

# Lessons Learned from Civil Society Efforts to Promote Community (Forest) Resource Rights and other Rights in Voluntary Partnership Agreements

Report prepared for the Workshop “Opportunities and Lessons for a Right-Based Perspective on FLEGT and VPA Processes in Latin America”

28-29 October 2013, Quito, Ecuador

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## Acknowledgements

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This report is funded by the UK Department for International Development under the Forest Governance Markets and Climate (FGMC) grant. It has been produced by Forest Trends as part of a collaboration between the Rights and Resources Group and Forest Trends “FLEGT and Impacts of Private Investment on Forest Rights” as a project activity under the Rights and Resources Initiative (RRI). The views expressed in this report are, however, those of the authors, who also take responsibility for any errors.

The authors are very grateful for the helpful guidance of Saskia Ozinga and Tom Lomax in early discussions of the paper; for comments on the first draft by Fernanda Almeida John Bazill, Omaira Bolaños, An Bolen, Ganga Dahal, Didier Devers, Julia Falconer, Patrice Kamkuimo, Albert Katako, Rudi Kohnert, Iola Leal, Jean Jacques Mathamale, Augusta Molnar, Andy Roby, and Arbi Valentinus; for the boxes contributed by Albert Katako, Kingsley Bekoe, Julia Christian and Robert Nyahn; and for the key informants who completed questionnaires, namely Albert Katako, Kingsley Bekoe, Eric Parfait Essomba, Lambert Mabiala, Jean Jacques Mathamale, Samuel Mawator, Jonathan Yieh, Arbi Valentinus, Minang Mardi, Dang Ngoc Toan, Giang Phan and the Vietnamese VNGO-FLEGT Network.

Finally the authors are very grateful to Anne Thiel for her patient editing and formatting of this report.

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## Glossary

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This glossary covers some of the main terms and acronyms in FLEGT VPA processes. A more extensive glossary can be found at [www.loggingoff.info](http://www.loggingoff.info)

<b>EFI FLEGT Facility</b>	European Forest Institute (EFI) Facility which supports the European Union in its implementation of the EU FLEGT Action Plan
<b>EU</b>	European Union
<b>EUTR</b>	European Union Timber Regulation
<b>External, self-mandated monitoring</b>	Self-mandated civil society campaigning organisations gathering information on forest governance. Monitoring activity is self-mandated, and NGOs undertaking it do not operate under any form of contract or mandate.
<b>FLEGT</b>	Forest Law Enforcement Governance and Trade
<b>FLEGT Licensing authority</b>	The authority that, in the context of a VPA, is designated the role of issuing and validating FLEGT licences.
<b>FLEGT Partner Country</b>	Timber-exporting (and often -producing) country that has agreed a VPA with the EU or that has shown interest to engage in negotiations towards the conclusion of such an agreement.
<b>FLEGT Licence</b>	A licence given in the context of a VPA which refers to a shipment of legally produced timber or derived product(s) that are destined to the EU market
<b>Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan</b>	EU Action Plan agreed in 2003 that sets out a process and a package of measures through which the European Commission proposes to address the growing problem of illegal logging and related trade.
<b>IFM</b>	Independent Forest Monitor, sees Independent Monitor (IM)
<b>IM_FLEG</b>	Independent Monitor of Forest Law Enforcement and Governance, see Independent Monitor (IM)
<b>Independent Auditor (IA)</b>	Independent non-political body which assesses the implementation and effectiveness of the LAS as defined in a given FLEGT VPA. NB: The Ghana VPA uses the terms 'Independent Monitor' and 'Third Party Monitor' in different places, both to refer to the IA.
<b>Independent Monitor (IM) / Independent Observer (IO)</b>	Independent organisation, often an NGO, undertaking analysis of the forest sector. The IM works under an agreement with the host country government and its findings are provided to the government NB: The IM has been also called Independent Forest Monitor (IFM) and Independent Monitor of Forest Law Enforcement and Governance (IM-FLEG)
<b>IO</b>	Independent Observer, see (IM) Independent Monitor
<b>JIC</b>	Once a VPA has been signed a Joint Implementing Committee (JIC) will be formed, consisting of EU representatives and government representatives as well as in most cases CSO representatives. The JIC is called JMRM in Ghana.
<b>LAS (Legality Assurance System)</b>	System set up within the context of a VPA to trace legal timber and ensure it is not mixed with illegal timber.
<b>Legality Definition</b>	Statement defining which set of laws of the FLEGT Partner Country will be enforced and monitored within the context of a VPA.
<b>Legality Matrix</b>	Defines the indicators and verifiers to clarify the laws whose enforcement will be monitored within the context of a VPA.
<b>Supply chain</b>	A timber supply chain is a system of organisations, people, technology, activities, information and resources involved in moving timber and timber products from the moment the timber is harvested to the moment it is sold, including transformation and transport.
<b>Supporting Measures</b>	Section of a VPA outlining the actions that will have to be undertaken, in parallel to setting up the Legal Assurance System, to ensure the VPA is effectively operationalized.
<b>TLAS (Timber Legality Assurance System)</b>	See LAS.
<b>Verification (of legality)</b>	Means of assessing that the timber to be licensed as 'legal' is in compliance with all legal requirements either in the forest or within the supply chain.
<b>Voluntary Partnership Agreement (VPA)</b>	A bilateral trade agreement between the European Union and a timber exporting (and producing) country (the FLEGT Partner Country).





## Executive Summary

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The 2003 European Union (EU) Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan represents an attempt to link forest governance reforms in timber producing countries with market incentives for legally produced timber. Voluntary Partnership Agreements (VPAs) are bilateral trade agreements signed between the EU and a timber producing country, and are a key element of the FLEGT Action Plan. Each VPA has been drafted to reflect the realities and priorities of the producer country, and the negotiation process for each agreement has directly involved national civil society representatives, often for the first time in the forest sector. Civil society in VPA countries and internationally have sought to use the VPA negotiation process to advance community resource rights and other rights.

The main objective of this paper is to examine the experiences and efforts of civil society in promoting a rights-based agenda through their engagement in VPA negotiations. It draws on experiences from the six countries that have completed negotiations: Cameroon, Central African Republic, Ghana, Indonesia, Liberia and Republic of Congo.

In most cases it is too early to see tangible 'on the ground' evidence as regards stronger community resource rights. It will only be possible to assess the effects when the VPA and its Legality Assurance System (LAS) are being fully implemented and FLEGT licences are issued. Positive effects will also depend on strong implementation of the EU Timber Regulation since this provides the basic market incentive for reform by producer country governments. However, according to the responses received from civil society key informants in VPA countries it is possible to identify considerable progress as regards procedural rights:

- It was found that all the VPA processes examined have resulted in significant advances for transparency, especially around concession allocation, logging operations, forest fees and other sensitive information. Transparency in terms of process also improved during VPA negotiations, with civil society organisations (CSOs) gaining insights into, and influence over, policy processes, including legal reform, usually for the first time in the forest sector.
- CSOs in most countries regard the VPA process as having been very important for getting customary and other rights onto the agenda, and/or for expanding the political space available to promote rights. This is why procedural rights are fundamental and a pre-condition for progress on substantive rights. VPA negotiations have provided an entry point or platform for raising politically contested rights issues, with some CSOs identifying a small but noticeable shift in government (or forest department) attitudes to community rights.
- In four of the countries a formal role for civil society in independent monitoring of VPA implementation has been established. This has been regarded as a major achievement by civil society since the potential for on the ground realisation of rights negotiated in a VPA is strongly related to how well its implementation is monitored - this puts pressure on loggers to respect community rights, and on governments to promote compliance by the private sector.
- In some cases the VPA has endorsed legislation with significant rights implications, for example, in Ghana and Central African Republic (CAR). These laws would have little hope of being operationalised without the need to comply with a VPA legality assurance system.
- In all VPA processes the review of forest legislation has highlighted gaps or inconsistencies, for instance non-existent or weak implementing measures for essential laws, conflicting laws, or a failure to recognize customary rights in statutory law. VPA processes have helped clarify the rights status of communities in and around forests, a key first step towards improving them.
- VPA processes have also been useful as a conduit for capacity building of CSOs, for example in undertaking independent monitoring activities. According to questionnaire responses, civil society key informants in most VPA countries felt that their capacity to defend community rights has been strengthened as a result of their participation in the VPA process.
- There are also early signs that governments that have signed VPAs are more sensitive about forest governance and rights issues because of concerns about their reputation in the eyes of European importers. CSO advocacy campaigns will be able to exploit this sensitivity.



On the other hand it must be acknowledged that in terms of promotion of tenure or community resource rights, the VPA process has its limitations. Most energy in the VPA implementation phase has gone into the technicalities of setting up the LAS, with much less attention paid to the rights-based agenda. In general, the VPA mainly affects rights linked to commercial timber production and trade, although some of the legal reforms mandated by VPAs include reforms to core statutory documents such as the Forest Code. There is also a requirement in VPAs that relevant national legislation is adjusted to incorporate international law, which should result in increased recognition of customary rights.

It is also recognised that there are major challenges to implementation, primarily the political will required to implement reforms that will impact on the political economy *status quo*. In some cases there has been a hiatus following successful negotiation of a VPA - civil society actors have sometimes lost their focus, and the state has taken the opportunity to retrench as regards vested interests and pre-VPA attitudes.

In sum, the main advances have been in terms of procedural rights - transparency, participation, consultation, monitoring and FPIC – rather than substantive rights. On the other hand these advances in procedural rights can be seen as being very significant in most of the countries, where, prior to the VPA process, civil society had very weak procedural rights. It can be argued that stronger procedural rights are a pre-condition for progress on substantive rights. Civil society can also see that by being linked to a legal instrument like the LAS there is at least a hope that for the first time advances on paper as regards community resource and other rights can be transmitted to practice.

The main conclusion of this paper is therefore that, for the countries examined, the prospects for community resource rights (and other rights) are more hopeful than if there had been no VPA process. As pointed out by a Ghanaian civil society informant “it is safe to conclude that without the VPA, farmers and forest communities will be worse off. The legally binding framework of the permits regime, access to information and reform agenda when complimented with proper implementation and monitoring by all stakeholders will increase community rights.”

# 1. Introduction

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## 1.1 The Emergence of FLEGT

The 2003 Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan of the European Union (EU) emerged from more than a decade of intense international interest in the problem of the international trade in illegal logging and other aspects of forest governance. The EU FLEGT Action Plan is an attempt to link prohibition of illegal timber and wood product imports into the EU with support for exporting countries to improve their forest management and governance.

Failure to produce a transnational agreement on forest management at the 1992 Rio 'Earth Summit' precipitated a number of bilateral and independent approaches, including the emergence of forest certification schemes<sup>1</sup> (the first coming from the Forest Stewardship Council created in 1993), which aimed to create a market based incentive for improved or sustainable forest management. These schemes incorporated an array of principles and standards for social, environmental and economic components of forest management. The impact of forest management certification has been uneven – it has been more successful in developed than developing countries.<sup>2</sup>

While some timber traders and NGOs focussed on forest management certification in the mid-1990s and beyond, a parallel consensus was being developed about the problem of illegal logging as a major barrier to good forest management and governance. Tackling illegal logging became a regular agenda item in international fora, as illustrated by the UN Intergovernmental Panel on Forests (created 1995), the G8 Action Plan on Forests (1998) and the Johannesburg World Summit on Sustainable Development (2002). The World Bank also sponsored a series of regional dialogues on Forest Law Enforcement and Governance (FLEG), the first of which resulted in the Bali Declaration (2001).<sup>3</sup>

It is widely recognised that illegal logging:<sup>4</sup>

- Is a major barrier for sustainable forestry;
- Depresses prices for legally harvested wood; and,
- Obstructs the effectiveness of certification schemes and other market incentives.

VPAs provide a unique opportunity for change and empowerment since they bring to bear the power of markets and political interests in a way that can create opportunities for progressive changes in power structures. A VPA process can empower civil society and its constituent stakeholder groups by giving them policy space and a voice through which they can influence the “rules of the game” – the legal and policy framework that shapes people’s access to the forest resource and its products. But at the same time, processes of legal formalization and stricter enforcement of laws and regulations could also have negative impacts on the rights and livelihoods of groups previously dependent on “illegal” use of the forest resource.<sup>5</sup> The FLEGT Action Plan stresses that “the challenge is to ensure that actions to address illegal logging, particularly enhanced law enforcement, do not target weak groups, such as the rural poor, while leaving powerful players unscathed.”<sup>6</sup>

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<sup>1</sup> Overdevest, and Zeitlin 2012.

<sup>2</sup> FAO,-Verifor 2009.

<sup>3</sup> Bali declaration available at [http://www.illegal-logging.info/uploads/Bali\\_ministerial\\_declaration.pdf](http://www.illegal-logging.info/uploads/Bali_ministerial_declaration.pdf).

<sup>4</sup> FAO,-Verifor 2009.

<sup>5</sup> Kaimowitz 2007.

<sup>6</sup> European Commission 2003.

## 1.2 What are FLEGT Voluntary Partnership Agreements?

The EU FLEGT Action Plan sets out a series of related measures for tackling illegal logging and its trade, including:

- Legislation to control imports of illegally harvested timber into the EU, specifically the EU Timber Regulation (EUTR), which came in to force in March 2013;
- A number of measures related to financial due diligence;
- Adoption of more sustainable government procurement policies by EU member states; and
- Creation of bilateral partnership agreements between timber producing countries and the EU.

These bilateral agreements are called Voluntary Partnership Agreements (VPA). Governments have an incentive to negotiate a VPA because it will make it easier for them to sell their forest products to the EU, and add legitimacy to the forest sector. Many NGOs and civil society organizations (CSOs) in timber producing countries and in Europe saw early on that, if the FLEGT Action Plan was going to be a positive force in timber exporting countries, local civil society would have to participate strongly in defining the new laws and systems. European NGOs lobbied the EU that civil society must have a genuine voice in the VPA negotiations<sup>7</sup>, and the EU eventually agreed. The EU Council thus confirmed that VPAs should, among other things:

- **Strengthen land tenure and access rights**, especially for marginalised rural communities and indigenous peoples;
- **Strengthen effective participation** of all stakeholders, notably of non-state actors and indigenous peoples, in policy making and implementation;
- **Increase transparency** associated with all stages of timber extraction, processing and trading, including through independent monitoring;
- **Reduce corruption** associated with awarding forest sector concessions, as well as with timber extraction and trade.

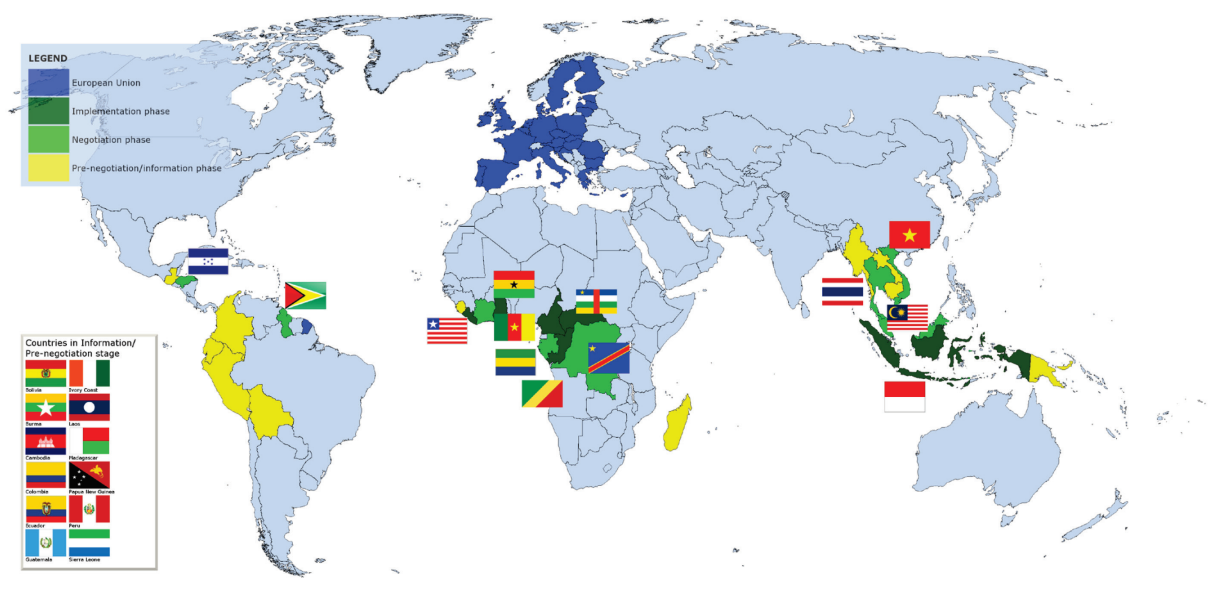
This has opened up new opportunities for civil society to influence resource rights, governance and other policy making areas in the forest sector. Each VPA is unique, designed to both reflect and reform the priorities and laws of the timber-producing country and in general shaped with the input of a broad base of stakeholders including CSOs. Each VPA negotiation process includes a period of legal review in which all relevant national and international laws are identified and inconsistencies, gaps or problems are examined, with the intention that remedial measures will be incorporated into the VPA.

Ten years on from release of the FLEGT Action Plan by the European Commission (EC), six countries have signed VPAs, and at least 19 countries are in varying stages of engagement or interest (see Figure 1). This report examines how, in the six countries with signed VPAs, the process of negotiating and beginning to implement a FLEGT VPA has influenced the resource rights and other human rights of communities and individuals whose livelihoods and rights are most at risk.

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<sup>7</sup> Greenpeace, FERN, WWF 2005.

**Figure 1. Current State of Play (October 2013) as Regards Country FLEGT or VPA Processes**



*Note: Currently six countries have signed VPAs: Cameroon, Central African Republic, Ghana, Republic of Congo, Liberia and Indonesia. Nine are actively negotiating VPAs – Ivory Coast, Democratic Republic of Congo (DRC), Gabon, Guyana, Honduras, Malaysia, Vietnam and Thailand – and a number of other countries are in various stages of prenegotiation, from information sharing to actively preparing to begin negotiations.*

*Source: [http://www.euflegt.efi.int/portal/home/vpa\\_countries/](http://www.euflegt.efi.int/portal/home/vpa_countries/)*

### 1.3 Statutory, Customary, and International Law

There has been a dramatic increase over the last 20 years in legislation recognizing tenure and other rights of rural communities, including those who depend on tropical forests for their livelihoods. Less progress has been made in most regions in applying those rights to mitigate economic and other pressures threatening people and forests.<sup>8</sup>

For centuries forest dependent communities have enjoyed customary rights to forests, even though these have rarely been formally codified in statutory (national, written) laws. As documented by Wily “in many countries, customary tenure systems remain the most relevant and most legitimate tenure systems for rural and forest communities.”<sup>9</sup> In some countries, customary rights are now recognized in statutory law, and an increasing body of international law recognising customary rights is emerging.<sup>10</sup> However the vast majority of the world’s forest area is still claimed by government, especially in Africa and Asia, with little statutory recognition of customary rights. As pressures on forest land increases, especially for investment (oil palm, biofuels, mining, etc.), the recognition, incorporation and application of customary rights in statutory law has never been more urgent, both environmentally and socially. While each VPA is unique, every agreement signed to date includes a commitment from the timber producing country to reconcile relevant customary, statutory, constitutional and international laws.

<sup>8</sup> RRI 2012.

<sup>9</sup> Wily 2012.

<sup>10</sup> For example, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

## 1.4 Substantive and Procedural Rights

This report is primarily concerned with community tenure and forest resource rights, although it touches on other substantive rights where they are relevant, in particular rights to compensation and benefit sharing from commercial forest activity. The term ‘resource rights’ encompasses a number of different rights and it is important to break down the ‘bundle of rights’ related to resource ownership, access and use (Box 1).

### Box 1. A ‘Bundle of Rights’ over Land and Forest Resources

It can be useful to think about a ‘bundle’ of rights that communities or an individual might be able to claim over forest land and resources, including:

**Access rights** – the right to go to a particular area

**Withdrawal rights** – the right to take resources from a particular area. This could mean harvesting timber, collecting forest plants, hunting animals and so on.

**Management rights** – the right to make decisions over how an area of land or a particular resource on that land is handled

**Exclusion rights** – the right to keep others out of an area

**Property rights** – the right to own and (sometimes) sell (alienate) or lease an area of land, or a resource on it or in it.

**Compensation rights** – the right to justice or compensation when the state decides to remove one of the other rights above.

*Source: Adapted from RRI (2012) What Rights?*

If substantive rights are to be realised, there must be structures and processes in place to enable them, such as consultation processes, information-sharing systems, and complaints mechanisms (for when substantive rights are violated). Procedural rights are the rights to these processes, rights which make it possible to ensure that substantive rights are upheld. The most important procedural right is the right to give or withhold free, prior and informed consent (FPIC). Others include the right to information, the right to consultation, the right to participate in decision-making processes, and the right to seek redress through complaints mechanisms. It is very difficult to make progress on substantive rights without first securing the relevant procedural rights. This report therefore examines the influence of VPA processes on securing (or not securing) both procedural and substantive rights.

## 1.5 Objectives, Structure, and Methods

The main objective of this paper is to identify lessons learned from the experiences and efforts of civil society to promote resource and other human rights in the six completed VPA processes (completed as regards being signed, although some VPAs have yet to be ratified). It was written to help inform the workshop “Opportunities and Lessons for a Right-Based Perspective on FLEGT and VPA Processes in Latin America” held on 28-29 October 2013 in Quito, Ecuador. It was hoped that this would help civil society obtain a better understanding of the potential for advancing land and forest tenure and other rights in the context of a VPA negotiation process. As regards civil society strategies for participation, readers are directed to the companion FERN publication “*Making forests fairer. A practical guide for civil society taking part in FLEGT VPA negotiations.*”

It is however very important to emphasize that the discussion and analysis in this paper is limited to the national contexts of the VPA countries in Africa and Indonesia, and does not attempt to make any inferences or recommendations for Latin America. This is because it is recognized that the context is different, including as regards the ‘starting position’ in terms of procedural and substantive rights, and because it is unclear at this point what a VPA in a Latin American country, especially one which exports very little to the EU, will look like.<sup>11</sup>

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<sup>11</sup> It is proposed that when there is more clarity about FLEGT/VPA processes, a new paper is required which could attempt (if perceived as useful) to draw out the applicable lessons from these VPA experiences for Latin American civil society and other actors.

It should also be noted that this paper does not attempt to act as a primer for civil society as regards the FLEGT/VPA process. Readers are directed to other resources that provide a basic explanation of FLEGT and VPAs, such as the 'Logging Off'<sup>12</sup> website and the website of the European Forest Institute.<sup>13</sup>

The remainder of this paper is divided into six country chapters that aim to bring out the main lessons from civil society attempts to promote a rights-based agenda in each country, followed by a concluding section on the main lessons learned. In order to facilitate understanding and comparison, the country level analysis has been divided up according to different categories of rights as follows:

- Property and exclusion rights
- Access, use and management rights
- Benefit sharing and compensation rights
- Procedural rights
- Other human rights

The country analysis does not attempt to be comprehensive in its coverage of these categories of rights, but rather focuses on those that have been more prominent in each VPA process, either because civil society has prioritised them or where there has been more progress.

A key source of information for this paper has been the responses of civil society key informants in VPA countries to three questionnaires; one designed specifically for this paper (Annex 1), and questionnaires conducted by FERN in 2012 and 2011. This was supplemented by other individual interviews and relevant literature.

This report is also informed by discussions and presentations at a workshop of the Africa Community Rights Network (ACRN) 'Using REDD and VPA-FLEGT to Secure Community Rights on Forest and Land in Africa: Lessons Learned and Ways Forward' held in Douala, Cameroon, 24-26 September 2013. This workshop was hosted by ACRN, Centre for Environment and Development (CED), Forest People's Programme (FPP) and RRI, and brought together civil society representatives of Ghana, Gabon, Cameroon, Central Africa Republic, Republic of Congo, Democratic Republic of Congo, Liberia, Cote d'Ivoire, Burkina Faso and Kenya.

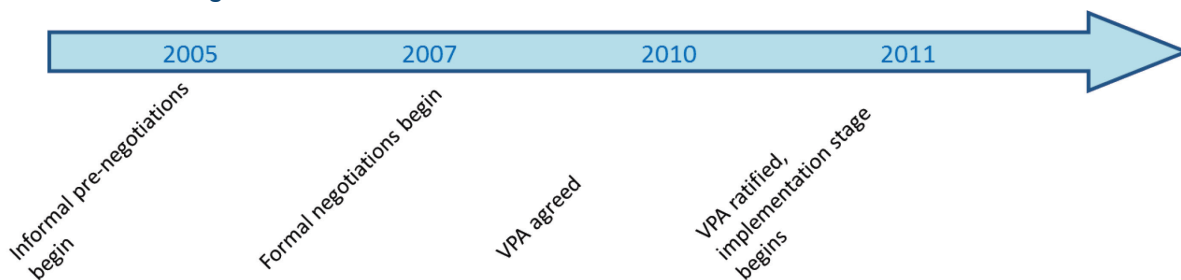
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<sup>12</sup> <http://loggingoff.info/document/what-are-flegt-vpas>.

<sup>13</sup> <http://www.euflegt.efi.int/portal/home/vpas/> The EFI website also has a series of training videos in English, Spanish and French on FLEGT including extensive interviews of key civil society actors in VPA countries: <http://www.euflegt.efi.int/portal/audiovisual/>.

## 2. Cameroon: Cautious Approach, Limited Returns

### 2.1 VPA Background



Cameroon was one of the first countries to open VPA negotiations with the EU and, in some ways, the resulting agreement and limited, although not insignificant, impact on community rights can be seen as a symptom of a process in its infancy. Cameroon's civil society had a clear community rights agenda for taking part in VPA negotiations, including wanting to advance:

- Recognition of customary property rights over land and resources;
- Recognition of participation rights in forest monitoring;
- The right to effectively participate in forest management;
- Access to justice when their first rights were violated; and
- Creation of adequate structures to enable their rights to consultation.<sup>14</sup>

Despite some resistance from the Forestry Ministry,<sup>15</sup> civil society was successful in placing these issues on the negotiating agenda – most of them were discussed during negotiations. Under Cameroon's constitution (revised in 1996), and as set out in the Land Code (1974) and Forest Law (1994), customary land rights extend only to usufruct rights, while customary property rights are not recognised. Despite commitments in the VPA to reform elements of the Forest Law, the VPA negotiation process did not significantly alter the status quo (see sections 2.2 and 2.3). Moving to the implementation phase of the VPA process has been slow; although negotiations concluded in 2010, reform of the Forest Law and Land Code only really began in late 2012. However considerable work has also been carried out in advancing procedural rights, especially transparency (see section 2.5).

### 2.2 Property and Exclusion Rights

Customary property rights were abolished in Cameroon in 1974, when all non-registered land, including land held under customary title, became state property<sup>16</sup> as 'national' land. Two other categories of land exist under the Land Code; public land (held by the state for the benefit of the people), and private land (owned by individuals, corporate groups, communities or the state). The 1994 Forest Law placed all forest land under state ownership, although it included the right (in theory) of forest communities to claim community forest allocation (managed by the municipality), with the associated right to first refusal in the logging concession allocation process.<sup>17</sup>

A forest zoning plan separates forested areas into Permanent Forest Domain (PFD) and Non-Permanent Forest Domain (NPFDD). PFD is public land under government ownership, and it covers both protected areas and commercial Forest Management Units (FMUs), from which the majority of annual commercial timber harvest is collected. No land use

<sup>14</sup> Questionnaire response from Cameroon civil society key informant.

<sup>15</sup> Ibid.

<sup>16</sup> Nguiffo et al. 2009.

<sup>17</sup> 'Community forests' in Cameroon refer to community managed forests but not to ownership. In reality, formal claims to communal forest are out of reach of most forest communities, as they would have to pro-actively claim the land through complex and expensive processes before gaining exclusion rights.

conversion is permitted in permanent forests, while this is permitted in NPFD areas. Community forests can only be established in NPFD (see section 2.3), although with no implication of community property rights -only usufruct rights. In practice, while PFD has been established in large areas containing forests with high logging potential, NPFD is largely restricted to areas that are already logged or otherwise degraded. FMUs in permanent forests therefore regularly overlap with forest areas that have previously been held under customary title.<sup>18</sup>

Government proposed reforms of the Forest Law have done little to bring national legislation in line with the customary property rights of forest communities,<sup>19</sup> and although the VPA does demand “respect for other parties’ legal tenure or rights of use of land and resources that may be affected by timber harvesting rights,”<sup>20</sup> the government continues to ignore customary tenure rights. Nonetheless CSOs claim that getting land conflict on the negotiation agenda is a success,<sup>21</sup> indicating that just opening up space for dialogue in this contentious area is a significant step forward.

## 2.3 Access, Use, and Management Rights

Community members living in and around NPFD had access and use rights under the 1994 Forest Law, notably the use of forest land and resources for domestic purposes, but the Ministry of Forests could remove or suspend these rights if they were deemed incompatible with the objectives of the domain classification (particularly regarding protected areas and FMUs).<sup>22</sup>

The VPA commits the state to respect community “*rights of use of land and resources that may be affected by timber harvesting rights*.”<sup>23</sup> Also VPA-compliant logging concession management plans must map community access and use rights in the concession area when they are drafted<sup>24</sup> - this could help bring statutory recognition into line with customary use rights if management plans were to become strictly enforced. Communities do not have the right to joint management of industrial logging concessions under the VPA, nor of consultation over management plans.

### 2.3.1 Chainsaw Logging in Community Forests

Community-managed forests are well established in Cameroon, both in statute (the 1994 Forest Policy invoked community forests as a measure to improve livelihoods) and practice (there were 67 community forests in 2004)<sup>25</sup> but they are limited in size to 5,000 hectares which undermines customary forest use and rights,<sup>26</sup> and can only be established in NPFD (see section 2.2). Community forests are supposed to be managed according to a management plan approved by the Ministry of Forests, and limited commercial timber exploitation (using chainsaws or mobile saws) is permitted. A number of Ministerial measures however have essentially thrust the whole sector into illegality.<sup>27</sup> It should also be noted that informal/illegal chainsaw milling is a source of income for many government officials, through ‘informal payments.’<sup>28</sup>

Since allowing chainsaw loggers access to community forests provides a significant income stream for some communities,<sup>29</sup> there is a need to normalise the sector while ensuring the continued right of communities to exercise their customary right to choose to whom they sell their trees. The ‘social safeguards’ article (17) of Cameroon’s VPA diverts from the template used by other countries by omitting a commitment to understand and assess impacts of the VPA on

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<sup>18</sup> De Blas et al. 2011.

<sup>19</sup> A January 2013 draft of the reformed forest code is available

<http://www.forestpeoples.org/sites/fpp/files/news/2012/12/Version%20de%20la%20loi%20compar%C3%A9e%20au%2031%20dec%202012.pdf>

<sup>20</sup> VPA Annex VIII, Section I.

<sup>21</sup> Questionnaire response from Cameroon civil society key informant.

<sup>22</sup> Wily 2011.

<sup>23</sup> VPA Annex VIII, Section I.

<sup>24</sup> Order No 222 MINEF (1), of 25 May 2001 laying down the procedures for implementing forest management plans.

<sup>25</sup> Smith 2010.

<sup>26</sup> Wily 2011.

<sup>27</sup> Wit et al. 2012

<sup>28</sup> Ibid.

<sup>29</sup> Evans 2012.



local people, highlighting the attitudes of government to this sector. There is scope in VPA-related efforts to reform the Forest Law, but early drafts of the reforms are not positive (see Section 2.5).

## 2.4 Benefit Sharing and Compensation Rights

Cameroon's 1993 Forest Policy aimed to ensure communities received a share of revenues generated by the forest sector, but, with the exception of community forests, the ensuing 1994 Forest Law focused almost exclusively on export-oriented industrial forestry.<sup>30</sup> However, the Forest Law does include some benefit sharing provisions, with 40% of FMU taxes designated to local municipalities and 10% directly for local communities. Neither the law nor its implementing decree establishes measures for accountability however and these taxes have rarely reached their intended recipients.

One of the indicators in the VPA Legality Assurance System (LAS) is that "the forestry entity respects the social obligations prescribed by the Forestry Code,"<sup>31</sup> which may provide some incentive for more stringent application of the benefit sharing provisions. Advances in transparency which the VPA process has supported (section 2.5) also increase the chances that revenues will reach the intended destination.

## 2.5 Procedural Rights

Cameroon's limited progress on the rights agenda in the VPA process can be partly attributed to very weak procedural rights. Shortly before the first JIC meeting in March 2012, civil society identified several procedural rights issues as immediate priorities for the VPA process:

- Ensuring good representation of NGOs, local community and indigenous peoples in the National Implementation Committee;
- Improving transparency; and
- Establishing independent civil society VPA monitoring.

There has been significant progress in advancing each of these priorities.

### 2.5.1 Participation

A new and increasingly active civil society platform was created for the VPA process. Its first statement highlighted the low level of involvement of CSOs. In the face of considerable hostility CSOs succeeded in gaining one civil society representative on the negotiating bodies, augmented to two representatives over the course of negotiations.<sup>32</sup> Lack of civil society capacity did mean that it was sometimes unable to make the most of these spaces, which remains a problem, but capacity for participation certainly improved over the negotiating period. Communities were not directly involved in the negotiations. Civil society included communities in the civil society platform but only to a very limited extent.<sup>33</sup>

The VPA National Monitoring Committee includes one seat each for civil society, local communities, indigenous peoples and commercial forest representatives, although these representatives only received an invitation the day before the third committee meeting in April 2013 making it impossible for them to prepare<sup>34</sup>. Some members of the CSO platform are now seen as stakeholders in national REDD processes, which would have been unlikely before the VPA experience.<sup>35</sup>

### 2.5.2 Transparency

Cameroon's VPA includes an extensive transparency annex covering 75 types of information.<sup>36</sup> Civil society lacks confidence in the political will of government to adhere to it,<sup>37</sup> but steps in the right direction has clearly been made; a

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<sup>30</sup> LoggingOff/CED 2010.

<sup>31</sup> VPA Annex II, LAS 2, 3, 4, Indicator 4.2.

<sup>32</sup> LoggingOff/CED 2010.

<sup>33</sup> Ibid.

<sup>34</sup> FERN – Forest Watch Special 2013

<sup>35</sup> Questionnaire response from Cameroon civil society key informant

<sup>36</sup> VPA Article VII.

dedicated FLEGT VPA website has been created by the Ministry of Forestry,<sup>38</sup> which has hired a consultant to populate the site with the information stipulated in the transparency annex, by the end of January 2014. A Joint Annual Report from the JIC on VPA implementation during 2012 has also been published.<sup>39</sup>

### 2.5.3 Monitoring

Independent forest monitoring existed prior to the VPA in Cameroon,<sup>40</sup> which confirms a continuing role for it. During VPA negotiations, civil society did not argue for civil society independent monitoring because of a perceived risk that CSOs involved in it could lose their independence.<sup>41</sup> Instead, civil society called for a “stronger and more formal role for civil society independent monitoring in the forest legislation being revised as a consequence of the VPA.”<sup>42</sup> Several NGOs including FODER and CED have been conducting “self mandated” monitoring missions, and intend to develop a systematic approach to monitoring forest governance. CSOs have increased capacity for this due to their involvement in the VPA process, which helped them in terms of their technical skills<sup>43</sup> and access to information and funding from FAO, the EU and UK.<sup>44</sup>

### 2.5.4 Reform of the Forest Act

Despite the unique (for Cameroon) participatory nature of the VPA negotiation process, the reform process of the 1994 Forest Law has been neither participatory nor transparent. Civil society was given time to submit proposals for reform before a new draft was produced, which a number of organisations including CED did. However these recommendations were rejected by the government, which held closed meetings on the new code to which civil society was not invited<sup>45</sup>. The draft that was finally seen by civil society lacked many of the measures to improve the rights of communities discussed during VPA negotiations<sup>46</sup> and there have been several subsequent drafts without communities or CSOs being involved. Civil society has observed little change in the government position of prioritising the agro-industrial sector over sustainable forest management, which also prevailed before the VPA process began.

Following an appeal from Cameroonian civil society, the UN Committee on the Elimination of All Forms of Racial Discrimination (CERD) wrote to the government in March 2013 criticising the new draft law and calling for proper civil society and community consultation.<sup>47</sup> The government has since responded with assurances that a more participatory approach will be pursued.

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<sup>37</sup> Questionnaire response from Cameroon civil society key informant.

<sup>38</sup> [www.minfoc.cm/apvcameroun](http://www.minfoc.cm/apvcameroun).

<sup>39</sup> FERN-Forest Watch Special 2013.

<sup>40</sup> Brack & Leger 2013.

<sup>41</sup> Ibid.

<sup>42</sup> CED 2012.

<sup>43</sup> Questionnaire response from Cameroon civil society key informant.

<sup>44</sup> Brack & Leger 2013.

<sup>45</sup> FPP Newsletter 2012.

<sup>46</sup> January 2013 draft of the reformed forest code (in French):

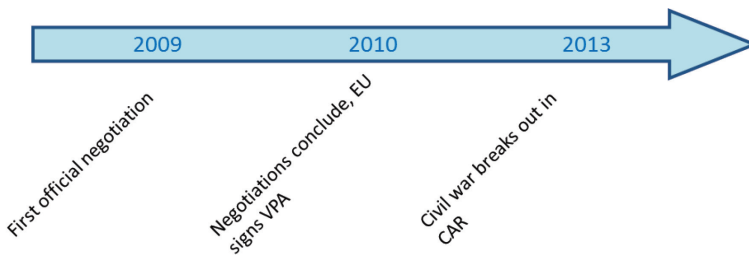
<http://www.forestpeoples.org/sites/fpp/files/news/2012/12/Version%20de%20la%20loi%20compar%C3%A9e%20au%2031%20dec%202012.pdf>.

<sup>47</sup> Available at [http://www2.ohchr.org/english/bodies/cerd/docs/early\\_warning/Cameroun1March2013.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Cameroun1March2013.pdf).

### 3. Central African Republic: A Process Interrupted

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#### 3.1 VPA Background



Official VPA negotiations with the Central African Republic (CAR) began in 2009, and were concluded in December 2010. The government was eager to push through negotiations quickly, and so was reluctant to prioritise the preparation of formal civil society or community consultation sessions. Pressure to include civil society in the negotiations came in part from external NGOs, as well as Central African civil society which saw in the VPA a “*unique opportunity to raise a number of concerns previously neglected by forest management policies.*”<sup>48</sup> Communities were not included.

The VPA text foresees various elements of legal reform, including:

- Creating a law on the participation of stakeholders
- Clarifying laws on forest management
- Clarifying tenure rights
- Clarifying compensation rights

The first JIC meeting in CAR was held in September 2012, when a revised roadmap for implementation and legal reform was adopted. However six months later in March 2013, a coup d'état thrust the country into political instability from which it has yet to fully emerge. This has thrown the implementation timeline envisaged in the VPA roadmap in to disarray, although the FLEGT Technical Secretariat within the currently unstable Ministry of Forests has convened some stakeholder meetings and elements of civil society are working on key elements of the legal reform process envisaged by the VPA in an effort to maintain momentum, and to strengthen their position when the process picks up again in the future.<sup>49</sup>

#### 3.2 Property and Exclusion Rights

In CAR the State claims ownership of all land, with exclusive power to allocate temporary or permanent property/ownership rights, and in the forested southwest region of the country at least, customary tenure rights have been long overruled by constitutional law due to strong overlapping interests of different forest actors.<sup>50</sup> In 2009, 66% of the surface of the southwest forest was under commercial logging concessions (called LMPs) belonging to just 11 companies.<sup>51</sup> In the VPA only customary *use* rights are explicitly recognised in the text, although it does mandate reform of legislation affecting tenure rights, in particular reform of the ‘rural code’. This, coupled with CAR’s adoption of ILO 169 and the need to incorporate this in to national legislation, offers civil society an avenue through which to pursue tenure recognition. Under the VPA legality matrix, companies are required to respect “other parties’ legal tenure or rights of use over land and resources that may be affected by timber harvesting rights, where such other rights exist.”<sup>52</sup>

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<sup>48</sup> FERN 2012.

<sup>49</sup> Questionnaire response from CAR key informant.

<sup>50</sup> Rainforest Foundation UK 2009

<sup>51</sup> FERN/Logging Off 2012.

<sup>52</sup> VPA Annex VII, Part 1.

### 3.3 Access, Use, and Management Rights

The most significant community rights advances which the VPA process has helped in CAR relate to access and use rights. Community access rights are recognised in the 2008 Forest Code. But these rights are curtailed in certain areas, land demarcations (namely protected areas) and types of activities - this amounts to more of a 'principle of prohibition' than a 'right to forest access' for communities.<sup>53</sup> Respect for community customary rights of access and use is a clear requirement for logging concession holders in the VPA legality matrix,<sup>54</sup> and the VPA calls for revision of the 'rural code' on use rights and land law.<sup>55</sup>

More positively the attitude of government, and particularly of the Department of Forests, most involved in the negotiations, has shifted over the course of the VPA process. Initially aggressive towards civil society and with no real intention of integrating community rights into the VPA process, the administration shifted to a position of recognising the value of incorporating community rights in policies and management plans.<sup>56</sup> This shift, and the signing of the VPA, increased awareness of community rights among government departments more generally, to the extent that it has been significantly more amenable to discussing community rights in other national processes, including REDD+ and the Extractive Industries Transparency Initiative (EITI).<sup>57</sup>

Some CSOs judge that there is now a genuine interest within some factions of government to translate community use rights laws into practice, but the lack of financial resources, technical capacity, and current political instability are seriously hindering progress.<sup>58</sup>

#### 3.3.1 Community Rights to Commercial Use and Management of Forest Resources

In the 2008 Forest Code community forests are envisaged as community-managed forests, but with no ownership rights implied.<sup>59</sup> The term 'community-managed forest' refers to a forest managed by a community according to a management plan endorsed by the Forest Authority, and covering an area no more than 5,000 hectares. The Forest Code allows space for community and traditional logging<sup>60</sup> (excluding logging for 'construction timber'), but no implementing decrees have been created so no permits for this kind of commercial activity have been issued and it therefore currently occurs informally.<sup>61</sup> The VPA LAS also excludes these activities, although it includes a commitment to developing a legality matrix to accommodate them in the future.<sup>62</sup> Civil society sees this exclusion as hindering progress of community resource management rights.<sup>63</sup>

#### 3.3.2 Indigenous Peoples

CAR ratified the ILO Convention 169 (Indigenous and Tribal Peoples' Convention)<sup>64</sup> in April 2010, a few months before the VPA negotiations ended. This enhanced existing recognition of indigenous peoples' rights in the 2008 Forest Code,<sup>65</sup> which guarantees indigenous peoples' customary use rights but frames them as subsidiary to current legislative texts.<sup>66</sup>

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<sup>53</sup> FERN/Logging Off 2012.

<sup>54</sup> VPA Annex II, Principle 4, Criterion 4.3.1.

<sup>55</sup> VPA Annex IX, 1.

<sup>56</sup> Questionnaire response from CAR key civil society informant.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> FERN/Logging Off 2012.

<sup>60</sup> VPA Article 15.

<sup>61</sup> FERN/Logging Off 2012.

<sup>62</sup> VPA Annex II, Definition of legally produced wood.

<sup>63</sup> FERN/Logging Off 2012.

<sup>64</sup> International Labour Organization 1989.

<sup>65</sup> The Forest Code preserves a number of indigenous peoples' customary rights, for instance prohibiting their eviction from protected areas if they were occupying the land prior before it was designated a protected area, relocation meeting FPIC standards. However the 'Minister responsible for forests' is empowered to suspend or withdraw those rights temporarily or permanently, which somewhat undermines them.

<sup>66</sup> Rainforest Foundation UK 2009

CSOs were already raising rights awareness among indigenous communities (namely the pastoralist Mbororo people and the forest dwelling Aka), and advocating for ratification of Convention 169 and adherence to other international instruments (UNDRIP,<sup>67</sup> African Charter on Human Rights)<sup>68</sup> before VPA processes began, but civil society in CAR was weak and beset with internal problems.<sup>69</sup> The VPA process strengthened its capacity to advocate indigenous and community rights through the VPA process both as a result of their experience of the negotiations and training received from NGOs supporting them in the VPA negotiations.<sup>70</sup>

Indigenous peoples and local communities appear together in the VPA legality matrix. This vests companies with the same responsibilities towards both groups, namely; to inform them of provisional logging agreements in the area; to respect customary rights of access and use; and to provide compensation for any assets destroyed by the company (see also Section 3.4).

### 3.4 Benefit Sharing and Compensation Rights

Companies are already required to pay a tax to communes (local authorities) where they operate. This revenue is intended for the community, but the funds rarely reach the intended destination. The VPA clarifies the responsibility of companies to make a “better contribution to local development”, including paying a regular amount (unspecified in the VPA) to a community fund, and including “social actions” in the management plan.<sup>71</sup>

Companies must also award compensation to communities for damaged assets, and there is a provision in the VPA for revising the law governing compensation for crop damage.<sup>72</sup> This provision, if civil society is successful in steering reform in a positive direction for communities, could also benefit communities that are not directly affected by the VPA process.<sup>73</sup> As community compensation forms part of the LAS, this is likely to offer an added incentive for governments to enforce compensation rights, in order to ensure timber legality, in the context of concession forests in particular.

### 3.5 Procedural Rights

#### 3.5.1 Access to Information

FPIC does not feature in CAR’s VPA, although the government’s ratification of Convention 169 implies that it must be incorporated into the LAS. In the legality matrix, logging companies are only required to inform local or indigenous communities of concession allocation *after* a provisional agreement has been awarded<sup>74</sup> although under the Forest Code the government is still required to inform them before the agreement is awarded.<sup>75</sup> There is no mention of joint management of logging concessions, although a decree is envisaged to include civil society on the committee which awards concessions.<sup>76</sup> CAR’s VPA does include an extensive Transparency Annex, which is in line with other VPAs (but different from Ghana’s).

#### 3.5.2 Participation

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<sup>66</sup> FERN/Logging Off 2012.

<sup>67</sup> The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

<sup>68</sup> Available at [http://www.humanrights.se/wp-content/uplo FERN/Logging Off 2012ads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf](http://www.humanrights.se/wp-content/uplo/FERN/Logging%20Off%2012ads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf)

<sup>69</sup> FERN/Logging Off 2012.

<sup>70</sup> FERN/Logging Off 2012 and Questionnaire response from CAR civil society key informant.

<sup>71</sup> VPA Annex II, Principle 9, Criterion 9.1, Indicators 9.1.1, 9.1.2.

<sup>72</sup> VPA Annex IX, 1, 1.1 (c).

<sup>73</sup> Questionnaire response from CAR key civil society informant.

<sup>74</sup> VPA Annex II, Principle 2, Criterion 2.3.

<sup>75</sup> Article 33 of Forest Code stipulates: “Any concession of a part of the State’s forest domain with a view to its industrial exploitation is subject to the prior consultation of local populations, including the indigenous peoples.”

<sup>76</sup> VPA Annex IX, 1, 1.1(a).

As noted in section 3.2, the CAR government was hostile towards CSOs at the start of VPA negotiations; civil society was only reluctantly invited to take part and was regularly given insufficient notice to prepare for meetings.<sup>77</sup> This situation was not helped by the fact that civil society was poorly organised with weak internal communication, for example, the VPA text was initialled before most CSOs had received it from their negotiating committee representatives, although they did manage to obtain it through other means.<sup>78</sup> Communities were not directly involved in negotiations. Hence, despite the progress mentioned in section 3.2, civil society regards its involvement in the VPA negotiations as insufficient, and environmental and social aspects have not been given due attention in the legality matrix.<sup>79</sup>

Since the negotiations, the civil society platform has sought to maintain momentum on legal reform, and to secure its involvement as provided for in the VPA. In March 2013 the platform issued a position statement on the VPA<sup>80</sup> highlighting serious delays to legal reforms (initially scheduled to begin January 2011) and the lack of NGO or community involvement, except for some marginal involvement in texts related to the Environmental Code, and making recommendations for stronger CSO and community involvement in future.

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<sup>77</sup> Questionnaire response from CAR key civil society informant, CAR civil society counter-brief.

<sup>78</sup> Bolen & Ozinga 2013.

<sup>79</sup> FERN/Logging Off 2010.

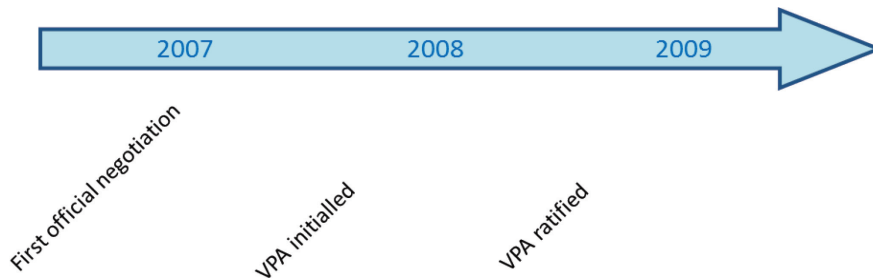
<sup>80</sup> Available (in French) at:

<http://loggingoff.info/sites/loggingoff.info/files/D%C3%A9clarationR%C3%A9formeL%C3%A9gale%20APV%202013%20Version%20finale.pdf>.

## 4. Ghana: The First VPA

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### 4.1 VPA Background



Ghana was the first VPA to be signed in 2008 and then ratified in 2009. When Ghana's VPA pre-negotiation process began in May 2005, civil society was initially excluded. After protests, the government agreed to include civil society representatives in the formal negotiations with the EU which started in 2007. But it was only after the civil society platform threatened to boycott the VPA process, and communicated this to the EU through allies in European NGOs, that the EU brought pressure to bear on the government to improve transparency and participation. Civil society saw this as a turning point in their participation in the VPA process, and Ghana's VPA process became a model as regards civil society participation for other countries to follow.<sup>81</sup>

### 4.2 Property and Exclusion Rights

#### 4.2.1 Land and Tree Tenure

In Ghana forest land is owned by communities in the form of 'allodial title' held in trust for the communities by traditional authorities (chieftaincies) who grant the land out in long-term leases to individual farmers. In spite of a lack of proper documentation of these leases, most 'indigene' farmers have reasonably secure land tenure as long as they put the land to use, but tenure is less secure for migrant tenant farmers. There are many land disputes, including between migrant and resident 'indigene' farmers. Although land tenure is not without its problems, tree or forest tenure is more problematic for both livelihoods and the resource. For example, Ghana's REDD+ Preparedness Preparation Proposal (R-PP) lists the lack of tree tenure rights for communities and farmers as a major driver of forest degradation.<sup>82</sup>

The tree tenure problems can be traced mainly to 1962 legislation that nationalized lands, disregarding customary land ownership.<sup>83</sup> The Administration of Lands Act conferred on the state the power to take over management and control of any stool or family land, while the Concessions Act (now repealed)<sup>84</sup> vested all timber trees in central government in trust for the stool on whose land they stood. According to Djokoto & Opoku (2010) the passage and implementation of these laws led to a dual, unequal and hierarchical system of land tenure in which freehold and leasehold land rights were treated as superior to customary land rights. Thus since 1962 the state, as represented by the forestry authority – currently the Forestry Commission (FC) – has managed the resource on behalf of the resource owners. In practice 'state management' has meant that off-reserve forest, as well as the extensive production forest reserves, has been allocated to concessionaires. Tree tenure is primarily assessed here as an issue of access and use rights (Section 4.3), but it also represents a loss of communities' tree ownership rights.

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<sup>81</sup> Questionnaire response from Ghana civil society key informant.

<sup>82</sup> Forestry Commission and R-PP Consultants 2009.

<sup>83</sup> Djokoto & Opoku 2010.

<sup>84</sup> In 1979 the Constitution re-vested land administration in local authorities, and the 1992 Constitution upheld the authority of chiefs and divided land into public (vested in the President in trust for the people of Ghana and managed by the Lands Commission) and customary tenure under chiefs (Djokoto & Opoku 2010).



#### 4.2.2 Withholding consent to timber industry concessionaires

Free, prior and informed consent (FPIC) is mainly considered under procedural rights (Section 4.5), but it can be briefly noted that the VPA process has advanced the right to withhold consent or permission to log, and thus exclude concessionaires from commercial timber values, if it can be established that a concessionaire has not respected the legal rights of communities. The civil society position on “legal timber” was always very clear: compliance with forest legislation, i.e., the 1997 Timber Resources Management Act<sup>85</sup> and its associated amendments and regulations, as well as the 1994 Forest and Wildlife Policy.<sup>86</sup> These statutes include provision for farmers to withhold consent to felling licences issued on their land, as well as the right to participate in the pre-felling inspection.

In spite of strong opposition by the industry, civil society successfully argued that the main source of legal wood should be the Timber Utilisation Contracts (TUCs) and salvage permits established by the 1997 Act, as opposed to timber from Timber Utilisation Permits (TUPs) which are not designed for commercial logging and do not consider community rights. Under a TUC, a farmer or an individual or group land owner in a TUC area has the right to give consent before a felling permit is granted.

### 4.3 Access, Use, and Management Rights<sup>87</sup>

#### 4.3.1 Advancing Farmer and Community Tree Tenure

As explained in Section 4.2, ‘state management’ has usurped community tree tenure. After 1962 communities found they had to apply to forestry officers in district capitals for permits to extract forest products for *domestic use only*, while concessionaires harvested the commercial timber and non-timber forest products (NTFPs). There was no right of appeal when applications by communities for domestic use of forest products were refused. It is not just a case of exclusion from the timber value. Particularly for cocoa farmers, there are perverse incentives as regards naturally occurring timber trees. This is because of the uncompensated, or very poorly compensated, damage to cocoa farms when trees are logged. Therefore many farmers destroy the timber trees as saplings, and nurture non-timber trees as shade trees for cocoa. Ironically some of the best shade trees are valuable timber trees – if farmers were entitled to at least a share of the timber value in recognition (at least) of their tree tending services, and properly compensated for damage, this would result in an attractive agroforestry system with high social and environmental benefits.<sup>88</sup>

Forest tenure and local forest management reform has therefore been a key demand of civil society in the VPA process. Some progress has been made in the VPA and associated reform process, as explained in Box 2, but this agenda faces major political economy obstacles, including due to the financial dependence of the Forestry Commission on forest fees (although rapid erosion of the off-reserve resource<sup>89</sup> means that this revenue source is declining).

#### Box 2. Forest (Tree) Tenure in Ghana’s VPA

Since the 1962 legislation discussed in Section 4.2, forest management has been vested in the state, while forest or tree ownership is vested in traditional authorities on behalf of communities and families. In spite of this, the way that the state – through the Forestry Commission – has exercised its forest management rights has meant that farmers have not been able to exert their rights over mature timber trees on farms in off-reserve concession areas. Tree tenure is not however a one size fits all issue – if a landowner leases land with mature timber trees, the lessee (farmer) cannot claim ownership over these trees, but should be able to claim ownership over seedlings he/she has nurtured to maturity. Even when tenant farmers gain tenure over trees they have nurtured, landowners will have a percentage share based on negotiated agreements (as practiced in cocoa).

Civil society, led by Forest Watch Ghana, succeeded in including a significant clause in the VPA as regards tree tenure. The VPA acknowledges that tree tenure is a key driver of forest degradation in off-reserve areas, and includes the following

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<sup>85</sup> Forestry Commission Ghana 1997.

<sup>86</sup> Forestry Commission Ghana 1994.

<sup>87</sup> Much of the information in this section was provided by key civil society informants Albert Katakob, Kingsley Bekoe and Samuel Mawathor.

<sup>88</sup> Richards & Asare 1999.

<sup>89</sup> Hansen et al. 2012.



statement that amounts to a commitment to tree tenure reform: “Affirmation of local forest tenure and different stakeholder rights, particularly farmers’ rights in different types of forests and clarification of the respective scope of local (including customary) and national institutions in forest management.” (VPA Annex II, 5a.iii). Furthermore the agreed time frame for reform was five years; since the VPA was signed in 2009, this means that reform should take place in 2014. There is however little sign of the political will needed to do this.

Although the VPA has not yet changed the government’s stance on tree tenure for naturally regenerating trees, civil society has made a proposal to government based on establishing a ‘reference age’ for naturally regenerating trees from agro-forestry practices. About 20 years ago, Ghana’s Ministry of Food and Agriculture started promoting agro-forestry practices that included both tree planting and natural regeneration. The civil society proposal is for recognition of individual or group tenure rights over trees resulting from these agro-forestry practices. A stakeholder consultative process is required to agree on the reference age for tree tenure.

A second dimension of tree tenure is ensuring the rights of those who plant trees. An amendment to the Timber Resources Management Act in 2002 recognized ownership rights over planted trees. However implementing this has been complicated by the requirement for people who plant trees are to show a land title or tenure document when they register the trees. Obtaining title deeds is a long and complex process, but in some places this hurdle is being overcome with simple community-based land administration processes that result in signed tenure agreements between landowners and farmers. This has encouraged more people to plant timber trees.

Source: Albert Katako with Forest Watch Ghana.

#### 4.4 Benefit Sharing and Compensation Rights

Until 1962, landowning communities were entitled to a large share of the gross revenue generated in forest reserves. But the 1962 Concessions Act stipulated that forest revenue was to be used firstly to pay the running costs of the Forestry Department, with a proportion of remaining money to be returned to local authorities and communities<sup>90</sup>. In practice the latter have been almost completely excluded from the financial benefits of commercial timber extraction due to elite capture at the national and local levels, and the bureaucratic benefit sharing system.<sup>91</sup>

Once again it is the endorsement of TUCs and the 1997 legislation in the VPA that gives rise to some optimism that the situation can improve. TUCs have several provisions relating to benefit sharing, forest fees and compensation:

- TUC holders are obliged to negotiate, prior to logging, social responsibility agreements (SRAs) with communities for a value of at least 5% of the stumpage fees (the SRAs also mandate company compliance with social-cultural and environmental norms);
- TUC holders must have paid off their stumpage arrears, thus increasing the amount of forest revenue to be shared out;
- Farmers have the right to compensation for crops damaged during felling.

Some improvement in the transparency of stumpage disbursements has been noted, although elite capture of stumpage fees at both national and local levels continues to be prevalent.<sup>92</sup> The EU funded Governance Initiative for Rights and Accountability in Forest Management (GIRAF) trained communities in 30 districts on their rights under the Timber Resources Management Act (and thus in TUCs), and some of these communities have increased their demands for downwards accountability as regards the distribution of forest revenue through traditional councils (which receive 9% of stumpage fees) and District Assemblies (24.5% of stumpage fees).

But other fiscal demands of civil society have not been met (so far), notably the quarterly revision of stumpage rates as stipulated in the 1997 Act and progress on competitive bidding.

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<sup>90</sup> Treue 2001.

<sup>91</sup> Questionnaire response from Ghana civil society key informant.

<sup>92</sup> Ibid.

## 4.5 Procedural Rights

### 4.5.1 Participation of Civil Society in the VPA Negotiation Process

Early on in the VPA process, a civil society Contact Group was created to coordinate civil society inputs in the negotiation process. This included a wide range of civil society stakeholders including:

- NGOs in the Forest Watch Ghana (FWG) coalition;
- Traditional Authorities;
- The Domestic Lumber Trade Association (DOLTA), an umbrella body for timber operators and workers in the informal sector including chainsaw operators; and,
- The Forest Forum process composed of community and district forest forums, platforms of forest stakeholders at the district level including forest communities, district assemblies, fire service, police, judiciary, timber companies, CBOs, etc.

The Contact Group had two representatives on the VPA Steering Committee - the official committee on Ghana's side of the negotiations – as well as representatives on five other working groups (chairing two of them). Regular meetings of the Contact Group enabled coherent advocacy of community rights issues. Regular forest forum and community forum meetings, together with the FWG coalition meetings meant that some forest communities participated in the process, and were able to get their issues raised in working groups and the Steering Committee.<sup>93</sup>

In 2007, civil society developed a 'Civil Society Position' to inform civil society of their rights to participate in the VPA<sup>94</sup>. This was included in the VPA in the form of a forest governance vision that emphasised public interest in biodiversity, livelihoods, 'sustainable industrialisation' and cultural development. This was considered an important achievement, and allowed civil society to think through and articulate minimum standards for a participatory process.<sup>95</sup> By taking an active role in negotiations, civil society representatives progressed from being regarded as unwelcome but necessary participants, to key contributors. For example, it appears that communities and grassroots CSOs are likely to have a key role in the LAS – this was being assessed (August 2013) by the Forestry Commission.

### 4.5.2 FPIC and the 'Absolute Power' of the State and Concessionaires

As mentioned in 4.2, the VPA process has boosted FPIC through endorsement of Timber Utilisation Contracts (TUCs) in the legality matrix. But to date low awareness and poor governance have limited the extent to which communities have exercised FPIC. Although awareness is still very low, some of the communities trained in the EU supported GIRAF project (see 4.4) have exercised their right to prevent logging. Box 3 also discusses how the VPA process has helped reduce the 'absolute power' of concessionaires and the state over communities.

#### Box 3. Advancing FPIC and Checking the Power of Concessionaires and the State

It can be argued that the VPA process has at least slightly shifted the balance of power away from the 'absolute power' of the state forestry authority and timber concessions. This can be attributed to the VPA text, the role of the independent monitor, and opportunities provided in the broader policy reform process associated with the VPA. The VPA text includes the right of communities to be fully informed and participate in forest governance (Article 20, clauses 1-2). As already noted, due to the consent clause, TUC holders need to take care to respect community rights under the TUCs. Infractions of community rights would also expose TUC holders to scrutiny by the independent monitor.

As regards the broader policy process, civil society – in the spirit of the VPA – has twice (2010 and 2012) blocked legislation proposing administrative allocation of timber permits in off-reserve areas, and at the discretion of the Forestry Commission as opposed to competitive bidding and parliamentary ratification. Also when Global Witness published a report in early 2013 revealing that Forestry Commission had approved over a hundred permits (not TUCs) that would result in illegal timber according to the VPA, the government of Ghana responded within a week. This was due to the fear of losing their EU market share. This sensitivity indicates that the state's power to ignore or circumvent forest law has been weakened.

<sup>93</sup> Questionnaire response from Ghana civil society key informant.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

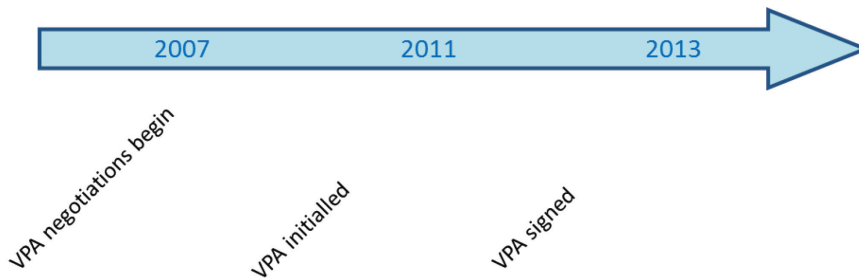
On the other hand the state and forest industry will not relinquish their powers easily. The Forestry Commission has so far blocked competitive bidding; resisted regulation of the NTFP regime; authorised a sharp increase, since 2010, in salvage permits; and continues to argue for “special permits” issued by the Minister. Recent training of armed forest guards to clamp down on chainsaw operators also confirms that there has been little change in state attitudes to the ‘informal forest sector.’ The continued strength of the forest industry is shown by the fact that stumpage fees have not been revised since 2004, and therefore declined in terms of their real value (foreign exchange free on board (fob) export values).

*Source: Kingsley Bekoe, Civic Response.*

## 5. Indonesia: First VPA to Supply LAS timber to EU

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### 5.1 VPA Background



The VPA process in Indonesia is unique in that the VPA evolved from a national legal timber verification process that started before the VPA process – the *Sistem Verifikasi Legalitas Kayu* (SVLK). In 2002, Indonesia and the UK signed a Memorandum of Agreement to improve forest law enforcement and combat illegal logging and trade. The parties then agreed to start a multi-stakeholder process to develop a standard for legal compliance.<sup>96</sup> This multiple stakeholder process eventually became absorbed in the VPA negotiations.

The SVLK process started in 2003 with the aim of providing a legality definition for use in forest industry audits.<sup>97</sup> A set of legal timber verification standards, monitoring and implementation procedures were released in the form of an SVLK Regulation in 2009. Following civil society critiques, modifications to the SVLK Regulation were released in 2011 and 2012.

Parallel to the SVLK process, the government started VPA negotiations with the EU in 2007. These intensified after the first SVLK Regulation.<sup>98</sup> Between 2009 and 2011, VPA negotiations focused on the compatibility of SVLK and the LAS. In April 2011 agreement was reached in which a revised version of the SVLK was approved as Indonesia's LAS, and in May 2011 the VPA was initialled.<sup>99</sup> Following another revision of the SVLK regulation in 2012, the VPA was signed on 30<sup>th</sup> September 2013 and entered the ratification stage.

The EU is a significant export market for Indonesia's wood products, especially pulp and paper. The latter comprise about 75-80 percent of the value of Indonesian wood based exports to the EU; furniture makes up most of the remaining value, most of it produced by small and medium scale enterprises (SMEs) in Java, Kalimantan and Sumatra.

### 5.2 Property and Exclusion Rights

#### 5.2.1 Land Tenure Issues

As in other countries, most customary forest land, which covers an estimated 70% of total forest area, has been allocated to forest industry concessionaires. Indonesia's Constitution recognises customary rights of indigenous (adat) and other forest dependent communities, while entrusting the State with a controlling power over lands and natural resources "to be used for the benefit of the people."<sup>100</sup> Agrarian Law also recognises collective usufruct rights, but states that they give way to development priorities. Customary rights also tend to be ignored by other sectoral laws (agriculture, mining, etc.), and are vulnerable to conflicting laws, especially between central and decentralised (District level) legislation.

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<sup>96</sup> Brown et al. 2008.

<sup>97</sup> EU delegation to Indonesia 2011.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Colchester et al. 2010.

While civil society was unable to directly advance customary rights in the SVLK/VPA process, a recent Constitutional Court decision (Box 4) has radically changed the outlook for customary land tenure in Indonesia. It means that the Ministry of Forestry can no longer ignore customary land rights when allocating concessions.

#### **Box 4. Constitutional Court Decision in Favour of AMAN, May 2013**

The landmark Constitutional Court decision in May 2013 was in response to an appeal by the Indigenous Peoples Alliance in Indonesia (AMAN). The decision declared as unconstitutional the provisions in the 1999 Forestry Law that denied the rights of *adat* communities to their land and forest. The court decision also admonished the Ministry of Forestry for misusing the Forestry Law to disenfranchise communities, basically by keeping them invisible in the legal framework so that logging or pulp & paper concession licences could be issued.

The decision means that state forest land under customary tenure should no longer be allocated to concessionaires, and in theory opens the way for indigenous peoples to claim indigenous territories. There are however some complications to this, for example, the National Land Agency (BPN) and not the Forestry Ministry deals with property rights issues - BPN has not been very responsive to the claims of customary communities, who have submitted maps to BPN totalling millions of hectares. Secondly, although legally incorrect, district and provisional governments have assumed responsibility for recognizing customary forest areas so that there are likely to be clashes between central and decentralised governance.

*Source: Fay, C. 2013.*

### **5.3 Access, Use, and Management Rights**

The SVLK, if and when it is properly implemented, could strengthen access and use rights of customary forest groups as well as the rights of small farmers with individual land holdings. But if not properly implemented it represents a threat to their livelihoods. An estimated three million tree-growing households, many of them near or below the poverty line, supply most of the teak used by the export furniture workshops of Java;<sup>101</sup> furniture, most of it from Java, is the third wood sector export after pulp & paper and plywood.

The SVLK could benefit these small tree growing households and their associations (included in the term 'community forestry' in Indonesia) by simplifying the system of permits and regulations. The SVLK will introduce a centralised and more streamlined set of permits compared to old or current 'local rules' that involve a plethora of formal and informal payments to local government, village headmen and district forestry offices responsible for a range permits, as well as to police at road checks.<sup>102</sup> For example, SVLK regulations allow a tree growing association to issue, following training, its own timber transport permit, rather than having to pay a variable fee to local government, the village headman, traders or the district forestry office.

But local stakeholders who stand to lose a source of revenue are already opposing the new SVLK rules.<sup>103</sup> At least in the 'transition period', tree growers are faced with two overlapping regimes – one being phased out and the other being phased in. There has been confusion even among district forestry staff as to which timber transport permit system to implement, as well as about overlaps between SVLK and other government regulations.<sup>104</sup> Tree grower associations also have to do more paperwork. The above implies that whether the SVLK is positive or negative<sup>105</sup> for such groups depends on whether:

- Mass education and training is carried out, as the DFID funded Multiple Forestry stakeholder Programme (MFP) is doing as much as its resources allow.

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<sup>101</sup> Subrpto 2012.

<sup>102</sup> Information from livelihoods impact assessment workshops with multiple stakeholders held in Yogyakarta, Java (December 2012) and Solo, Java (February 2013).

<sup>103</sup> There is evidence of the spreading of misinformation such as that even with SVLK, tree growers still have to pay the old fees (Livelihoods impact assessment workshops, Java).

<sup>104</sup> Krystof Obidzinski, CIFOR, personal communication.

<sup>105</sup> Dharmawan et al. (2013) report that the income from tree growing amounts to 17-31% of household cash income of smallholder growers in Java..

- SVLK is backed by effective and equitable local governance that curbs local rent seeking – MFP is targeting local and district government, police and other groups in its information and capacity building work.
- SVLK is fully implemented – a partially implemented SVLK is likely to be worse for small operators producing and processing timber than no SVLK at all.<sup>106</sup>

## 5.4 Procedural Rights

### 5.4.1 Participation of Civil Society in the SVLK and VPA Processes

A key feature of the SVLK and VPA processes has been the multiple stakeholder process. Civil society representatives were members of various Technical Working Groups and invited to VPA Joint Experts and Senior Officials Meetings. The NGO Telapak has held annual national civil society consultation workshops on FLEGT issues that have allowed a range of CSOs to better understand the issues and feed back their concerns into the SVLK/VPA negotiation processes.

National and international CSOs and NGOs were strongly involved in SVLK Draft 1.0 released in 2005. A representative of the NGO network of indigenous peoples AMAN, helped develop the standards. SVLK Draft 1.0 included provisions around gazettment, social and environmental impacts, community forestry and workers' rights.<sup>107</sup> A key development in 2005 was definition by civil society of a set of minimum standards for participatory stakeholder consultation in the VPA (Box 5).

There was also strong civil society participation in the SVLK Draft from 2005 to 2008, but when the Ministry of Forestry unveiled its version in December 2008, civil society found its concerns were largely disregarded.<sup>108</sup> Some of the language around social principles was removed, social and environmental sustainability concerns were neglected, and the Ministry came up with a new unilateral set of standards and implementation procedures.<sup>109</sup> Following NGO rejection of the Ministry's version, an 'implementation review' of the 2009 SVLK regulation was agreed. In 2011, following another extensive consultation process in which most of the social provisions were put back in, a second SVLK Regulation was approved. Civil society was involved in further revisions of standards and procedures, leading to a third (current) SVLK Regulation in December 2012.

#### Box 5. Minimum Standards for Participatory Stakeholder Consultation in the VPA Process

The following principles, drawn up by civil society, were agreed as necessary for ensuring good practice multiple stakeholder consultation in Indonesia's VPA:

- Stakeholders should be involved in every step of the VPA process.
- The VPA should recognize FPIC.
- The negotiation process between the government and the EU must be transparent with clear information and good communication between all stakeholders.
- The VPA should include activities to review the participatory aspects of legislation in a partner country (Indonesia), identify the shortcomings and injustices of the system, and consider the principles of responsible forest management.
- The mandate of negotiation should ensure that procedures are transparent and include civil society participation.
- The importance of ensuring the role for civil society in verification and monitoring.
- The VPA must be binding on both parties and implemented with clear activities and targets.

*Source: Indonesian Civil Society 2005.*

<sup>106</sup> Threats to full implementation include the very few (14) SVLK certification auditors compared to the huge number of timber producers and SMEs (the national statistics office estimates 686,000 SMEs employing 2.7 million people), the cost of SVLK and its impact on net profits (also highly dependent on what happens to prices), and a range of governance issues (information from VPA Livelihoods Impact Assessment workshops).

<sup>107</sup> Brown et al. 2008.

<sup>108</sup> Brown et al. 2008.

<sup>109</sup> van Heeswijk and Turnhout 2012.

#### 5.4.2 Free Prior and Informed Consent in the SVLK (Indonesia's LAS)

FPIC was included in earlier SVLK drafts but was removed by the Ministry of Forestry. But civil society, via multi-stakeholder dialogue, achieved partial re-instatement of FPIC in the SVLK Regulations of 2011 and 2012. FPIC is not included in the legality matrix, but is included in the sustainability standards of the SVLK. Under the SVLK Regulation, certified sustainable forest management is mandatory for concessionaires, and the certification standards include FPIC.<sup>110</sup>

As regards the right to information, the SVLK/VPA strengthens rights to public disclosure of timber related information. The VPA text describes how information will be placed in the public domain, the institutions responsible for making it available, and mechanisms for accessing it.<sup>111</sup> The VPA transparency provisions were helped by the issue of Indonesia's Public Disclosure Act in 2008. This obliges public institutions to provide guidance to the public on how it can access different types of information. In the case of the Ministry of Forestry, the public is instructed to apply to the Director of the Centre for Public Relations in a "one door information policy." The SVLK has also increased transparency by establishing provincial forest information centres, and in 2013, the Ministry of Forestry issued a specific regulation about direct access to information on SVLK implementation.

#### 5.4.3 Civil Society Monitoring of SVLK Implementation

Probably the most important achievement of civil society has been securing a very prominent monitoring role of SVLK (Indonesia LAS) implementation. There are three main elements to this:

- Civil society is responsible for independent monitoring<sup>112</sup> of SVLK implementation, especially compliance (with SVLK Standards) of SVLK permit holders and the Ministry of Forestry nominated Conformity Assessment Bodies (CABs) which audit the legality of SVLK licensed operations.<sup>113</sup> A vital component of this is the complaints system (Box 6). With the support of the UK and EU, Indonesian CSOs have established two networks to support independent monitoring of the SVLK - JPIK<sup>114</sup> and APIKS (in Sumatra). Civil society representatives are on a multiple stakeholder monitoring working group charged with conducting 'comprehensive evaluation' of the functioning of the SVLK.
- Civil society is on the Joint Implementation Committee, the task of which is to promote a balanced and transparent process of implementation of the SVLK.<sup>115</sup>

#### Box 6. The Complaints System in the SVLK (Indonesia's LAS)

Civil society has a central role in the SVLK complaints system - this has already raised official complaints about the audit process. The complaints system works as follows:

- First, the Conformity Assessment Body (CAB) releases an audit report into the public domain. A civil society organisation or a member of the public can then access and review the report, and submit a complaint to the CAB about the legality of an SVLK certificate.
- If an appeal has been made, the CAB has 14 days to respond to it. If the CAB cannot settle the appeal, the auditee can request an independent accreditation body (KAN) to adjudicate the appeal.
- Following the complaint from the independent monitor, the CAB establishes an '*ad hoc* team' to assess whether the auditor has followed correct procedures. An improved report, if necessary, will then be submitted to the 'performance assessment decision-maker', who is a staff member of the CAB.
- If the complaint is found to be valid, the CAB issues a corrective decision on the results of the audit

<sup>110</sup> Questionnaire response from Indonesian civil society key informant.

<sup>111</sup> Ministry of Forestry/MFP 2013.

<sup>112</sup> Independent monitoring of the SVLK is different to the independent monitor in VPAs.

<sup>113</sup> Luttrell et al. 2011.

<sup>114</sup> JPIK consists of over 40 NGOs and 120 individuals from different parts of Indonesia – many Provinces have their own JPIK focal point. Statutes, codes of conduct and working standards for monitoring have been developed.

<sup>115</sup> Luttrell et al. 2011.

If this process does not satisfy civil society, it can request a 'special audit' to investigate a complaint; the cost of this will be charged to the SVLK licence holder.

*Sources: Arbi Valentinus, personal communication; Luttrell et al. 2011*

These monitoring mechanisms are already having an impact. Since 2009 there have been four evaluations, all of them informed by civil society feedback around community rights and other issues. These evaluations influenced the modified SVLK regulations of 2011 and 2012, especially as regards standards and procedures on monitoring, the complaint mechanism, state assistance for SVLK certification of 'community forestry' and SMEs, timber administration, import regulations of timber and wood products (ongoing draft at the time of writing) and public procurement policy.

Indonesian civil society regards the latest SVLK Regulation (2012) and VPA Articles agreed by all stakeholders as products that have been strongly influenced by civil society.<sup>116</sup> Moreover civil society key informants claim that there has been some change in government attitudes to community resource rights as a result of various factors, *including* the multiple stakeholder dialogue of the SVLK/VPA processes in addition to climate change, the increased international profile of the indigenous movement, the national political situation and the May 2013 Constitutional Court decision.

Another achievement related to monitoring was inclusion of a livelihoods impact assessment (LIA) in the VPA road map. This is linked to VPA Article 17 that commits signatories to understand, monitor and mitigate adverse livelihood impacts caused by concessionaires. An *ex ante* LIA was undertaken over 2012-2013; data analysis and reporting is being conducted by the NGO KEHATI with support from Forest Trends.

## **5.5 Other Human Rights**

Progress on labour rights for those working on industrial forest concessions and in the processing industry has been another important achievement for civil society.

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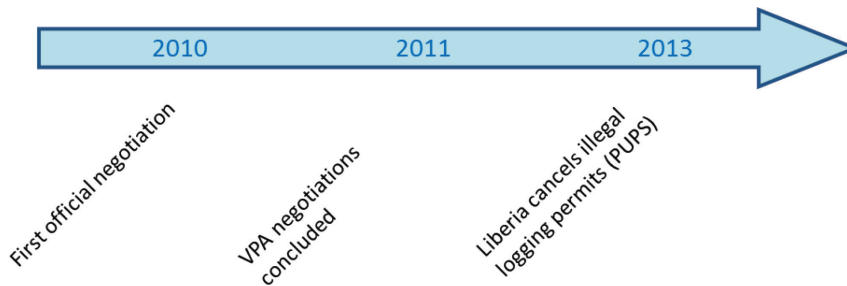
<sup>116</sup> Questionnaire responses of Indonesian civil society key informants.



## 6. Liberia: Direct Community involvement

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### 6.1 VPA Background



Liberia's forest laws had already undergone considerable reform before the VPA process began; the 2006 National Forestry Reform Law<sup>117</sup> (NFRL) recognised existing community use and access rights, sought to promote community engagement in sustainable forest management, and made provisions to improve transparency and reduce corruption and violence in the forest sector.<sup>118</sup> Liberia's formal expression of interest to begin VPA negotiations was made in December 2006, three months after the NFRL was signed.<sup>119</sup>

Civil society sees the VPA's contribution as a "strengthening instrument" to improve the implementation of, or enforcement capabilities for, these rights, as "good laws have not [yet] translated into corresponding effective implementation."<sup>120</sup> As such, the VPA does not envisage big changes to the legal framework, although it commits the government to regulate such issues as the minimum content of social agreements, community user rights in concession areas, and third-party access to concession areas.<sup>121</sup> The logging sector ground to a halt in 2012-2013 as a result of a strong Presidential response to gross illegalities and injustices in the sector. NGOs and the Forest Development Authority (FDA) agree that the VPA could be an opportunity to put Liberia's "unravelling forestry reform back on track."<sup>122</sup>

### 6.2 Property and Exclusion Rights

Unlike most of Africa, almost half of Liberia's land area (44.5%) is privately owned and 90% of privately owned forest land (which is currently minimal) is collectively owned by communities.<sup>123</sup> The majority of forest land, however, is in practice under customary ownership but in statute belongs to the state. A new Land Policy will, when translated into law, reverse this position and give statutory recognition to customary land ownership.

The VPA adds to these already strong rights by stipulating that communities living within 3 kilometres of a proposed logging concession have the right to FPIC, thereby strengthening communities' rights to exclude others from their customary land.

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<sup>117</sup>Liberia National Forestry Reform Law 2006.

<sup>118</sup> Forest Peoples Programme 2006.

<sup>119</sup> Lomax 2008.

<sup>120</sup> Questionnaire response from Liberian civil society key informant.

<sup>121</sup> VPA Annex II, Appendix A, 1.

<sup>122</sup> FERN Forest Watch Special 2013.

<sup>123</sup> Wily 2007

## 6.3 Access and Use Rights

### 6.3.1 Chainsaw Regulation

The perverse situation in Liberia has been that while environmentally destructive large-scale logging industry was legal, chainsaw logging, with its modest environmental impact and significant contribution to the local economy, has been illegal. The VPA includes a commitment to draft and implement a new chainsaw regulation to correct this situation, and to this end the Chainsaw Milling Regulation<sup>124</sup> was passed in March 2012. Under this regulation community level FPIC must be obtained before a chainsaw licence can be issued for a community forest area, thereby strengthening community rights to use and control their forest resources.

### 6.3.2 Strong Laws, Weak Implementation

The access and use rights of communities in forests are strongly articulated in Liberian law in the form of the 2006 NFRL, the 2009 Community Rights Law,<sup>125</sup> and the Forest Development Authority Ten Core Regulations.<sup>126</sup> These rights are underwritten in the VPA legality matrix which also places strong emphasis on community approval in the legality indicators and verifiers. According to Liberia's LAS, logging companies must:<sup>127</sup>

- Obtain FPIC from affected communities, i.e., those within 3 kilometres of the concession site
- Obtain permission from the landowner including collective landowners
- Negotiate a social agreement with all affected communities to come into force before felling
- Ensure that the social agreement includes an element of financial benefit sharing

However, law enforcement in Liberia's forests is very weak with the Forest Development Authority tending to side with the forest industry (see Box 7). Improving law enforcement will be a slow process, but CSOs have identified the VPA as a key factor in getting President Sirleaf to cancel the controversial abuse of private use permits (PUPs), as civil society, and in particular SDI Liberia and the NGO Coalition Liberia, was able to use the fact that the illegal PUPs undermined the VPA in their advocacy work<sup>128</sup> putting pressure on the government to address the problem, as also described in Box 7.

#### Box 7. Problems in the Forest – is the VPA Liberia's Last Hope for Meaningful Forest Reform?

The VPA is one of few options left to promote transparency and accountability in the forest sector, help government to collect its revenue, and assist rural communities obtain their share of the benefits. The VPA seeks to strengthen the provisions of the NFRL, but the VPA is in danger from attempts by government agencies to undermine and amend the NFRL in favor of concession holders.

##### The PUP Scandal

Private Use Permits (PUPs) were intended to allow private land owners to benefit from their timber trees, but the PUPs were usurped on a massive scale – they covered about a third of the country's forest area - by logging companies in collusion with officials from the FDA. Following appeals from CSOs and international NGOs, President Sirleaf ordered a Special Presidential Committee to investigate the claims. This identified extensive falsified documents and bribery to forestry officials, and made some robust recommendations. The President took decisive action by cancelling all PUPs (except a very small number of legal PUPs), suspending senior FDA officials for alleged misconduct pending investigation, and established committees to investigate the remaining recommendations. In effect this amounted to a logging moratorium.

<sup>124</sup> Liberia Chainsaw Milling Regulation 2012.

<sup>125</sup> Liberia Community Rights Law 2009.

<sup>126</sup> Forest Development Authority Liberia 2007.

<sup>127</sup> VPA Annex II, Appendix A, 2.

<sup>128</sup> Jackson 2012.

### The Land Rental Bid Scandal

The NFRL mandates a competitive bidding process for timber concessions in which the landowning communities stand to receive up to 30% of the land rental bid premium. Many companies with concessions have not paid land rental fees for years and collectively owe the government more than 20 million dollars. Instead of the concessions being cancelled in compliance with the law, the companies negotiated with relevant ministries and the FDA, and presented a bill before Parliament to cancel the rental bid premium entirely. Many communities had planned community development activities based on calculations of their share of the land rental fees which have never materialized. New legislation has been drafted without consultation, which also violates the NFRL, to exclude the rental bid premium.

*Source: The text of this box was contributed by Robert L. Nyahn.*

## 6.4 Benefit Sharing and Compensation Rights

As mentioned in Box 7, under the NFRL, communities are entitled to up to 30% of the land rental bid premium. The FDA Ten Core Principles also outline revenue due to communities based on the amount of timber felled in a concession. In reality, these financial benefits have rarely reached communities. More broadly, social agreements in Liberia were drafted before Community Forest Development Committees (CFDCs), through which communities represent themselves, even existed.

The VPA mandated the creation of guidelines to outline a minimum content for social agreements, including benefit sharing. These guidelines were created in 2012, which CSOs cite as a major achievement in the VPA process.<sup>129</sup>

A key responsibility of the FDA under the VPA is to ensure that communities understand the process of benefit sharing when a private company has a logging concession on their land; early indications suggest that communities are largely unaware of what benefits they are owed. It is difficult to say if this problem stems from a lack of political will or lack of capacity, or both, but CSOs observe that the VPA has played an important role in raising awareness of the legal framework among stakeholders, including FDA officials and communities.<sup>130</sup>

## 6.5 Procedural Rights

### 6.5.1 Strengthening Community Participation

Uniquely among VPA countries, Liberia has been able to include seven community representatives, as well as four civil society representatives, in the VPA negotiating panel. Direct community representation was at the insistence of civil society organisations.<sup>131</sup> A community mapping process was set up to facilitate community participation, but it was mainly through the existing CFDCs<sup>132</sup> that communities were able to nominate and select their own representatives to take part in the negotiations.<sup>133</sup>

Over the course of the VPA negotiations, communities and their representatives engaged gradually more actively in the process as both their capacity and sense of agency grew, moving from “non-participating communities to communities that are now participating willingly in decision-making activities.”<sup>134</sup> When speaking about the impact of VPA negotiations, one CFDC member who took part said: “Any decision that is made about natural resources about community benefits in any part of Liberia now, they can now bring in community representatives to take part.”<sup>135</sup>

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<sup>129</sup> Questionnaire response from Liberia civil society key informant.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Community Forest Development Committees (CFDCs) were created as local administrative units, which were to prove extremely useful in enabling community participation in the VPA negotiations.

<sup>133</sup> Questionnaire response from Liberia civil society key informant

<sup>134</sup> Ibid.

<sup>135</sup> Mafete Wale, personal communication.

### **6.5.2 Transparency**

A key issue preventing civil society from fulfilling their monitoring role is lack of transparency and flow of information. For instance, although consultants have been contracted to draft VPA verification protocols, these have yet to be sent to civil society. Also new PUP regulation was initially drafted without consultation, but following civil society opposition in a VPA working group, a broad-based consultation process was adopted.<sup>136</sup>

### **6.5.3 Civil Society Monitoring**

The VPA stipulates a role for civil society and community independent monitoring in the implementation phase, particularly as regards impacts of the VPA on forest-dependent communities, which was a key priority for Liberian CSOs.<sup>137</sup> Civil society and community representation is provided for in the ‘national multi-stakeholder committee’ mandated by the VPA.<sup>138</sup> Following this success, the EU has begun providing support to civil society monitoring at the pre-implementation phase, and has committed to continue this support through implementation. This will help build the capacity of civil society to fulfil their monitoring role and highlight rights abuse.

### **6.5.4 Access to Justice**

There is a feeling in Liberian civil society that the FDA lacks the will and capacity to strengthen community rights; it has been noted that the Community Forestry Department of the FDA “has not demonstrated a single case of successful action of protection of community rights against any logging interest.”<sup>139</sup> The EU’s role in VPA implementation is seen by civil society as a source of tentative hope – hope that the EU will be robust in demanding full legality including respecting community rights, and will fulfill its commitment to strengthen the capacity of institutions like the FDA.<sup>140</sup>

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<sup>136</sup> Questionnaire response from Liberia civil society key informant.

<sup>137</sup> Ibid.

<sup>138</sup> VPA Annex X.

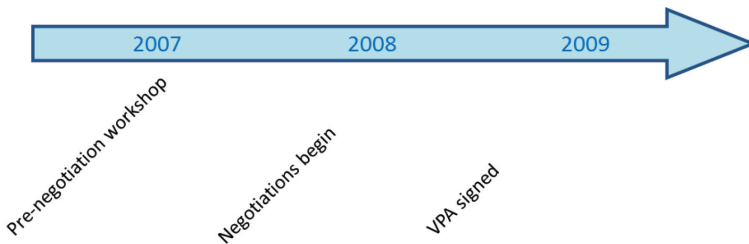
<sup>139</sup> Questionnaire response from Liberia civil society key informant.

<sup>140</sup> Ibid.

## 7. Republic of Congo: Rushed but not Ruined

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### 7.1 VPA Background



The VPA negotiation process of the Republic of Congo (ROC) has been the fastest to date, with formal negotiations beginning in June 2008 and concluding 11 months later in May 2009. It took almost three years however for the agreement to be ratified and then “activated” by Presidential order in 2012.<sup>141</sup> The first meeting of the JIC was held in April 2013,<sup>142</sup> and the technical secretariat, including three civil society representatives, held its first meeting in the same month.

Despite alarm from national and international NGOs over the pace of negotiations,<sup>143</sup> civil society used the process to advance the legal framework for community rights in several key areas, including

- Gaining assurances over community participation in the revision of the forest-related laws, including revision of the influential Forest Act (2000),
- Introduction of an indigenous peoples’ law including FPIC, and
- Formal recognition of the concept of ‘community forests’.

Work on legal reforms has begun to move ahead and significant resources and attention have been given to developing the technical systems for monitoring illegal logging. All legal reforms must be completed before FLEGT licences can be issued.

### 7.2 Property and Exclusion Rights

#### 7.2.1 Strengthening Customary Ownership and Community Forests

The main laws governing community land ownership rights in the forests of RoC are the 2000 Forest Code<sup>144</sup> and the 2004 Land Law. The Land Law recognises and guarantees both individual and collective pre-existing customary ownership rights where they do not contradict existing legal title, but communities have to appeal for recognition from an “ad hoc organ established at the local level” which in practice means this protection remains out of reach for most.<sup>145</sup> The 2000 Forest Code claims state ownership for all non-plantation forests, and does not recognise customary use or practices as a basis for claiming property rights in the forests<sup>146</sup>; nor does it recognise community forests, reversing the position of the 1974 law it superseded.<sup>147</sup> In practice most forest community members are unaware of their rights under statutory law,

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<sup>141</sup> Logging Off/OCDH 2010.

<sup>142</sup> An aide memoire from this meeting is available at <http://www.apvflegtcongo.org/images/aide%20memoire%20du%20ccm.pdf>.

<sup>143</sup> PGDF 2012.

<sup>144</sup> Republique du Congo Code Forestier 2000.

<sup>145</sup> Anaya 2011.

<sup>146</sup> The Forestry Code allows for a form of collective private ownership of plantation forests in the form of “communes” (for forests belonging to communities) and “collectivités locales” (for forests belonging to other local collectives). However this ownership can only be recognised by a government decree and if the forest has been planted by the community on land it owns.

<sup>147</sup> Rainforest Foundation UK 2008.

operating largely in the context of customary law except when the state actively intervenes, for instance by issuing logging concessions.<sup>148</sup>

Explicitly acknowledging the failure of the Forest Code to recognise community forests, the VPA commits to involving civil society and communities in the creation of regulations, and specifies:

- The concept of community forests;
- The process of parcelling community forest territories;
- Procedures for managing community forests “guaranteeing the involvement of all parties concerned.”

As the regulations for implementing the law have yet to be created, it is uncertain exactly how a ‘community forest’ will be legally constituted, but the VPA presents two possible options:

- Community forest blocks in a management plan
- Forests of local authorities

Civil society has identified the regulations and reform of the Forest Code as priorities in the VPA implementation stage.<sup>149</sup> After a period of hiatus, reform of the Forest Code began moving ahead towards the end of 2012, but with very poor involvement from civil society or communities (Section 7.5). Other legal reforms form part of a detailed work plan agreed by the JIC in April 2013.<sup>150</sup>

### **7.2.2 Indigenous Peoples**

The VPA of ROC commits to the creation of a law “promoting and protecting” the rights of indigenous peoples. The Indigenous Peoples’ law was passed in February 2011 following strong lobbying from civil society. Although a version of the law had been drafted in 2004, it was put on hold until its ratification became a condition of the VPA.<sup>151</sup> The new law confirms indigenous peoples’ inalienable “collective and individual right to property, possession, access and utilization of the lands and natural resources that they occupy or use traditionally for their subsistence, medical use and work”, and clarifies that “in the absence of land titles, the indigenous populations preserve their pre-existing land tenure.” This law brings the RoC closer in line with UNDRIP, which it has ratified and is referred to in the VPA preamble.

### **7.2.3 Exclusion Rights**

In the informal, small-scale domestic logging sector, customary landowners have the power to grant or deny access to loggers, who are supposed to obtain a ‘special permit’ to fell trees, but few bother as it is a costly and lengthy process. Those who get a ‘special permit’ tend to breach its conditions in any case.<sup>152</sup> Thus VPA implementation regulations will need to ensure compliance to the law.

## **7.3 Access, Use, and Management Rights**

Non-commercial customary use rights in protected forests are recognised in the 2000 Forestry Code, allowing resource gathering and clearing of land for domestic agriculture, although this is formulated as an alienable right which the Minister of Forests has the power to regulate.<sup>153</sup> The new Indigenous Peoples’ law emphasizes the customary access and use rights for indigenous groups.

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<sup>148</sup> Questionnaire response from RoC civil society key informant.

<sup>149</sup> Bolen & Ozinga 2012.

<sup>150</sup> Available <http://www.apviflegtcongo.org/images/aide%20memoire%20du%20ccm.pdf>.

<sup>151</sup> Questionnaire response from RoC civil society key informant.

<sup>152</sup> Lescuyer, Guillaume 2011

<sup>153</sup> Anaya 2011.

The VPA reinforces these existing rights through the LAS by clarifying the responsibility of companies to respect “the rights, customs and practices of local and indigenous populations in accordance with national legislation and regulations and international conventions.”<sup>154</sup> Access and use rights should be further strengthened by the envisaged involvement of communities and civil society in drawing up management plans for forest concessions. The legality matrix anticipates that logging companies will create a ‘community development package’, including areas designated (in forest management plans) for community use for the duration of the logging concession. But there has so far been little change in community access to forests as a result of the VPA process.<sup>155</sup>

### **7.3.1 Community Forest Management**

While the 2000 Forest Code is generally weak on social issues,<sup>156</sup> it allows for the participation of local and indigenous communities in forest management. But very few forest concession management plans have been drafted and fewer put into effect, so that (to date) community involvement in the process has been virtually non-existent.

As already mentioned, community forests are recognized in the VPA. “Joint and participative forest management” is a significant theme in the VPA with a new decree envisaged to set out the terms of involvement of communities and civil society in the management of forest concessions,<sup>157</sup> and another to outline how local communities, indigenous populations and civil society will be involved in making decisions relating to the drafting of concession terms and conditions. These decrees have been preliminarily drafted but not finalised.<sup>158</sup>

## **7.4 Benefit Sharing and Compensation Rights**

Apart from informal small-scale logging, communities have seen little benefit from logging and have not been compensated for damage to their farms by loggers. The VPA provides for compensation to communities whose crops are damaged by logging concession holders, in accordance with existing legislation.<sup>159</sup> But this provision has not been widely enforced, due to lack of awareness by communities and/or a lack of will or capacity of local administration.<sup>160</sup>

Logging companies must also provide a formal undertaking to “make a greater contribution to local development”. Benefit sharing provisions in the VPA are less detailed than in some other VPAs (such as Ghana’s), but as communities take up the roles envisaged for them in the VPA - in the drafting and agreement of management plans, and in monitoring - they should be better positioned to claim compensation and benefit sharing rights. The new Indigenous Peoples’ law also provides for benefit sharing for indigenous peoples.

## **7.5 Procedural Rights**

Communities in RoC often see themselves as powerless against government agreements with private companies that impinge on their customary rights, sometimes behaving as “passive and resigned” actors.<sup>161</sup> This can in part be attributed to the lack of statutory procedural rights historically available to communities, making it difficult to understand, exercise or defend their statutory rights.

### **7.5.1 Participation**

Civil society capacity of and experience of participation was significantly enhanced during VPA negotiations, aided by the creation of the civil society platform.<sup>162</sup> But CSOs were not initially given a place on the JIC when the implementation

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<sup>154</sup> VPA Annex II, Matrix 1,2, Principle 3, Criterion 3.2.

<sup>155</sup> Questionnaire response from RoC civil society key informant.

<sup>156</sup> Rainforest Foundation UK 2008.

<sup>157</sup> VPA Annex IX, 3.1, Ministry for the Forest Economy, 4.

<sup>158</sup> Questionnaire response from RoC civil society key informant.

<sup>159</sup> VPA Annex II, Matrix 1, 2 Principle 4, Criterion 4.1.1, 4.1.2.

<sup>160</sup> Questionnaire response from RoC civil society key informant.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

phase began; they had to request it,<sup>163</sup> while communities were not invited to participate directly.<sup>164</sup> Members of civil society at the JIC (one representative) and the technical secretariat (three representatives) have used their position to stress the need to involve local communities, improve stakeholder communication, and have genuine civil society and community participation in the legal reform process.<sup>165</sup>

Although community participation in the implementation phase is provided for in the VPA text, there is less clarity on how to put this in to action. This is partly due to a lack of investment in the human, material, financial and technical resources required for community participation, although under the VPA the government commits to “seek the additional financing necessary” to rectify these deficiencies<sup>166</sup>

The government began moving ahead with reforming the forest code at the end of 2012 without including civil society. The civil society platform therefore voiced its concerns,<sup>167</sup> following which government promised to organise proper consultations with the support of the *Agence Française de Développement* (AFD).<sup>168</sup> The support of AFD is significant since lack of capacity, both in government and civil society, has been identified as an obstacle to VPA implementation.

The VPA also envisages the “involvement of local, indigenous populations and civil society in the process of classifying and declassifying forests,”<sup>169</sup> including classification of production forests (i.e., available for logging concessions), and civil society involvement in granting forest concessions.

### 7.5.2 Transparency

Transparency has improved in the VPA process, including through an official RoC VPA FLEGT website ([www.apvflegtcongo.org](http://www.apvflegtcongo.org)) and electronic bi-monthly newsletter. There is little indication as yet that these good practices around participation and transparency will be adopted in the REDD+ process, although there is a lot of potential synergy between the two processes (Box 8).

#### Box 8. Opportunities for Community Rights and Synergies between VPA and REDD+ in ROC

The primary REDD+ activities in RoC so far have been conclusion of the World Bank's national Readiness Preparation Proposal (RPP) in 2011, and initiation of the country's first REDD+ project in May 2012. Several of the RPP's proposed actions could help protect communities' rights. However, the RPP process has been criticised for failing to integrate consultation with local civil society, for its negative portrayal of community land uses as drivers of deforestation, and for treating community rights as ancillary to the goal of reducing deforestation. This has led to concerns that REDD+ in ROC could result in an expansion of strict protected areas and displaced communities.

The VPA's impact is largely confined to logging concessions, which limits its ability to protect community rights across the country. REDD+'s wider focus could help expand the impact of the VPA to other land-use sectors, as well as provide additional funding and institutional support. In order to do this, it should build on VPA advances or activities in various ways:

**Community-managed forests.** The RPP proposes community-managed REDD+ projects based on the model of the Community Development Areas that forms the cornerstone of the VPA's community rights protection. REDD+ credits could provide an additional source of income for these areas, as well as spreading the model beyond logging concessions. In addition, REDD+'s concern for the stability of carbon sink levels could also help strengthen the Community Development Area model. The VPA legal reform working group on community forests could take account of the potential for REDD+ credits in determining the legal shape of Congo's community forests, so as to improve the permanence of the tenure right and its protection against third parties.

**Land reform.** The RPP's call for a national land reform and land-use plan is a useful supplement to the VPA, whose confinement to the forestry sector inhibits it from making such recommendations. In order to heed civil society warnings that

<sup>163</sup> FERN-Forest Watch Special 2013.

<sup>164</sup> Logging Off/OCDH 2010.

<sup>165</sup> FERN-Forest Watch Special 2013.

<sup>166</sup> VPA Article IX.

<sup>167</sup> Plateforme de gestion durable des forêts au Congo 2012.

<sup>168</sup> <http://www.apvflegtcongo.org/images/aide%20memoire%20du%20ccm.pdf>.

<sup>169</sup> VPA Annex IX, 3.1 Ministry for the Forest Economy, 4.



REDD+ activities will disenfranchise communities, the RPP should build them into the participatory mechanisms put into place by the VPA.

**Monitoring and enforcement of community rights.** The RPP mentions building its governance monitoring on the basis of the VPA monitoring system. ROC could develop its REDD+ Safeguard Information System on the basis of the VPA Legality Assurance System. This could help spread the VPA participatory monitoring framework to areas of the country not covered by logging concessions, and provide further financial and institutional support for it; it could also, if REDD+ payments were tied to safeguard compliance as well as carbon emission reductions, increase incentives to respect community rights.

**Inter-sectoral coordination.** The VPA and REDD+ come under different ministries: the Forestry and Sustainable Development Ministry for the VPA, and the Environment and Tourism Ministry for REDD+. This would inhibit coordination. However, the RPP proposes mechanisms for cross-ministerial cooperation, such as a Public Authority Platform of the National REDD+ Committee, and that land use planning incorporates all relevant sectors. This could also assist the protection of community rights.

*Source: The text of this box was contributed by Julia Christian.*

### 7.5.3 Monitoring

An interesting model that could help civil society monitor VPA implementation is being piloted in the form of a project on community mapping and monitoring of logging company behaviour, involving University College London's ExCiteS<sup>170</sup> and OCDH, a national NGO. The project aims to enhance the timber monitoring activities outlined in the VPA (which are extensive and build on existing forest monitoring initiatives in the country), and to help put laws, particularly those around community rights, into practice. It plans to do this by drawing on community knowledge of their forest environment and the behaviour of logging companies in their vicinity, and empowering communities to defend their management, access and ownership rights by collecting evidence and speaking out.

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<sup>170</sup> [http://www.mappingforrights.org/Congo\\_Brazzaville](http://www.mappingforrights.org/Congo_Brazzaville).

## 8. Synthesis of Lessons Learned on Promoting Rights in VPA Processes

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From the six VPA country experiences it is possible to make several observations about the progress of civil society efforts to promote community resource rights and other human rights.

### 8.1 Too Early to Tell

In most cases it is too early to see many tangible 'on the ground' effects as regards protection of community resource rights. It will only be possible to assess the effects when the VPA and its LAS are being implemented (the 'operational' phase) and FLEGT licences are issued. Correspondingly, CSOs in a number of VPA countries point out that if the potential long-term beneficial impacts are to be realized, the EU must adhere strictly to the EUTR since without credible FLEGT licences the incentive for governments to reform disappears. This incentive for reform is mainly associated with EU market access, but it is also partly predicated, at least in the eyes of producer country exporters, on the potential for increased market prices<sup>171</sup> - this could occur due to supply scarcity of FLEGT licensed products, especially in the short term as producer countries gradually establish their LAS, and/or due to a risk premium associated with the risk of importers being found not to have exerted 'due diligence.'

### 8.2 Better Monitoring, Transparency, and Participation

The potential for rights provisions negotiated in VPAs to be applied on the ground is directly related to how well they are monitored, both through the independent monitor and civil society's role in monitoring compliance, since this will put pressure on loggers to respect community rights, or on governments to make sure that the private sector does. Indonesian civil society regards their monitoring role in SVLK (Indonesia's LAS) as a major achievement, and CAR, RoC and Liberia CSO all cite establishing a formal role for civil society independent monitoring as a significant advance. In the case of Liberia, provision was made for communities to play a direct role in monitoring as well. All VPAs include provisions for civil society to feed back monitoring information on the LAS to the Independent Auditor.

It was found that all the VPA processes have resulted in significant advances for transparency, especially around concession allocation, logging operations, forest fees and other sensitive information. This provides CSOs with vital information for their advocacy campaigns. Transparency in terms of process also improved during VPA negotiations, with CSOs gaining insights into, and influence over, policy processes in the forest sector, including legal reform, usually for the first time. Unfortunately this level of transparency has been difficult to maintain in the implementation phase. Civil society in Ghana and Cameroon for example, has had to struggle to access information or maintain their participatory role beyond the VPA negotiations.

In all countries civil society has achieved a formal role in VPA implementing bodies (and in the case of Liberia a formal role for communities), which is a positive step towards tackling problems of transparency and corruption. CSOs have often been able to use their position in VPA processes to slow down the pace of negotiations to ensure that there was enough time for civil society and communities to influence the process and promote their rights agenda.

It should also be pointed out that, aside from the efforts to more directly promote a rights agenda, insofar as VPAs can help make corruption a bit more difficult by improving forest governance or reducing illegal logging, they are likely to be positive for basic human rights associated with people's livelihoods, health and security.

### 8.3 Getting Rights onto the Agenda, Improving the Laws

CSOs in most VPA countries appear to regard the VPA process as having been very important as regards getting customary and other rights onto the agenda or expanding the political space available to promote rights. This is why

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<sup>171</sup> Vulnerable stakeholders in Indonesia have already observed that without an increase in EU market prices, it will be very difficult for small timber producers and processors to cover the expected short-term increase in costs associated with the LAS

<sup>171</sup> even if the initial certification costs are subsidised by government. According to the multiple stakeholder analysis in Indonesia, the concern is that costs will rise during a transitional period while the LAS is being introduced. This is due to the likely overlap between a new centralised regulation system at the same time as the old system, based on local rules, is being phased out. The latter process is being resisted in some areas by stakeholders who have benefited from the old rules. This situation is seen as likely to result in more fees, both formal and informal. In the longer term however the transaction costs (formal and informal) should fall as a result of more streamlined regulations (Source: LIA workshops, Java, Indonesia 2012 and 2013).

procedural rights are fundamental and a pre-condition for progress on tenure and other rights. VPA negotiations have often been an entry point or platform to raise politically contested rights issues, with some CSOs identifying a small but noticeable shift in government (or forest department) attitudes to community rights (for example in CAR, RoC and Liberia). In other cases, they have offered the political space to highlight and argue rights issues, for example, in the case of the misallocation of Private Use Permits (PUPs) in Liberia (it was felt that the VPA process was a factor in the President's decision to suspend PUPs) or the lack of progress of the Indigenous Rights law in RoC.

In all VPA processes the review of forest legislation highlighted gaps or inconsistencies, either as regards weak implementing measures for essential laws, conflicting laws, or a failure to recognize customary rights in statutory law. In this way VPA processes have helped clarify the rights status of communities in and around forests, which is a vital first step towards improving them.

Despite a requirement in the text of all VPAs that governments reconcile national legislation with relevant international law, this has not formed a significant element of civil society advocacy around the VPA in any of the countries examined, and hence does not appear to be a priority for governments in the implementation phase. Integration of international law into national legislation, alongside greater recognition of customary rights, could help uphold community resource rights in the future.

In some cases the VPA has been important in terms of endorsing legislation with significant rights implications, for example, in CAR the VPA process consolidated the 2008 Forest Code that included indigenous rights, and in Ghana it reinforced the 2002 Forest Law that included various community rights, including FPIC, in the Timber Utilization Contracts. These laws would have little hope of being operationalised without the need to comply with a VPA LAS.

In other cases it can be seen that rights legislation or reforms are more directly linked to the VPA process, such as the 2011 Indigenous Rights law in ROC that became a condition for ratifying the VPA. Several VPAs include commitments by government to longer term legal and policy reforms, and that process of reform has been initiated in some countries (Cameroon, CAR, Liberia, Ghana), which may have far reaching impacts for resource rights, for instance Ghana's VPA includes a commitment to tree tenure reform.

## **8.4 Strengthening Civil Society Capacity to Defend Rights**

It is one thing to obtain procedural rights and political space, but quite another thing to be able to take advantage of it – in this respect, the links between (often initially quite weak) VPA country CSOs and European NGOs, which have maintained pressure on the EU side of the negotiations, have been critical.

VPA processes have also been useful as a conduit for training and support for CSOs, for example, EU funding has helped Ghana and Liberia civil society undertake monitoring activities. According to questionnaire responses, civil society key informants from all VPA countries observe that taking part in the VPA process has strengthened their capacity to defend community rights (in general) as a result of the negotiating experience itself, the support and training provided by other NGOs, and through information shared across regional networks such as the European Community Forestry Platform (ECFP) and the Africa Community Rights Network (ACRN).

Even in countries with relatively strong rights legislation, such as Liberia, the VPA has been useful in providing a working example of rights in the process of being exercised. The inclusion of community representatives in Liberia's VPA process was the first time many communities were directly involved in national level decision-making over their customary land and resources, and was widely regarded as successful by communities, CSOs and government alike.

There are also early signs that governments that have signed VPAs are more sensitive about forest governance and rights issues because of concerns about their reputation in the eyes of European importers. For example, when Global Witness published a report in early 2013 that Ghana's Forestry Commission was issuing hundreds of new felling licences that were not in the VPA legality matrix, the government of Ghana responded within a week. CSO advocacy campaigns will be able to increasingly exploit this sensitivity.

## **8.5 The Limitations of VPAs**

On the negative side of the scorecard as regards opportunities for the rights based agenda, it must be acknowledged that the VPA process has its limitations. The LAS is limited to all timber permits and harvest rights, and monitoring for legal

compliance is only triggered by harvesting or in production costs. Nonetheless some of the legal reforms mandated by VPAs, including reforms to core statutory documents such as Forest Codes and Land Laws, and the requirement in all VPAs that relevant national legislation is adjusted to incorporate international law, which often includes stronger recognition of customary rights, as well as the strengthened procedural rights, would have implications well beyond the harvesting and trade of timber.

Although the VPA process has its limitations, it should be seen as one of several complementary processes promoting forest policy and governance reforms. In Indonesia, for example, the VPA advances may be limited on their own, but when combined with progress on FPIC in the national REDD+ process, efforts around human rights associated with the Roundtable on Sustainable Palm Oil (RSPO), and the achievement of the indigenous peoples' NGO network (AMAN) in obtaining the groundbreaking Constitutional Court decision in favour of the rights of customary (*adat*) communities to their lands and forests, they are part of a bigger force for change and reform.

An apparent problem for civil society is that there can be a hiatus following successful negotiation of a VPA - civil society actors seem to lose their focus, and the state has a chance to retrench as regards vested interests and traditional attitudes. Also, when it gets to the implementation stage, the lead civil society actors may be different to those who led the way in VPA negotiations, and may therefore lack the experience to make the best of the opportunities. The same is true of government ministers and civil servants. It can also be observed that in general most energy in the VPA implementation phase has gone into the technicalities of setting up the LAS, with much less attention paid to the rights-based agenda.

There is perhaps a role at this point for the international community to support local civil society efforts to get back on track. One way of doing this could be to conduct livelihoods impact assessment (LIA) to assess the likely consequences of the VPA for vulnerable stakeholder groups, as being done in Indonesia and Vietnam. It is also clear that, as and when the LAS becomes operational and FLEGT licences are issued, the pressure and advocacy will increase, especially in those countries in which civil society has a strong monitoring role.

## 8.6 Summing Up

In general, the major advances in rights that have been put into practice have been procedural - transparency, participation and consultation rights were advanced in all six VPA countries, and FPIC or consent rights and/or a prominent civil society monitoring role was achieved in some countries. These procedural rights are fundamental to civil society's ability to promote and defend rights – they are a pre-condition for progress on tenure and other sensitive resource rights.

Property rights have made little progress through the VPAs (with the exception of CAR's Indigenous Peoples' law), but there has been more progress on access, use, and benefit sharing rights. The concept of community forestry has also gained ground in several countries. Maintaining the progress made during the negotiation phase has proved more difficult in the VPA implementation phase, but it is expected to pick up again when the VPAs move into their 'operational' stage, and civil society/independent monitoring of LAS implementation becomes a vital tool for the rights-based agenda. At the same time it is recognised that there are major challenges to implementation, primarily the political will to implement forest sector reform that will impact on the political economy status quo.

The main conclusion of this paper is that, for countries that have gone through a VPA process, things are much more hopeful for resource rights (and other rights) than if they had not had a VPA process, but that it is too early to see many on the ground effects. As pointed out by a Ghanaian civil society informant "it is safe to conclude that without the VPA, farmers and forest communities will be worse off. The legally binding framework of the permits regime, access to information and reform agenda when complimented with proper implementation and monitoring by all stakeholders will increase community rights."

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## **Annex 1. Questionnaire Sent to Civil Society and Other Key Informants**

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### **Questionnaire: Community Rights and FLEGT VPAs**

#### **Before the VPA**

1. Before the VPA negotiation process began, did communities or civil society have a clear idea of their existing rights recognised by the country government? If yes, what were these existing rights? If no, to what extent did communities have a concept of 'community rights' before the VPA process?

#### **What the VPA says**

1. What rights have been included in the VPA?
2. Do you think the rights covered in the VPA are sufficient to protect communities' livelihood and security IF properly implemented? If not, why not?

#### **Negotiating VPAs**

1. Did civil society or communities play an active role in getting rights recognised in the VPA? If yes please explain.
2. Were there any rights that CSOs or communities especially wanted to include in the VPA? If yes, what progress was made in getting these included?
3. Did civil society encounter any particular problems in trying to secure rights in the VPA?
4. What strategies did you/they use to overcome these problems, and with what success?
5. Did the attitude of government towards community resource rights change during the VPA negotiation process? Why?

#### **Experiencing Rights**

1. Has the VPA made it easier to defend rights in practice? How?
2. Since the VPA was initialled, are communities' rights being more respected? If yes, please give some examples.
3. Do you think the rights established or clarified in the VPA will be useful for communities not directly affected by the VPA?
4. What lessons have you learned about getting rights recognised through the VPA negotiation process?