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POLICY BRIEF # 11

THE VOLUNTARY PARTNERSHIP AGREEMENT: BACKSTOPPING THE COMMUNITY RIGHTS LAW¹

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

POLICY ISSUE

Following passage of the National Forestry Reform Law in 2006, the European Union (EU) and Government of Liberia (GoL) began informal discussions about signing a Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreement (VPA), as a means to further strengthen the reform process in the commercial forestry sector. The VPA was officially signed on July 27, 2011 and became effective on December 1, 2013. To date, the VPA covers the following contract/permit types: Forestry Management Contracts (FMCs), Timber Sales Contracts (TSCs), Forest Use Permits (FUPs) and Private Use Permits (PUPs). This is understandable, given that these arrangements were – at the time VPA negotiations formally began – the only way in which timber could be commercially exploited. However, the GoL then passed the *Community Rights Law of 2009 with Respect to Forest Lands* (CRL), establishing a process through which communities could have their customary claims to forest resources formally recognized, allowing them to engage in commercial logging. Unfortunately, the *Regulations to the Community Rights Law of 2009 with Respect to Forest Lands* (CRL Regulations), which were to provide guidance on how Forest Communities could commercially exploit their timber, were not passed until August 30, 2011 – months after the VPA had been signed – so could not be incorporated into the first iteration of the agreement.

The parties did, however, recognize the need to incorporate community forestry into the VPA, since the CRL explicitly provides for the commercial exploitation of timber. But the timing and nature of the community forestry program's inclusion was made dependent upon when the CRL Regulations were finalized. It now appears that the CRL Regulations, after initially failing to reflect what was established in the CRL, are close to being harmonized, which will ultimately require the VPA to be updated. This is happening not a moment too soon, as communities will need to be able to understand and comply with the VPA if they want to commercially exploit their own timber;² and because the VPA provides an opportunity to establish important safeguards that may help to prevent the emergence of a scandal, similar to that which was associated with PUPs. Although both are relevant, the second issue is more immediately important, as communities interested in commercial timber harvesting will more than likely – based upon their low

¹ Thanks to Ms. Lea Turunen at the European Forest Institute, Abraham Guillen of the VPA Support Unit in Liberia, and Carl Bruch of the Environmental Law Institute in Washington, D.C., for providing advice and feedback on the final draft of the policy brief.

² Attorneys visiting from the Environmental Law Institute, based in Washington, D.C., were provided with a full overview and given a step-by-step tour of the chain of custody system. They reported seeing logs that had been extracted from a Forest Community, illustrating the urgent need for the VPA to incorporate community forestry.

capacity – have to contract with outside parties,³ which may seek to exploit communities’ ignorance of the forestry sector. The policy brief will look at measures that could be included in the VPA to achieve the goals of the community forestry program, while protecting communities from predatory practices.

FLEGT AND THE VPA

Overview of the VPA

The VPA “aims to reduce illegal logging by strengthening sustainable and legal forest management, improving governance and promoting trade in legally produced timber.”⁴ To meet these objectives the VPA requires that all logs, timber, and timber products be produced in conformity with legal standards, and establishes a Legality Assurance System (LAS) to verify that these standards are met. According to the VPA, the existing LAS “is based on the national legislation in force and existing governmental control systems and was designed by a national multi-stakeholder process.”⁵ It involves various elements and steps, including: a legality definition, which establishes a matrix of 11 principles, together with numerous indicators (see Box 1); verification of compliance with the legality definition by the Liberia Verification Department (LVD); reinforcement of the existing Chain of Custody (CoC) system to “trace a standing tree to the point of export”;⁶ FLEGT licensing, overseen by the Liberia Licensing Department (LLD); the requirement for regular independent audits; and, eventually, a complaints mechanism to address grievances.

Legality Definition, Verification and the Community Rights Law of 2009 with Respect to Forest Lands

According to the VPA, all “domestically grown timber and timber products controlled by the LAS must originate from legally designated areas for which use rights have been allocated in accordance with the legal provisions,” and must be in keeping with the rules governing FMCs, TSCs, FUPs, PUPs or Chainsaw Permits, as established by the law and regulations promulgated by the Forestry Development Authority (FDA). The VPA, somewhat incorrectly, asserts that the “above-mentioned types of permit are provided for by the [NFRL], the [CRL], the Chainsaw Regulation and other related regulations” – incorrectly, because the CRL is silent about the type of permit required for the commercial exploitation of timber on community forest lands. The CRL allows for the commercial exploitation of timber on community forest lands as long as the community in question has signed a Community Forest Management Agreement (CFMA) and has developed a Community Forest Management Plan (CFMP) – reviewed and authorized by the FDA – that incorporates timber harvesting for commercial purposes.

³ It should be noted that communities will also eventually be able to collaborate with chainsaw loggers, once the amended chainsaw regulations have been promulgated.

⁴ FLEGT Website, <http://www.euflegt.efi.int/about-flegt>

⁵ VPA, Annex II, Section 1

⁶ Joint Annual Report of 2014, Implementing the Liberia-EU Voluntary Partnership Agreement, p.5

4.1. Legality Definition and Related Verification Procedures

The legality definition consists of 11 *principles*, each of which is divided into a number of *indicators* representing the legal requirement that must be complied with. Each indicator is equipped with *verifiers* that are used for determining whether a private-sector operator or government agency complies with the legal requirements covered by the indicator concerned.

Appendix A contains the legality definition and outlines verification procedures to guide the responsible ministry, government agency and LVD in compliance assessment. This verification framework specifies the:

- Objective to describe the purpose of a verification procedure;
- Regulatory control to provide for the normative and/or regulatory requirements and the responsibility for a particular indicator;
- Verification method to provide for description and means of verification, which will consist of document review, field inspection, confirmation and/or consultation;
- Frequency to define how often compliance with an indicator or certain aspects thereof must be assessed by the LVD.

More detailed procedures, including checklists, to assess compliance with the legality definition will be developed during implementation of the VPA.

The VPA does not yet adequately address the issue of commercial logging on community forestlands, focusing instead on “social agreements” and “affected communities” – subjects that appear in the NFRL, and which are meant to protect the rights of communities when the GoL grants concessions. To its credit, the VPA recognizes this, noting that the CRL Regulations “are currently being drafted and, once they have been completed, amendments will be made to the LAS to reflect any additions.”⁷

The Right Time

The CRL Regulations that were being drafted at the time of the VPA’s signing, and which became effective in August 2011, did not accurately reflect what was written in the CRL,⁸ leading to complaints from communities, Civil Society Organizations (CSOs), and the Liberian Timber Association (LTA). In response, the Joint Implementation Committee (JIC) of the VPA established the Regulations Harmonization Committee (RHC), which was made up of various stakeholders and headed by a representative of the NGO Coalition, to oversee the harmonization process. The RHC employed the services of a consultant, secured by USAID| PROSPER, and ultimately agreed upon the recommendations submitted. Although the FDA has yet to finalize and publish a draft of the amended CRL Regulations, it is gradually moving the process forward and will likely – based upon the RHC’s unanimous endorsement – incorporate many if not most of the recommendations. It is therefore timely to start considering how best to incorporate CF into the VPA and the LAS.

THE CRL AND VPA: PROTECTION THROUGH VERIFICATION

The CRL, CRL Regulations, and Minimum Requirements

Although it is not yet known exactly what the harmonized CRL Regulations will look like, there are certain minimum requirements governing commercial timber operations in community forests that will have to be included, as they are established by the CRL – the controlling statute. This includes, for example, requirements that any “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” (CRL, Section 2.2(c)) and that all large-scale commercial use contracts must comply “with the [Ten] Core Regulations for Commercial Logging” (CRL, Section 6.3(b)). Other requirements established by the CRL Regulations will also undoubtedly remain in force, most importantly the Nine-Steps, which ensure the requirement for free, prior and informed consent (FPIC) is met.

Based upon these assumptions and the intent of the existing regulations, which appeared to try to protect the community by having the FDA oversee agreements between Forest Communities and outside parties, various recommendations are proposed for the expansion of the VPA’s LAS to cover community forestry, and specifically the legality verification principles and indicators. The policy brief does not address exactly how the proceeding recommendations will be integrated into the VPA – i.e. whether new principles are needed, or whether indicators will simply need to be added to existing principles – but instead sets out specific actions and standards that will need to be verified by the LVD before a FLEGT license can ultimately be issued. The VPA Support Unit and other stakeholders can determine the exact format, once the CRL Regulations have been finalized and the issue has been more thoroughly reviewed.

RECOMMENDATIONS FOR PRINCIPLES AND INDICATORS

A. Free, Prior and Informed Consent – Proper Establishment of a Forest Community

Before any activities can be taken on a community’s forestland, it must be verified that the community has established its legal authority through the process laid out in the CRL and CRL Regulations. Under the CRL, this requires free, prior and informed consent (FPIC) (CRL, Section 2.2(c)), which is further developed in the CRL Regulations under the Nine Steps. Essentially, this requires the substantive participation of all members of a community forest who will be affected by a “decision, agreement or activity,” before any such decision is taken. This requirement is, to some extent, already covered by Principle 2 of the VPA, which demands that the “Forest Use Rights covered by the contract was awarded pursuant to the National Forestry Reform Law and the Community Rights Law.” However, the public participation verification requirements under indicator

⁷ VPA, Annex 2, Section 2.1

⁸ See the USAID Policy Brief, “Addressing the Shortfalls of the Community Rights Law: To Amend or Adapt,” June 2015, for an overview of some of the key issues

2.2 of the legality matrix, which might otherwise satisfy the need for FPIC explicitly refers to “affected communities,” which falls under the NFRL.

The VPA will need to require the LVD to verify that the Nine Steps have indeed been followed: that people were informed of meetings and proposals; were given ample time to prepare comments and responses; and ultimately supported the decision to establish a community forest. The method described in the legality matrix for Indicator 2.1 could similarly be applied to verifying that a Forest Community has been properly established, though it would need to be expanded: “In the case of consultation with communities, the LVD shall confirm the fact and quality of the consultations by review of documentation, including the report of the socio-economic survey and the timing and arrangements relating to the conduct and discussions at the meetings.” The LVD will therefore need to verify:

- The content, method and timing of notices for community meetings;
- The date, attendance, minutes and outcome of meetings held by communities;
- The results of the socio-economic survey; and
- That all required documents have been signed and attested, including the CFMA and the Forest Community’s constitution and bylaws.

B. Community Forest Management Plans Incorporating Timber Harvesting

The CFMP establishes how forest lands will be zoned and forest resources used, and thus determines the scope and scale of any commercial timber harvesting operation. The CRL Regulations will undoubtedly maintain the requirement that all “persons who are not members of communities...harvest and use timber...resources only as governed by the Community Forest Management Plan and the community forest rules” (CRL Regulations, Chapter 5, Section 4). The LVD will need to verify that the Forest Community’s representative institutions have approved the CFMP; that the CFMP explicitly incorporates timber harvesting for commercial purposes as one of its objectives; and that plans for timber harvesting meet all technical and legal requirements. This will include verifying that:

- The community members were fully aware of the proposal to log the community forest and were consulted by their representatives in the CA;
- The CFMP was reviewed and approved by both the CA and the FDA;
- The CFMP meets all technical and legal requirements, including those for sustainable forest management (SFM); and
- That an Environmental Impact Assessment has been conducted, and that it has been reviewed, approved and attested by the Environmental Protection Agency.

C. Contract Review and Advice for Small- and Medium-Scale Commercial Use Agreements

Communities are able to freely negotiate and sign small – and medium-scale commercial use agreements with outside parties, as made clear by Sections 6.1 and 6.2 of the CRL. With regard to contractual arrangements between Forest Communities and outside parties in these circumstances, the FDA has little oversight authority, except to ensure that minimum technical and legal requirements for timber harvesting are met. It does, however, play an important advisory role: its “duties and powers” (Chapter 5 of the CRL) are to, “[p]rovide and assist communities seek [sic] and access technical assistance and support for management of forest resources,” and “[p]rovide minimum standards for and assist in drafting model forest management plans, forest rules, forest agreements and other technical documents for use by CFMBs.” This arguably includes providing Forest Communities with model contracts that incorporate standardized clauses for the transfer of environmental and financial liability, species pricing for merchantable timber, and the amount and timing of payment of fees and royalties.

The VPA would not be able to require specific contractual arrangements outside of the statutory framework established by the CRL, but it could include additional regulatory requirements that give effect to the CRL. It could also give effect to changes in the CRL Regulations, which could require that the FDA provide Forest Communities with standardized contracts (templates), review proposed contracts between Forest Communities and outside parties, and provide advice to Forest Communities about the terms of the contract – for instance, to inform communities that the proposed price for harvested timber is lower than

that listed in the Liberian Code of Forest Harvesting Practices.⁹ The VPA can make sure this happens by requiring that:

- The Forest Community in question was provided with a model template to guide them in their negotiations with outside parties;
- Before signing a contract with an outside party, the relevant contract was submitted to the FDA for review;
- The FDA reviewed the contract and provided advice to the community, in conformity with the standardized clauses of model templates, and based upon best practices;
- The community received and understood the advice provided by the FDA, and attested to such; and
- The contract between the outside party and the community was reviewed and approved by the CA.

D. Payment of Fees and Royalties

There are at least two clauses within the CRL that require certain fees and royalties to be paid to communities by outside parties for the commercial exploitation of timber. The first, Section 3.1(d) of the CRL, establishes that the “Community will have the rights to at least 55% of all revenue/income generated from large-scale commercial contract between communities, the Authority and third parties for harvesting of timbers on Community Forest Land.”

The second is Section 6.5, which states that under small-, medium- and large-scale contracts, “land rental as specified in Regulation 107-07 Section 33 (a) and (b) shall be paid according to that regulation. Bid premiums as specified in Section 33 (e) shall be paid to the community.” This has since been replaced by *An Act to Abolish the Payment of Annual Land Rental Bid Premium on Contract Area and Merging of Export Taxes into Stumpage/Production Fee in the Forestry Sector of the Liberian Economy*. Section II of this new act states that “in lieu of Annual Land Rental Bid Premium [the FDA] is authorized to levy, through regulations, a special production-based fee (stumpage premium) to compensate for revenue loss associated with the cancellation of Annual Land Rental Bid Premium.” Once the FDA has established how communities will be compensated in lieu of Section 6.5, this will need to be incorporated into the regime.

The VPA could demand that all payments due to Forest Communities, which are statutorily required, are deposited into the communities’ accounts before a FLEGT license can be issued, as occurs under Principle 9 of the legality matrix with timber from concessions. Principle 9 establishes that the “contract holder or timber processor is current in its compliance with all fiscal obligations including payment of taxes and fees,” and sets out methods for verifying that these payments have been made, including tax statements and reports issued by the FDA’s own Commercial and Finance Departments. The VPA could require similar measures, by verifying:

- In the case of a large-scale commercial use contract, that the company has paid at least 55% of all relevant revenues to the Forest Community;
- That the production-based fee, under the *Act to Abolish the Payment of Annual Land Rental Bid Premium*, has been paid to the Forest Community.

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⁹ Something similar already exists in the VPA with regard to social agreements. Indicator 3.3 includes a note in the ‘Verification guidance’ section, which states: “Section 33 (a) of Regulations 105-07 provides that the FDA shall make model codes of conduct freely available on the Internet and shall, upon request, provide paper or electronic copies of model codes of conduct to contract/permit holders, CFDCs, and affected communities.”