

## IMPROVING FOREST MANAGEMENT PRACTICES IN MYANMAR: *Logging Moratorium as a Catalyst for Review & Reform*

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As Myanmar continues its transition to democratic rule, a focus on the forest sector is necessary. In order to reduce conflict, attract needed investment, and improve the management of valuable natural resources the government must address weak governance and overlapping claims in the sector, including the improper allocation of licenses/concessions. Recognizing these needs, the Government of Myanmar has recently announced logging moratoria in different regions of the country. However, unless the moratoria are tied to implementing needed reforms, the government risks simply ‘hitting the pause button’ until time runs out, after which ‘business as usual’ will continue, albeit with different elite players in charge. This briefing argues that the moratoria provide an important opportunity to review the sector in order to clarify claims and to identify the reforms necessary for the good governance of the forest sector. Further, if done well, this process can have wider impacts by demonstrating a new approach to resource management and building legitimacy of the new government.

As currently proposed, the lifting of the moratoria is based on a time limit—they are in place for 1-2 years (see Map 1). Logically, however, if the need for the moratoria was based on the current state of mismanagement, then the conditions for lifting should be based on the implementation of the changes necessary to address this mismanagement.<sup>1</sup> This begs the question: what are the most urgently needed management reforms that should act as triggers to lift the moratoria? This is most effectively answered through a review of existing forest concession claims, the process by which they were issued and the state of current their operations.

### **The case for a concession review to identify the ‘necessary reforms’**

The most efficient way to reach consensus on what reforms are most urgently needed as benchmarks is to conduct a review of the existing forest-concession claims. These reviews are a common tool for improving resource management in transitional contexts and identifying who has the legal right to operate. Reviews also are defensible as they have a legal basis for their establishment. Moreover, they yield information that is invaluable in chaotic and information-poor transitions as new administrations struggle to rationalize management and improve governance destroyed by years of conflict and dictatorship.

*Concession reviews are common in transitional contexts.* Cambodia conducted a review of forest contracts, as did Liberia and the Democratic Republic of Congo (Rochow 2016); similarly, Iraq and Libya, for example, reviewed oil contracts allocated by previous administrations; and Indonesia recently began

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<sup>1</sup> Indonesia is one interesting example having instituted a national moratorium on new concessions in order to undertake critical forest governance reforms, however, the conditions for lifting the moratorium is not based on achieving these reforms. In contrast, in the post-conflict autonomous province of Aceh, the first transitional government instituted its own logging moratorium, and conducted a complete re-zoning of the forest sector to reflect goals of preventing floods and landslides, protecting wildlife corridors, maximizing yields from plantations, protection of forest carbon, and access of local communities to forest-based and plantation livelihoods.

a process to evaluate the legality of more than 10,000 mining contracts, many of which overlap, given out by local authorities<sup>2</sup> (PwC 2015).<sup>3</sup>

*Concession reviews have legal basis.* Standard contracts include a provision for ‘periodic review’. A review, therefore, in no way violates the sanctity of the contract, and, in fact, should be considered a responsible practice of an administration transitioning from a period of weak ‘rule of law’. (Box 1 summarizes the experience of Liberia in its concession review.)

*Concession reviews are instructive, especially in chaotic transitional environments.* An objective review can clarify legal uncertainty around overlapping claims. Such certainty is a pre-requisite for productive investment. Moreover, a review can help provide details about the past behaviour of companies and government/authorities. This helps to identify illegal pathways (including corruption), as well as those that have resulted in environmental and social problems that the a legitimate government should aim to prevent. Blocking these practices becomes the basis of the recommendations for reform.

Using an objective process can help build consensus on goals of forest management and how to move forward in order to avoid the return to ‘business as usual’ that all can agree led to conflict and poverty. **If done well, the concession review becomes both a catalyst and a roadmap for reform.**

### **The Concession Review: How should it work?**

*Due process* is necessary to avoid arbitrary decision-making and is critical to a fair adjudication of rights and performance. In particular, during the tense transitional period, it will be important to ensure that the review is not (or even perceived to be) an opportunity for ‘score-settling’ or for transitional authorities to undertake resource-grabs.

“Fundamentally, concession reviews should be viewed as vehicles for restoring the rule of law” (Rochow 2016), and therefore, they should be conducted in a manner consistent with the reinstatement of the rule of law. Thus, the governance of the review itself is of critical importance. The review must be (and be seen as) objective, impartial, and fair. This can be accomplished through its structure and process, including:

- **All claimants of licenses/concessions/contracts are requested to supply information to support their claim.**

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<sup>2</sup> More than a third of the contracts have failed the first criteria of ‘clean and clear’ of overlap with competing claims. <https://www.pwc.com/id/en/energy-utilities-mining/assets/May%202016/PwC%20Indonesia-mining-in-Indonesia-survey-2016.pdf>

<sup>3</sup> During transitions it may seem expedient to ‘start with a clean slate’ and simply reject all claims and cancel all contracts. Aside from perceptions that such a policy move is simply score-settling, a review is preferable because not all contracts allocated in war-time or by military dictators are necessarily illegal. Collier (2007) has noted that transitional governments often “inherit” contracts that are legal but have terms that are not advantageous to the country. This is particularly true of natural resources—which are an easy target for rent-seeking. Although unfair to the country, ‘rule of law’ demands that legal contracts are respected (*i.e.*, the ‘sanctity of the contract’). But it should not be assumed that all contracts, or even that any single contract, are valid. In many cases, corrupt individuals may use the chaos of war-time or their absolute authority during dictatorships to reward themselves and their cronies by allowing companies to operate in violation of the law. This argues further for the need of a review in order to resolve legal uncertainty, in particular where there are overlapping claims.

- **A multi-stakeholder<sup>4</sup> review committee will be responsible for deciding on the validity of the claims and all other decision-making/recommendations.** Whenever possible, decisions should be by consensus in order to help build legitimacy for the committee's recommendations for reform.
- **A secretariat of independent expert investigators<sup>5</sup>** to assemble and evaluate the information for each claim, which is then submitted to the review committee for decision-making.

**Prior to engaging the claimants, the review committee must decide on the process and standards for decision-making and establish the review criteria to be used on each and every claim.** The committee can make a number of findings (which should be legally defensible should the claimant disagree with the finding):

- *Rejection of the claim (i.e., find the claim null & void from the outset [ab initio])*
  - Where the claimant cannot provide sufficient supporting evidence to defend the legal validity of their claim
- *Acceptance of the claim*
  - Remedial actions may be required where the claim is deemed legal but some infractions are detected in the allocation or operation of the contract that can be corrected
- *Cancellation/revocation of the claim*
  - Where the claim may have been legally issued but the operator is in material violation of the terms of the contract/concession in a manner that triggers termination.

A failure to produce an executed contract/concession agreement should constitute automatic rejection as failing to meet the minimum legal requirements of a valid operator.

The 'review criteria' used by the committee to decide on compliance must be specific, measurable, relevant, and based on the law/regulations/terms of the contract and concession *at the time of issuance* (or as legally amended by subsequent law/regulation<sup>6</sup>). It is worth re-iterating that these criteria must be established with the review committee *before* any of the claims are evaluated. It is likely that there will be intense pressure to avoid setting standards in advance so as to allow *ad hoc* decisions during the review process (which allow certain operators to remain, in some cases due to corruption).<sup>7</sup> *Ad hoc* decision-making will rightly be seen as arbitrary and preferential, and can be used to paint the review as a witch-hunt or a corrupt resource-grab.

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<sup>4</sup> The individual representatives to the review committee should be self-selected by the constituencies that they represent.

<sup>5</sup> It is unlikely that members of the review committee will be subject experts on all aspects of concession allocation and operations. They will therefore rely on the secretariat to conduct the appropriate investigations. (In Liberia, for example, there were expert foresters, lawyers, and forensic accountants in the Technical Secretariat.) International counterparts for secretariat experts can also contribute global experience; greater expertise; independence; credibility (which also reassures foreign donors and potential investors); as well as funding opportunities for local capacity building.

<sup>6</sup> Under some contracts/concession agreements or trade agreements, the government may not change the terms even if new/amended laws come into force without fairly compensating the operator.

<sup>7</sup> For political reasons, the review may not be able to treat every claimant equally due to their influence with (and threats to) the fragile new government (e.g. generals and/or ex-combatants). This is a political decision, best made transparently and in advance.

Investigators should be given legal authority (*e.g.*, a writ of search & seizure) to compel evidence, including from financial institutions and the Treasury (*e.g.*, in order to evaluate tax/royalty payments).

If performance is to be evaluated, then affected parties should be given the opportunity to submit evidence. Claimants should be given access to all information about their claim used in the evaluation and offered the opportunity to make any corrections of error. Non-cooperation of claimants should be considered cause for dismissal of claims (rejecting the claims outright as if null and void).

### **Maintaining the moratorium**

**During a review, a moratorium on both logging and the allocation of new concessions is essential.** The moratorium is necessary to avoid cut-and-run extraction by those who expect their claims to be terminated. Further, no new concessions should be allocated until the flaws identified by the review have been corrected to avoid further compounding the problems.<sup>8</sup>

The review itself and subsequent reform, including capacity building to ensure implementation, will take time to implement. This will require strong ‘political will’, requiring leadership and broad participation/buy-in, because there is often political and economic pressure to lift the moratorium in transitional situations before the reforms are complete.<sup>9</sup>

But there are also favorable opportunities during transitional periods for the governance reform of resource sectors. Most people—in government, the donor community, civil society, and citizens at large—recognize the need for reforms in order to block the return to ‘business as usual’ and armed conflict. This represents ‘a constituency for change’ that, if fostered, can build the ‘political will’ among elites that might otherwise resist change. Donor funding and international ‘good will’ to support the peace and transitional government can also help apply pressure for reform, and likewise, international consumer (importers and end-users/buyers) pressure can help reinforce reforms.

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<sup>8</sup> In addition to the need for clarification of the allocation process, in many transitional periods, corruption is rife. Therefore, strong governance ‘checks and balances’ should be in place before any new concessions are allocated to avoid compounding problems of overlapping claims, unlawful and destructive extraction, or contract terms that are disadvantageous to a country struggling to recover from conflict. As Collier (2007) notes: “During the transition period ministers have a strong incentive to ‘mine’ public assets for private gain, since their time horizon is short. Thus, in the three years before the 2007 election in DRC, there were massive sales of mineral rights to private companies on terms that have repeatedly been called into question as being nationally disadvantageous. Companies connive with powerful politicians to cut deals that are advantageous to both at the expense of the government. In effect, post-conflict governance is typically too weak to surmount the ‘agency problems’ involved in letting ministers negotiate on behalf of the government.”

<sup>9</sup> Collier (2007) notes that pressure is high to allow timber production because: transitions are subject to construction booms as new investment and donor funding pours in and reconstruction demands are high. This burgeoning domestic market requires material, including timber; illegal and/or “informal” artisanal logging tries to meet this demand, making enforcement difficult; transitional governments need to generate revenue and jobs, and the natural resource sector is seen as the route to rebuild the economy. However, as Blundell & Harwell (2016) discuss a lack of investment (due to the high-risk environment) often undermines these goals, which then undermines trust in government to deliver (basic services, job creation, poverty reduction strategies, etc.). Instead, donor funding is generally a much more reliable source of revenue in the short-term.

## SUMMARY

Myanmar has taken the first step in establishing logging moratoria across much of the country, but three important steps now must be taken:

- 1) *The conditions for lifting the moratoria must be explicitly linked to governance reform* to correct the mismanagement that served as the basis for the moratoria in the first place.
- 2) *These conditions should be established through a legitimate process*, the most effective being a concession review for which there is:
  - a. Precedent (especially in transitional situations similar to Myanmar);
  - b. Legal basis (in the ‘periodic review’ articles in standard concession agreements); and,
  - c. Utility—information about the forms of mismanagement, if any, will be identified in the review and can become the basis for recommendations of reform
- 3) *Implementation of the reforms trigger the lifting of the moratoria.* More importantly, implementation of reform is necessary to help secure the maintenance peace and security in Myanmar through the sustainable, effective, and equitable management of its forest resources.

### Text Box 1: CASE STUDY

***Liberia’s post-conflict forest concession review*** (adapted from Rochow 2016).

The concession review “was structured from its beginning to mirror and reinforce the goal of restoring the rule of law according to commonly recognized legal principles. The review was conducted in a transparent manner according to predetermined decision criteria and procedures, beginning with the widespread publication of those criteria. The burden of proof was explicitly placed on each concession holder to document compliance consistent with the procedures for license applications.”

Each claimant was “required to verify by affidavit all documentation submitted. The review went beyond due process (which requires that parties affected have the right to challenge decisions by adjudicatory process after they have been made) by scheduling individual meetings to allow participating concession holders to make their case to the technical secretariat during the review process.”

A claim was invalid if it could not satisfy the fundamental legal requirements of a valid contract at the time of its issuance, including:

- A business license & articles of incorporation
- An executed concession agreement, and
- A performance bond (as outlined in the concession agreement)

The “concession review called for a comprehensive land use–planning process that would rationalize the forest concession allocation process under FDA control, a significant departure from past practices. Other foundational reform recommendations included a ‘cradle-to-grave’ chain-of-custody system for tracing harvested timber and the institution of a transparent competitive bidding system to prevent the sequential awarding of overlapping concessions through corruption and cronyism. The general failure to meet financial obligations and the usurpative behavior characteristic of many of the forest concession holders led to recommendations that independent suspension and debarment lists be instituted.”<sup>10</sup>

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<sup>10</sup> Debarment lists were generated, but for political reasons, were never implemented.