



# **Governance of Agricultural Concessions in Liberia: Analysis and Discussion of Possible Reforms**

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## Summary

Liberia faces serious challenges in developing effective regulatory systems for large-scale agricultural concessions. Agricultural concessions have the potential to contribute to the country's GDP, employment rates, and economic development. They have been credited with providing significant employment opportunities and improving education systems, housing, health care, and infrastructure around the country. But rural Liberian communities often have not received the benefits from concessions that they expected; many affected communities are worse off after concession construction than they were before the concessionaires arrived. While other developing nations experience similar challenges, Liberia's extreme poverty and history of civil war combine to make regulation especially difficult, yet all the more important, as continued disputes over land and resources hamper efforts to build a peaceful and prosperous post-conflict society. The many government officials interviewed for this paper largely agreed that the existing concession structure system must be reformed to address community concerns and to ensure that development will be sustainable in the future. This paper attempts to identify steps that the Liberian Government and its civil society and private sector partners might take in furtherance of that vision.

The Liberian Governance Commission engaged Yale Law School's Allard K. Lowenstein International Human Rights Clinic to research gaps in the regulatory framework governing plantations. The authors note the ongoing debate, in Liberia and globally, about whether large-scale agricultural concessions are an effective development strategy. That question, while critical for all Liberians, is beyond the scope of this paper. Instead, this paper sets forth recommendations for improving plantation governance in the event that at least some agricultural concessions will continue to operate in Liberia in the years to come.

The paper identifies a range of issues at each stage of agricultural concession regulation. To begin, civil and political rights are a prerequisite to effective regulation, given the importance of civic engagement at all stages of reforms in the agricultural sector. Another critical and overarching issue is land tenure and the recognition of communal property rights; passage of the Land Reform Act or a similar law should be a top priority. Drawing upon examples from other countries (particularly those in sub-Saharan Africa) and human rights principles, the paper then seeks to set forth context-specific recommendations for how to include communities in concessions negotiations; to ensure that benefits reach communities; and to clarify and strengthen enforcement powers, including by developing effective means to resolve disputes. Lastly, the authors discuss how the government might approach renegotiation of existing concession contracts that raise serious concerns.

## Introduction

### A. Methodology

This paper was prepared by the Allard K. Lowenstein International Human Rights Clinic<sup>1</sup> (the Lowenstein Clinic) at Yale Law School at the behest of the Liberian Governance Commission, a public entity mandated to design and formulate public sector reforms, and in consultation with governmental ministries and civil society organizations (CSOs). The paper relies on a series of interviews with key stakeholders and attempts to represent their views as accurately as possible. The paper's final recommendations are the independent conclusions of the Lowenstein Clinic, though they often reflect broad agreement among many of the stakeholders.

The Lowenstein Clinic's work proceeded in the following phases. From January to July 2016, the Lowenstein Clinic performed extensive legal research and literature reviews of existing scholarship, non-governmental and multilateral institutional reports, and news articles on domestic, comparative, and international law and concession regulation practices. The authors also conducted interviews with experts on agricultural concessions, plantation regulation, and Liberian law. It should be noted that the following paper is not a fact-finding report. To understand recurring issues in and around concession areas, the authors relied principally on news articles and reports from Liberian, international, and non-governmental organizations.<sup>2</sup> The authors did, however, conduct limited fact-findings as to Liberia's governance structure for concessions. To that end, in August 2016, the Lowenstein Clinic visited Monrovia for interviews with twelve government agencies, two legislators, five domestic and international non-governmental organizations, and three communities located in or near plantations outside of Monrovia. The purpose of the interviews was twofold: (1) to understand how concessions governance functions both in theory and in practice; and (2) to solicit interviewees' perspectives on current shortcomings and their suggestions for reform. To encourage candor, interviewees were told that their organizational affiliations would be disclosed, but not their names or, for community members, the names of their specific communities.

The recommendations focus on the regulatory system governing the creation and monitoring of agricultural concessions, not on the particular terms that should be included in future concession contracts. For parties interested in improving contractual terms, the

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<sup>1</sup> The Lowenstein Clinic undertakes fact-finding, litigation, and advocacy efforts on behalf of human rights organizations and individual victims of human rights abuse. Under the supervision of seasoned practitioners and faculty, students work in small teams on projects involving international human rights lawyering. More information about the Lowenstein Clinic and its past projects is available at <https://www.law.yale.edu/centers-workshops/orville-h-schell-jr-center-international-human-rights/lowenstein-clinic>.

<sup>2</sup> This analysis draws extensively on fact-finding studies by government and civil society groups, including the Governance Commission's own 2016 study. See Ibrahim Al-bakri Nyei, Jeremiah Witherspoon, McNeil Wilson, Janet Johnson & Mahamed Boakai, *Strengthening Social Cohesion and Building Resilience Through Communication and Community Dialogues in Sinoe County: An Assessment Report of Relations Between Investors and Communities in Sinoe County (GVL and Butaw District)*, GOVERNANCE COMMISSION (Aug. 2016).

Lowenstein Clinic recommends the *Guide to Land Contracts*,<sup>3</sup> prepared by the International Senior Lawyers Project and the Columbia Center on Sustainable Investment, and *The IISD Guide to Negotiating Investment Contracts for Farmland and Water*,<sup>4</sup> prepared by the International Institute for Sustainable Development.

This analysis focuses on large-scale agricultural concessions granted by the Liberian government to investors, particularly those concessions that are located in whole or in part on communal land. The paper addresses small community–investor transfers only where they are a facet of large-scale investor-state concessions or have been proposed as a solution to problems generated by those concessions. And while much of the analysis centers on the rights of rural communities traditionally occupying conceded lands, many of the issues identified and recommendations proposed apply to smallholders and private individual landowners as well.<sup>5</sup>

## **B. Background on Agricultural Concessions in Liberia**

### ***Current Status of Liberian Agricultural Concessions***

Liberia has a long history of working with private companies to harness the benefits of its many natural resources, including fertile lands, valuable timber species, and metal ores. As early as 1926, Liberia granted a 99-year lease to Firestone for up to one million acres to be developed into a rubber plantation.<sup>6</sup> In 1956, the Liberian government passed the Public Lands Law, effectively granting state ownership over customary lands and permitting the President to concede land to agriculture and mining companies.<sup>7</sup>

Liberia placed renewed emphasis on concessions in crafting a strategy to recover from the devastating fourteen-year civil war that ended in 2003.<sup>8</sup> The civil war killed over 270,000 people, displaced hundreds of thousands, and, as the World Bank described, “destroyed basic institutions of governance as well as significant physical infrastructure and social capital.

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<sup>3</sup> See *Guide to Land Contracts: Agricultural Projects*, INTERNATIONAL SENIOR LAWYERS PROJECT & COLUMBIA CENTER ON SUSTAINABLE INVESTMENT (Mar. 2016), <http://ccsi.columbia.edu/files/2016/03/Ag-Guide-2016.pdf> (explaining common contract provisions, as well as a Glossary of specific legal and technical terms).

<sup>4</sup> See *The IISD Guide to Negotiating Investment Contracts for Farmland and Water*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Nov. 2014) [hereinafter *IISD Guide to Negotiating Investment Contracts*], [https://www.iisd.org/sites/default/files/publications/iisd-guide-negotiating-investment-contracts-farmland-water\\_1.pdf](https://www.iisd.org/sites/default/files/publications/iisd-guide-negotiating-investment-contracts-farmland-water_1.pdf) (providing model contract terms that address everything from tenure and financing to stabilization and dispute settlement provisions).

<sup>5</sup> To give just one example, there have reportedly been challenges recognizing and enforcing all property rights, not just those of communities writ large. Lowenstein Clinic Interview with Land Commission (Jan. 10, 2017).

<sup>6</sup> R.J. Harrison Church, *The Firestone Rubber Plantations in Liberia*, GEOGRAPHY, vol. 54, p. 432 (Nov. 1969), <http://www.jstor.org/stable/40567142>.

<sup>7</sup> See Public Lands Law, § 70 (1956), in Liberian Code of Laws of 1956, <http://www.documents.clientearth.org/wp-content/uploads/library/1956-03-22-law-1956-public-lands-law-ext-en.pdf>. The Public Lands Law granted leasing rights for “any portion of the public lands not appropriated for other purposes.” *Id.* Any land which was not held through formal private title was vulnerable to classification as “public lands.”

<sup>8</sup> See *Poverty Reduction Strategy*, p. 18, REPUBLIC OF LIBERIA (Apr. 2008), [http://siteresources.worldbank.org/INTPRS1/Resources/Liberia-PRSP\(Jul2008\).pdf](http://siteresources.worldbank.org/INTPRS1/Resources/Liberia-PRSP(Jul2008).pdf).

The economy collapsed, impoverishing much of the Liberian population.”<sup>9</sup> The economy shows signs of recovery but remains fragile. According to the International Monetary Fund, poverty levels declined from 64 percent to 54 percent between 2007 and 2014.<sup>10</sup> Unemployment has dropped to relatively low levels, but the majority of workers remain vulnerable because of under-employment or the informal nature of their work.<sup>11</sup> The high poverty rate, high levels of under-employment, and recent violence combine to make development projects like agricultural concessions both attractive prospects and unique challenges.

In 2008, President Ellen Johnson Sirleaf initiated a national Poverty Reduction Strategy, which focused on increasing foreign direct investment in order to address critical public needs, including funding shortages, unemployment, and lack of public infrastructure.<sup>12</sup> Since then, Liberia has signed natural resource concessions agreements with many foreign investors.<sup>13</sup> These concessions account for a significant portion of Liberia’s substantial foreign direct investment flows, which totaled U.S. \$512 million in 2015.<sup>14</sup>

Concessions generally, and agriculture concessions in particular, have a large and growing footprint in Liberia. As of 2013, the U.S. Agency for International Development estimated that over 50 percent of Liberia’s land had been conceded to foreign investors.<sup>15</sup> The non-governmental organization Rights and Resources Initiative placed that estimate closer to 75 percent.<sup>16</sup> Liberian civil society groups estimate that nearly ten percent of the country’s land has been awarded to just three agricultural companies: Sime Darby, Golden Veroleum, and Equatorial Palm Oil.<sup>17</sup> Palm oil concessions have been particularly attractive to investors, as Liberia holds approximately 40 percent of West Africa’s remaining rain forest and enjoys an ideal climate for palm oil production.<sup>18</sup> The government has encouraged palm oil production

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<sup>9</sup> *Id.* p. 13.

<sup>10</sup> *Liberia: Staff Report for the 2016 Article IV Consultation*, p. 4, INTERNATIONAL MONETARY FUND (June 22, 2016), <https://www.imf.org/external/pubs/ft/scr/2016/cr16238.pdf>.

<sup>11</sup> *Id.*

<sup>12</sup> *Poverty Reduction Strategy*, *supra* note 8.

<sup>13</sup> Copies of many of Liberia’s concession contracts are available at <http://www.openlandcontracts.org/countries/lr>.

<sup>14</sup> *World Investment Report 2016, Country Fact Sheet: Liberia*, U.N. CONFERENCE ON TRADE AND DEVELOPMENT (2016), [http://unctad.org/sections/dite\\_dir/docs/wir2016/wir16\\_fs\\_lr\\_en.pdf](http://unctad.org/sections/dite_dir/docs/wir2016/wir16_fs_lr_en.pdf).

<sup>15</sup> Chelsea Keyser, *Good Laws, Weak Implementation*, p. 1, U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT (Nov. 2013), [http://pdf.usaid.gov/pdf\\_docs/PA00M7RK.pdf](http://pdf.usaid.gov/pdf_docs/PA00M7RK.pdf).

<sup>16</sup> *Who Owns the World’s Land? A Global Baseline of Formally Recognized Indigenous and Community Land Rights*, p. 18, RIGHTS AND RESOURCES INITIATIVE (Sept. 2015), [http://rightsandresources.org/wp-content/uploads/GlobalBaseline\\_complete\\_web.pdf](http://rightsandresources.org/wp-content/uploads/GlobalBaseline_complete_web.pdf).

<sup>17</sup> *Civil Society Coalition Statement on Oil Palm Concessions in Liberia*, p. 3, SAVE MY FUTURE FOUNDATION & SUSTAINABLE DEVELOPMENT INSTITUTE (2014), [http://rightsandresources.org/wp-content/uploads/2014/01/doc\\_5720.pdf](http://rightsandresources.org/wp-content/uploads/2014/01/doc_5720.pdf).

<sup>18</sup> Sophie Bertazzo, *In Palm Oil, Liberia Sees Economic Boom—But Forests Many Lose*, CONSERVATION INTERNATIONAL (Oct. 28, 2016), <http://blog.conservation.org/2016/10/in-palm-oil-liberia-sees-economic-boom-but-forests-may-lose>.

as well, since it provides prospects for long-term local employment.<sup>19</sup> Commercial demand for palm oil has also increased in recent years, thus offering a desirable revenue stream for the central government.<sup>20</sup>

To date, large-scale agricultural concessions have offered numerous benefits to the country and surrounding communities, including local employment, infrastructure improvements, and revenue for the central government. For instance, Firestone employs 8,000 Liberians and has invested more than \$135 million into the rehabilitation of housing, schools, medical facilities, and other infrastructure.<sup>21</sup> The company offers high wages for the region, as well as free housing, free education, free healthcare, subsidized food, and other social and economic benefits for company employees and their dependents.<sup>22</sup>

Despite these contributions, however, there are significant concerns that agricultural concessionaires have dispossessed communities of control over and benefits from their own lands. Negotiations typically occur between central government and company officials in Monrovia, far from affected communities and without consultation from community members. Most of the concessions are located in isolated rural communities that operate outside formal legal structures. Under the Aborigines Law and the Public Lands Law in 1956, the Liberian government has treated all land not under fee simple private ownership as public property owned by the state.<sup>23</sup> Consequently, central government officials have negotiated concessions without consulting the affected communities, and often without the knowledge of which communities in fact live on the land in question. Further, negotiations have also deviated from the formal legal procedures required of them. A 2013 audit by London-based accounting firm Moore Stephens found that only six out of the 68 agriculture, mining, forestry, and oil concession contracts examined were awarded in accordance with the procedures mandated in Liberian law.<sup>24</sup>

As a general matter, concession agreements have generated some revenue for the central government but have brought relatively few improvements to the people who live nearby. Concessions have created fewer jobs than predicted, and, due to the long growing cycle of oil palm, jobs have often been short-term and unstable.<sup>25</sup> Companies often promise to undertake

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<sup>19</sup> See, e.g., Toweh Alphonso, *Liberia: How Sime Darby & Oil Palm Production Will Help Liberia's Economy*, ALLAFRICA (Nov. 24, 2015), <http://allafrica.com/stories/201511241568.html>.

<sup>20</sup> *Agricultural Outlook: 2012-2021*, p. 137, OECD & U.N. FOOD AND AGRICULTURE ORGANIZATION (2012), [http://www.fao.org/fileadmin/templates/est/COMM\\_MARKETS\\_MONITORING/Oilcrops/Documents/OECD\\_Reports/Ch5StatAnnex.pdf](http://www.fao.org/fileadmin/templates/est/COMM_MARKETS_MONITORING/Oilcrops/Documents/OECD_Reports/Ch5StatAnnex.pdf).

<sup>21</sup> *Rebuilding*, FIRESTONE (2014), <http://live-firestone-liberia.pantheonsite.io/>.

<sup>22</sup> Sarah Childress, *Firestone Responds*, FRONTLINE (Nov. 18, 2014), <http://www.pbs.org/wgbh/frontline/article/firestone-responds>.

<sup>23</sup> See *Good Laws, Weak Implementation*, *supra* note 15, p. 2; see also Public Lands Law, *supra* note 7; Caleb J. Stevens, *The Legal History of Public Land in Liberia*, JOURNAL OF AFRICAN LAW, vol. 58, pp. 250-65 (Oct. 2014), <https://www.cambridge.org/core/journals/journal-of-african-law/article/the-legal-history-of-public-land-in-liberia/773E2E9E4A6633D0F179FF5799433FD8>.

<sup>24</sup> *Final Report for the LEITI Post Award Process Audit*, p. 100, MOORE STEPHENS LLP (May 2013) [hereinafter LEITI Audit], [http://www.leiti.org.lr/uploads/2/1/5/6/21569928/leiti\\_post\\_award\\_process\\_audit\\_final\\_report.pdf](http://www.leiti.org.lr/uploads/2/1/5/6/21569928/leiti_post_award_process_audit_final_report.pdf).

<sup>25</sup> See *Hollow Promises: An FPIC Assessment of Golden Veroleum and Golden Agri-Resource's Palm Oil Project in Liberia*, pp. 53-54, 65, FOREST PEOPLE'S PROGRAMME (Apr. 2015) [hereinafter *Hollow Promises*],

community development projects, such as building health clinics and schools, but may not deliver on these promises for years or may not provide access to residents who are not directly employed by the company.<sup>26</sup> Agricultural concessions have also reportedly deprived communities of their cultural heritage, including burial grounds and sacred community sites.<sup>27</sup> As one Columbia University report concluded, “Unless directly hired by the concessionaire, members of [affected communities] experience little improvement to living standards as a result of [foreign direct investment].”<sup>28</sup>

As plantations have expanded, some Liberians have lost land for subsistence agriculture but have not recouped income or compensation in return. Cash payments given for destroyed crops have often failed to compensate for the loss of livelihood experienced by local farmers.<sup>29</sup> For instance, a 2013 study found that food insecurity increased in communities affected by the concessionaire Sime Darby.<sup>30</sup> A 2016 economic analysis found that the economic losses to the communities affected by the concessionaire Golden Veroleum would far outweigh any economic gains.<sup>31</sup> Furthermore, those gains would be concentrated in the minority of the community directly employed by the company, while the losses would affect the entire community.<sup>32</sup>

Large-scale agricultural concessions have triggered conflicts within communities and between communities, government, and companies. These disputes are particularly acute where

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[http://www.forestpeoples.org/sites/fpp/files/news/2015/04/Golden\\_Veroleum\\_FINAL\\_1.pdf](http://www.forestpeoples.org/sites/fpp/files/news/2015/04/Golden_Veroleum_FINAL_1.pdf); Frazier Lanier, Ashoka Mukpo & Frithiof Wilhelmsen, “Smell-No-Taste”: *The Social Impact of Foreign Direct Investment in Liberia*, pp. 41-42, 106-08, COLUMBIA CENTER FOR INTERNATIONAL CONFLICT RESOLUTION (Jan. 2012) [hereinafter *Smell-No-Taste*]; see also Matthias Rhein, *Industrial Oil Palm Development: Liberia’s Path to Sustained Economic Development and Shared Prosperity? Lessons from the East*, pp. 14-15, RIGHTS & RESOURCES (Feb. 2015), <http://rightsandresources.org/en/publication/view/industrial-oil-palm-development-liberias-path-to-sustained-economic-development-and-shared-prosperity-lessons-from-the-east/> (explaining that palm oil production in Indonesia has not increased the total number of jobs available but has increased the amount of casual and seasonal employment). Similar problems are reported on rubber plantations. Report of the Joint Government of Liberia – United Nations Rubber Plantations Task Force, ¶ 25 (May 23, 2006) [hereinafter U.N. Rubber Task Force Report], [http://www.laborrights.org/sites/default/files/publications-and-resources/Rubber\\_TF\\_Report.pdf](http://www.laborrights.org/sites/default/files/publications-and-resources/Rubber_TF_Report.pdf); *Rubber Production in Liberia: An Exploratory Assessment of Living and Working Conditions, with Special Attention to Forced Labor*, p. 30, VERITÉ (2012) [hereinafter *Rubber Production in Liberia*], [https://www.verite.org/wp-content/uploads/2016/11/Research-on-Working-Conditions-in-the-Liberia-Rubber-Sector\\_9.16.pdf](https://www.verite.org/wp-content/uploads/2016/11/Research-on-Working-Conditions-in-the-Liberia-Rubber-Sector_9.16.pdf).

<sup>26</sup> See *Hollow Promises*, *supra* note 25, pp. 54-57, 60-61; *The New Snake Oil?: Violence, Threats, and False Promises at the Heart of Liberia’s Palm Oil Expansion*, p. 20, GLOBAL WITNESS (July 2015) [hereinafter *New Snake Oil*], <https://www.globalwitness.org/en/campaigns/land-deals/new-snake-oil/>; *Smell-No-Taste*, *supra* note 25, pp. 12, 51; U.N. Rubber Task Force Report, *supra* note 25, ¶ 23.

<sup>27</sup> See *Hollow Promises*, *supra* note 25, p. 6; *Temples & Guns*, *supra* note 24.

<sup>28</sup> *Smell-No-Taste*, *supra* note 25, p. 7.

<sup>29</sup> See *New Snake Oil*, *supra* note 26, p. 13; *Smell-No-Taste*, *supra* note 25, pp. 42-44.

<sup>30</sup> Lakshmi Balachandran et al., *Everyone Must Eat? Liberia, Food Insecurity, and Palm Oil*, p. 16, COLUMBIA SCHOOL OF INTERNATIONAL AND PUBLIC AFFAIRS (July 2013) [hereinafter *Everyone Must Eat*], [http://www.earth.columbia.edu/sitefiles/file/students/showcase/2013/Report\\_Everyone\\_Must\\_Eat\\_Liberia\\_Food\\_Security\\_and\\_Palm\\_Oil.pdf](http://www.earth.columbia.edu/sitefiles/file/students/showcase/2013/Report_Everyone_Must_Eat_Liberia_Food_Security_and_Palm_Oil.pdf).

<sup>31</sup> *Liberian Industrial Agriculture Livelihood Impact and Economic Value Study*, pp. 7-8, SYNC CONSULT LIMITED (Oct. 2016) [https://www.globalwitness.org/documents/18631/Sync\\_Consult\\_-\\_Liberia\\_Agriculture\\_Economic\\_Study\\_-\\_Oct\\_16.pdf](https://www.globalwitness.org/documents/18631/Sync_Consult_-_Liberia_Agriculture_Economic_Study_-_Oct_16.pdf).

<sup>32</sup> *Id.*

community members find they have lost the land that once supported them and received neither adequate compensation for that land nor employment on the new plantations.<sup>33</sup> Communities have protested and filed complaints with the Roundtable on Sustainable Palm Oil,<sup>34</sup> and non-governmental organizations have published reports documenting abuse and calling for accountability. Some fear that tensions over concessions could lead to violence and destabilization. A 2008 report by the Liberian Truth and Reconciliation Commission recognized land disputes as “a threat to national peace.”<sup>35</sup> The Liberian Early Warning Early Response Working Group, composed of Liberian CSOs, government agencies, and international organizations, emphasized that the exploitation of agricultural concessions is an “early warning” sign of potential conflict.<sup>36</sup>

In sum, despite benefits that concessions have provided to some communities, there is reason to be cautious about the continued advisability of a concession-driven development strategy, both in Liberia and worldwide. Other countries that have depended on agricultural concessions have experienced similar problems to those described above. Common criticisms are that large-scale concessions reduce the ability of states to self-govern, threaten food security, harm the environment, fuel land conflicts, and benefit neither national nor local economies to the degree anticipated.<sup>37</sup> These concerns are complex and context-dependent, and this paper does not take a position on whether the Liberian government should grant more concessions contracts in

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<sup>33</sup> See, e.g., Elaisha Stokes, *Riot on the Plantation: In Liberia, Palm Oil Has Set Off a Dangerous Scramble for Land*, ALJAZEERA AMERICA (Oct. 4, 2015) [hereinafter *Riot on the Plantation*], <http://projects.aljazeera.com/2015/10/liberia-palm-oil> (describing a riot at the Golden Veroleum plantation set off by lack of land and jobs).

<sup>34</sup> See, e.g., *Case Tracker: Golden Veroleum Liberia*, ROUNDTABLE ON SUSTAINABLE PALM OIL (last visited Mar. 3, 2017), <http://www.rspo.org/members/complaints/status-of-complaints/view/24> (tracking status of community complaints to the RSPO about Golden Veroleum and aggregating complaints, company responses, and RSPO statements); *SDI/SESDev/FPP Letter Expressing Dissatisfaction with the RSPO Complaints Panel Decision on Golden Veroleum Liberia*, FOREST PEOPLES PROGRAMME (Feb. 8, 2016), <http://www.forestpeoples.org/topics/agribusiness/news/2016/03/sdisesdevfpp-letter-expressing-dissatisfaction-rspo-complaints-pane> (NGO letter criticizing RSPO’s complaint resolution).

<sup>35</sup> *Conflict Looms Over Failure to Pass Land Rights Law*, REUTERS (July 19, 2016), <http://www.liberianobserver.com/news/conflict-looms-over-failure-pass-land-rights-law>.

<sup>36</sup> Nat B. Walker, *Liberia: Early Warning and Early Response Collaboration*, INSIGHT ON CONFLICT (Apr. 5, 2013), <https://www.insightonconflict.org/blog/2013/04/liberia-early-warning/> (citing *Agricultural Land Concessions and Conflict in Liberia Policy Analysis Brief*, EARLY WARNING EARLY RESPONSE WORKING GROUP (2012)).

<sup>37</sup> See, e.g., Emily Harwell, *The Dark Side of Green Growth: Human Rights Impacts of Weak Governance in Indonesia’s Forestry Sector*, HUMAN RIGHTS WATCH (2013), <https://www.hrw.org/report/2013/07/15/dark-side-green-growth/human-rights-impacts-weak-governance-indonesias-forestry-02889c>; *Economic Land Concessions in Cambodia: A Human Rights Perspective*, U.N. CAMBODIA OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (June 2007), [http://cambodia.ohchr.org/WebDOCs/DocReports/2-Thematic-Reports/Thematic\\_CMB12062007E.pdf](http://cambodia.ohchr.org/WebDOCs/DocReports/2-Thematic-Reports/Thematic_CMB12062007E.pdf); Kaitlin Cordes, Olle Ostensson & Perrine Toledano, *Employment from Mining and Agricultural Investments: How Much Myth, How Much Reality?*, COLUMBIA CENTER ON SUSTAINABLE INVESTMENT (July 2016), <http://ccsi.columbia.edu/files/2016/07/Jobs-Paper-Aug-2.pdf>; *Land Grabbing and Human Rights: The Involvement of European Corporate and Financial Entities in Land Grabbing Outside the European Union*, EUROPEAN PARLIAMENT DIRECTORATE-GENERAL FOR EXTERNAL POLICIES (May 2016), [https://www.tni.org/files/publication-downloads/expo\\_stu2016578007\\_en.pdf](https://www.tni.org/files/publication-downloads/expo_stu2016578007_en.pdf); *The Truth About Land Grabs*, OXFAM AMERICA (2016), <https://www.oxfamamerica.org/take-action/campaign/food-farming-and-hunger/land-grabs>.

the future. Instead, given that at least some agricultural concessions will remain in operation in the foreseeable future, this paper offers recommendations on how Liberia can strengthen the regulatory regime and ensure the human rights of its citizens in the face of large-scale development.

### ***Current Laws Governing Agricultural Concessions***

Unlike the forestry sector, which is governed in large part by a single piece of regulatory legislation,<sup>38</sup> no general management law regulates Liberia's agricultural sector. Instead, a number of laws impact the awarding and operation of agricultural concessions. All of these laws should be interpreted in light of the fundamental rights protected in the Liberian Constitution.

The 2010 amended Public Procurement and Concessions Act, which applies generally to concession agreements in Liberia, provides the main procedural requirements for awarding agricultural concessions.<sup>39</sup> The Public Procurement and Concessions Act requires that the government hold a public stakeholder discussion on the possibility of a concession and provide public notice of the investment opportunity.<sup>40</sup> The government must hold a competitive bidding process that includes conducting due diligence on bidding companies before beginning contract negotiations.<sup>41</sup> A few Liberian laws set limitations on the substantive terms of agricultural concession contracts. The Public Lands Law sets a maximum duration of fifty years for agricultural concessions.<sup>42</sup> The Liberian Revenue Law limits the duration of certain tax-related stability clauses in contracts to fifteen years.<sup>43</sup>

Once a concession is put into place, several Liberian laws impact various aspects of its operations. For example, the Environmental Protection and Management Law requires an additional layer of environmental due diligence before the "commencement of" large-scale monoculture on a plantation.<sup>44</sup> This mandatory Environmental Impact Assessment must be performed after public consultation<sup>45</sup> and should include both a description of the "[e]nvironmental impact of the proposed activity or project including its direct, indirect, cumulative, short-term and long-term effects on both the natural and built environments and on public health and safety"<sup>46</sup> and a plan for mitigating those consequences.<sup>47</sup>

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<sup>38</sup> An Act to Establish the Community Rights Law of 2009 with Respect to Forest Lands (2009) [hereinafter Community Rights Law of 2009], <http://www.fda.gov.lr/wp-content/uploads/2015/07/Community-Rights-Law-of-2009-with-Respect-to-Forest-Lands.pdf>.

<sup>39</sup> Amendment and Restatement of the Public Procurement Concessions Act of 2005 (approved Sept. 16, 2010) [hereinafter Amended PPCA], [http://ppcc.gov.lr/doc/PPCA\\_Sept132010\\_FINAL.pdf](http://ppcc.gov.lr/doc/PPCA_Sept132010_FINAL.pdf).

<sup>40</sup> *Id.* §§ 90-91.

<sup>41</sup> *Id.* §§ 95-97, 101.

<sup>42</sup> Public Lands Law (1972), § 70, <http://landwise.resourceequity.org/record/408>.

<sup>43</sup> Amendments to the Revenue Code of Liberia Act (2000) [hereinafter Revenue Code], § 17, [http://mofrevenue.gov.lr/doc/consolidated\\_modified.pdf](http://mofrevenue.gov.lr/doc/consolidated_modified.pdf).

<sup>44</sup> Environmental Protection and Management Law (2002), § 6, [http://www.unesco.org/culture/natlaws/media/pdf/liberia/liberia\\_act2002\\_engorof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/liberia/liberia_act2002_engorof.pdf).

<sup>45</sup> *Id.* § 11.

<sup>46</sup> *Id.* § 14(1)(e).

<sup>47</sup> *Id.* § 15.

The Liberia Extractive Industries Transparency Initiative Act of 2009 institutionalizes certain transparency procedures. It requires the creation of “national depositories of all concessions, contracts, and licenses” that are open for public access<sup>48</sup> and the performance of regular audits and reporting of all existing contracts.<sup>49</sup> Lastly, the Labor Law, General Business Law,<sup>50</sup> and Revenue Code<sup>51</sup> set requirements for all businesses operating in Liberia, including agricultural concessionaires.

### C. Comparative Practices in Governing Agricultural Concessions

Many countries with large-scale concessions struggle with problems similar to those faced in Liberia. Some countries have adopted stronger regulations to govern agricultural concessions, including stringent legal and procedural protections for communities. But laws and procedures are not always followed in practice; many countries struggle with enforcement and compliance. Unfortunately, no single country offers a replicable model for governing concessions. Moreover, it is important to recognize the social, cultural, and economic factors—including resource constraints—that are unique to the Liberian context and make the wholesale replication of another country’s model inappropriate. As such, the discussion below outlines how some countries have approached concession regulations in order to offer examples of different approaches, not endorsements of any of these country’s regulatory systems as a whole.

A number of countries have passed domestic legislation that recognizes the rights of customary land users and indigenous communities to their land and its development.<sup>52</sup> For instance, the Democratic Republic of Congo has enacted laws that require the free, prior and informed consent (FPIC) of indigenous peoples in the context of land concessions.<sup>53</sup> Mozambique similarly legislated the FPIC requirement with regard to customary land users.<sup>54</sup> Malaysia has domestic laws requiring community consultation in the context of forest reserves

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<sup>48</sup> Act Establishing the Liberia Extractive Industries Transparency Initiative (2009), § 4.1(f), <http://www.leiti.org.lr/uploads/2/1/5/6/21569928/act.pdf>.

<sup>49</sup> *Id.* §§ 4-7.

<sup>50</sup> General Business Law (1973), <http://www.moci.gov.lr/doc/General%20Business%20Law.pdf>.

<sup>51</sup> Revenue Code, *supra* note 43.

<sup>52</sup> See Comparative Legislation Protecting Customary Rights, *infra* Appendix A. Where this report uses the term “indigenous,” it uses it consistently with the African Commission definition and therefore consistently with the Liberian definition of communities deserving of customary land rights. For a discussion of the use of the terms “indigenous” and “customary land users” in the African and Liberian legal contexts, see *infra* notes 66-74 and accompanying text.

<sup>53</sup> *Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making*, p. 13, ¶ 63, EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES, HUMAN RIGHTS COUNCIL, U.N. GENERAL ASSEMBLY (Aug. 2011) [hereinafter *Indigenous Peoples and the Right to Participate in Decision-Making*], <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/154/84/PDF/G1115484.pdf?OpenElement>.

<sup>54</sup> Laura German, Esther Mwangi, & George Schoneveld, *Contemporary Processes of Large-Scale Land Acquisition by Investors: Case Studies from Sub-Saharan Africa*, p. 23, CENTER FOR INTERNATIONAL FORESTRY RESEARCH (2011) [hereinafter *Land Acquisition Case Studies*], [http://www.cifor.org/publications/pdf\\_files/OccPapers/OP-68.pdf](http://www.cifor.org/publications/pdf_files/OccPapers/OP-68.pdf).

and other protected areas.<sup>55</sup> In Canada, courts have recognized a “duty to consult and accommodate indigenous peoples in relation to activities that can affect them.”<sup>56</sup>

Many countries have established procedural safeguards throughout the concession negotiating process. In Tanzania, for instance, investors must go through several levels of governmental approval, culminating with the president, in order to gain derivative rights of occupancy.<sup>57</sup> Tanzanian law also prevents Village Councils from directly transferring more than 250 hectares of land, which in turn helps to prevent the use of coercive tactics by investors.<sup>58</sup> In Zambia, investors cannot obtain a Certificate of Title until six years have passed, thus providing a test period and opportunity for community members to voice concerns. However, investors can bypass this requirement if they receive direct permission from the president, with no legislative ratification required, thus weakening this procedural protection.<sup>59</sup>

Despite the existence of strong regulatory laws and policies, compliance with the terms of concession agreements and governing law remains a significant and ongoing challenge. Several countries have enacted reforms to strengthen monitoring, enforcement, and complaint mechanisms. Ghana, for example, has created a variety of grievance mechanisms for aggrieved community members.<sup>60</sup> In Australia, several state agencies, in partnership with local authorities, are responsible for monitoring compliance with mining agreements and conditions. But even in Australia, which has instituted some of the strongest monitoring and enforcement mechanisms in the world, studies have found that in many cases, the relevant governmental agencies have not successfully monitored the environmental, economic, and social impacts of mining concessions.<sup>61</sup> Effective enforcement is especially challenging because many investor-state agreements specify international arbitration as the sole avenue for resolving disputes.

## **D. Human Rights Framework**

### ***Government Responsibility to Respect Community Land Rights***

As a ratifying state of the African Charter on Human and People’s Rights, as well as other international human rights treaties, Liberia is obligated to treat communities with historic attachment to their land as active stakeholders in any concession process. The African Charter places a unique emphasis on collective rights, reserving to “all peoples” the rights to equality,

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<sup>55</sup> *Indigenous Peoples and the Right to Participate in Decision-Making*, *supra* note 53, p. 17, ¶ 66.

<sup>56</sup> *Id.* p. 18, ¶ 68.

<sup>57</sup> *Land Acquisition Case Studies*, *supra* note 54, p. 15.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* p. 176.

<sup>60</sup> Emmanuel Marfo et al., *Development of Dispute Resolution Mechanism for REDD+ in Ghana*, FOREST CARBON PARTNERSHIP (Nov. 2014), [https://www.forestcarbonpartnership.org/sites/fcp/files/2015/April/Final final DRM Report.pdf](https://www.forestcarbonpartnership.org/sites/fcp/files/2015/April/Final%20final%20DRM%20Report.pdf).

<sup>61</sup> *Ensuring Compliance with Conditions on Mining*, WESTERN AUSTRALIAN AUDITOR GENERAL’S REPORT (Sept. 2011), [https://audit.wa.gov.au/wp-content/uploads/2013/05/report2011\\_08.pdf](https://audit.wa.gov.au/wp-content/uploads/2013/05/report2011_08.pdf).

self-determination, property, development, peace, and a satisfactory environment.<sup>62</sup> In Liberia, tribes and rural communities are among the many inheritors of these collective rights.

The landmark ruling by the African Commission on Human and Peoples' Rights in *Centre for Minority Rights Development (Kenya) & Minority Rights Group International v. Kenya* (known as the “Endorois decision”) clarified what the term “indigenous” means in the African context and what obligations African governments have to protect the rights of indigenous peoples to traditional land while pursuing economic development. The Endorois are a traditional pastoral community who lived in central Kenya, around Lake Bogota.<sup>63</sup> To develop the region, which was seen as having high tourism potential because of its wildlife and hot springs, the Kenyan government evicted the Endorois.<sup>64</sup> The Endorois lost both their livelihood, forced from the fertile lake land to arid land that could not support their cattle, and their cultural patrimony, as the lake region contained their central religious and burial sites.<sup>65</sup> In ruling on their case, the African Commission explained the nature of the community's rights under the African Charter. Because the ruling was based on international law rather than domestic Kenyan law, its logic is directly applicable to the Liberian context.

Ruling that the eviction violated the Endorois' rights as indigenous people, the Commission rejected the claim that the term “indigenous” is meaningless in the African context as all Africans are indigenous. The Kenyan High Court had denied recognition of the Endorois as a community, rather than affected individuals, and denied any special protection based on their historical occupation of the land or its cultural significance.<sup>66</sup> Rejecting this interpretation, the Commission acknowledged that the definition of indigenous community was “contested,”<sup>67</sup> but necessary under the African Charter “to address historical and present-day injustices and inequalities” and to facilitate protection of collective rights emphasized in the Charter as belonging to collective peoples, not individuals.<sup>68</sup>

In defining indigenous groups, the Commission emphasized three factors: 1) historic and cultural linkages to a “distinct territory,”<sup>69</sup> 2) self-identification as members of a group,<sup>70</sup>

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<sup>62</sup> African Charter on Human and Peoples' Rights (1981), arts. 19-24 [hereinafter African Charter], [http://www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf).

<sup>63</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, Communication 276/03, African Commission on Human and Peoples' Rights, ¶ 3 (Nov. 25, 2009) [hereinafter *Endorois*], [http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46\\_276\\_03\\_eng.pdf](http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf).

<sup>64</sup> *Kenya: Landmark Ruling on Indigenous Land Rights*, HUMAN RIGHTS WATCH (Feb. 4, 2010), <https://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights>.

<sup>65</sup> *Endorois*, *supra* note 63, ¶¶ 6, 16, 17, 19.

<sup>66</sup> *Id.* ¶ 12.

<sup>67</sup> *Id.* ¶ 147.

<sup>68</sup> *Id.* ¶ 149. The Commission also emphasized that the Inter-American Court of Human Rights “has not hesitated in granting the collective rights protection to groups beyond the ‘narrow/aboriginal/pre-Colombian’ understanding of indigenous peoples traditionally adopted in the Americas.” *Id.* ¶ 159.

<sup>69</sup> *Id.* ¶¶ 154-56.

<sup>70</sup> *Id.* ¶ 157.

and 3) cultural distinctiveness, with members sharing a common history and culture.<sup>71</sup> The Commission found that the Endorois constituted an indigenous group because of their historic and cultural connection to Lake Bogoria and their self-identification as a distinct group with a common history and culture.<sup>72</sup>

That definition is consistent with Liberia's Land Rights Policy, which defines a "community" as "a self-identifying group that uses and manages its land in accordance with customary practices and norms."<sup>73</sup> Further, the Land Rights Policy respects the community as "responsible for identifying its own membership," consistent with the self-identification concept in the African Commission's definition.<sup>74</sup>

As the African Commission clarified in *Endorois*, indigenous communities are entitled to protections regarding the development of their communal land, including the protections of FPIC. The Commission explained that the right to development, enshrined in Article 22 of the African Charter, requires that development be equitable, non-discriminatory, participatory, accountable, and transparent.<sup>75</sup> The African Commission emphasized that the state, not the community, "bears the burden for creating conditions favourable to a peoples' development."<sup>76</sup> To respect procedural development rights, "the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions."<sup>77</sup>

Although the Commission in *Endorois* required states to obtain FPIC before confiscating or using their land, the Commission did not provide a detailed explanation of FPIC's nature or its international legal basis. FPIC is a "crucial element[] of the right to self-determination,"<sup>78</sup> which is protected in the African Charter and other international legal instruments.<sup>79</sup> The Human Rights Council emphasizes that FPIC is not just a "procedural process," but is a "substantive mechanism" designed to ensure "genuine consultation and participation."<sup>80</sup> States must not engage in any "coercion, intimidation or manipulation"; must obtain consent "in advance of the activity associated with the decision being made"; must provide time for indigenous peoples to

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<sup>71</sup> *Id.* ¶ 162.

<sup>72</sup> *Id.*

<sup>73</sup> Land Rights Policy (2013), p. 17, § 6.2.3, [http://www.globalprotectioncluster.org/assets/files/field\\_protection\\_clusters/Liberia/Liberia\\_Land\\_Rights\\_Policy\\_2013\\_EN.pdf](http://www.globalprotectioncluster.org/assets/files/field_protection_clusters/Liberia/Liberia_Land_Rights_Policy_2013_EN.pdf).

<sup>74</sup> *Id.* p. 17, § 6.2.4.

<sup>75</sup> *Endorois*, *supra* note 63, ¶ 277.

<sup>76</sup> *Id.* ¶ 297.

<sup>77</sup> *Id.* ¶ 291.

<sup>78</sup> *Indigenous Peoples and the Right to Participate in Decision-Making*, *supra* note 53, ¶ 18.

<sup>79</sup> African Charter, *supra* note 62, art. 20(1); *see also* International Covenant on Civil and Political Rights (ICCPR), art. 1(1), Dec. 16, 1966, 999 U.N.T.S. 171, [https://treaties.un.org/doc/Treaties/1976/03/19760323\\_06-17\\_AM/Ch\\_IV\\_04.pdf](https://treaties.un.org/doc/Treaties/1976/03/19760323_06-17_AM/Ch_IV_04.pdf); International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 1(1), Dec. 16, 1966, [https://treaties.un.org/doc/Treaties/1976/01/19760103\\_09-57\\_PM/Ch\\_IV\\_03.pdf](https://treaties.un.org/doc/Treaties/1976/01/19760103_09-57_PM/Ch_IV_03.pdf).

<sup>80</sup> *Indigenous Peoples and the Right to Participate in Decision-Making*, *supra* note 53, ¶ 21.

“undertake their own decision-making processes”; and must provide indigenous peoples with information that is “objective, accurate and . . . understandable.”<sup>81</sup>

In *Endorois*, the Commission ultimately rejected Kenya’s arguments that the development of the game reserve violated the Endorois’ right to development, even though the reserve was good for the economic development of the country as a whole.<sup>82</sup> The Commission found a violation of the right to development because the Endorois lost, rather than gained, from the development in question and because the consultation was insufficient. In reaching this conclusion, the Commission emphasized the importance of examining the development outcomes of the particular community in question.<sup>83</sup> Nor was the fact that the Endorois had been represented in the decision to create the game reserve sufficient to vindicate their rights. Instead, the Commission considered whether or not the community felt it had a choice in whether or not to approve the development project,<sup>84</sup> and the relative equality of the community in the bargaining process.<sup>85</sup> The Commission found that the Endorois had been represented in negotiations inadequately, since their representatives were illiterate, and that the community was not adequately informed of the nature and consequences of the development,<sup>86</sup> with many unaware that the eviction was permanent.<sup>87</sup>

The Commission also emphasized that development, even where pursued with proper procedure, must include adequate compensation for the affected communities. Holding that Kenya’s one-time cash payment did not amount to adequate compensation for evicting the Endorois,<sup>88</sup> the African Commission approved the compensation recommendations for evicted persons developed by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, which establish that compensation should occur prior to the actual move, assistance should be provide during the move, and the move should result in standards of living and income earning capacity at least equal to those prior to the move.<sup>89</sup>

### ***State and Corporate Human Rights Responsibilities in Business Operations***

The United Nations Guiding Principles on Business and Human Rights and Principles for Responsible Contracts provide a framework for considering state and corporate responsibility in the context of business operations. The Guiding Principles emphasize that both governments and businesses bear responsibility for avoiding negative human rights outcomes. Specifically, states are obliged to take all necessary steps to “prevent, investigate, punish and redress” human rights

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<sup>81</sup> *Id.* ¶ 25.

<sup>82</sup> *Endorois*, *supra* note 63, ¶¶ 270-72, 276.

<sup>83</sup> *Id.* ¶ 286.

<sup>84</sup> *Id.* ¶ 279.

<sup>85</sup> *Id.* ¶ 282.

<sup>86</sup> *Id.* ¶ 292.

<sup>87</sup> *Id.* ¶ 290.

<sup>88</sup> *Id.* ¶ 236.

<sup>89</sup> *Id.* ¶ 237.

abuse through “effective policies, legislation, regulations and adjudication.”<sup>90</sup> Businesses are responsible for seeking “to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”<sup>91</sup> In short, states have a duty to protect human rights, corporations have a responsibility to respect human rights, and both actors must provide access to remedy for victims of business-related abuses.<sup>92</sup>

The Contracts Principles, an addendum to the Guiding Principles, establish standards for incorporating the Guiding Principles into the process of negotiating contracts between investors and states, including concession agreements. The Contracts Principles emphasize that, rather than deferring consideration of human rights risks until after investor-state contracts are signed, governments and investors should “consider them coherently along with economic and commercial issues” throughout contract negotiations.<sup>93</sup> Addressing human rights at the outset is essential because successfully managing human rights risks “will have implications for other contractual issues” and affect the terms of the contracts.<sup>94</sup> Parties should enter negotiations prepared to discuss human rights risks and leave with a clear understanding of where the various responsibilities to prevent and mitigate those risks lies.<sup>95</sup>

In addition to government and investor responsibilities to prevent and mitigate negative human rights impacts,<sup>96</sup> the Contracts Principles emphasize the responsibility to implement procedural protections for communities both during and after contract negotiations. The Principles specify that inclusive community engagement should occur before contract negotiations conclude<sup>97</sup> and that affected individuals and communities should have access to a non-judicial grievance mechanism.<sup>98</sup> The Principles also place responsibility with the state to monitor the project continually to ensure that the investor is abiding by the contract terms.<sup>99</sup>

### ***Connection to Civil and Political Rights***

Fulfillment of the FPIC requirement calls for the protection of fundamental civil and political rights, including the rights to freedom of expression and association. In other words, governmental protections, particularly for human rights defenders and critics of government

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<sup>90</sup> *U.N. Guiding Principles on Business and Human Rights*, Principle 1, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS (2011) [hereinafter Guiding Principles], [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>91</sup> *Id.* Principle 13(b).

<sup>92</sup> *Id.* Principles 27 & 29.

<sup>93</sup> *Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations*, p. 6, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (2015), [http://www.ohchr.org/Documents/Publications/Principles\\_ResponsibleContracts\\_HR\\_PUB\\_15\\_1\\_EN.pdf](http://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* Principles 1 & 2.

<sup>96</sup> *Id.* Principle 3.

<sup>97</sup> *Id.* Principle 7.

<sup>98</sup> *Id.* Principle 9.

<sup>99</sup> *Id.* Principle 8.

policies and concessionaires, are paramount for any FPIC process to truly be considered “free.” States have a responsibility to maintain safe and enabling environments for individuals, communities, and civil society organizations to operate unhindered, free from government intimidation or retaliation.<sup>100</sup> Any measures that restrict civil and political rights risk violating Liberia’s obligations under international and domestic law.<sup>101</sup> According to the ICCPR, the only permissible restrictions to the rights to freedom of expression and association are those prescribed by law and necessitated by national security and public order interests or respect for the rights of others.<sup>102</sup> To successfully fulfill civil and political rights, CSOs, communities, and individual citizens must all be empowered to speak out both while a particular contract is being negotiated and while reforms to the framework regulating concessions are being considered.

Respect for civil and political rights is critical to the fulfillment of long-term development and poverty-alleviation goals more broadly. Human rights and development governing bodies have recognized this interdependence. For instance, the U.N. Office of the High Commissioner for Human Rights and the U.N. Development Programme have both emphasized the role of civil and political rights in addressing the root causes of poverty.<sup>103</sup> Only when individuals and communities have a voice at the negotiating table can the government be sure that their concerns are being addressed and their goals achieved.

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<sup>100</sup> Human Rights Council, *Human Rights Council Adopts Text on Civil Society Space and Suspends Thirty-Second Regular Session* (Jul. 1, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20225&LangID=E>.

<sup>101</sup> Human Rights Council, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: Liberia*, p. 5, ¶¶ 19-20, U.N. Doc. A/HRC/WG.6/22/LBR/1 (Feb. 18, 2015) [hereinafter *Human Rights Council National Report*] <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/027/38/PDF/G1502738.pdf?OpenElement>. Internationally, Liberia has ratified the International Covenant on Civil and Political Rights and the African Charter, both of which protect the freedoms of expression and association. African Charter, *supra* note 62, arts. 9-10; ICCPR, *supra* note 79. Domestically, Liberia’s Freedom of Information Act of 2010 incorporated key provisions of the International Covenant on Civil and Political Rights, and other bills that would further domesticate relevant civil and political rights obligations have been submitted to the legislature. *Human Rights Council National Report*, *supra*, ¶¶ 19-20. Key civil and political rights are also enshrined in the Liberian Constitution. Article 15 stipulates the right to freedom of expression, including the “right to hold opinions without interference and the right to knowledge,” and Article 17 guarantees the right to peaceful assembly and association. CONSTITUTION, Jan. 1, 1986, arts. 15(b) & 17.

<sup>102</sup> ICCPR, *supra* note 78, arts. 19(3) & 22(2).

<sup>103</sup> United Nations Office of the High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, p. 9, U.N. Doc. HR/PUB/06/8 (2006), <http://www.ohchr.org/Documents/Publications/FAQen.pdf>; *Poverty Reduction and Human Rights: A Practice Note*, p. 6, U.N. DEVELOPMENT PROGRAMME (June 2003), [http://content-ext.undp.org/aplaws\\_publications/1873321/povertyreduction-humanrights0603%5B1%5D.pdf](http://content-ext.undp.org/aplaws_publications/1873321/povertyreduction-humanrights0603%5B1%5D.pdf).

## Recommendations

### A. Community Property Rights

#### *Issue to Address*

In recent years, the Liberian government has taken positive steps toward recognizing rural and indigenous communities' rights to the land that they have occupied for generations. The Community Rights Law of 2009 began the process by defining customary land broadly, as "[l]and, including forest land, owned by individuals, groups, families, or communities through longstanding rules recognized by the community."<sup>104</sup> The law specified, "To be recognized as customary land, it is not necessary for the land to have been registered under statutory entitlements."<sup>105</sup> In 2013, the Land Commission developed a new Land Rights Policy, declaring the government's intention to "recognize[] and protect[] the land rights of communities, groups, families, and individuals who own, use, and manage their land in accordance with customary practices and norms, as equal to Private Land rights."<sup>106</sup> A diverse cross-section of community members, civil society organizations, and government leaders validated the policy at the National Validation Conference in May 2013. Though the Land Rights Policy is a positive development, it is not binding. The legislature would have to enact the Land Rights Act to give its recommendations the force of law.

Property rights remain difficult to enforce. The only existing legal avenue for documenting community ownership of agricultural land is through the tribal certificate processes described in the Public Lands Law of 1973. These processes are time-consuming, expensive, and of limited use.<sup>107</sup> The certificates do not confer or officially recognize title, but many community members mistakenly believe that the certificates grant them the property outright.<sup>108</sup> Consequently, the failure to provide a clear means to codify communal property rights remains a source of tension, especially in rural areas.

Communities affected by agricultural concessions have voiced anger and frustrations regarding the government's failure to fully respect and protect community land rights, and the resulting conflicts are well documented.<sup>109</sup>

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<sup>104</sup> Community Rights Law of 2009, *supra* note 38, § 1.3.

<sup>105</sup> *Id.*

<sup>106</sup> Land Rights Policy, *supra* note 73, § 4.1.

<sup>107</sup> Lowenstein Clinic Interview with Land Commission (Jan. 10, 2017).

<sup>108</sup> *Id.*

<sup>109</sup> See, e.g., *LIBERIA – The Promise Betrayed*, SUSTAINABLE DEVELOPMENT INSTITUTE (Jan. 2010), [http://www.sdiliberia.org/sites/default/files/publications/2010\\_Liberia\\_The\\_Promise\\_Betrayed.pdf](http://www.sdiliberia.org/sites/default/files/publications/2010_Liberia_The_Promise_Betrayed.pdf) (describing the role of logging concessionaires in exacerbating conflicts); Rachel Knight et al., *Protecting Community Lands and Resources: Evidence from Liberia*, NAMATI, SUSTAINABLE DEVELOPMENT INSTITUTE & IDLO (2013), [http://www.sdiliberia.org/sites/default/files/publications/2013\\_Protecting\\_Community\\_Lands\\_and\\_Resources.pdf](http://www.sdiliberia.org/sites/default/files/publications/2013_Protecting_Community_Lands_and_Resources.pdf) (citing evidence that inadequate boundary harmonization created conflicts within communities); Elaisha Stokes, *Riot on the Plantation*, *supra* note 31 (describing a riot at the Golden Veroleum plantation); *Temples & Guns*, *supra* note 24 (describing communities' anger at the destruction of sacred land areas by the expanding Golden Veroleum plantation); Klaus Deininger et al., *Rising Global Interest in Farmland: Can It Yield Sustainable and Equitable Benefits?*, p. 98, WORLD BANK (2011) (recognizing the violent clashes that arose from the government's failure to

In addition to holding various types of protests,<sup>110</sup> some communities have used international monitoring mechanisms to lodge complaints regarding the limited recognition of their traditional land tenure systems.<sup>111</sup>

In response, some companies have developed their own consultation processes and dispute mechanisms. Sime Darby, for example, explained in an interview its approach to communal land disputes. The company's existing concession agreement promises 220,000 hectares of land free of any encumbrances, but in fact numerous communities live on or nearby the concession.<sup>112</sup> After facing challenges from customary landowners, Sime Darby engaged the services of the international nonprofit The Forest Trust to develop a new model of engagement. The result, Sime Darby stated, was that the company now directly procures consent from customary landowners.<sup>113</sup> Today, the company states that it negotiates directly with communities under the FPIC process required by the Roundtable for Sustainable Palm Oil.

Despite these reforms, community members often perceive concession policies with regard to land occupation and compensation as unfair and arbitrary. The failure to resolve these tensions risks aggravating conflicts within communities and between communities, governments, and companies. For instance, members of communities near the Sime Darby plantation reported that the company appropriated their land, including sacred areas, without providing adequate consultation or compensation. The concessionaire allegedly occupied the entirety of one community's land so that no space remained for subsistence farming. As a result, in the words of one interviewee, the community members were "scavengers" on their own land.<sup>114</sup> At the time of interviews, the community was organizing a peaceful protest to respond to government and concessionaire's inaction.<sup>115</sup>

Without a formal land tenure system in place, concessionaires effectively become the final authority to determine which communities are entitled to compensation. Leaving concessionaires to sort out conflicting land claims is problematic since some concessions are located on areas subject to "long-standing and well-known boundary conflicts."<sup>116</sup> For example, a town leader in another community near the Sime Darby plantation complained that the company had improperly recognized and compensated squatters on its customary land, despite his community's clearly defined, historic claim to the land. According to the interviewee, the

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recognize customary land rights); *Strengthening Social Cohesion and Building Resilience Through Communication and Community Dialogues in Sinoe County*, *supra* note 2, p. 2 (describing the violent uprisings against the government and investors).

<sup>110</sup> See, e.g., Angnieszka Paczynska, *Liberia Rising? Foreign Direct Investment, Persistent Inequalities and Political Tensions*, pp. 1, 16-18, PEACEBUILDING (June 2016) (describing a number of public demonstrations, protests, and violent confrontations between demonstrators, palm oil and mining concessionaires, and government security forces); *Temples & Guns*, *supra* note 24.

<sup>111</sup> See, e.g., *Case Tracker: Golden Veroleum Liberia*, *supra* note 34 (following a complaint to the international palm oil association, RSPO, alleging that Golden Veroleum violated, inter alia, FPIC requirements).

<sup>112</sup> Lowenstein Clinic Interview with Sime Darby (Dec. 9, 2016); *Sime Darby Plantation in Liberia*, SIME DARBY (Mar. 2014), [http://www.simedarby.com/upload/Sime\\_Darby\\_in\\_Liberia.pdf](http://www.simedarby.com/upload/Sime_Darby_in_Liberia.pdf).

<sup>113</sup> Lowenstein Clinic Interview with Sime Darby (Dec. 9, 2016).

<sup>114</sup> Lowenstein Clinic Interviews with a Community Near Sime Darby (Aug. 20, 2016).

<sup>115</sup> *Id.*

<sup>116</sup> *Hollow Promises*, *supra* note 25, p. 28, ¶ 1.29.

company failed to consult with communities in the area, which regarded the land as belonging to the community under the region's customary land tenure system.<sup>117</sup> While some companies are working to address these concerns, for example by walking with community members on their land to find and confirm boundary stones together,<sup>118</sup> such policies are not universally practiced.

In interviews, government officials expressed concern regarding the limited recognition of customary land ownership despite the Land Rights Policy. The Ministry of Justice observed that many existing concession contracts were negotiated under the working assumption that the government owned the conceded land.<sup>119</sup> The Ministry of Finance and Development and the National Bureau of Concessions emphasized the importance of addressing the failure to recognize customary land rights.<sup>120</sup> The Ministry of Agriculture expressed similar concerns, noting the especially grave consequences of existing land concession practices given that entire communities' livelihoods depend on their land and natural resources.<sup>121</sup> The National Bureau of Concessions and the Law Reform Commission discussed the importance of demarcating and differentiating community, private, and public lands, particularly through legislative reforms.<sup>122</sup> In response to these interrelated concerns, one of the main priorities of the government's Interim Land Task Force has been to clarify the appropriate allocation of land rights.<sup>123</sup>

Several coalitions have reaffirmed the urgency of respecting community land rights. At a conference in September 2016, government and civil society representatives from ten counties gathered to discuss land rights issues; many reportedly stressed the need to protect community rights to their land and resources.<sup>124</sup> The Liberian chapter of the Extractive Industries Transparency Initiative (LEITI), an international coalition of civil society groups, companies, and governments, supported increased recognition of customary land rights, particularly because communities rely on customary land for subsistence farming and even health remedies.<sup>125</sup> LEITI representatives also explained that robust recognition of land rights would empower communities to be responsible stewards of their land and resources.<sup>126</sup>

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<sup>117</sup> Lowenstein Clinic Interview with a Community Near Sime Darby (Aug. 20, 2016).

<sup>118</sup> Lowenstein Clinic Interview with Equatorial Palm Oil (Oct. 27, 2016).

<sup>119</sup> Lowenstein Clinic Interview with Ministry of Justice (Aug. 17, 2016).

<sup>120</sup> Lowenstein Clinic Interview with Ministry of Finance and Development Planning (Aug. 16, 2016); Lowenstein Clinic Interview with National Bureau of Concessions (Aug. 18, 2016).

<sup>121</sup> Lowenstein Clinic Interview with Ministry of Agriculture (Aug. 17, 2016).

<sup>122</sup> Lowenstein Clinic Interview with National Bureau of Concessions (Aug. 18, 2016); Lowenstein Clinic Interview with Law Reform Commission (Aug. 16, 2016).

<sup>123</sup> Lowenstein Clinic Interview with Interim Land Task Force (Aug. 17, 2016).

<sup>124</sup> Lowenstein Clinic Interview with Social Entrepreneurs for Sustainable Development (Oct. 18, 2016). *See also* Civil Society Working Group on Community Land Rights in Liberia, *Position Statement on the Land Authority Act and the Land Rights Act* (June 28, 2016), <http://www.forestpeoples.org/sites/fpp/files/publication/2016/07/position-statement-laa-lra-2016.pdf>.

<sup>125</sup> Lowenstein Clinic Interview with LEITI (Aug. 17, 2016).

<sup>126</sup> *Id.*

## ***Legal Analysis***

Without legal title to their lands, rural communities risk losing their primary means of subsistence and, along with it, their rights to property, self-determination, and development. Even where—as in Liberia—communities do not have statutory title to the land under domestic law, they nonetheless have property rights that are recognized under international human rights law. For instance, the U.N. Declaration on the Rights of Indigenous Peoples guarantees indigenous peoples the “right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands.”<sup>127</sup> The African Charter on Human and People’s Rights also emphasizes the unique importance of communal property in the region, reserving to “all peoples” the right to “freely dispose of their wealth and natural resources.”<sup>128</sup> According to the Charter, African governments must “eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.”<sup>129</sup>

Regional jurisprudence has affirmed the obligation of African states, including Liberia, to protect community property rights. For instance, the African Commission on Human and Peoples’ Rights held in *Endorois* that Kenya had violated the rights of the Endorois community by removing them from their ancestral lands and failing to provide them with adequate compensation.<sup>130</sup>

Several sets of U.N. principles give useful context in understanding the nature of community property rights and how best to remedy violations of those rights. The U.N. Food and Agriculture Organization’s Voluntary Guidelines on the Responsible Governance of Tenure of Land Fisheries and Forests address the vulnerability of marginalized people in the context of land tenure policies. The Voluntary Guidelines on the Responsible Governance of Tenure of Land Fisheries and Forests provide guidelines to fulfilling “the goals of food security and progressive realization of the right to adequate food, poverty eradication, sustainable livelihoods, social stability, housing security, rural development, environmental protection and sustainable social and economic development.”<sup>131</sup> And under the system of joint responsibility contemplated by the U.N. Guiding Principles on Business and Human Rights, the state and the companies should work together to vindicate and protect community property rights.<sup>132</sup> When governments or companies fail to procure community consent or to adequately compensate communities

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<sup>127</sup> U.N. Declaration on the Rights of Indigenous Peoples, art. 25, G.A. Res. 61/295 (Sept. 13, 2007), [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf). As previously noted, where this paper uses the term “indigenous,” it uses it consistently with the African Commission definition and therefore consistently with the Liberian definition of communities deserving of customary land rights. For a discussion of the use of the term “indigenous” in the African and Liberian legal contexts, see *infra* notes 66-74 and accompanying text.

<sup>128</sup> African Charter, *supra* note 62, art. 21(1).

<sup>129</sup> *Id.* art. 21(5).

<sup>130</sup> *Endorois*, *supra* note 63.

<sup>131</sup> See Committee on World Food Security, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, § 1.1, U.N. FOOD AND AGRICULTURE ORGANIZATION (2012) [hereinafter *VGGT*], <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>.

<sup>132</sup> See *Guiding Principles*, *supra* note 90, Principles 1, 11, 25.

affected by the use, conveyance, or transfer of the lands that they traditionally occupied, communities' fundamental human rights under international law are violated.

### ***Recommendations***

- **Legally recognize community title to the lands traditionally occupied by indigenous communities.**

Given the ongoing land disputes in Liberia, it is essential that the government fulfill its obligation to respect and protect the rights of indigenous communities to their land and natural resources. One avenue to do so is passing the Land Rights Act, currently pending in the legislature. The Land Rights Act would recognize customary land as the property of communities, not the government, and provide critical protections for communities located near agricultural concession areas. Passage of the draft Land Rights Act or similar legislation would help to ensure that all parties recognize community title. This in turn may help minimize chances of future land conflicts.

Until legislation enforcing community property rights takes effect, government ministries and other stakeholders should act in a manner consistent with the existing Land Rights Policy. For example, ministries should implement FPIC policies that recognize the communities' right to be consulted in all matters related to the disposal of their land, encourage land documentation efforts,<sup>133</sup> and structure their internal policies related to agricultural concessions in such a way that communities are consulted regularly and respectfully. A number of rights-respecting policies are detailed in the remaining recommendations of this paper.

Additionally, it is important to recognize that even if the Land Rights Act or analogous legislation formalizing community titles is adopted, only future concessions would be impacted. Thus, upon implementing legislative changes, government and company stakeholders would need to take further steps to remedy past violations of the property rights of communities already dispossessed of their land. Efforts addressing the needs of previously affected communities might include contract renegotiations,<sup>134</sup> restructuring community agreements into leases or other binding documents,<sup>135</sup> and, where possible, returning the original parcels to those who suffered loss or to their heirs.<sup>136</sup>

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<sup>133</sup> See, e.g., *Protecting Community Lands and Resources: Evidence from Liberia*, *supra* note 109.

<sup>134</sup> See *infra* Section III.E.

<sup>135</sup> Lowenstein Clinic Interview with Social Entrepreneurs for Sustainable Development (Oct. 18, 2016); see also *infra* Section III.B.2.

<sup>136</sup> See *VGGT*, *supra* note 131, Principle 14.2 ("Where possible, the original parcels or holdings should be returned to those who suffered the loss, or their heirs, by resolution of the competent national authorities. Where the original parcel or holding cannot be returned, States should provide prompt and just compensation in the form of money and/or alternative parcels or holdings, ensuring equitable treatment of all affected people.").

## B. Negotiating Contracts and Community Agreements

### *Issue to Address*

The substance of concession contracts and the means by which they are negotiated have come under heavy criticism. Because excellent literature is already available describing rights-respecting concession terms in international investment contracts,<sup>137</sup> this section will focus on the procedural shortcomings that have hindered the negotiation process.

At present, concession agreements are generally forged without an opportunity for informed negotiation between communities and concessionaires, resulting in tensions and uncertainty on all sides. In an interview, the Ministry of Agriculture noted that negotiations usually occur and are enacted into law in Monrovia, leaving affected communities unaware; representatives proposed that involving communities in the awarding of concessions might prevent the need for renegotiation of the contracts later on.<sup>138</sup> But even where communities are directly involved in negotiations, as is the case in the drafting of Memoranda of Understanding (MOUs), similar criticism applies. Often, communities are not given complete and accurate information about proposed concessions when either contracts or MOUs are being negotiated.<sup>139</sup>

During community consultations and negotiations, community members are at an informational disadvantage. For example, the Governance Commission found that while communities often have general knowledge of their land boundaries, they rarely have specific knowledge of the land area's exact measurements.<sup>140</sup> In an interview, the Interim Land Task Force suggested that communities should be supported in going through a self-identification process, involving the physical marking of land and issuance of deeds. CSOs have also begun responding to this concern by encouraging processes like community land documentation and land valuation.<sup>141</sup> Communities are also at an information disadvantage with respect to their legal entitlements. CSOs are concerned that companies take advantage of communities' lack of access to information by, for example, signing agreements that provide the community with few benefits beyond what was required in the original contracts.<sup>142</sup>

Where community negotiations do occur, the terms under which they gave their consent are not necessarily honored. First, signed MOUs are not ratified by the legislature and lack legal

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<sup>137</sup> See, e.g., *Guide to Land Contracts: Agricultural Projects*, *supra* note 3; *IISD Guide to Negotiating Investment Contracts*, *supra* note 4.

<sup>138</sup> Lowenstein Clinic Interview with Ministry of Agriculture (Aug. 17, 2016).

<sup>139</sup> See, e.g., *New Snake Oil*, *supra* note 26, pp. 18-19; *Strengthening Social Cohesion and Building Resilience Through Communication and Community Dialogues in Sinoe County*, *supra* note 2, p. 12.

<sup>140</sup> *Strengthening Social Cohesion and Building Resilience Through Communication and Community Dialogues in Sinoe County*, *supra* note 2, p. 12.

<sup>141</sup> Lowenstein Clinic Interview with Sustainable Development Institute and Social Entrepreneurs for Sustainable Development (Aug. 22, 2016).

<sup>142</sup> For example, Global Witness has documented that “under their MOUs, Golden Veroleum will actually give non-employed community members with very little – slightly more than six toilets – over that which the company was already obligated to provide under its concession agreement with the Government.” *New Snake Oil*, *supra* note 26, p. 20.

force.<sup>143</sup> Second, the vagueness of MOU terms means that the company can delay following through on their promises for years without technically violating its promises, all while community anger grows. In an interview, one community located near the Sime Darby plantation shared that in their agreement, the company had promised to build a well and a school but did not specify at which point in the multi-decade concession these would be constructed.<sup>144</sup> Indeed, according to CSOs, concessionaires generally fail to fulfill the corporate social responsibility terms of MOUs at all.<sup>145</sup> But communities nonetheless agree to concessions on the understanding that they will receive the development benefits embodied in MOUs, which they may wrongly believe to be legally binding.

Even when community rights are included in investor-state contracts, which are enforceable, the terms are equally vague. An expert from the Columbia Center on Sustainable Investment observed that Liberia's concession agreements generally have placed far more emphasis on the government and investor's rights; any community rights are implicit, if alluded to at all.<sup>146</sup> Still, in an interview, the Ministry of Justice described a recent push to improve concession agreement terms to be more favorable to communities, including through specific bans on the use of eminent domain and inclusion of recommended social benefit provisions.<sup>147</sup>

The Sustainable Development Institute, Social Entrepreneurs for Sustainable Development, and the National Investment Commission recommended instituting FPIC procedures prior to concession negotiations as a means of elevating and improving the quality of community participation at the front-end of the process.<sup>148</sup> The Interim Land Task Force has also proposed providing capacity building support to communities in the negotiating process, through independent legal and technical advice to communities, in addition to training communities in their rights and perhaps in technical tasks like GPS mapping and reading land surveys.<sup>149</sup> Sustainable Development Institute, Social Entrepreneurs for Sustainable Development, the National Bureau of Concessions Concessions Working Group, and communities near the Sime Darby plantation all promoted the involvement of CSOs in helping communities negotiate.<sup>150</sup>

## ***Legal Analysis***

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<sup>143</sup> Lowenstein Clinic Interview with Liberian Governance Commission (Aug. 16, 2016); Lowenstein Clinic Interview with National Bureau of Concessions (Aug. 18, 2016); *Hollow Promises*, *supra* note 25, p. 62.

<sup>144</sup> Lowenstein Clinic Interview with a Community Near Sime Darby (Aug. 20, 2016).

<sup>145</sup> *Strengthening Social Cohesion and Building Resilience Through Communication and Community Dialogues in Sinoe County*, *supra* note 2, p. 7.

<sup>146</sup> E-mail Correspondence with Columbia Center on Sustainable Investment (Dec. 3, 2016).

<sup>147</sup> Lowenstein Clinic Interview with Ministry of Justice (Aug. 17, 2016).

<sup>148</sup> Lowenstein Clinic Interview with Sustainable Development Institute and Social Entrepreneurs for Sustainable Development (Aug. 22, 2016); Lowenstein Clinic Interview with National Investment Commission (Aug. 23, 2016).

<sup>149</sup> Lowenstein Clinic Interview with Interim Land Task Force (Aug. 17, 2016).

<sup>150</sup> Lowenstein Clinic Interview with National Bureau of Concessions (Aug. 18, 2016); Lowenstein Clinic Interview with Concessions Working Group (Aug. 18, 2016); Lowenstein Clinic Interview with Sustainable Development Institute and Social Entrepreneurs for Sustainable Development (Aug. 22, 2016).

Community involvement and empowerment is grounded in the principle of FPIC and the right to self-determination.<sup>151</sup> FPIC requires indigenous, or customary land-holding,<sup>152</sup> community members to be consulted, to freely choose whether or not to sign away their land rights, and to knowingly accept the given contract terms. Communities have the right to be involved in negotiations because they have rights to their land. Until such time as Liberian law officially recognizes community title, communities' property rights are nonetheless protected under the African Charter on Human and People's Rights, the International Covenant on Economic and Social Rights, and the U.N. Declaration on the Rights of Indigenous Peoples.<sup>153</sup>

The current practice of executing MOUs does not remedy the failure to achieve sufficient consent from communities prior to contract negotiation. Where communities consented to a particular development project under the mistaken belief that companies would be obliged to fulfill the terms of the MOU, those community members did not give informed consent as required by FPIC. Existing MOUs appear to have no legal force and communities have no means to take companies to court when terms are not fulfilled.<sup>154</sup>

When land is taken from communities without following proper FPIC procedures, those communities are entitled to "just, fair and equitable compensation" in the form of "lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress."<sup>155</sup> Under the international legal protections of the right to housing, "[a]ll persons threatened with or subject to forced evictions have the right of access to timely

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<sup>151</sup> For more discussion of the international legal basis of FPIC, see *supra* notes 77-81 and accompanying text.

<sup>152</sup> As previously noted, where this paper uses the term "indigenous," it uses it consistently with the African Commission definition and therefore consistently with the Liberian definition of communities deserving of customary land rights. For a discussion of the use of the term "indigenous" in the African and Liberian legal contexts, see *infra* notes 66-74 and accompanying text.

<sup>153</sup> Article 14 of the African Charter, see *supra* note 62, states, "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws." Article 21 of the African Charter protects the right of all peoples to "freely dispose of their wealth and natural resources," including land. This right may only be exercised in the "exclusive interest of the people." Article 1 of the ICESCR, see *supra* note 79, stipulates that all people have the right to "for their own ends, freely dispose of their natural wealth and resources" and accordingly, they must not be deprived of their "own means of subsistence." Article 11 of the ICESCR recognizes the "the right of everyone to an adequate standard of living for himself and his family, including adequate . . . housing, and to the continuous improvement of living conditions." Article 25 of the U.N. Declaration on the Rights of Indigenous Peoples, see *supra* note 127, guarantees indigenous peoples the right to "traditionally owned or otherwise occupied and used lands." For a more thorough discussion of the legal basis of community property rights, see "Legal Analysis," *supra* Section III.A.

<sup>154</sup> For an analysis of MOUs declaring that they are not legally enforceable because of lack of consideration and vague contract terms, see *Hollow Promises*, *supra* note 25, pp. 62-63. Government officials confirmed in interviews that the MOUs are not seen as legally binding. Lowenstein Clinic Interview with National Bureau of Concessions (Aug. 18, 2016); Lowenstein Clinic Interview with Liberian Governance Commission (Aug. 16, 2016). Unfortunately, the Clinic team is not aware of any method by which existing MOUs can retroactively be made legally binding except by consent of the negotiating parties. Neither courts nor the government may unilaterally change the terms of private contracts. Courts might have grounds to void MOUs that contravene public policy or are based on fraudulent promises, but even then, they are unlikely to alter terms of the MOUs to make them enforceable. For more information about the possibilities of renegotiating both contracts and MOUs, see *infra* Section III.E.

<sup>155</sup> U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 127, art. 28.

remedy.”<sup>156</sup> The U.N. Basic Principles and Guidelines on Development-Based Evictions and Displacement emphasize that the state “must provide or ensure fair and just compensation for any losses of personal, real or other property or goods,” and note that “[c]ash compensation should under no circumstances replace real compensation in the form of land and common property resources.”<sup>157</sup>

Per the U.N. Guiding Principles on Business and Human Rights and the Contracts Principles, governments and concessionaires share responsibility for preventing, mitigating, and remedying human rights violations that arise in the course of contract and MOU negotiation.<sup>158</sup> To avoid such violations before they begin, governments should consider requiring—and companies should implement of their own initiative—“human rights due diligence.”<sup>159</sup>

## ***Recommendations***

- **Empower communities to participate in all stages of negotiations by providing technical and legal support.**

All government officials interviewed agreed that communities need to be better involved in setting up agricultural concessions. According to the Ministry of Agriculture and the National Investment Commission, procedures are already being put into place to require companies to negotiate directly with affected communities prior to signing concession contracts.<sup>160</sup> These procedures should be made public, so affected groups can ensure that they are followed and give feedback on their implementation. Assuming that these procedures were designed with input from a heterogeneous representation of affected communities, they should be followed in all future concession negotiations. Ministry regulations or well-written standard operating procedures would ensure that concessionaires continue to negotiate directly with communities.<sup>161</sup>

FPIC best practices guidelines typically encourage reliance on traditional leadership and community decision-making structures in making agreements with affected communities. However, in some cases community interests are not homogenous and full consensus may not be achievable. Approaching FPIC as a consensus-building process would take this intra-community

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<sup>156</sup> U.N. Basic Principles and Guidelines on Development-Based Evictions and Displacement, ¶ 59, Annex to U.N. Doc. A/HRC/4/18 (Feb. 5, 2007), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/106/28/PDF/G0710628.pdf?OpenElement>.

<sup>157</sup> *Id.* ¶ 60.

<sup>158</sup> For more information on how businesses and governments share responsibilities, see “State and Corporate Human Rights Responsibilities in Business Operations,” *supra* Section II.D.

<sup>159</sup> Guiding Principles, *supra* note 90, Principles 4, 15, 17.

<sup>160</sup> Lowenstein Clinic Interview with Ministry of Agriculture (Aug. 17, 2016); Lowenstein Clinic Interview with National Investment Commission (Aug. 23, 2016).

<sup>161</sup> The government may not choose to rely on companies’ FPIC procedures and thereby abrogate its own responsibilities. Not only does the state have its own obligations to protect communities’ rights, but not all companies operating in Liberia have standardized FPIC procedures of their own. *See, e.g., Respecting Rights? Assessing Oil Palm Companies’ Compliance with FPIC Obligations*, p. 15, FOREST PEOPLES PROGRAMME & SUSTAINABLE DEVELOPMENT INSTITUTE (Dec. 2015), <http://www.forestpeoples.org/sites/fpp/files/publication/2016/02/reportepo.pdf> (concluding that Equatorial Palm Oil does not have an adequate Standard Operating Procedure for securing FPIC).

heterogeneity into account and emphasize the importance of establishing good communication at the start of a negotiation process. Allowing the FPIC process due time may facilitate internal consensus building among communities.<sup>162</sup> In addition, if FPIC is to be meaningful, communities must have information on the nature of the project (its scale, timeline, developers, financing mechanism, governmental support, etc.), the project's impact (area affected, impact assessments, potential risks, benefits to the community, etc.), and the expected protocols for consultation and negotiation (opportunities for community input, participation in impact assessments, complaint mechanisms, etc.).<sup>163</sup>

Simply requiring community consultation is insufficient to guarantee meaningful community participation. Official policies should emphasize that the goal is not just to receive community signatures, but to ensure communities are empowered to meaningfully participate in negotiations.<sup>164</sup> Community empowerment programs can helpfully be divided into two types: technical assistance and legal assistance.<sup>165</sup> Requiring either or both types of assistance would help address power differentials during negotiation.

- **Provide for technical assistance from CSOs in community land documentation, land valuation, and mapping.**

To build the community capacity required for effective participation, CSOs that have appropriate relationships with affected communities should conduct a variety of informative activities with community members so they can assess and understand their lands' monetary value and better negotiate with concessionaires.<sup>166</sup> Faculty and students from relevant academic institutions, such as the University of Liberia College of Agriculture and Forestry and the Louis Arthur Grimes School of Law, may also prove integral to such a program. This program would ideally proceed with high-level oversight by lawyers and technical professionals to ensure uniform implementation. International organizations might assist in drawing up an appropriate framework. Forest Peoples Programme is currently developing informational materials for communities considering seeking concession agreements and assisting these communities with mapping their land<sup>167</sup>; their experience may be informative in developing a systematic approach across the country. Namati also recently co-authored a book that provides case studies and

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<sup>162</sup> See *Respecting Free, Prior and Informed Consent: Practical Guidance for Governments, Companies, NGOs, Indigenous Peoples and Local Communities in Relation to Land Acquisition*, p. 14, U.N. FOOD AND AGRICULTURE ORGANIZATION (2014), <http://www.fao.org/3/a-i3496e.pdf>.

<sup>163</sup> See *Guide to Free Prior and Informed Consent*, OXFAM AUSTRALIA (June 2010), pp. 16-17, [http://www.culturalsurvival.org/sites/default/files/guidetofreepriorinformedconsent\\_0.pdf](http://www.culturalsurvival.org/sites/default/files/guidetofreepriorinformedconsent_0.pdf).

<sup>164</sup> See Sample Concessionaire Recommendations for Community Facilitation, *infra* Appendix B, for recommendations to Golden Veroleum for ensuring meaningful community participation.

<sup>165</sup> The Forest Peoples Programme has similarly recommended that communities must have the benefit of technical and legal advice and called on Golden Veroleum to commit not to enter into agreements with communities that have not had the benefit of such advice. *Hollow Promises*, *supra* note 25, p. 71.

<sup>166</sup> See Community Land Protection Process, *infra* Appendix C.

<sup>167</sup> For a list of projects and reports detailing work on the issue, see *Participatory Resource Mapping*, FOREST PEOPLES PROGRAMME (last visited Mar. 3, 2017), <http://www.forestpeoples.org/topics/environmental-governance/participatory-resource-mapping>.

practical guidance for African practitioners and advocates working on community land and natural resource tenure security.<sup>168</sup>

Three types of technical interventions—land documentation, land valuation, and mapping—are interrelated and have proven helpful in the Liberian context. Community land documentation processes have been an effective means of protecting communities’ customary land claims.<sup>169</sup> Formal recognition of communities’ customary land claims and an informed sense of their land’s value better enables community members to formulate their expectations and demands. Past CSO involvement in community training for land identification, piloted by Namati, Sustainable Development Institute, and the International Development Law Organization, found that periodic and targeted legal education and technical assistance along with direct paralegal support was effective in helping communities document their own land boundaries and in encouraging community-led management of natural resources.<sup>170</sup> Land surveying and valuation thus presents an opportunity for community education and empowerment.

- **Provide legal support for communities involved in negotiations, either from independent counsel or CSOs.**

Just as companies and governments rely on counsel to help articulate and achieve their goals in negotiations, communities should have access to a legal support network during negotiations. In addition to helping clarify community goals and giving legal advice, negotiation support will respond to serious concerns that community agreements have been “signed in a climate of fear and intimidation.”<sup>171</sup>

Legal assistance might be provided by the same CSOs, students, and faculty that provide technical assistance, if the communities wish and the CSOs and university groups are capable of filling such a role. Such legal-technical teams would also be helpful in informing community positions as they enter into negotiations with concessionaires and may provide an infrastructure for cross-community knowledge transfer as well as concrete data and direct recommendations to the government.

Alternately or in addition, providing for the creation of a separate legal aid fund, funded either by companies or donors, would allow communities to access independent legal advice instead of relying on advice provided by companies through pre-filled MOUs or by CSOs with whom they do not have a sustained relationship. This program might look to the Legal Aid

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<sup>168</sup> See PROTECTING COMMUNITY LANDS & RESOURCES IN AFRICA: GRASSROOTS ADVOCATES’ STRATEGIES & LESSONS, NAMATI & NATURAL JUSTICE (2015), <https://namati.org/wp-content/uploads/2016/01/Protecting-Community-Lands-and-Resources-in-Africa-Namati-and-Natural-Justice-LR.pdf>.

<sup>169</sup> See *Protecting Community Lands and Resources: Evidence from Liberia*, *supra* note 109; see also Katelyn Baldwin et al., *Liberia at a Crossroads: The Political Economy of Key Policy and Institutional Reforms in the Land Sector*, Paper Presented at World Bank Conference on Land and Poverty, pp. 26-27 (Mar. 24-27, 2014), <http://www.oicrf.org/pdf.asp?ID=13817> (recommending investment in SDI and USAID’s land demarcation program).

<sup>170</sup> *Protecting Community Lands and Resources: Evidence from Liberia*, *supra* note 109, pp. 13, 19.

<sup>171</sup> *New Snake Oil*, *supra* note 26, p. 18.

Board's paralegal project in Sierra Leone as a model. The Legal Aid Board's project deploys community-based paralegals in order to provide free legal advice.<sup>172</sup>

- **Make community agreements legally binding, either by negotiating leases directly with communities or by incorporating community-related concerns into concession contracts.**

At present, community-specific concerns are addressed, if at all, in MOUs that do not appear to be legally binding. As the Governance Commission reflected in interviews, making MOUs legally enforceable would help hold companies accountable for following through on their agreements with communities.<sup>173</sup> The National Bureau of Concessions has similarly asserted that improved MOU monitoring and enforcement would help to ensure consistency with concession agreements, but explained that since MOUs are private agreements, the National Bureau of Concessions itself could not enforce them.<sup>174</sup>

As a legal matter, existing MOUs are unlikely to be enforceable for two reasons.<sup>175</sup> First, MOU terms are typically vague and uncertain, thereby creating no clear and binding obligations upon companies.<sup>176</sup> Second, as a matter of Liberian contract law, MOUs do not appear to be supported by consideration (a legal requirement that both parties to a contract bring something to exchange at the bargaining table), such that communities may not be able to enforce even specific commitments.<sup>177</sup> Addressing both concerns would vindicate community members' right to a remedy and the principles of FPIC.

The first concern could be addressed through a regulatory or legislative requirement that future agreements with communities meet certain criteria for specificity, including by incorporating details of what the company will do, time horizons for completing aspects of the projects, and quality standards for the final products. These details would clarify the company's responsibilities to the government and to the community and provide a yardstick for measuring the company's performance and addressing noncompliance before it becomes total dereliction. The government has two options to address the second hurdle and achieve a regime where

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<sup>172</sup> For a brief introduction to the Legal Aid Board's paralegal program, see *Community Justice Sierra Leone*, OPEN SOCIETY FOUNDATIONS (2016), <https://www.opensocietyfoundations.org/sites/default/files/community-legal-sierraleone-20160920.pdf>.

<sup>173</sup> Lowenstein Clinic Interview with Governance Commission (Aug. 16, 2016).

<sup>174</sup> Lowenstein Clinic Interview with National Bureau of Concessions (Aug. 18, 2016).

<sup>175</sup> For a list of other publications and interviews concluding MOUs are unenforceable, see sources cited *supra* note 154.

<sup>176</sup> For example, many MOUs promise to give "priority" or "preference" to community members, which cannot be easily disproven in a case for breach of contract. Other MOUs contain generic promises to provide benefits to communities such as schools, clinics, or roads, but do not have specific schedules for the completion of the projects, such that the company may always claim in a suit for breach of contract that performance was imminent.

<sup>177</sup> See The Liberian Commercial Code of 2010, § 4.30(3) ("The drawer or maker of an instrument has a defense [in a suit to enforce a contractual instrument] if the instrument is issued without consideration."). Because MOUs are signed after the contracts are passed into law, the companies may claim that the communities no longer have any legal right to their customary land. Under that framework, provisions in the MOUs might be classified as gifts rather than bargained-for exchanges.

agreements with communities are clear, reliable, and enforceable. These options are described in detail below.

To successfully implement either option, the government will need to make clear that it will act to protect community members' rights. At present, no government agency takes responsibility for enforcing contract violations.<sup>178</sup> According to the terms of some contracts, the government does not appear to have standing to sue on the communities' behalf, and the government has not expressed any intention to do so.<sup>179</sup> In all future agreements, the government should therefore make clear that it intends to support any action brought against concessionaires for breach of contract or MOU terms.

- **Upon passage of legislation recognizing communal title, replace MOUs with legally binding leases, negotiated directly with the communities.**

Once the validity of communal property rights is assured through passage of the Land Rights Act or analogous legislation,<sup>180</sup> future concessions contracts would ideally replace MOUs with leases negotiated directly with communities. These leases would be legally binding and supported by consideration, as they provide land in return for rent and other negotiated benefits. Under this new regime, an investor would enter into a pre-lease agreement with the government declaring its intention to begin negotiations. The investor would then negotiate a lease directly with communities to allow the use of land.

To address company concerns about the costs of decentralized negotiation, the government may facilitate negotiations. Ideally, matters of national importance would be settled through passage of a National Agriculture Law or smaller-scale legislation designed to set minimum standards for contract terms. Until passage of such a law is possible, government officials could have the option of inserting those provisions into leases negotiated between communities and companies, subject to approval by all negotiating parties. In this context, the government might consider building on and widely circulating the Ministry of Justice's list of sample terms to ensure sufficient specificity so as to bind companies to a particular course of action.

All community members involved in such negotiations would need access to the capacity-building programs discussed above in order to represent their own interests.<sup>181</sup> To ensure community participation, the Liberian government could also institute standardized procedures for confirming contract terms with communities and for providing legal review of terms negotiated without government assistance. It might also clarify the safeguards that must be in place before companies are allowed to negotiate lease terms independently with communities.

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<sup>178</sup> See *infra* Section III.D.

<sup>179</sup> See *Recommendations for Future Concession Contract Negotiations Drawn From the Amended Firestone Contract*, p. 4, SAVE MY FUTURE FOUNDATION & GLOBAL WITNESS (Dec. 2008), [https://www.globalwitness.org/sites/default/files/import/amended\\_firestone\\_agreement\\_updated\\_overview.pdf](https://www.globalwitness.org/sites/default/files/import/amended_firestone_agreement_updated_overview.pdf) (“[T]here is no express provision that outlines an intention by the Government to support any claim by an affected group for non-performance of the socio-environmental contractual obligations made in the agreement. Local populations therefore have to rely on the willingness of the Government to take up their cause and sue for the enforcement of the company's commitments.”).

<sup>180</sup> For a more in-depth discussion of community property rights, see *supra* Section III.B.

<sup>181</sup> See *supra* Section III.C.1.

- **Until communal title is recognized, incorporate community concerns into concession contracts to give them legal force.**

Until community title is recognized through passage of the Land Rights Act or analogous legislation, and in other circumstances in which communities have not had the opportunity to have their title recognized, community concerns could be incorporated into concession contracts. According to interviews, procedures currently being put into place require companies to receive FPIC from communities before concession contract negotiations can begin.<sup>182</sup> As such, when communities decide to permit concessions on their land, the terms of their consent could be incorporated directly into concession agreements. In this manner, government officials would be able to review proposed terms for specificity and legal enforceability. Before the concession agreements are finalized, all relevant counsel, CSOs, and community leaders would have authority to review the draft contracts in order to ensure that the community's concerns were accurately represented and responded to.

South Africa's 2002 Minerals and Petroleum Resources Development Act follows a procedure analogous to this, requiring companies to submit a "Social and Labour Plan," committing them to various employment policies and community development projects before they can be granted mining rights.<sup>183</sup> The Social and Labour Plan then becomes legally binding. Breach of the plan can lead to the company's mining right being suspended or cancelled.

- **Perform human rights impact assessments**

At present, the government itself does not necessarily have the information required to enter into and support responsible negotiations because no process exists to inform the government about human rights violations. Although some concession contracts include provisions mandating environmental assessments, such assessments fail in scope and methodology to consider the impact of concessions on a broader set of human rights, including the fundamental social, economic, cultural, civil, and political rights protected under international human rights law.

To better assess the risks that plantations pose to human rights and develop strategies for mitigating these risks, Liberia might consider mandating that human rights impact assessments (HRIAs) be performed for all new plantations and for expansions to existing plantations. HRIAs measure the cumulative impact of a specific intervention on the rights of individuals.<sup>184</sup> HRIAs

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<sup>182</sup> Lowenstein Clinic Interview with National Investment Commission (Aug. 23, 2016); Lowenstein Clinic Interview with Ministry of Agriculture (Aug. 17, 2016).

<sup>183</sup> See Minerals and Petroleum Resources Development Act (2002), <http://www.dmr.gov.za/publications/summary/109-mineral-and-petroleum-resources-development-act-2002/225-mineraland-petroleum-resources-development-actmprda.html>.

<sup>184</sup> *Human Rights Impact Assessments: A Review of the Literature, Differences with Other forms of Assessments and Relevance for Development*, xi, WORLD BANK & NORDIC TRUST FUND, (Feb. 2013) [hereinafter *Human Rights Impact Assessments*], [http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/HRIA\\_Web.pdf](http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/HRIA_Web.pdf).

generally aim to prioritize human rights in policymaking, strengthen accountability, and empower rights holders.<sup>185</sup> Procedurally, HRIAs entail the following phases: preparation, screening, scoping, evidence gathering, consultations, analysis, recommendations, evaluation and monitoring, and preparation of a final report.<sup>186</sup>

The use of HRIAs for investment projects originated in the early 2000s with an assessment commissioned by British Petroleum for a natural gas project in Indonesia.<sup>187</sup> In Liberia, some HRIAs have been performed. For example, in 2016, NomoGaia piloted a methodology for HRIAs, evaluating the risks of Liberia's Equatorial Palm Oil plantation, owned by Malaysia's Kuala Lumpur Kepong Berhad palm oil company.<sup>188</sup> But HRIAs have not yet been widely adopted.

HRIAs can be beneficial for companies as well as governments and communities, allowing companies to integrate risk management measures into their initial practices and avoid later conflict. Companies in various sectors around the world have begun to take advantage of HRIAs for these purposes. For instance, in 2011, a mining company in Southeast Asia performed a HRIA as part of its broader social impact management plan. The company was ultimately able to incorporate risk management and human rights preventive measures into its existing strategies and strengthen internal awareness and partnerships with key stakeholders, such as Amnesty International, Human Rights Watch, and local human rights CSOs.<sup>189</sup> The Canadian mining company Teck Resources has also developed a global HRIA process to ensure human rights due diligence across its sites.<sup>190</sup>

An effective HRIA performed during the concession negotiations process must ensure local participation and transparency.<sup>191</sup> Companies who have performed HRIAs vary in their level of transparency, generally making general findings publically available but not releasing the whole HRIA.<sup>192</sup> Ideally the full HRIA should be made publically accessible. Doing so is important for ensuring accountability, clarifying responsibilities for particular human rights

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<sup>185</sup> *Making the Right Impact? OHCHR/FES Expert Workshop on Evaluating Human Rights Impact Assessments (HRIA) in Trade and Investment Regimes*, 1, 17-18, UN OHCHR & EBERT STIFTUNG (Sept. 2014) [http://www.ohchr.org/Documents/Issues/Globalization/Report\\_HRIA\\_Workshop.pdf](http://www.ohchr.org/Documents/Issues/Globalization/Report_HRIA_Workshop.pdf).

<sup>186</sup> *Human Rights Impact Assessments*, *supra* note 184, p. 22.

<sup>187</sup> Alejandro Gonzalez, *Evaluating the Human Rights Impact of Investment Projects: Background, Best Practices, and Opportunities*, PROJECT ON ORGANIZING, DEVELOPMENT, EDUCATION AND RESEARCH (Dec. 2014), <http://projectpoder.org/wp-content/uploads/2015/01/PODER-HRIA-Best-Practices-Dec-2014.pdf>.

<sup>188</sup> *Human Right Risk Assessment: Equatorial Palm Oil's Palm Bay Plantation*, NOMOGAIA, <http://nomogaia.org/wp-content/uploads///2016/10/EPO-HRRA-Final.pdf>

<sup>189</sup> *Conducting an Effective Human Rights Impact Assessment: Guidelines, Steps, and Examples*, p. 10, BSR (Mar. 2013), [https://www.bsr.org/reports/BSR\\_Human\\_Rights\\_Impact\\_Assessments.pdf](https://www.bsr.org/reports/BSR_Human_Rights_Impact_Assessments.pdf).

<sup>190</sup> *Id.* p. 8.

<sup>191</sup> See *Human Rights Impact Assessments*, *supra* note 184, pp. x-xi; Cathal Doyle & Jill Cariño, *Making Free Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector*, p. 21 (May 2013) [hereinafter *Making Free Prior and Informed Consent a Reality*], <http://www.ecoesuit.com/wp-content/uploads/2014/09/Making-FPIC-a-Reality-Report.pdf> (explaining why local communities must be involved in the impact assessment process).

<sup>192</sup> Lowenstein Clinic Interview with Columbia Center on Sustainable Investment (Dec. 2016).

processes and outcomes, and designing redress mechanisms were violations to occur.<sup>193</sup> Lastly, HRIAs should also address the human rights and public policy concerns related to the specific terms of preexisting concession agreements where the HRIA is being performed for an existing concession that is expanding its operations.<sup>194</sup>

When implementing this recommendation, government officials might first identify an appropriate actor to spearhead the performance of HRIAs. If governmental agencies or companies take the lead, there are risks of political and economic interests unduly influencing the assessment; if CSOs carry out the assessment, the government or companies may not readily cooperate.<sup>195</sup> An independent consultancy or collaborative partnership with relevant stakeholders may ensure appropriate impartiality and independence. HRIA financing also raises concerns about independence. Government agencies may not have the resources to perform HRIAs, but if companies pay for the HRIAs, there may be a risk of undue influence, even if the HRIAs are ultimately performed by an independent consultancy. Thus, were Liberia to choose to mandate HRIAs, funding sources and their impact on impartiality would require careful consideration.

### **C. Community Access to Land Compensation and Social Development Funds**

#### ***Issues to Address***

Agricultural concessions are expected to foster economic development and improve the quality of life in affected communities. For example, at the signing ceremony for the Golden Veroleum concession contract in 2010, President Ellen Johnson Sirleaf declared that the concession would “provide income; create employment; support small farmers in out-growers schemes; provide infrastructure and education; provide management expertise; and allow for development of the land not only for oil palm but for other types of agriculture activity.”<sup>196</sup> Members of Liberian communities near and far from Monrovia proved eager to welcome agricultural concessions for such development benefits.

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<sup>193</sup> *Human Rights Impact Assessments*, *supra* note 184, pp. x-xi.

<sup>194</sup> For example, several Liberian concession contracts contain provisions that allow companies to operate security forces with significant policing powers but no corresponding protections. *See, e.g., Golden Veroleum Liberia, Concession Agreement Between Golden Veroleum Liberia and the Government of the Republic of Liberia* (Sept. 2010), [http://goldenveroleumliberia.com/images/pdf/2014-09-30.2\\_GVL\\_Concession\\_Agreement.pdf](http://goldenveroleumliberia.com/images/pdf/2014-09-30.2_GVL_Concession_Agreement.pdf). An HRIA would ideally highlight and explain the possible concerns with such a system. (While these and other contract terms are particularly vulnerable to human rights abuse, a systematic critique of existing contract provisions is beyond the scope of this project, which focuses not on the contracts themselves but on the regulatory scheme governing contracts. If policymakers are interested in improving contract provisions in future negotiations, existing reports give excellent advice on how to proceed. *See, e.g., Guide to Land Contracts: Agricultural Projects*, *supra* note 3; *IISD Guide to Negotiating Investment Contracts*, *supra* note 4.)

<sup>195</sup> *See Human Rights Impact Assessments*, *supra* note 184, p. 10; *see also Making Free Prior and Informed Consent a Reality*, *supra* note 191, p. 21 (“[T]he widespread government practice of requiring corporations to conduct Environmental and Social Impact Assessments has side-lined the role of the State in ensuring that communities are given ample opportunity to be consulted and fully informed of potential impacts.”).

<sup>196</sup> *Remarks by H.E. President Ellen Johnson Sirleaf at Signing Ceremony and Official Announcement Of Golden Veroleum Liberia US\$1.6 Billion Investment* (Sept. 2, 2010), [http://www.emansion.gov.lr/doc/20100902\\_Remarks\\_by\\_President\\_at\\_Golden\\_Veroleum\\_Event.pdf](http://www.emansion.gov.lr/doc/20100902_Remarks_by_President_at_Golden_Veroleum_Event.pdf).

While communities near concessions have realized some benefits,<sup>197</sup> many of the anticipated benefits have not materialized.<sup>198</sup> This mismatch occurs in part because, as discussed above, communities are not empowered to clearly state their expectations during negotiations and the agreements they sign are not necessarily binding.<sup>199</sup> In addition to the negotiation-related problems, there are concerns that even where benefits programs are included in the contracts, the implementation of those programs has not been properly overseen.

Many communities have not been compensated for lost lands, crops, and resources at a rate they believe is appropriate.<sup>200</sup> In a complaint filed with the Roundtable for Sustainable Palm Oil in 2012, villagers from around Sinoe County declared that Golden Veroleum destroyed crops and farmlands “without adequate compensation.”<sup>201</sup> The compensation scheme, they alleged, was imposed “with threats, intimidation, harassments and sometime illegal detention and arrest[s.]”<sup>202</sup> In interviews, the Environmental Protection Agency and community members near the Sime Darby plantation recalled how some affected communities were told they must settle for the official Ministry of Agriculture rates.<sup>203</sup> But those rates are not made widely available and communities do not know what amount they are entitled to receive.<sup>204</sup>

Even where the official rates are available, communities find the rates inappropriately low.<sup>205</sup> Government rates for crop compensation are calculated based on the value of a single harvest, such that “unless recipients can move to other farmland quickly and plant new crops in

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<sup>197</sup> See, e.g., *Smell-No-Taste*, *supra* note 25, p. 51, (“[Golden Veroleum] has provided funding for the construction of police stations, cleanup efforts in the city of Greenville, and community activities such as sporting events.”); see also *supra* notes 21-22 and accompanying text (describing community benefits from the Firestone plantation).

<sup>198</sup> Lowenstein Clinic Interview with Communities Near Sime Darby (Aug. 20, 2016); see also, e.g., *Everyone Must Eat*, *supra* note 30 (concluding that affected communities near the Sime Darby plantation are more food insecure, have less access to water, and are in more debt to cover food and health expenses than communities not affected by the plantation); Tom Lomax, *Human Rights-Based Analysis of the Agricultural Concession Agreements Between Sime Darby and Golden Veroleum and the Government of Liberia*, p. 29, FOREST PEOPLES PROGRAMME (Dec. 2012) [hereinafter *Human Rights-Based Analysis of Agricultural Concession Agreements*], [http://www.forestpeoples.org/sites/fpp/files/publication/2012/12/liberiacontractanalysisfinaldec2012\\_0.pdf](http://www.forestpeoples.org/sites/fpp/files/publication/2012/12/liberiacontractanalysisfinaldec2012_0.pdf) (in Grand Cape Mount, permanent employees are “outsiders,” while locals are hired only as day laborers); *Smell-No-Taste*, *supra* note 25, pp. 39-42 (describing problems of food scarcity, poor pay, and lack of jobs at the Sime Darby plantation).

<sup>199</sup> For analysis and recommendations addressing these concerns, see *supra* Section III.C.

<sup>200</sup> Lowenstein Clinic Interview with Communities Near Sime Darby (Aug. 20, 2016). See also, e.g., *New Snake Oil*, *supra* note 26, p. 13.

<sup>201</sup> Revised Final Complaint Letter from Alfred Lahai Gbabei Brownell, Green Advocates International, to Salahudin Yaacub, Roundtable on Sustainable Palm Oil, pp. 4-5 (Oct. 1, 2012), <http://www.rspo.org/files/download/0bc46419adb1464>.

<sup>202</sup> *Id.*

<sup>203</sup> Lowenstein Clinic Interview with the Environmental Protection Agency (Aug. 16, 2016) (describing villagers near Sime Darby who were told they must settle for the official Ministry of Agriculture rates, even though they asked for higher rates of compensation.).

<sup>204</sup> Lowenstein Clinic Interview with Communities Near Sime Darby (Aug. 20, 2016).

<sup>205</sup> Lowenstein Clinic Interview with Sustainable Development Institute and Social Entrepreneurs for Sustainable Development, (Aug. 22, 2016) (explaining that civil society organizations like SDI and SESDev have devoted significant effort to educating communities about the value of their land and crops.).

anticipation of the next harvest or find alternate means of income, the payments will not last long enough for them to sustain their livelihoods beyond a very limited period of time.”<sup>206</sup> In 2012, “the compensation rates calculated by the Liberian government . . . [were] lower than the prices for those crops would be in a modern market.”<sup>207</sup>

Some companies find ways to avoid paying even those rates. According to the Forest Peoples Programme, after Sime Darby adjusted its rate upwards in 2011 and 2012, it started enclaving farms—that is, building around them to leave the farms intact but severely curtailing their accessibility—in order to avoid paying compensation.<sup>208</sup> Between 2013 and 2015, Golden Veroleum was “telling community members that it cannot afford to pay the Ministry of Agriculture’s most recent] rates.”<sup>209</sup> For some time now, Golden Veroleum has reportedly stopped paying crop compensation in its operations in southeast Liberia.<sup>210</sup> The company “stat[ed] that compensation for rubber cannot be incorporated into Golden Veroleum’s business model.”<sup>211</sup> Communities quickly come to resent companies that pay them below-market rates, and when rumors surface about other communities receiving greater amounts, tensions may develop.

Relatedly, the affected communities cannot access social benefit funds that are earmarked for their use. As of August 2016, while concessionaires had begun to pay into these funds, no funds for any community development projects had been awarded.<sup>212</sup> Further, neither companies nor government officials clearly understand their obligations with respect to these funds. In 2012, Sime Darby officials were described as being “unsure of whether any payments have even been made at all” to such a fund; “[c]ounty administrators appeared unclear of whether such a fund exists, let alone who is tasked with managing it.”<sup>213</sup> Instead of financing development, these funds risk financing corruption. International organizations and government officials have recognized that, because no clear mandate governs how to spend the money placed in development funds, the funds are ripe for misappropriation.<sup>214</sup>

When interviewed, Sime Darby explained that the problem of managing social development funds was especially complicated due to the difference between community expectations for development and the concessionaire’s own commitments to sustainable development. For instance, a Sime Darby representative explained that the company’s “moratorium on new developments pending trialing of recently developed methodologies to

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<sup>206</sup> *Smell-No-Taste*, *supra* note 25, p. 92.

<sup>207</sup> *Id.* p. 53.

<sup>208</sup> Lowenstein Clinic Interview with the Sustainable Development Institute (Nov. 24, 2016).

<sup>209</sup> *Hollow Promises*, *supra* note 25, pp. 48, 52.

<sup>210</sup> Lowenstein Clinic Interview with the Sustainable Development Institute (Nov. 24, 2016).

<sup>211</sup> *Hollow Promises*, *supra* note 25, p. 67.

<sup>212</sup> Lowenstein Clinic Interview with the Liberian Ministry of Finance and Development Planning (Aug. 16, 2016).

<sup>213</sup> *Smell-No-Taste*, *supra* note 25, pp. 39-40.

<sup>214</sup> *Human Rights-Based Analysis of Agricultural Concession Agreements*, *supra* note 198, p. 30; Lowenstein Clinic Interview with the Governance Commission (Aug. 14, 2016); Lowenstein Clinic Interview with the Ministry of Finance and Development Planning (Aug. 16, 2016); Lowenstein Clinic Interview with the Environmental Protection Agency (Aug. 16, 2016); Lowenstein Clinic Interview with the Consortium on Natural Resources Management (Aug. 18, 2016).

identify and preserve high carbon stock forests” has led to increased tension with communities who expected faster land development and other social benefits.<sup>215</sup>

Government officials and CSOs are aware of these problems and are working to find other systems that can channel the benefits from concessions into communities. As noted above, crop compensation rates have been increased and the government is aware of the need to improve social benefit fund use. The government has also begun investing in outgrower programs as a complementary means to provide livelihoods for farmers in concession areas. Outgrower programs, which are provided for in seven of the existing agricultural concessions agreements, have yet to be implemented on any scale.<sup>216</sup> The National Investment Commission, Ministry of Labor, National Bureau of Concessions,<sup>217</sup> and some NGOs<sup>218</sup> are promoting outgrower programs as a means of translating concessions into local jobs and development. At the time of writing, the Liberian cabinet had approved a new community palm oil outgrower model and awaited community approval. The model is discussed in more detail in the third recommendation below.

### ***Legal Analysis***

Community development programs must vindicate the fundamental rights to development and self-determination, which belong to individuals and communities, not to the government. By ratifying the African Charter on Human and Peoples’ Rights, Liberia has affirmed that all people have the right to “freely dispose of their wealth and natural resources.”<sup>219</sup> As the U.N. Declaration on the Rights of Indigenous Peoples establishes, communities both have a right to improve their economic conditions and “to be actively involved in developing and determining . . . economic and social programmes affecting them. . . .”<sup>220</sup>

In vindicating their rights to development and self-determination, communities need accurate and complete access to information. Legal structures must safeguard other rights, including, for example, access to adequate food and the rights to freedom from discrimination, freedom of association, and freedom of speech. As the Voluntary Guidelines on the Responsible Governance of Tenure of Land Fisheries and Forests emphasize, states must evaluate each potential change in investment to consider “the potential positive and negative impacts that those

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<sup>215</sup> Lowenstein Clinic Interview with Sime Darby (Dec. 9, 2016).

<sup>216</sup> See *Smell-No-Taste*, *supra* note 25, p. 41 (noting that, as of January 2012, “neither the government nor [Sime Darby] has invested in the creation of this program despite a provision in the concession agreement that requires its establishment within three years of the signing date”). Some NGOs have piloted outgrower programs on a small scale. See, e.g., *Liberia Oil Palm Sector-Outgrower Models: Consultative Workshop Summary Report*, SMALLHOLDER ACCELERATION AND REDD+ PROGRAMME & GROW (June 11-12, 2014) [hereinafter *Outgrower Workshop Report*], <http://www.sharp-partnership.org/objects/pdfs/liberia-outgrowers-workshop-report>.

<sup>217</sup> See, e.g., Lowenstein Clinic Interview with National Investment Commission (Aug. 23, 2016); Lowenstein Clinic Interview with the Liberian Ministry of Labor (Aug. 19, 2016).

<sup>218</sup> See, e.g., *Smell-No-Taste*, *supra* note 25, p. 94.

<sup>219</sup> See *Indigenous and Tribal Peoples Convention No. 169*, art. 15(2), INTERNATIONAL LABOUR ORGANIZATION (1989), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169) (requiring that any development projects on indigenous peoples’ lands prioritize the “the improvement of the conditions of life and work and levels of health and education of the peoples concerned”).

<sup>220</sup> U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 127, art. 23.

investments could have on tenure rights, food security and the progressive realization of the right to adequate food, livelihoods and the environment.”<sup>221</sup>

## ***Recommendations***

- **Outline a procedure by which communities are assisted in valuing and receiving appropriate compensation for land and crops.**

Communities should not be offered compensation on a unilateral, take-it-or-leave-it basis. Official procedures for crop and land compensation should be FPIC-compliant, emphasizing that communities are empowered to make their own decisions about the method and amount of compensation they will accept.<sup>222</sup> “Determining new figures should be done in a participatory manner and on a case-by-case basis. Specifically, negotiations of these rates should be conducted during the FPIC process that this paper recommends.”<sup>223</sup> It is not enough for the government to rely on corporate compensation policies to fulfill this requirement, as such policies have been criticized as insufficient.<sup>224</sup>

Because community members likely do not have sufficient experience to value their land and crops on their own, the government should adopt a land valuation tool, which can guide communities toward appropriate and consistent valuation. Liberian CSOs have already begun developing a land valuation tool and are piloting its use in communities around the country.<sup>225</sup> The government should adopt that effort, learn from CSOs about the best practices they have already developed, and make use of a similar tool.<sup>226</sup> Communities attempting to use the land valuation tool and set appropriate compensation rates should have access to the legal and technical support described above.<sup>227</sup>

To minimize friction between communities, the government should encourage adoption of a default procedure for making payment descriptions transparent. While individual names should not be included for security reasons, descriptions of the amount and type of payment distributed should be publicly available.<sup>228</sup>

Until such time as the government is able to put such participatory, FPIC-based procedures into place, steps can be taken to make the existing price information more widely

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<sup>221</sup> *VGGT*, *supra* note 131, p. 22.

<sup>222</sup> *Hollow Promises*, *supra* note 25, p. 35.

<sup>223</sup> *Smell-No-Taste*, *supra* note 25, p. 93.

<sup>224</sup> *Hollow Promises*, *supra* note 25, p.35 (describing problems with Golden Veroleum’s crop compensation standard operating procedures, which does not provide space for communities to propose their own priorities for compensation schemes).

<sup>225</sup> Lowenstein Clinic Interview with Forest Peoples Programme (Oct. 5, 2016); Lowenstein Clinic Interview with Sustainable Development Institute and Social Entrepreneurs for Sustainable Development (Aug. 22, 2016).

<sup>226</sup> SDI and SESDev have developed a land evaluation tool, forthcoming publication.

<sup>227</sup> *See supra* Section III.C.1.

<sup>228</sup> *See* Liberian Forestry Reform Law (2006) [hereinafter Forestry Reform Law] (The procedure could draw upon transparency requirements in § 5.8 of that law requiring holders of forestry contracts to publish the amounts and dates of payments provided pursuant to the contract in a Monrovia newspaper).

available and more accurate. Several government agencies agreed that the prices used need to be updated immediately.<sup>229</sup> Once new values are set, procedures should be put in place to update the price list regularly, in case of changes in the market value of crops.<sup>230</sup> The Ministry of Agriculture should post the updated crop price list on its website.

- **Clarify responsibility for managing, auditing, and distributing corporate social development funds.**

Presently, no clear policy governs how money from social development funds is distributed to communities. This creates opportunities for corruption and impunity. A clear, transparent policy will help ensure the accountability of both investors and governmental actors and may increase community satisfaction. One set of international analysts has provided a detailed recommendation that could govern such a reorganization:

[A] certain portion of revenue should be earmarked for county level development in addition to the [social development funds]. While there are a number of needs that the Liberian government must address in its economic plans, it would be wise to allocate at least 10 percent of revenues from a particular concession for supervised county level development, preferably through the [social development funds] management system and with the same 20 percent clause for affected communities.

All [social development funds] should be audited annually by the General Auditing Commission (GAC) and projects selected by the [County Advisory Committees] should be announced publicly on the radio repeatedly. If the GAC does not have the capacity or funding to audit the fund's operations, a small percentage of the yearly contribution could be allocated to hiring an auditor in the GAC whose primary purpose would be the public auditing of the fund and its use. Construction contracts should only be granted to companies that are licensed by the Ministry of Commerce, and strict conflict-of-interest provisions that include prohibitions on allowing family members of [Project Implementation Unit] or [County Advisory Committee] representatives to be involved in project implementation.<sup>231</sup> Any malpractice related to the [social development funds] should be swiftly referred to the Ministry of Justice for immediate investigation and – if warranted – prosecution.<sup>232</sup>

Government officials have already urged adoption of plans like this one. Environmental Protection Agency officials acknowledged the lack of accountability in the management of these

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<sup>229</sup> Lowenstein Clinic Interview with the Environmental Protection Agency (Aug. 16, 2016).

<sup>230</sup> For example, the Forestry Reform Law, *supra* note 228, § 14.2(c)(iv) requires the managing authority to “[k]eep the public informed about the fees by publishing and making readily available a single schedule of all forest-related fees, in plain language, and updating that schedule promptly after any change to the fees.” Similar requirements would be helpful in the agricultural sector.

<sup>231</sup> See Amended PPCA, *supra* note 39 (regulating public procurement and concessions and stipulating corresponding methods).

<sup>232</sup> *Smell-No-Taste*, *supra* note 25, p. 98.

funds and similarly suggested that portions of the money should be earmarked to go directly to counties and communities.<sup>233</sup>

Even where revenue is properly earmarked, the funds in social development funds may be lost to elite capture, misuse, and theft, minimizing potential social benefits for ordinary citizens. Accordingly, those implicated in misuse of theft must be held accountable. The Governance Commission affirmed these concerns about mismanagement, acknowledging that the government should do more to recommend prosecutions where necessary.<sup>234</sup>

Thus, when clarifying which actors are ultimately responsible for managing social development funds, the government should work to ensure that communities are able to take advantage of such funds. One way to increase the social benefits reaped by local communities might be to make the amount in corporate social development funds more transparent. For instance, government officials could update the amount of available funds at least annually on the agency website, accounting at that time for any changes in the balances of the funds.<sup>235</sup> Government officials could also distribute paper announcements multiple times per year, describing both the available funding and possible development projects that communities can choose and shape.

- **Provide legal protections and equality of access where outgrower programs are implemented.**

While outgrower schemes may provide increased development benefits, they come with a number of risks. First, programs may formalize uneven bargaining positions between smallholder farmers and concessions holders. Unrealistic expectations imposed by concessions holders on farmers can result in relationships that intensify rather than remediate situations of poverty. Second, outgrower schemes may embed socioeconomic inequalities within communities by establishing access to employment for some community members and not others; this may especially risk marginalizing women and youth.<sup>236</sup> Finally, outgrower programs may negatively affect the entire community if they result in more community land being taken. Many existing outgrower provisions in contracts state that the government will provide more land for outgrower use without clarifying where this land will come from. In addition, the government faces the challenge of procuring the funding required to pilot and launch models of outgrower schemes.<sup>237</sup>

The Food and Agriculture Organization, the International Institute for the Unification of Private Law, and the International Fund for Agricultural Development have developed a Legal Guide on Contract Farming that may guide Liberia's own framework.<sup>238</sup>

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<sup>233</sup> Lowenstein Clinic Interview with the Environmental Protection Agency (Aug. 16, 2016).

<sup>234</sup> Lowenstein Clinic Interview with the Governance Commission (Aug. 16, 2016).

<sup>235</sup> Liberia's existing community forestry law similarly requires "transparent and accountable" management of community forest funds, with periodic external audits. Community Rights Law of 2009, *supra* note 38, § 4.3.

<sup>236</sup> See, e.g., Lisa Paglietti & Roble Sabrie, *Outgrower Schemes: Advantages of Different Models for Sustainable Crop Intensification: Ghana Case Studies*, p. 10, U.N. FOOD AND AGRICULTURE ORGANIZATION (Mar. 2012), <http://www.fao.org/3/a-at673e.pdf>.

<sup>237</sup> *Outgrower Workshop Report*, *supra* note 216.

<sup>238</sup> *Legal Guide on Contract Farming*, U.N. FOOD AND AGRICULTURE ORGANIZATION (2015), <http://www.unidroit.org/work-in-progress-studies/current-studies/contract-farming - Partner>.

In determining what outgrower models would best suit the Liberian context, the government may benefit from consultations with organizations like Smallholder Acceleration and Redd Programme and GROW.<sup>239</sup> A GROW pilot model was recently approved by the government and will likely help shape future guidelines for outgrower schemes. The pilot model places great emphasis on collective community ownership through the creation of town “community producer organizations.” The pilot model has also established a Steering Committee, which will include community representatives when fully operational<sup>240</sup> and presents an opportunity to include commonly marginalized populations like women and youths.<sup>241</sup>

Despite its innovative features, the adopted scheme may have weaknesses. For instance, GROW’s model does not require an HRIA but might benefit from its incorporation.<sup>242</sup> As such, stakeholders should regularly monitor the pilot model, revise the guidelines, and document lessons learned for future initiatives. In addition to experimenting with and learning from the pilot model, government officials might also consider developing a more robust legal framework for regulating outgrower programs and ensuring legal safeguards are in place to protect the interests of communities. Business information centers at the municipal level may also provide a useful resource for guiding farmers through the administrative processes, for disseminating information to outgrowers, and for collecting complaints and recommendations from communities.<sup>243</sup>

## **D. Contract Monitoring and Enforcement**

### ***Issue to Address***

There are widespread concerns in both the Liberian government and civil society that compliance with contract terms, domestic law, and human rights law is not properly monitored or enforced. At present, no one agency has ultimate responsibility for enforcing the terms of agricultural concessions. The National Investment Commission is responsible for attracting investment and negotiating terms, but its involvement is minimal after the contract is signed. The National Investment Commission described monitoring and enforcement as the National Bureau of Concessions’ responsibility.<sup>244</sup> The National Bureau of Concessions is responsible for monitoring but lacks the power to enforce terms, pointing to the Ministry of Justice as the enforcement agency.<sup>245</sup> Meanwhile, the Ministry of Justice described its role as primarily focused on the negotiating process and any risk of arbitration, noting that the monitoring and

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<sup>239</sup> *Outgrower Workshop Report*, *supra* note 216, p. 2.

<sup>240</sup> Lowenstein Clinic Interview with the Sustainable Development Institute (Nov. 24, 2016).

<sup>241</sup> *GROW Liberia – Community Oil Palm Outgrower Scheme: Operational Plan*, p. 15, GREENSTAR RESOURCES LTD. & LTS INTERNATIONAL (July 2016).

<sup>242</sup> *Id.* p. 9.

<sup>243</sup> Siobhan Kelly, *Smallholder Business Models for Agribusiness-led Development: Good Practice and Policy Guidance*, p. 4, U.N. FOOD AND AGRICULTURE ORGANIZATION (2012), <http://www.fao.org/docrep/015/md923e/md923e00.pdf>.

<sup>244</sup> Lowenstein Clinic Interview with the National Investment Commission (Aug. 23, 2016).

<sup>245</sup> Lowenstein Clinic Interview with the National Bureau of Concessions (Aug. 18, 2016).

enforcement duties of the National Bureau of Concessions were unclear.<sup>246</sup> The Ministry of Agriculture receives complaints but does not claim a general role in enforcing contracts. The Ministry of Agriculture reported that it might bring the Ministry of Internal Affairs, National Investment Commission, Ministry of Finance and Development Planning, or National Bureau of Concessions into its complaint resolution efforts.<sup>247</sup> The President's office and the Inter-Ministerial Concessions Committee have enforcement powers but cannot engage in day-to-day enforcement. The Inter-Ministerial Concessions Committee is convened only intermittently and in response to particular identified concerns; it is not designed to engage in systematic, long-term enforcement. A few agencies claim responsibility for enforcing a narrow slice of provisions related to their mandate—for example, the Environmental Protection Agency over environmental problems, and the Ministry of Labor over treatment of workers—but disclaim responsibility for other provisions.<sup>248</sup>

Nor do concessionaires themselves necessarily know which government agencies or independent bodies are responsible for monitoring and enforcement. For instance, Sime Darby's concession agreement includes terms requiring the establishment of a Coordination Committee for the monitoring and enforcement of the contract's terms, but this committee has yet to be established.<sup>249</sup> For now, the main avenues used by Sime Darby to monitor their agreement are direct engagements with the President, Vice President, Ministry of Agriculture, MoF, Ministry of Internal Affairs, and the Chief of the National Bureau of Concessions.<sup>250</sup> This multitude of interactions exacerbates the confusion regarding governmental responsibilities with regard to enforcement. Sime Darby mentioned that the formation of the Sustainable Partnership Initiative could provide a platform for open and transparent discussions between communities and other stakeholders, but also recognized that the quality of such engagement could vary and its results were unpredictable.<sup>251</sup>

Geographic distance further complicates efforts to monitor and enforce concession contracts. The main agencies currently involved in monitoring and enforcement are based in Monrovia. From Monrovia, these agencies dispatch teams of personnel to visit affected communities across the country. According to the National Bureau of Concessions, resource and capacity constraints limit the frequency of such visits. For instance, the National Bureau of Concessions has a team of 30 people based in Monrovia, only some of whom have the capacity to conduct sporadic site visits.<sup>252</sup> The Environmental Protection Agency similarly faces logistical constraints in monitoring concessions for environmental compliance.<sup>253</sup> The lack of local agency offices makes it difficult to effectively and regularly monitor and evaluate the state of

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<sup>246</sup> Lowenstein Clinic Interview with the Ministry of Justice (Aug. 17, 2016).

<sup>247</sup> Lowenstein Clinic Interview with the Ministry of Agriculture (Aug. 17, 2016).

<sup>248</sup> Lowenstein Clinic Interview with Ministry of Labor (Aug. 19, 2016); Lowenstein Clinic Interview with the Environmental Protection Agency (Aug. 16, 2016).

<sup>249</sup> Lowenstein Clinic Interview with Sime Darby (Dec. 9, 2016).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> Lowenstein Clinic Interview with the National Bureau of Concessions (Aug. 18, 2016).

<sup>253</sup> Lowenstein Clinic Interview with the Environmental Protection Agency (Aug. 16, 2016).

concessions, which in turn diminishes the prospects for enforcement of concession contracts and MOUs.

Community complaints are often the main means of bringing compliance issues to the government's attention, but no single ministry is responsible for hearing or responding to those complaints. At present, community members' direct complaints to different entities, without a clear understanding of who is responsible for receiving, processing, or responding to complaints. For instance, community members described reporting complaints to or meeting with the local land commissioner's office, company's central office, local commissioner, district commissioner, paramount chief, Ministry of Agriculture, Ministry of Internal Affairs, National Bureau of Concessions, Land & Mines, Ministry of Education, and World Bank.<sup>254</sup> The dispersal of complaints across different ministries makes it difficult for the government to be fully aware of the exact complaints raised and the extent to which complaints are shared across communities. No one is accountable for responding to complaints, and complaints go unresolved. The government seems distant and out of touch to communities when they cannot reach a responsive government official through a clear, accessible procedure. Community members' voices risk going unheard until conflicts arise.<sup>255</sup>

### ***Legal Analysis***

In *Endorois*, the African Commission stressed that the state “should ensure mutually acceptable benefit sharing” in the development process.<sup>256</sup> Fulfilling this responsibility requires both negotiating contracts with appropriate benefit sharing provisions and monitoring and enforcing the terms of those contracts so that benefit sharing actually occurs. States' legal obligations to monitor and enforce contracts are closely tied to their duties to provide access to remedies for human rights violations. Victims of human rights violations have an internationally recognized right to an effective remedy,<sup>257</sup> which applies with particular force when indigenous or tribal groups are deprived of their land or natural resources.<sup>258</sup> The state responsibility to provide access to remedies applies even when the state did not itself cause the violation.<sup>259</sup>

Under the U.N. Guiding Principles on Business and Human Rights, companies also have a duty to respect the right to remedy throughout their operations. In addition to recommending the provision of restitution and compensation to affected communities, the Guiding Principles

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<sup>254</sup> Lowenstein Clinic Interviews with Communities Near Sime Darby (Aug. 20, 2016).

<sup>255</sup> For descriptions of such conflicts, see *supra* notes 33-36 and accompanying text. Multiple ministries and NGOs interviewed by the Lowenstein Clinic raised fears of renewed conflicts if concessions were not monitored or community complaints addressed appropriately. Reporting on Liberia in 2009, the International Crisis Group noted the tendency for land disputes to “escalate over time toward large-scale clashes” if not resolved. *Liberia: Uneven Progress in Security Sector Reform*, p. 8, (Jan. 13, 2009), [http://www.observatori.org/paises/pais\\_67/documentos/148\\_liberia\\_uneven\\_progress\\_in\\_security\\_sector\\_reform.pdf](http://www.observatori.org/paises/pais_67/documentos/148_liberia_uneven_progress_in_security_sector_reform.pdf).

<sup>256</sup> *Endorois*, *supra* note 63, ¶ 296 (emphasis added).

<sup>257</sup> Universal Declaration on Human Rights (1948), art. 8, [http://www.un.org/en/udhrbook/pdf/udhr\\_booklet\\_en\\_web.pdf](http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf); ICCPR, *supra* note 79, art. 2(3).

<sup>258</sup> U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 127, art. 28; *Indigenous and Tribal Peoples Convention No. 169*, *supra* note 219, art. 15(2).

<sup>259</sup> Guiding Principles, *supra* note 90, Principle 25.

also call for redress in the form of apologies, rehabilitation, financial compensation, punitive sanctions, injunctions to prevent harm, and guarantees of non-repetition.<sup>260</sup>

States that do not have systems in place for monitoring and investigating possible violations risk being unable to provide adequate remedies for human rights violations. The existence of a judiciary alone does not satisfy the responsibility to provide access to a remedy, especially when, as in Liberia, communities are unlikely to file claims in court due to a distrust of the legal system.<sup>261</sup> The African Charter specifically requires that, in addition to guaranteeing the independence of courts, states “shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed” in the Charter.<sup>262</sup> As the African Commission recognized in *Endorois*, state remedial systems must be empowered to provide restitution or compensation adequate to the harm suffered, such as monetary compensation or new land grants.<sup>263</sup> Vindicating the right to a remedy and enforcing contract terms requires both judicial and non-judicial redress mechanisms that are legitimate, accessible, predictable, equitable, transparent, and rights-compatible.<sup>264</sup>

### ***Recommendations***

- **Clarify ministry responsibilities with regard to contract monitoring and enforcement.**

In interviews, multiple government agencies identified the lack of clarity with regard to monitoring and enforcement responsibilities as thwarting efforts to monitor and enforce concession agreements effectively. Other independent analyses of Liberian concession regulation have also identified the need to clarify and centralize enforcement. For instance, the Natural Resource Governance Initiative (then the Revenue Watch Institute) recommended in 2009 that Liberia might consider “centraliz[ing] all technical resources to support and monitor its concession activity into a single institution” as a step towards “growing a culture of transparency and accountability in Liberia’s concession sector.”<sup>265</sup> Similarly, in its analysis of Golden Veroleum, Global Witness noted a vacuum in regulating and managing concessions after they are granted.<sup>266</sup>

While many different ministries may be involved in contract enforcement, the Liberian government should consider designating one ministry, such as the Ministry of Agriculture,

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<sup>260</sup> *Id.* Principle 25 commentary.

<sup>261</sup> For instance, LEITI expressed concerns about the ability of the legal system, still recovering from the war, to settle contract disputes and give meaningful remedies. Lowenstein Clinic Interview with LEITI (Aug. 17, 2016).

<sup>262</sup> African Charter, *supra* note 62, art. 26.

<sup>263</sup> *Endorois*, *supra* note 63, ¶ 297.

<sup>264</sup> Guiding Principles, *supra* note 90, Principle 31. The accessibility requirement is particularly relevant in the Liberian context where barriers to access may include lack of awareness of a complaint mechanism, language and literacy, financial costs, remote physical location, and fears of reprisal.

<sup>265</sup> Raja Kaul et al., *Getting a Better Deal from the Extractive Sector*, p. 78, REVENUE WATCH INSTITUTE (2009), <http://www.resourcegovernance.org/sites/default/files/documents/rwi-getting-a-better-deal-final0226.pdf>. Revenue Watch also noted that Liberia had a centralized program like this in the 1970s, housed in the Ministry of Finance. *Id.*

<sup>266</sup> *New Snake Oil*, *supra* note 26, p. 12.

National Bureau of Concessions, or Land Authority, to shoulder the ultimate responsibility to ensure that contract provisions, as well as the relevant domestic and international provisions that govern those contracts, are enforced. Alternatively, the Liberian government could consider convening a small, independent panel outside of any one ministry to shoulder ultimate responsibility for coordinating enforcement, which might have the benefit of gaining greater efficiency from a streamlined structure and gaining greater legitimacy from its independent status. Creating a clear structure of responsibility would foster transparent, reliable, and accountable resolutions of concerns.

The government could also allocate enforcement responsibilities explicitly on a contract-by-contract basis. For instance, when the government signs a new concession agreement, it could work with its lawyers to develop a monitoring and compliance checklist that explains which agency is responsible for particular tasks. To develop consistency across all concessions, it would be useful for the government to review existing contracts before signing new ones, in order to design similar plans for monitoring and enforcement.

Both government agencies and CSOs have emphasized the importance of involving all relevant ministries in contract enforcement actions, both to gain the value of their expertise and to respect the existing power structure in the government.<sup>267</sup> To balance concerns of inclusivity and accountability, the government may wish to envision the ministry or independent panel described above as the primary coordinator responsible for receiving complaints, convening meetings, and scheduling and coordinating all delegations to plantations. While that ministry or panel would not act unilaterally, both community members and CSOs would know which ministry could be held responsible and coordinated with in case of non-response to a contract enforcement complaint. Further, the coordinating body may have to delegate enforcement authority on specific issues such as environmental protection, labor law, or taxation, which are more closely related to the mandates of other government ministries.

When establishing or designating the coordinating body, government officials may want establish guidelines for processing complaints from communities, concessionaires, and other government ministries. The enforcement body may choose to standardize the responses to be triggered by specific categories of complaints. For example, the central agency might be required to convene a meeting of the Inter-Ministerial Concessions Committee, to schedule an immediate delegation to visit the affected plantation, or to notify the offending party that it is in breach of a particular contract term or domestic law. The guidelines should also consider personnel and resource constraints. For monitoring and enforcement to actually occur, the government should ensure that coordinating ministries and panels have the resources necessary to follow through on their responsibilities. The guidelines could also include consideration of the penalties within the body's powers impose. For instance, if upon notification, the offending party does not bring its conduct into compliance with the contract term or the relevant provision of domestic or international law, the enforcement agency should be able to, at a minimum, refer the matter for litigation. It might also be empowered to assess fines or to threaten harsher sanctions.

While, as noted above, some details may be worked out on a concession-by-concession basis, the complexity of instituting this monitoring system and coordinating responsibilities amongst a coordinator and multiple other ministries means that this recommendation would

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<sup>267</sup> Lowenstein Clinic Interview with Sustainable Development Institute and Social Entrepreneurs for Sustainable Development (Aug. 22, 2016); Lowenstein Clinic Interview with National Bureau of Concessions (Aug. 18, 2016); Lowenstein Clinic Interview with Governance Commission (Aug. 16, 2016).

likely benefit from being placed in a law. The law should mandate certain procedures and ensure that special privileges and exemptions that would remove its usefulness are not granted to investors.

- **Improve access to monitoring bodies by establishing local offices or enhancing field capacity.**

As a part of its overall move towards decentralization, the Liberian government could consider establishing local ministry offices to monitor concessions. This recommendation is closely aligned with the Liberian National Decentralization and Local Development Program, which drew on the Interim Poverty Reduction Strategy of 2006 in reiterating the government's commitment to "empowering and engaging communities, especially the poor and vulnerable within those in the reconstruction process, in local governance and in addressing the root causes of poverty." The aim of the Program is to "build trust between the government and the governed."<sup>268</sup> Empowering local offices will advance decentralization, address the National Bureau of Concessions's concerns about the logistical difficulties of monitoring from Monrovia, and draw on the good practices of the Forest Development Authority's existing arrangement of regional and sub-regional offices.<sup>269</sup>

Significant international and comparative practice supports decentralizing monitoring functions. Various studies have documented the more efficient and equitable results of decentralization, particularly in terms of consequent downward accountability.<sup>270</sup> In Bolivia, Cambodia, Guatemala, Uganda, and other country settings, decentralization has involved the re-allocation of authority from the federal government to local branches of the central government, the devolution of rights and responsibilities to elected local governments with full autonomy, and innovations in the form of privatization or public-private partnerships.<sup>271</sup>

Liberia could take different approaches to the decentralization of contract monitoring. Agencies with key monitoring authority included in their mandates could expand their field capacity to enable regular monitoring trips to all concession areas. Ministries might establish local offices in each county, or existing county officials might take on expanded monitoring authority. When interviewed, the National Bureau of Concessions suggested that it might be effective to base one of their representatives in the newly decentralized Ministry of Internal Affairs offices to monitor compliance on the ground.<sup>272</sup> Importantly, the presence of monitoring

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<sup>268</sup> *Liberian National Decentralization and Local Development Program*, pp. 6-7, U.N. CAPITAL DEVELOPMENT, GOVERNMENT OF LIBERIA & U.N. DEVELOPMENT PROGRAMME (2007), [http://www.uncdf.org/sites/default/files/Documents/ldld\\_58379\\_prodoc\\_0.pdf](http://www.uncdf.org/sites/default/files/Documents/ldld_58379_prodoc_0.pdf).

<sup>269</sup> The Forestry Development Authority uses regional and subregional offices to monitor logging company compliance. Lowenstein Clinic Interview with the Forestry Development Authority (Aug. 18, 2016).

<sup>270</sup> Iben Nathan & Tove E. Boon, *Constraints and Options in Local Forest Management in Cambodia: Is Decentralization a Solution?*, p. 399, vol. 31, JOURNAL OF SUSTAINABLE FORESTRY (2012).

<sup>271</sup> Krister P. Andersson et al., *Unpacking Decentralization: A Case Study of Uganda's Forestry Reforms*, pp. 5-6, SANREM CRSP Annual Meeting (2008), [http://www.colorado.edu/ibs/cgnr/andersson/papers/SANREM\\_Decentralization\\_submission\\_to\\_CAPRI\\_WP.pdf](http://www.colorado.edu/ibs/cgnr/andersson/papers/SANREM_Decentralization_submission_to_CAPRI_WP.pdf).

<sup>272</sup> Lowenstein Clinic Interview with National Bureau of Concessions (Aug. 18, 2016).

bodies should be distributed across all areas affected by concessions contracts and not just those proximate to urban centers.

To ensure consistency across regional offices, the central government may develop monitoring principles and guidelines and provide oversight through periodic visits and audits.<sup>273</sup> CSOs with strong monitoring capability might be a resource for training and reinforcement in pilot programs. In unrolling such a monitoring process, the relevant ministry must prioritize independence and taking affirmative steps to prevent industry capture of local officers, ensuring that local officers see their role as protecting the government's interest in concessionaires' legal compliance rather than protecting the concessionaires' interests.<sup>274</sup>

- **Create an administrative complaint mechanism**

To resolve community conflicts with companies more efficiently, the government could create an administrative complaint mechanism, either within a specific ministry or as a small independent panel, which might be perceived as more impartial by parties. While many different agencies and actors would doubtless continue to receive complaints, all complaints, except those filed in court, could be referred to this centralized mechanism. The goal would be to create a national complaint mechanism that would be legitimate, accessible, predictable, equitable, and transparent, as required by the U.N. Guiding Principles on Business and Human Rights.<sup>275</sup> To avoid discouraging use of the judicial system, any administrative complaint mechanism should not supplant judicial review: community members should have the choice of filing a complaint in court or through the administrative process, with a right of appeal to the courts after exhausting administrative procedures.

The current dispersal of complaints across different agencies impedes regulators' awareness of the nature of complaints raised and the extent to which those complaints are shared across communities, preventing the government from effectively mining the information contained in the complaints to determine if larger scale policy changes are necessary. Similarly, without centralized procedures, complaint processing is inefficient. Because there is no clear chain of responsibility for handling complaints, no one is accountable for responding to complaints and complaints may go unresolved. A centralized complaint mechanism might help to address these shortcomings.

Other countries offer examples of analogous national administrative complaint mechanisms, although none focus specifically on agricultural concession-related disputes. Kenya's National Commission on Human Rights actively processes complaints received by mail, email, phone, or in person. From 2013 to 2014, the Commission received 1,797 complaints, and resolved 221 with redress and 1,308 through the provision of legal advice and referrals to partner organizations.<sup>276</sup> India's online Centralized Public Grievance Redress and Monitoring System, which is considered central to many campaign promises for good governance, has successfully

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<sup>273</sup> See Division of Authority Table, *infra* Appendix D.

<sup>274</sup> See *New Snake Oil*, *supra* note 26, pp. 12, 16 (describing violence in Butaw).

<sup>275</sup> Guiding Principles, *supra* note 90 Principle 31.

<sup>276</sup> *11th Annual Report: 2013/2014*, p. 21, KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (2014), [http://www.knchr.org/Portals/0/AnnualReports/KNCHR\\_Annual\\_Report\\_2013-2014.pdf](http://www.knchr.org/Portals/0/AnnualReports/KNCHR_Annual_Report_2013-2014.pdf).

consolidated an incredible number of complaints, but struggled with timely processing.<sup>277</sup> Cambodia's cadastral commissions focus specifically on land disputes and "provide a timely, inexpensive and less adversarial means of resolving cases."<sup>278</sup> The commissions offer two levels of appeal and as of 2013, they processed approximately 5,000 cases and solved more than 2,500, of which nearly 400 involved "several parties ... embroiled in a conflict, oftentimes a large group of villagers against a locally powerful person."<sup>279</sup> However, they were criticized for alleged bribery and for failing to resolve disputes in a timely manner.<sup>280</sup>

Learning from such comparative practices, it is clear that a new complaint mechanism in Liberia would need to be easily accessible to community members and their representatives. It should strive for prompt, thorough, transparent, and accountable investigations and resolutions of complaints. To enable transparency and public accountability, the government might consider posting all complaints in a database on the agency's website, along with updates about the status of each complaint, unless the complainant does not consent to its posting. The government might also wish to advertise the availability of the complaint mechanism through online campaigns, as well as direct engagement with communities.

The mechanism must be able to provide meaningful remedies. Ideally, the remedy would address the wrongdoing directly, for example by giving compensation to individuals who did not receive what they were owed and levying fines on misbehaving companies. Financial compensation might be feasible through the creation of a complaint settlement fund comprised of funds earmarked from companies and/or international donors. Where the complaint addresses the behavior of the company, for instance its failure to meet promises to the community or environmental or labor violations, concession contracts may limit or eliminate the availability of effective remedies. In these cases, at a minimum, the process should result in documentation of the validity of the complaint, facilitated meetings between the complaining parties and the concessionaire, and government request that the company address the problem. If the complaints are serious, the government should consider bringing other enforcement powers to bear, referring the case for prosecution, or convening the Inter-Ministerial Concessions Committee to address renegotiation or other next steps.

## **E. Renegotiating and Addressing Retroactive Reforms**

### ***Issues to Address***

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<sup>277</sup> *Prime Minister's Office Gets Over 61,000 Public Grievances Every Month*, NDTV (May 11, 2016), <http://www.ndtv.com/india-news/prime-ministers-office-gets-over-61-000-public-grievances-every-month-1405209>; Aman Sharma, *States Turn a Blind Eye to Citizen's Complaints: Nearly 1.2 Lakh Grievances Remain Unattended*, INDIA TIMES (May 29, 2015), [http://articles.economictimes.indiatimes.com/2015-05-19/news/62368879\\_1\\_public-grievances-monitoring-system-citizen](http://articles.economictimes.indiatimes.com/2015-05-19/news/62368879_1_public-grievances-monitoring-system-citizen).

<sup>278</sup> *The Failure of Land Dispute Resolution Mechanisms*, p. 3, CAMBODIAN CENTER FOR HUMAN RIGHTS (July 2014), [http://www.cchrcambodia.org/admin/media/analysis/analysis/english/2014\\_07\\_28\\_CCHR\\_Briefing\\_Note\\_The\\_Failure\\_of\\_Land\\_Dispute\\_Resolution\\_Mechanisms\\_\(ENG\).pdf](http://www.cchrcambodia.org/admin/media/analysis/analysis/english/2014_07_28_CCHR_Briefing_Note_The_Failure_of_Land_Dispute_Resolution_Mechanisms_(ENG).pdf).

<sup>279</sup> *Land Rights Programme*, p. 2, GERMAN FEDERAL MINISTRY FOR ECONOMIC COOPERATION AND DEVELOPMENT (Sept. 2013), <http://giz-cambodia.com/wordpress/wp-content/uploads/FactSheet-Land-Rights-final-09.01.pdf>.

<sup>280</sup> *The Failure of Land Dispute Resolution Mechanisms*, *supra* note 278, p. 7.

As of 2013, the date of the most recent audit of concession contracts currently in effect in Liberia, all agricultural concession agreements fell short of Liberia's obligations under national and international law.<sup>281</sup> Many of the concessions have violated affected communities' rights to property and self-determination, among other rights. Unfortunately, these existing contracts will not expire for decades. Accordingly, government actors, communities, and CSOs are concerned that any reforms to concessions law and policies will prove inadequate because they will not address the unfairness embodied in and conflict generated by existing contracts.

Many communities and CSOs believe that renegotiation might be an avenue to address those existing issues. One community expressed the desire to renegotiate the terms of the concession agreement affecting them. If they had sufficient bargaining power, they said they would even try to litigate the issue in domestic court.<sup>282</sup> The Liberia Extractive Industries Transparency Initiative supported renegotiation efforts that brought affected communities to the table.<sup>283</sup> One international organization, the Forest People's Programme, took a more rigid stance: because the current concession contracts are unlawful under domestic and international law, as well as the Roundtable for Sustainable Palm Oil's guidelines, the contracts must be renegotiated so that communities, rather than the government, are formally recognized as the lessors of their land.<sup>284</sup>

For the government, remedying defects of existing contracts poses a challenge. A number of contracts contain stabilization clauses, which either state that subsequent changes to domestic law cannot alter the contracts' terms or that investors are required to comply with new laws but the host state must compensate them for any losses incurred in doing so.<sup>285</sup> Even if the Liberian courts were to deem stabilization clauses invalid, numerous international investment arbitration tribunals have adopted a different view, upholding and enforcing such clauses.<sup>286</sup> Therefore, new legislation does not necessarily offer a solution to existing contract deficiencies. Furthermore, because many contracts specify international arbitration, a lengthy and extremely expensive process, as the sole dispute resolution mechanism, there are barriers to the government's initiative and action.

Despite these difficulties, several governmental actors believe renegotiation attempts may prove fruitful. The Law Reform Commission expressed the need for a new dispute resolution mechanism that would allow for the renegotiation of concession agreements.<sup>287</sup> The National Investment Commission highlighted the role of contract renegotiations going forward.<sup>288</sup> The

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<sup>281</sup> LEITI's audit found that only six of 68 concession agreements in Liberia complied with the Public Procurement and Concessions Act and other domestic regulations; none of the six compliant contracts were in the agricultural sector. *See* LEITI Audit, *supra* note 24, p. 100.

<sup>282</sup> Lowenstein Clinic Interview with Communities Near Sime Darby (Aug. 20, 2016).

<sup>283</sup> Lowenstein Clinic Interview with LEITI (Aug. 17, 2016).

<sup>284</sup> Lowenstein Clinic Interview with Forest People's Programme (Oct. 5, 2016).

<sup>285</sup> Kaitlin Y. Cordes, et al., *Land Deal Dilemmas: Grievances, Human Rights, and Investor Protections*, p. 17, COLUMBIA CENTER ON SUSTAINABLE INVESTMENT INTERVIEW (Mar. 2016), <http://ccsi.columbia.edu/2016/03/10/land-deal-dilemmas-grievances-human-rights-and-investor-protections/>.

<sup>286</sup> *Id.* p. 17.

<sup>287</sup> Lowenstein Clinic Interview with Law Reform Commission (Aug. 16, 2016).

<sup>288</sup> Lowenstein Clinic Interview with National Investment Commission (Aug. 23, 2016).

Ministry of Agriculture stated that attempts by concessionaires to expand their operations may offer unique opportunities to renegotiate and settle issues related to existing agreements, ideally in accordance with international principles.<sup>289</sup>

The Ministry of Justice, while recognizing the limitations of renegotiations, acknowledged the role that governmental transitions may play in ushering in new waves of renegotiations.<sup>290</sup> Indeed, the largest groundswell of concession renegotiations in Liberia took place in the last presidential transition. After President Sirleaf took office, the government initiated a number of concession renegotiations, including with the companies Firestone and ArcelorMittal (which underwent 40 and 30 amendments respectively).<sup>291</sup> Those renegotiations ultimately resulted in gains in transfer pricing, taxes, duties, agreement terms, corporate governance, infrastructure ownership, value-added manufacturing, sovereignty issues, environmental matters, and additional social benefits.<sup>292</sup> Concession contract renegotiations have also occurred in other countries in the region, such as the renegotiation of London Mining's concession contract in Sierra Leone.<sup>293</sup>

Companies may or may not be open to renegotiation. Companies weigh two competing interests when considering renegotiations: a fundamental interest in keeping the original concession contract terms and an interest in developing good relations with the government and affected communities to ensure smooth operations and revenue streams. One agricultural company in Liberia stated that it had never been approached about renegotiations since its concession agreement worked well for both parties.<sup>294</sup> Secondary research indicates that several Liberian companies have agreed to contract renegotiations in the past, particularly to address revenue and employment terms.<sup>295</sup>

### ***Legal Analysis***

The existence of signed concession contracts with no easy exit options does not absolve the government of its obligations under international human rights law. The Committee on Economic, Social, and Cultural Rights recognizes that the state's obligation to protect indigenous peoples' right to control and use their territories extends retroactively. According to the General Comment to the right to take part in cultural life, "where [lands] have been otherwise inhabited or used without free and informed consent, [the state must] take steps to return these lands and territories."<sup>296</sup> Accordingly, the Liberian government has an obligation to return community

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<sup>289</sup> Such moments of expansion also may instigate direct clashes with communities. Lowenstein Clinic Interview with Ministry of Agriculture (Aug. 17, 2016).

<sup>290</sup> Lowenstein Clinic Interview with Ministry of Justice (Aug. 17, 2016).

<sup>291</sup> *Getting a Better Deal from the Extractive Sector*, *supra* note 265, p. 1.

<sup>292</sup> *Id.*

<sup>293</sup> Lowenstein Clinic Interview with Equatorial Palm Oil (Oct. 27, 2016).

<sup>294</sup> Lowenstein Clinic Interview with Equatorial Palm Oil (Oct. 27, 2016).

<sup>295</sup> *Getting a Better Deal from the Extractive Sector*, *supra* note 265, p. V.

<sup>296</sup> U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 21: Right of Everyone to Take Part in Cultural Life*, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2000), <http://www.refworld.org/docid/4ed35bae2.html>.

lands and renegotiate related contracts, with the objective to generate new contract terms consistent with international law.

In the contract renegotiation process, the government has a further obligation to involve communities directly and ensure that company commitments to communities are a part of a legally enforceable contract rather than an unenforceable MOU, as outlined above.<sup>297</sup> The rights to property, self-determination, and an effective remedy, as well as the international principle of FPIC, all apply to renegotiations exactly as they do to negotiations.

### ***Recommendation***

- **Where contracts violate national or international law, the government has an obligation to seek renegotiation to remedy those violations.**

The government can and should seek to renegotiate concession agreements that constitute significant breaches of the government's and the companies' human rights obligations under international law. As the Columbia Center on Sustainable Investment has observed:

In long-term contracts, requests for renegotiation are not uncommon. Indeed, they are often requested by investors who are party to investor-state contracts and seek to reduce their obligations or increase their rights under the agreement.

Government requests for renegotiation in order to address land grievances are therefore also possible, and may be a feasible option to ensure that the contract survives over time.<sup>298</sup>

Companies may be more willing to renegotiate “if there has been public pressure around the investment, and credible documentation of issues related to it.”<sup>299</sup>

If at any point companies approach the government with requests to excuse noncompliance, the government should capitalize on the opportunity to request renegotiation instead. During interviews, government officials acknowledged that companies have, for example, requested that payments be excused where global prices for their products have fallen.<sup>300</sup> In those instances, government officials could push for more complete renegotiations instead, in accordance with international human rights obligations. Moreover, government officials should work together to clarify which ministries and individuals are ultimately responsible for proposing and pursuing renegotiations.

In some cases, the concessionaire may refuse to renegotiate the contract. As previously stated, the inability to renegotiate an existing contract does not relieve the government of its legal obligations towards the community affected by the contract. The government has an obligation to protect and defend community rights to the best of its ability where renegotiation is unavailable. Even without renegotiating, the government can pursue many of the recommendations in this paper, including investigating community complaints, raising complaints with companies, using

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<sup>297</sup> See *supra* Section III.C.

<sup>298</sup> *Land Deal Dilemmas: Grievances, Human Rights, and Investor Protections*, *supra* note 285, p. 30.

<sup>299</sup> *Id.* p. 31.

<sup>300</sup> Lowenstein Clinic Interview with National Investment Commission (Aug. 23, 2016); Lowenstein Clinic Interview with Ministry of Finance and Development Planning (Aug. 16, 2016).

enforcement procedures contractually available, and promoting community interests in outgrower and other social benefit schemes.

## Conclusion

A variety of tools exist for Liberia to address the current problems attendant to agricultural plantations. As an initial matter, recognizing communal land tenure through the Land Reform Act or similar legislation is a critical foundation for any future reforms. With respect to negotiating, monitoring and enforcing concessions, numerous steps could be taken under current law through administrative reforms. Legislation, however, would be an important means to codify community rights and to create an effective dispute resolution mechanism. These changes could be accomplished through piecemeal adoption of new statutes or through a National Agriculture Law establishing a comprehensive regulatory system for agricultural concessions.

In particular, we recommend that the Liberian government, concessionaires, CSOs, and communities consider the following measures:

### *Recommendations for legislators*

- Legally recognize community title to the lands traditionally occupied by indigenous communities by passing the draft Land Rights Act or analogous legislation.
- Consider drafting a comprehensive National Agriculture Law. Such a law should incorporate many of the recommendations listed in this paper and would need to address land claims disputes, benefits for relocated communities, and standard FPIC procedures.

### *Recommendations for executive branch officials*

- Seek input from community representatives and civil society organizations and proactively protect their civil and political rights.
- Provide technical and negotiating support to communities involved in negotiations with companies.
- Begin replacing investor-community MOUs with legally binding leases or the direct incorporation of community concerns into concession contracts.
- Require concessionaires to perform human rights impact assessments before implementing any future contracts or expanding existing ones.
- Implement improved procedures for assisting communities in valuing and receiving appropriate compensation for lands and crops.
- Clarify responsibilities for managing, auditing, and distributing social development funds and for ensuring accountability in cases of theft and misuse.
- Institute regular monitoring of the pilot outgrower model and other existing outgrower programs, with a focus on ensuring community participation and ownership.
- Clarify ministry responsibilities with regard to contract monitoring and enforcement.
- Improve access to monitoring bodies by decentralizing and increasing funding for local offices.
- Create and fund an administrative complaint mechanism.
- Fully review all existing concession contracts and seek renegotiation where there is evidence of human rights violations of domestic or international law. Push for more

complete renegotiation of terms when approached by the concessionaire to excuse non-performance of contractual duties.

- Consider instituting a moratorium on new concession contracts until a concrete plan is in place to ensure implementation of FPIC-compliant procedures.

### ***Recommendations for concessionaires***

- Make sure that local communities, including women, youth, minorities and others that might be marginalized, are represented when procuring FPIC and providing social development benefits.
- Place a moratorium on new concession contracts until a concrete plan is in place to ensure implementation of FPIC-compliant procedures.
- Perform human rights impact assessments before beginning or expanding an agricultural concession. Provide communities with compensation for land and crops that is based on the value of land and crops over time, not a single harvest.
- Be transparent about distribution of payments to communities.
- Implement an internal complaint mechanism that supplements, but does not replace, the recommended governmental complaint mechanism.
- Provide funding for an administrative complaint mechanism and for a legal support fund for communities in negotiations.

### ***Recommendations for civil society***

- Engage actively with the government throughout the process of instituting regulatory reforms in the agricultural concession sector.
- Provide communities with technical and legal support in negotiations with concessionaires.
- Participate in the performance of human rights impact assessments by highlighting concerns which concessionaires and government officials overlook.
- Help communities draft proposals for the appropriate use of social development funds.
- Assist communities in accessing complaint mechanisms.
- Monitor existing contracts in order to recommend to the government any contracts that are ripe for renegotiation.

### ***Recommendations for communities***

- Ensure adequate and diverse community representation at all stages of negotiations with concessionaires.
- Hold community-wide meetings to determine needs—including for civil society support—and to select representatives. Establish procedural safeguards to set the limits of what these community representatives can decide without fuller consultation with the community.
- Actively participate in clarifying the substance and processes of land compensation and social development benefits in order to ensure transparency and fairness.

## Appendix

### A. Comparative Legislation Protecting Customary Rights

Country	Law(s)	Provisions
Republic of Congo	Act No. 5-2011 On the Promotion and Protection of Indigenous Populations	<ul style="list-style-type: none"> <li>Article 31: The indigenous populations have a 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.</li> <li>Article 32: The State facilitates the delimitation of the lands on the basis of customary tenure with the aim of guaranteeing the recognition. In the absence of land titles, the indigenous populations preserve their pre existing land tenure. The land rights of the indigenous populations are inalienable and inalienable except in cases of expropriation for public interest.</li> <li>Article 33: The indigenous populations cannot be displaced from the lands they possess except for public interest.</li> <li>Article 34: In case of expropriation for public interest, the indigenous populations enjoy the benefits provided by law.</li> <li>Article 35: Every exploration, exploitation or conservation projects of natural resources on the lands occupied or utilized by the indigenous populations has to be prior subject to socio economic and environmental impact assessment.</li> <li>Article 36: The indigenous populations have the rights to define the priorities and strategies for development, utilization and control of their lands and other resources within the limits of the law.</li> <li>Article 37: The indigenous populations have the right to preserve and develop their economic and social systems and to enjoy without fear their own methods of subsistence.</li> <li>Article 38: The indigenous populations are consulted before the formulation or establishment of any project having effect on the lands and resources which they possess and use traditionally.</li> <li>Article 39: The indigenous populations are consulted every time the State considers the creation of protected areas likely to affect directly or indirectly their lifestyles.</li> <li>Article 40: The State ensures the amelioration of the living conditions and the level of education, instruction, work and health of the indigenous populations as a priority in the notebooks of private or public companies which exploit the resources existing on the lands traditionally occupied and utilized by the indigenous populations.</li> <li>Article 41: The indigenous populations have a right on the profit resulting from the commercial exploitation and utilization of their lands and their natural resources.</li> <li>Article 42: Only indigenous populations can rely on their custom and claim reparation for all prejudices caused in the violation of their land rights and natural resources.<sup>301</sup></li> </ul>
Mozambique	1997 Land Law and accompanying	<ul style="list-style-type: none"> <li>Customarily-held land rights are equal in weight and validity to administratively-granted land rights.</li> <li>“Local communities” are the lowest level of land and natural resource</li> </ul>

<sup>301</sup> Act No. 5-2011 On the Promotion and Protection of Indigenous Populations (Feb. 25, 2011) (Congo), [http://www.iwgia.org/iwgia\\_files\\_news\\_files/0368\\_Congolese\\_Legislation\\_on\\_Indigenous\\_Peoples.pdf](http://www.iwgia.org/iwgia_files_news_files/0368_Congolese_Legislation_on_Indigenous_Peoples.pdf).

	legislation	<p>management and administration.</p> <ul style="list-style-type: none"> <li>• The “local community” may choose and create the leadership structures and rules by which it will administrate and manage its lands (customary or otherwise).</li> <li>• Customary principles of land management (including land transfer, dispute resolution, inheritance, and demarcation) govern community land use and allocation with the “local community.”</li> <li>• Women have equal rights to hold, access and derive benefits from land independent of any male relatives: this principle overrides any contrary customary rule.</li> <li>• No written proof of customary rights is necessary; the oral testimony of an individual's neighbors that he or she has been occupying land in good faith for more than ten years is proof equivalent to and as enforceable as a paper title.</li> <li>• Processes for delimitation and registration of local community lands as a whole are established, after which the community becomes a legal entity, capable of transacting with outsiders.</li> <li>• Communities must be consulted before an investor or outsider application for land within that community can be granted, and are empowered to negotiate for mutual benefits in exchange for the use of their land; 9. Customary rights of way and other communal areas are explicitly reserved and protected.</li> <li>• The decisions of community-level (customary) dispute resolution bodies are appealable directly up to the highest court of Mozambique.</li> <li>• Customary land cannot be sold. It can only be reclassified to state land when acquired through the right to eminent domain<sup>302</sup></li> </ul>
Ghana	Land Title Registration Law 1986; Administration of Lands Act; Constitution	<ul style="list-style-type: none"> <li>• Customary tenure is recognized and governed by customary law.</li> <li>• Traditional Council has to approve the alienation of Customary Land and is mandated to represent its constituents in negotiations, having fiduciary duties to administer land in a manner beneficial to its constituency.<sup>303</sup></li> </ul>
Tanzania	Village Land Act 1999	<ul style="list-style-type: none"> <li>• Customary tenure is recognized and governed by customary law.</li> <li>• Anyone proposing to use village land under a right of occupancy may, by invitation, address a Village Assembly meeting to answer questions about the proposed land.</li> <li>• Village Council and Village Assembly have to provide approval when allocating land.</li> <li>• Village Council is required to agree on and approve the nature and extent of compensation with the Commissioner of Lands.</li> <li>• Village Council is to manage land as trustee in line with principles of sustainable development.<sup>304</sup></li> </ul>
Zambia	Land Act 1995; Administrative	<ul style="list-style-type: none"> <li>• Customary tenure is recognized and governed by customary law. The chiefs and local authorities have to approve the alienation of customary land.</li> </ul>

<sup>302</sup> Rachel S. Knight, “Mozambique’s Land Law,” in *Statutory Recognition of Customary Land Rights in Africa: An Investigation into Best Practices for Law Making and Implementation*, p. 102, U.N. FOOD AND AGRICULTURE ORGANIZATION (2010), <http://www.fao.org/docrep/013/i1945e/i1945e02.pdf>.

<sup>303</sup> Land Acquisition Case Studies, *supra* note 54, pp. 8-12.

<sup>304</sup> *Id.*

	Circular, No.1, 1985; Customary Tenure Conversions Regulations 2 1996	<ul style="list-style-type: none"> <li>• Customary land cannot be alienated without certification that the people's 'interests and rights have not been affected by the approval.'</li> <li>• When alienating land, both chiefs and District Councils must declare that 'members of the community' were consulted.</li> <li>• When approving conversion of customary to leasehold tenure, the chiefs and District Councils must confirm that the land transfer to the applicant will not infringe on the rights of others.<sup>305</sup></li> </ul>
Australia	Aboriginal Land Rights (Northern Territory) Act of 1976	<ul style="list-style-type: none"> <li>• Section 23AA: "[G]ive priority to the protection of the interests of traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the Council" and "promote effective consultation with the traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the Council".</li> <li>• Section 45: a mining interest may not be granted in respect of Aboriginal land unless an agreement has been reached between the Aboriginal land council and the intending miner.<sup>306</sup></li> </ul>

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<sup>305</sup> *Id.*

<sup>306</sup> Aboriginal Land Rights (Northern Territory) Act of 1976 (Austl.), <http://www.nlc.org.au/articles/info/aboriginal-land-rights-northern-territory-act-1976/>

## B. Sample Concessionaire Recommendations for Community Facilitation<sup>307</sup>

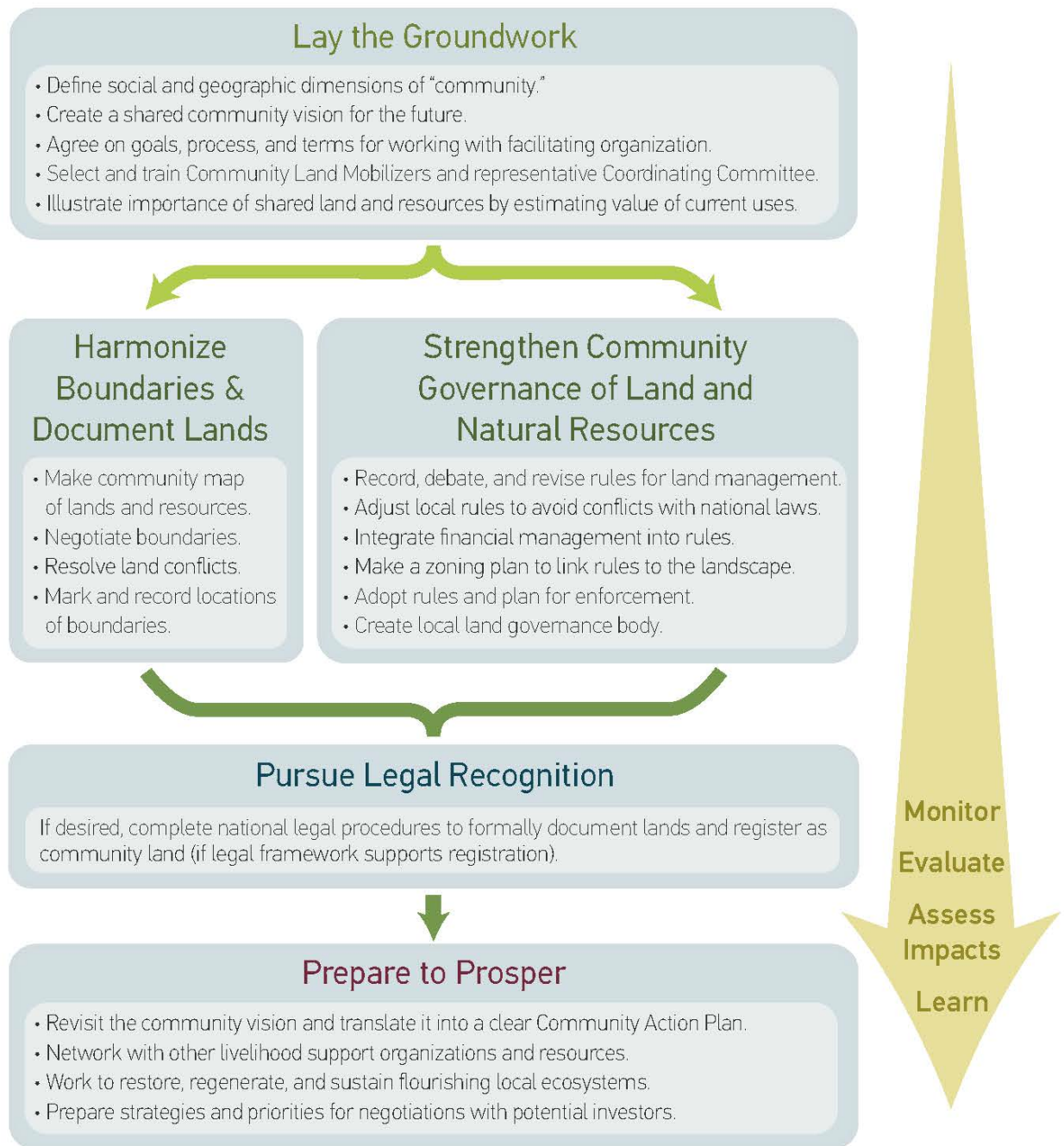
- 1) Remove the Provisional MOU procedure from GVL policy and practice, and where communities have already entered into MOUs of this kind, they should as a matter of urgency be given the option (with the benefit of independent legal advice) to either renegotiate or rescind those Provisional MOUs so that only Full MOUs are agreed, on the back of a comprehensive FPIC process without short-cuts.
- 2) Ensure all steps of the FPIC process are entirely open-ended as to how communities wish to communicate, negotiate, make decisions and engage with GVL. Erring on the side of caution, GVL should assume (unless authority from the whole community confirms otherwise) that community representative structures do not have decision-making powers that can bind the whole community, and that decision-making will be a fully collective and participatory right reserved by the whole community.
- 3) Remove from policy and practice steps that implicitly or explicitly undermine civil society and NGOs, and instead (a) actively accommodate independent civil society monitoring and supervision of GVL's FPIC policy and practices, and (b) repeatedly and strongly encourage communities to seek independent technical and legal advice including through civil society organisations.
- 4) Accept that it would not be responsible for the company to enter into agreements with communities who have not had the benefit of independent legal and technical advice, *and make a clear policy commitment only to enter into agreements with communities where those communities have received adequate independent legal and technical advice.*
- 5) Ensure adequate policy guidance on addressing real sources of coercion, undue influence and actions undermining community cohesion – namely the actions of prominent figures in local government and GVL itself. *As part of this, GVL should urgently make a clear policy commitment to only giving jobs to community members after a clear, equitable, written and legally binding community-company contract has been concluded with that community on the basis of a full (i.e. 'no short cuts') FPIC process.*
- 6) Mainstream into policy and practice the crucial principle that the outcome of GVL's community engagement should not be predetermined, pre-empted or preconceived in any way. All options should be on the table – both if the community decides to formally engage with the company (including smallholder use of the land for palm fruits sold to the company, lease of community land to the company for growing palm oil, company shareholdings for communities etc.) – as well as if the community decides not to formally engage with the company.
- 7) Ensure that GVL's information sharing includes full and objective disclosure of the commercial and agricultural realities of the palm oil business and palm oil crop, so that any company-community agreement is based on a fair and equitable understanding of key factors.
- 8) Provide proper guidance on how GVL should initiate its engagement with communities in a way that properly respects communities' right to determine for themselves *whether the FPIC process should proceed and if so how.* This requires a process by which GVL can legitimately find out the answers to a sequence of key questions that communities will need to decide for themselves at the outset without GVL being present. (Namely: whether to talk to GVL at all; what their 'unit of community' is for the purposes of collective decisions and negotiations; how they want to communicate with the company; how they want to validate and confirm key decisions; and, if they want to communicate

<sup>307</sup> *Hollow Promises*, *supra* note 25, pp. 71-72.

with GVL via representatives, who will those representatives be.) Due to the importance of this key early step, a proposed process is set out in detail in the section above at paragraph 1.12 of Part 1.

- 9) Guarantee that GVL will only embark on supporting ESIA and HCVA processes, *after* a minimum set of internal decisions have been made by communities highlighted above (at Recommendation 8). Only after these decisions have been made are communities ready to participate in designing, executing and validating these key information exchange processes.
- 10) Take a far more careful and nuanced approach to dealing with traditional governance in a way that properly takes account of the very high risks of assuming traditional governance bodies own land (on trust or otherwise) and can grant user rights over land, and makes sure that the decisions communities reach, the ways that they negotiate, and how their decisions are communicated, have been fully determined and endorsed by the community themselves, not just by traditional governance bodies.
- 11) Mainstream throughout policy and practice the express recognition and respect on the part of GVL of communities as *owners* of their customary lands, territories and natural resource, and treat that ownership as equivalent in strength and legal effect to documented/deeded property rights. A major component of this recommendation will manifest itself in the kinds of contractual agreements that emerge from GVL's engagement with communities, which must thereby be: (a) clear, equitable and legally enforceable; (b) *expressly* recognise the lands, territories and resources concerned as the property of the community; (b) properly ascribe to the communities concerned *all the rights* consistent with their status as owners, including their right to *continued* recognition as owners even where they have consented to GVL using or occupying some of their lands, territories or resources, e.g. by deriving a rent under a land-use contract (lease); (c) expressly guarantee legal certainty for those communities that their legal standing in relationship to their agreement with the company will not be compromised or diminished by the fact that GVL's 2010 Concession Agreement with the Government of Liberia purports to provide a lease to GVL and warrants the concession area to be free of encumbrances.
- 12) Ensure that the 2010 Concession Agreement will not itself continue to present a serious barrier to full compliance with relevant legal, RSPO and FCP standards, by demanding that the Concession Agreement is properly amended to address the various deficiencies in the *process* by which the Concession Agreement was agreed and the multiple flaws in the *substance* of the Concession Agreement (as outlined above). This will require a negotiation process that has the meaningful participation of potentially affected communities and civil society.
- 13) Mainstream an ethic of 'getting things right first time' rather than the current emphasis on mere 'continued improvement', in order to recognise that in practice it is much harder (and potentially impossible) to satisfactorily put things right once they have gone wrong in the context of community engagement and FPIC. *While degrees of improvement in policy and practice are of course positive signs, anything less than a swift achievement of full FPIC compliance creates a real risk of seriously harmful consequences for communities and their environments.*

### C. Community Land Protection Process<sup>308</sup>



<sup>308</sup> Rachel Knight et al., *Community Land Protection Facilitators Guide*, p. 8, NAMATI (2016), [HTTPS://NAMATI.ORG/RESOURCES/COMMUNITY-LAND-PROTECTION-FACILITATORS-GUIDE/](https://namati.org/resources/community-land-protection-facilitators-guide/)

## D. Division of Authority Template<sup>309</sup>

No.	Function	Key government institutions	Level	Regulations	Remarks on authority
1	Policy and norms	MoA	National	– Elucidation part (z) of GR No. 38 of 2007.	– Authority to formulate policy, guidance and manual on the development, management and monitoring of plantations. – Authority to develop spatial and land-use planning for national plantation development. – Authority to formulate national plantation targets.
		MoA and other ministries	National	– Elucidation part (z) of GR No. 38 of 2007.	– Authority to formulate policy, guidance and manual on plantation support systems (e.g. water, technology, fertilizers).
		Provincial government	Province	– Elucidation part (z) of GR No. 38 of 2007; Elucidation part of Law No. 23 of 2014.	– Authority to develop maps that guide the development, management and monitoring of plantations. – Authority to develop spatial and land-use planning for provincial plantation development. – Authority to formulate provincial plantation targets.
		District/ city government	Local	– Elucidation part (z) of GR No. 38 of 2007; Elucidation part of Law No. 23 of 2014.	– Authority to design the needs and demands for oil palm development. – Authority to develop maps that guide the development, management and monitoring of plantations at the district level. – Authority to develop spatial and land-use planning for local plantation development. – Authority to formulate local plantation targets.
2	Administration (implementation)	MoA	National to local	– Elucidation part (z) of GR No. 38 of 2007.	– Not available
		Provincial government	Province	– Elucidation part (z) of GR No. 38 of 2007; Elucidation part of Law No. 23 of 2014.	– Authority to guide the development and implementation of plantations. – Authority to manage integrated provincial plantation development areas. – Authority to guide the application of plantation support systems (e.g. water, technology, fertilizers).

<sup>309</sup> Fitrian Ardiansyah et. al., *Forest and Land-Use Governance in a Decentralized Indonesia: A Legal and Policy Review*, p. 84, CENTER FOR INTERNATIONAL FORESTRY RESEARCH (2015), [http://www.cifor.org/publications/pdf\\_files/OccPapers/OP-132.pdf](http://www.cifor.org/publications/pdf_files/OccPapers/OP-132.pdf).

No.	Function	Key government institutions	Level	Regulations	Remarks on authority
		District/ city government	Local	<ul style="list-style-type: none"> <li>– Elucidation part (z) of GR No. 38 of 2007; Elucidation part of Law No. 23 of 2014.</li> </ul>	<ul style="list-style-type: none"> <li>– Authority to map and develop plantation potential.</li> <li>– Authority to manage integrated local plantation development areas.</li> <li>– Authority to designate center for plantation development.</li> <li>– Authority to apply plantation support systems (e.g. water, technology, fertilizers).</li> </ul>
3	Control/ monitoring	MoA	National	<ul style="list-style-type: none"> <li>– Elucidation part (z) of GR No. 38 of 2007.</li> </ul>	<ul style="list-style-type: none"> <li>– Authority to monitor and control the spatial planning of national plantation development.</li> </ul>
		Provincial government	Province	<ul style="list-style-type: none"> <li>– Elucidation part (z) of GR No. 38 of 2007; Elucidation part of Law No. 23 of 2014.</li> </ul>	<ul style="list-style-type: none"> <li>– Authority to monitor and control the development and implementation of plantations.</li> <li>– Authority to monitor and control the spatial planning of provincial plantation development.</li> <li>– Authority to monitor the application of plantation development support systems.</li> </ul>
		District/ city government	Local	<ul style="list-style-type: none"> <li>– Elucidation part (z) of GR No. 38 of 2007; Elucidation part of Law No. 23 of 2014.</li> </ul>	<ul style="list-style-type: none"> <li>– Authority to monitor and control the local development and implementation of plantations.</li> <li>– Authority to monitor and control the spatial planning of local plantation development.</li> <li>– Authority to monitor the application of plantation development support systems.</li> </ul>
4	Auditing	MoA, BPN, BPK, KPK and UKP4	National to local	<ul style="list-style-type: none"> <li>– PI No. 10 of 2011 and PI No. 6 of 2013.</li> <li>– Paragraph 35(2) of MoAR No. 98 of 2013.</li> <li>– Law No. 15 of 2006; Law No. 30 of 2002; Law No. 8 of 2010.</li> </ul>	<ul style="list-style-type: none"> <li>– Authority to carry out legal audits.</li> </ul>
5	Prosecuting crime/ sanctioning breaches (compliance issue)	KPK and judicial system	National to local	<ul style="list-style-type: none"> <li>– Law No. 15 of 2006; Law No. 30 of 2002; Law No. 8 of 2010.</li> </ul>	<ul style="list-style-type: none"> <li>– Authority to prosecute and convict those breaching laws and having significant negative environmental impacts as a result of plantation activities.</li> </ul>

Source: First author's compilation based on relevant regulations and references.