USAID
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POLICY BRIEF # 10

THE IMPORTANCE OF FREE, PRIOR AND INFORMED CONSENT: STRATEGIES FOR REALIZATION

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

POLICY ISSUE

Community forestry (CF) is dependent upon Forest Community members being aware of their rights to forest resources; fully appreciating the benefits they derive from their forest resources; and being able to meaningfully participate in the decision-making process over how their forest resources are used. In recognition of this, Section 2.2.(c) of the *Community Rights Law of 2009 with Respect to Forest Lands* (CRL) establishes, "[a]ny decision, agreement or activity affecting the status or use of community forest resources shall not proceed without the prior, free, informed consent of the said community." In theory, the requirement for free, prior and informed consent (FPIC) prevents communities from being taken advantage of. This is based on the principle that if communities are aware of the true value of their forest resources, and able to make decisions about how those resources are to be used without being unduly influenced by external actors, they will be able to act in their own best interests.

The high value of forest resources continues to attract the attention of logging companies, who, understandably, seek to profit from the commercial exploitation of timber. As the Public Use Permit (PUP) scandal demonstrated, unscrupulous companies are able and willing to exploit loopholes in the law to avoid consulting and working with communities, if given the opportunity. Sadly, what occurred with PUPs also demonstrated that community leaders could be coopted to secure commercial terms that benefited logging companies, to the detriment of the majority of community members. Such cases illustrate the need for effective measures to ensure compliance with FPIC in order to protect communities from predatory companies, and from elites that would otherwise seek to exploit the people whose interests they are supposed to represent. This imperative is even more urgent now that it has become clear that many companies are attempting to use the CF program in the same manner as they did PUPs – to circumvent the more stringent regulations for the commercial harvesting of timber, as established under the National Forestry Reform Law (NFRL), the Ten Core Regulations, and the Liberia Code of Timber Harvesting (LCTH).

Forest Communities may very well be interested in commercially exploiting their forest resources – in fact, the CF program assumes they will do so – but they must be given an opportunity to make that choice and to meaningfully influence the decision-making process. And they must be able to benefit from any such arrangement. This policy brief will look at what FPIC means under the CRL, how some companies are attempting to circumvent the legal requirements, and what might be done to improve the current regime.

THE CRL & FREE, PRIOR AND INFORMED CONSENT

Statutory Requirements

Under the CRL, FPIC is required for any "decision, agreement or activity affecting the status or use of community forest resources." This means that FPIC needs to be considered and complied with before the community alters the way it manages its forest resources, i.e. before the decision to form a Forest Community is made; before it signs an agreement with the Forestry Development Authority (FDA); during the development of a Community Forest Management Plan (CFMP), and before submitting it to FDA for final approval; and before signing a contract with a logging company to commercially exploit forest resources, or a contract with a conservation organization that would alienate community members' use rights. However, besides stating the need for FPIC, the CRL provides little guidance about what it actually requires – the section of the law that defines statutory terms is silent on the issue.

Fortunately FPIC is, to a large extent, self-explanatory (the guidance provided in Box 1 should not be surprising). Community members should be able to freely decide upon a course of action without being pressured; to substantively take part in the deliberation process; be made fully aware of the nature, scope, scale and impacts of a proposed decision, agreement or activity; and be given the option to affirm or reject any decision, agreement or activity.

International Labor Organization (ILO) Convention 169 and the United Nations' Declaration on the Rights of Indigenous Peoples (UNDRIP)

In addition to FPIC's amenability to a "plain meaning" reading, it is also a well-established concept closely associated with ILO Convention169 and UNDRIP, both of which incorporate the requirement. The ILO's Committee of Experts (CoE) on the Application of Conventions and Recommendations and the UN Assembly's Permanent Forum on Indigenous Issues (Box 1) have both provided guidance about how FPIC should be interpreted – most relevantly for CF in Liberia, on the subject of representative institutions. According to the CoE, representative institutions must have "[l]egitimacy and credibility with both government" and community members; establish "two-way accountability," i.e. accountability to both government and community members; be accountable and transparent in their operations; and truly represent the diverse make-up of the community represented, through the inclusion of women and youth representatives.

Box 1: Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples: Conclusions and Recommendations, Para. 46 & 47

- **Free** should imply no coercion, intimidation or manipulation;
- **Prior** should imply consent has been sought sufficiently in advance of any authorization or commencement of activities and respect time requirements of indigenous consultation/ consensus processes;
- **Informed** – should imply that information is provided that covers (at least) the following aspects:
  a. The nature, size, pace, reversibility and scope of any proposed project or activity;
  b. The reason/s or purpose of the project and/or activity;
  c. The duration of the above;
  d. The locality of areas that will be affected;
  e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle;
  f. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others)
  g. Procedures that the project may entail
- **Consent** – Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women is essential, as well as participation of children and youth as appropriate. This process may include the option of withholding consent. Consent to any agreement should be interpreted as indigenous peoples have reasonably understood it."

Other relevant guidance provided by the CoE includes emphasizing a thorough and rigorous consultation over the speediness of the process. Economic development is understandably a priority for many governments and communities; however, the "adoption of rapid decisions should not be to the detriment of effective consultation for which sufficient time must be given to allow the country's indigenous peoples to engage their own decision-making processes and participate effectively in decisions taken in a manner consistent with their cultural and social traditions" (ILO Guide, p.66).

FPIC & THE NINE STEPS

Regulations to the Community Rights Law of 2009 with Respect to Forest Lands

Although there is no explicit link between Section 2.2(c) of the CRL and the "Steps in Establishing an Authorized Forest Community" (Appendix) of the *Regulations to the Community Rights Law of 2009 with Respect to Forest Lands* ("CRL Regulations"), the process described in the latter clearly establishes a means through which the free, prior and informed consent of community members is to be secured. "The Nine Steps," developed by the FDA with support from USAID|PROSPER , entails an extensive participatory process, beginning with a series of exploratory meetings at the community level to determine whether or not members are interested in having their customary rights over forest resources formalized. If community members collectively agree to become a Forest Community, a process is triggered involving notification, multiple meetings, a socio-economic survey, establishing internal rules and regulations, development of representative institutions and election of representatives, the signing of a Community Forest Management Agreement (CFMA) with the FDA, and the cooperative development of a CFMP.

This process ensures that all members of the community are thoroughly informed about the program and process before they decide whether or not to pursue Forest Community status. It also ensures that all members of the community are involved in the development of the institutions that are to govern the Forest Community – the Community Assembly (CA), the Executive Committee (EC) and the Community Forest Management Body (CFMB) – and the CFMP, both of which are essential to FPIC. Many community members are understandably eager to have their customary rights formally recognized in order that they may commercially benefit from their forest resources, leading some to complain about the lengthiness of the Nine Steps. Although this is a legitimate concern the rigorousness of the nine-step process cannot be sacrificed to expediency, otherwise there is a real danger that forest dwelling communities will be further marginalized.

CIRCUMVENTING FPIC

Memorandums of Understanding and Contracts

Despite the requirements established in the CRL and CRL Regulations, it is clear that logging companies and influential members of the community – often in leadership positions – are attempting to circumvent FPIC, advertently or inadvertently. This is well illustrated in the following two examples, both of which have been taken from credible reports submitted by reliable parties.

In the first case the Kpogblen Clan of Grand Bassa County was approached by a member of the legislature and a representative of a logging company, who together offered to pay the community's application fee to become a Forest Community, on the condition that a Memorandum of Understanding (MOU) would be signed granting logging rights to the company. Because PROSPER had been working with the Kpogblen Clan to establish a Forest Community, community members were aware of the nine-step process, the legal requirements and, importantly, their rights to a participatory decision-making process. The company was asked to leave a copy of the MOU so that members could discuss the proposed arrangement and terms, as the community was divided on the issue, but the company refused. It was later reported that the member of the legislature, who had initially approached the community with the logging company, then invited clan chiefs, town chiefs, elders and paramount chiefs to his home where he asked that they sign the MOU. Several of the leaders did so.

In the second case, a logging company approached the Numopoh CFMB and expressed interest in logging the community forest; however, the company refused to submit the proposed contract to the CFMB for review, which would be legally obliged to consult the CA and Forest Community members about the proposed contractual terms. Instead, the company directed the CFMB to accompany one of its representatives to the FDA office in Monrovia, whereupon the contract would assumedly be signed.

Implications and Consequences

Following the moratorium imposed on the use of Private Use Permits (PUPs) – a consequence of the scandal that affected the Liberian forestry sector – many companies that had previously held rights to harvest timber under such permits have attempted to reestablish their claims through the community forestry program. Much of the forestland that was allocated under PUPs should have anyway been subject to the CRL, not the NFRL, because the "private" deeds under which many PUPs were granted represented the collective property rights of the community, and as such are governed by Section 2.3(b) of the CRL ("Forest land holders with Aborigines Grant Deeds, Public Land Deeds, Tribal Land Deed Certificate and Warranty Deeds shall be classified as Community Forest Land").

Although the CRL provides little explicit protection to communities when they decide to negotiate a commercial arrangement with a company – part of the reason why companies are so eager to engage Forest Communities – the CRL and the CRL Regulations clearly establish certain safeguards, as explained above. So when a company approaches the leaders of a community and asks them to sign an MOU before a Forest Community has been established, they are operating in contravention of the law: community members must first be consulted about whether or not they want to form a Forest Community; be fully informed about the process and implications; and be allowed to establish representative bodies, governed by clear rules. Only once these requirements have been met may the Forest Community contract with an outside party. Without these requirements having been met, FPIC has not been satisfied, since an MOU signed by clan chiefs, town chiefs, elders and paramount chiefs, commits the community to a course of action before a proper discussion can be held, and before the requisite representative institutions can be established.[1]

Similarly, when a company approaches a CFMB – the body with the legal authority to negotiate commercial agreements with outside parties – with a proposal to commercially exploit the community's forest resources, no legally enforceable agreement can be signed without the wider community first being consulted. Even if community members have agreed in principle to the logging of their forest, a commercial contract must be fully reviewed and consented to anew, as it represents a "decision, agreement or activity affecting the status or use of community forest resources," which requires the "prior, free, informed consent of the said community" (CRL, Section 2.2(c)).

It is important for both community leaders and company representatives to understand that the actions described above – MOUs signed before the establishment of a Forest Community, or the signing of a contract by the CFMB without wider consultation – are in direct contravention of the CRL. The legal implications of this are serious, in that an agreement that has been signed without meeting the requirements for FPIC is legally unenforceable. At the very least, companies may be forced to abandon significant investments if legal challenges successfully establish that the community in question did not provide its free, prior and informed consent.

RECOMMENDATIONS

Option 1 – Education of Rights under the CRL

As shown by the above example with the Kpogblen Clan, where community members are aware of their rights they can and will enforce them. The challenge, in this case, is making sure that community members are informed of their rights under Section 2.2(c) of the CRL. This has been a central objective of the USAID|PROSPER program, which – in collaboration with the FDA – has instituted a comprehensive process of education, notice, and consultation. Not only has this been essential for informing communities of their rights, it has also been necessary to counter the prevailing assumption amongst community members that the FDA intends to appropriate communities' forest resources.

The nine-step process that has now been developed and refined represents the best way to both inform communities that might be interested in pursuing CF of their rights, and at the same time satisfy the requirements for FPIC. Because the CF program will undoubtedly expand, it is essential that knowledge about the process be effectively transferred to the FDA's CF department, which will soon have to adopt

[1] The issue of FPIC arises even before the statutorily required representative bodies are formed, as neither the CRL nor CRL Regulations establish how the community is supposed to guide itself to the point where the Community Assembly is formed. If it is left solely to the village elders and chiefs there is a danger that the community could be directed to pursue a course of action that it might not otherwise take. There is a need for the establishment of a more inclusive, democratic body that can steer the process at the earliest stages.

greater responsibility for the program. USAID|PROSPER is already preparing for this by, for instance, creating a Community Forestry Handbook to be used by persons with an interest in CF. Other measures will, however, need to be considered and implemented, such as a training/mentoring program to transfer the theoretical, legal and practical knowledge to the FDA. Although there will be financial and logistical challenges in the future, it is imperative that FDA staff be able to meet the same high standards that have been established to ensure that communities are able to provide free, prior and informed consent – failure to do so risks undermining the entire CF program. The FDA and USAID|PROSPER will therefore need to coordinate effectively to ensure that best practices are adopted, and that a rigorous and thorough process is maintained.

Option 2 – Notice of Requirements to Companies and Other Interested Parties

As is clear, it is in the best interests of companies wishing to secure legally enforceable agreements with Forest Communities, that community members have provided their free, prior and informed consent. Although some companies have in the past attempted to manipulate the legal system (some having even perpetrated fraud), it is not a given that all such enterprises seeking to secure commercially beneficial agreements by approaching communities directly are intentionally attempting to evade the legal requirements under the CRL and CRL Regulations. It may be the case that a company is unaware of the legal requirements for FPIC under the CRL, or the Nine Steps under the CRL Regulations. Even if companies are aware of Section 2.2(c) of the CRL, they may not fully appreciate the legal importance of FPIC for any later contract; their immediate concern is more likely that a competitor may secure an agreement, and so they do what they can to get there first, such as attempt to make agreements with community leaders.

One way of ensuring that legitimate logging companies do not inadvertently attempt to circumvent FPIC is therefore to inform them of their legal responsibilities with regard to community forestry, the CRL, and the CRL Regulations, as well as the legal implications of noncompliance. Identifying the appropriate parties is easy enough, as all logging companies operating in Liberia need to be pre-approved by the FDA. All that would need to be done is for the FDA to determine how best to provide notice to the companies about how they are to act. This could be done in the following ways:

- The FDA could issue written notices to all pre-approved logging companies, explaining the legal requirements of the CRL and CRL Regulations. This would explain that before any agreement between a company and community could be signed, a Forest Community would have to be formally established, and that the scope and terms of any contract would have to be approved by the CA, after appropriate consultations with community members. The notice would make clear that without FPIC having been satisfied, any agreement signed between the company and community would be unenforceable;
- The FDA could convene a workshop, inviting representatives of the various pre-approved logging companies and the Liberian Timber Association (LTA), to explain the legal requirements of FPIC and the Nine Steps. The same subjects addressed in the written notice could be presented and explained, and any questions the attendees may have could be answered. It would also be a good opportunity and forum for companies and the LTA to raise any concerns they may have, and make recommendations for the improvement of the system.

Option 3 – New Regulatory Penalties and Fines

Under the Section 2.2(g) of the CRL the FDA has the authority to promulgate regulations to govern community forestry, which may by necessity include penalties and fines. This power could be used in conjunction with the provision of notices to establish an effective mechanism to deter logging companies from attempting to circumvent FPIC. They would not be able to argue they were unaware of their legal obligations, as they would have received notice; and because they would be subject to punishment, they would be more inclined to comply with the law. For any such regime to be successful, though, the punishments and/or fines need to be sufficiently strong and credible, otherwise companies may calculate that the benefits of circumventing FPIC outweigh the gains of compliance. Such penalties and/or fines could include the following:

- A monetary fine of enough value to compel the company to seriously consider its effect. A flat fee could be imposed, or the fine could be determined by the area of forestland the company sought to secure;

- Temporary or permanent suspension of all logging operations, depending upon the nature of the violation, and whether or not it was the company's first offence. Persistent offenders could be permanently barred from operation within Liberia, but even temporary suspensions would be a significant deterrent to logging companies.

Recommendation

The three options listed above would all, if independently implemented, help to ensure that the requirements for free, prior and informed consent, as established in Section 2.2(c) of the CRL, are met. However, it would be preferable for all three to be implemented, as the actions suggested in the options are intended to reinforce one another, just as the provisions in CRL.

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