitats.

3.2.5 Environmental protection law (Code de la protection et de la mise en valeur de l'environnement, Ordonnances N°045/PRG/87 et N°022/PRG/89)

This law seeks to combine protection of the environment with sustainable development of natural resources (Articles 1 and 5). At a level of generality that includes the entire “environment” (defined as all natural and artificial elements engaged in interaction with the activities of humans and all living organisms – Article 2), property rights are shared at two levels: “the Guinean environment constitutes a national patrimony which is an integral part of the universal patrimony” (Article 4).

3.2.6 Mining code (La Loi L/95/036/CTRN du 30 juin 1995 portant “Code Minier” de la République de Guinée)

The Guinean mining code is presented at length in a PRADD/Guinea policy review of mining legislation. The key property rights provisions establish all in-the-ground minerals as state property that can be privatized upon harvest based on detailed mining agreements, concessions, or permits.

3.2.7 Decentralization law (Loi Portant Code des Collectivités Locales en République de Guinée)

Decentralization law defines the legal regime and rights of local collectives, defined in article 2 as Urban Communes and Rural Development Communes. These decentralized collectives are legal entities possessing their own resources and property. The property of a collective is composed of two domains, referred to as the public domain and the private domain (Article 37). The public domain includes lakes, streams, and subterranean water sources; and local public forests and tourist sites, as well as “collective land reserves” (Article 38). The private domain includes patrimonial resources including, presumably, land holdings (Article 41).

4.0 CONCLUDING: STATUTORY NATURAL RESOURCES STATUTORY PROPERTY RIGHTS AND THE PRADD PILOT PROJECT

Although PRADD is most centrally concerned with mining legislation, one recognizes that a single category of NRM policy does not exist in a vacuum, and that many other statutes that influence access and use (i.e., property rights) of natural resources also apply in alluvial diamond mining zones. Mining for diamonds involves the transformation of a broad range of natural resources, not only minerals. Land, vegetation, water, and even wildlife are used and transformed in the course of diamond mining. Access and use of each of the categories of natural resource is subject to a unique body of legislation.

The NRM statutory environment in Guinea is segmented and confusing. Current natural resource legislation in Guinea is spread across several sectors including land, forests, water, and minerals. The natural resources “codes” often lack adequate application texts, and are often little known to the general population and even to some of the technical agents responsible for its implementation. Property rights are also affected by an increasing trend toward decentralization in Guinea, and by accompanying legislation that provides a potential for realigning property rights to resources, such as land and forests. There are often inconsistencies and even contradictions across the policies of the different sectors. Sometimes inconsistencies exist within a set of policies of a single sector. Moreover, although the Guinean State claims extensive property rights to natural resources in general, and to minerals in particular, available human, material, and financial resources are usually inadequate to fully implement NRM policies and manage government “property” as legally mandated.

In spite of all the problems and challenges surrounding NRM statutory legislation in Guinea, among PRADD goals is the reinforcement of statutory policy by bringing currently informal activities, such as clandestine artisanal diamond mining, into the formal, i.e., statutory, system. The strategy for pursuing this goal includes both efforts to uphold and better implement existing policies, and initiatives that will encourage adapting policies in the longer term to better reflect the realities of the rural environment in which artisanal diamond mining is conducted.

In summary, the present policy review accomplishes the following goals:

1. It provides a checklist of the legally established regulations regarding access and use of natural resources that are the routine inputs or by-products of diamond mining, specifically land, vegetation, and water.
2. It expands opportunities for achieving more targeted and efficient interventions that take into account GOG policy goals and strategies.
3. It positions and enables PRADD/Guinea to provide knowledgeable input into policy revisions of the relevant NRM sector, such as the planned revision of mining legislation being prepared with World Bank assistance.

Finally, it is important to remember that this document addresses only one-half of the property rights environment that characterizes rural areas throughout Guinea. At the time of this writing, PRADD/Guinea is preparing to conduct participatory research adjacent to the Kissidougou-Kérouané-Macenta *diamond triangle* with the objective of understanding customary property rights systems and practices. Based on the pilot project's philosophy and methodology, the exhaustive property rights portrait that PRADD/Guinea plans to achieve at artisanal diamond mining pilot sites must unavoidably include both statutory and customary authority systems.

ANNEX 1: REFERENCES AND LEGISLATION

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CURRENT LAND AND NATURAL RESOURCES LEGISLATION IN GUINEA – PRINCIPAL STATUTES

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 2. Rural Land Tenure Policy – Déclaration de la Politique Foncière du Milieu Rural, 2001
 3. Decentralization Law – Loi portant Code des Collectivités Locales en République de Guinée
 4. Water Code – Loi L/94/005/CTRN Portant code de l'eau – 15 Février 1994
 5. Forest Code – Loi L/99/013/ AN du 22 juin 1999 portant code forestier
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 9. Environmental Protection – Code de la protection et de la mise en valeur de l'environnement, Ordonnances N°045/PRG/87 et N°022/PRG/89
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 11. Mining code: The Mining Code: La Loi L/95/036/CTRN du 30 juin 1995 portant "Code Minier" de la République de Guinée
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ANNEX 2: PARTICIPANT LIST

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Hotel Camayenne, October 20, 2008

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