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## STUCK IN STAGES: THE EVOLVING ROLE OF ENFORCEMENT IN LIBERIA FOREST SECTOR REFORM

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### SUMMARY

Liberia became notorious for its internal collapse of civil order and its role as an epicenter of regional conflict, of which “conflict timber” as well as “blood diamonds” proved both cause and symptom. Pressured by UN sanctions and with the support and cooperation of the international community and Liberian civil society, the post-conflict Liberian government undertook a comprehensive reform of the forest sector, beginning with a review of all existing forest concessions. The ensuing legislative, regulatory, and management revisions and reforms formed a program based on transparent transactions, competitive bidding, “cradle-to-grave” timber tracking, community involvement, and public participation. But the reform program’s enforcement provisions do not completely match its comprehensiveness. If environmental enforcement is viewed as proceeding through stages from a “state of nature” to administrative-centered regulation that emphasizes prevention and planning, the reformed enforcement provisions are “stuck in stages.” Also, enforcement provisions lack administrative order, authority, and civil penalty assessment without consent. These limitations, which stem from a suspicion of executive power rooted in past abuses, will especially handicap enforcement of the “technical” tracking and permit requirements that form the core of the forest sector reform program. The forest management reforms includes an interdisciplinary in-house strike force (Enforcement Division) lodged in the forest agency, which could serve to support and professionalize the field inspection force, as well as handle priority cases. However, reaction to past abuses has led some to conclude that the Enforcement Division should constitute an internal affairs investigative unit. That view presents another illustration of how understandable concern about not repeating the tragic immediate past can impede the effectiveness of present and future enforcement efforts.

### 1 “CONFLICT TIMBER” AND PERVASIVE ILLEGALITY IN LIBERIA

#### 1.1 Liberia as a Failed State

Liberia has eponymously exemplified a “failed state” and constituted an epicenter of disorder for almost two decades. It is a country whose internal convulsions ushered in a long civil war and regional *bouleversement* characterized by rebel factions and warlords brutally contending for corrupt advantage and territorial control across the permeable boundaries of Liberia and its West African

neighbors. As a result of a peace agreement reached in 2003, Liberia is currently functioning as a relatively stable and democratic government, with President Ellen Johnson Sirleaf working with the international community to carry out a host of legal, economic, and social reform programs. President Sirleaf is attempting to accomplish the Herculean task of rebuilding Liberia almost from scratch and, while doing so, tempering peoples' unrealistic expectations while retaining a sense of optimism in the society. The United Nations Mission in Liberia remains the world's largest peacekeeping mission, consisting of both soldiers and civil police, designed to help keep the peace during Liberia's reformation.

## **1.2 "Conflict Timber": UN sanctions and the Liberia Forest Initiative**

The illicit trade in "blood diamonds" centering in Sierra Leone and Liberia has gained international recognition as a cause and dramatic symbol of civil disorder and gruesome brutality – indeed it has become the subject and title of a recent Hollywood movie. But illegal trade in "conflict timber" also played a major role in perpetuating convulsive lawlessness in Liberia and in fueling conflict in West Africa.<sup>1</sup> Consequently, the UN Security Council embargoed both timber and diamonds in the export sanctions it placed on Liberian exports pending Liberia's transition to democratic government and institution of comprehensive reforms in its management of the country's natural resources.

As a response to the UN sanctions and the recognized need to reform the forest sector, key governments, international institutions, and NGOs (including the European Union, the World Bank, the U.S. Government, and Conservation International) formed the Liberia Forest Initiative in 2003. The Liberia Forest Initiative embarked on a program of technical assistance and capacity building based on the "3 C's" of forest management: (1) developing a sustainable industry through Commercial Forestry; (2) democratizing process and profits through Community Forestry; and (3) protecting biodiversity through Conservation.

## **2 THE LIBERIA FOREST CONCESSION REVIEW AND LAW REFORM**

### **2.1 The Liberia Forest Concession Review**

Recognizing the need to review all existing forest (timber) concessions in Liberia as one of the first steps toward lifting the UN timber sanctions and reinstating control of the forest sector through systematic process and the rule of law, the Forest Development Authority of Liberia instituted two in-house concession reviews. Liberian civil society, however, refused to accept these reviews as transparent and valid. To resolve those concerns and under prodding from the international community, the government of Liberia mandated a third review (Concession Review) by a Forest Concession Review Committee composed of both Liberian and international representatives, including those from the government, Liberia civil society, United Nations Mission in Liberia, and the Liberia Forest Initiative. The concession review was conducted by a Technical Secretariat

consisting of Liberian experts and international counterparts<sup>2</sup> under the direction and control of the Forest Concession Review Committee.

The concession review x-rayed a pervasive pattern of lawlessness – it revealed that two and a half times the entire surface forested area of Liberia had been granted in concessions (pointing to a pattern of usurpative overlap) and that concession holders owed over 64 million U.S. dollars in back taxes and financial arrears. Of the 47 concessions reviewed on a case-by-case basis (the 23 others failed to respond to the review and were automatically voided), not a single one could demonstrate compliance with even minimum legal requirements (such as possessing a current business license). Moreover, twelve of the concessions reviewed were identified by the UN as associated with warlordism, insurrection, and illicit commerce. As a result of these and similar findings, the Forest Concession Review Committee recommended that all existing forest concessions be voided and the Liberian Ministry of Justice duly followed up by sending formal cancellation notices to each of the concession holders.<sup>3</sup>

## **2.2 The Concession Review as the Foundation of Forest Law Reform**

The concession review in design and practice served as an animating model for the restoration of the rule of law in post-conflict Liberia.<sup>4</sup> The Forest Concession Review Committee was explicitly mandated to recommend forest sector reform measures based on the information collected and organized by the concession review.

After considering the results of the concession review, the Forest Concession Review Committee recommended a set of sweeping changes to the existing forest legal regime. Those recommendations were founded on instituting formal and transparent procedures for granting future concessions. These procedures include competitive bidding, mandating a “cradle to grave” chain of custody system for tracking timber, requiring concessions to adhere to site specific environmental planning (including the preparation of environmental impact assessments), and to comply as well with broader conservation plans and protected areas designations. The newly elected Johnson Sirleaf administration adopted the Forest Concession Review Committee’s recommendations for concession cancellations and reform measures in their entirety by executive order in one of its first official acts.<sup>5</sup>

## **2.3 Enactment of the Forest Sector Reform Program**

The package of reforms recommended by the Forest Concession Review Committee and endorsed by Executive Order No. 1 was enacted into legislation virtually in their entirety.<sup>6</sup> The Forest Development Authority of Liberia then prepared a package of detailed rules and regulations to carry out the legislation, most of which have now been issued. Moreover, the Forest Development Authority of Liberia (with the support of the Liberia Forest Initiative) is in the process of drafting field manuals and policy guidance documents to elaborate legal

requirements and operational procedures. In parallel, the Forest Development Authority of Liberia has been undergoing an administrative reorganization and streamlining to enable it to implement the detailed responsibilities of the reformed forest sector regime.

## **4 ROLE OF ENFORCEMENT IN FOREST SECTOR REFORM: A MIXED MESSAGE**

### **4.1 Background: Three-Stage Theory of Environmental Enforcement**

The three-stage theory of environmental enforcement provides a framework for analyzing the enforcement provisions of Liberia's new forest law.<sup>7</sup> That theory postulates a typified evolution starting with a state of nature – no or very little environmental regulation – and proceeding later in the first stage to the use of private remedies sounding in tort for individualized damages for after-the-fact harm. The second stage represents the transition to reliance on administrative action and public remedies, including binding administrative orders develop as a principal and efficient tool, governing statutes prescribe a panoply of civil and criminal judicial remedies (including prospective (injunctive) relief), and prevention of pollution based on violation of regulatory standards rather than belated correction of and compensation for actual harm becomes the central standard.

The concept of a permit links the second and third stages. The permit institutionalizes prevention by translating general requirements into operation specific requirements. As it evolves, the third stage emphasizes integrated approaches (such as multi-media permits tied to environmental impact assessments), coordination of permits with planning, and systematic data collection (where every permit becomes, in effect, an experimental permit whose monitoring data systematically generates information). The third stage also increasingly rationalizes remedies, such as basing administrative civil penalties on recouping the economic benefits of non-compliance.<sup>8</sup>

### **4.2 Enforcement under the Reformed Forest Sector Regime: Third Stage Features**

Based on the preceding description of the comprehensive structure for forest sector reform that Liberia has established as a response to the civil disorder that "conflict timber" helped spawn and sustain, one would logically assume that the enforcement provisions in the revised law would likewise be as comprehensive and advanced. Indeed, the whole elaborate forest reform effort ultimately depends on enforcement, the point of the pyramid. In considerable part, that view is correct: the enforcement provisions of the revised Liberian Forest Law contain some basic second stage provisions, as well as some innovative third stage features.

Foundationally, the new forest law incorporates the Precautionary Principle, and explicitly mandates the Forest Development Authority of Liberia to take a precautionary approach to its administration and enforcement.<sup>9</sup> Operationally, the law makes it clear that all of the categories of permissions it requires – whether they are labeled contracts (*e.g.*, Forest Management Contracts) or permits (*e.g.*, Forest Use Permits) – are essentially licenses.<sup>10</sup>

The significance of the law's pervasive license requirement for enforcement is two-fold. First, licenses carry out the precautionary approach by requiring pre-operation review of management plans and the filing of an environmental impact assessment as part of the approval process.<sup>11</sup> Licenses are also conditioned on submittal of an annual operations plan on the status and progress of the operation. Second, the licensing system gives the Forest Development Authority of Liberia, theoretically at least, the upper hand in enforcement. A license is a unilateral and revocable permission granted by the government to individuals and enterprises to conduct activities under terms and conditions specified in law; whereas, a contract is a freely negotiated agreement between parties assumed to be equal.

Enforcement through prevention is also embedded in the key operational concepts of the new forest law. For example, pre-qualification under the competitive bid system<sup>12</sup> is designed to enhance environmental compliance and enforcement by weeding out unqualified and incapable operators and “bad actors” from the very beginning of the process. The chain of custody requirement,<sup>13</sup> to take another example, prescribes a “cradle to grave” tracking system based on continuity of documentation.

Moreover, the new forest law mandates the collection and collation of data related to enforcement and compliance by requiring the Forest Development Authority of Liberia to prepare an annual report on its enforcement activities.<sup>14</sup>

### **4.3 Historical Ambivalence: The Missing Second Stage in Liberian Forest Enforcement**

Given the pronounced presence of third-stage provisions in the new forest law, it is at least somewhat surprising that its enforcement provisions at the same time lack some key second stage authority. As a result, these provisions pose the potential of hindering the implementation of those reforms. Although the new forest law does authorize prospective relief in the form of injunctions and allows the Forest Development Authority of Liberia to sue in court for both civil and criminal penalties, it provides no authority whatsoever for the Forest Development Authority of Liberia to issue administrative orders and uniquely provides that administrative civil penalties may only be imposed with the written consent of the assessed.<sup>15</sup>

A salient characteristic of the second stage is its reliance on administrative remedies. The most efficient way to ensure strong and proactive enforcement

is to provide a set of remedies the agency itself may initiate, including cease orders. The new forest law's lack of provisions for administrative orders and its limitation of administrative penalties to cases of consent especially handicap the kind of technical enforcement that is necessary to vindicate the reformed statutory scheme, which is grounded on a chain of custody tracking of commercial timber. Under such a scheme, "technical" violations – those involving record-keeping inaccuracies or unplanned timbering off-site, for example – need to be addressed through routine administrative remedies to protect the integrity of the system.<sup>16</sup>

The common explanation for these limitations is that they reflect a profound distrust of executive power given Liberia's recent history. The usurpative history of forest concessions in Liberia dramatically illustrates those executive abuses. Forest enforcement, when it occurred at all, was characteristically corrupt – government inspectors would use the threat of enforcement action to obtain bribes. Although Liberian civil society backed the limitations on administrative remedies in the new forest law, the rationale for doing so seems unconvincing. The requirement of written consent for administrative civil penalties will not necessarily vitiate coercion: while written consent forms should enable comparative tracking of civil penalties assessed and paid in, unreported bribes can still be coerced if a culture of government corruption exists. The rationale also assumes that the judiciary is itself incorruptible and unreliable. In fact, the Liberian judiciary did not prove a bulwark against past executive abuse and more recently has not uniformly demonstrated an understanding of the meaning and importance of environmental requirements.<sup>17</sup>

#### **4.4 A Test Case: The Forest Development Authority of Liberia's Enforcement Division**

Another prominent feature of the Forest Development Authority of Liberia's enforcement program is the Enforcement Division, created last year within the Forest Development Authority of Liberia as part of its management reform. On its face, the Enforcement Division appears to embody a "strike force" concept, statutorily conceived as a largely autonomous unit within the Forest Development Authority of Liberia composed of inspectors and technical staff, with its director reporting directly to the Forest Development Authority of Liberia's Managing Director. However, the role of the Enforcement Division, however, has been subject to a debate that reflects the legacy of historical ambivalence that compromised the second stage remedies in the new forest law. Reflecting the trauma caused by past abuses, some argue that the Enforcement Division should concentrate not on enforcement, but on rooting out corruption among the Forest Development Authority of Liberia inspectorate and enforcement personnel. While the reasons for that view are historically understandable, the better view is to utilize the Enforcement Division in two badly needed roles: to train inspectors and rebuild the Forest Development Authority of Liberia's enforcement capacity and to draw together experts from the different Forest Development Authority of Liberia technical divisions into an interdisciplinary team to support the field inspectors

and to handle priority cases. The Enforcement Division should not mix those environmental strike force functions with an anti-corruption mission. Turning the Enforcement Division into an internal affair investigatory unit will discourage the kind of cooperation with the field inspectors on the basis of mutual trust and support that is necessary to fulfill the strike force concept. More positively put, the strike force model will help fight corruption by fostering a highly professional and competent interdisciplinary inspection force.

## 5 CONCLUSION

Liberia's comprehensive forest sector reform program generally provides a model for the post-conflict reinstatement of the rule of law in "failed states." In partial contrast, the enforcement provisions of the new forest law represent second and third stage remedies emphasizing administrative regulation oriented toward prevention inharmoniously mixed with a first stage absence of basic administrative powers. Most notably is the lack of agency authority to issue orders and to collect contested civil penalties. Such ambivalent enforcement authority traces back to the legacy of Liberia's convulsive recent past, which (as the forest concession review systematically confirmed) was characterized by pervasive abuse of executive power. But the success of the forest sector reforms largely depends on the agency's ability to enforce technical requirements such as chain of custody verification on the spot (subject of course to due process challenges). Handicapping the enforcement of the reform program through inapt analogies to the past would detract from, not advance the rule of law and constitute a notable historical irony.

## 6 REFERENCES

<sup>1</sup> While "blood diamonds" are more portable, easier to conceal, and perhaps more notorious as sources of illicit funds than timber, forest concessions enable territorial control and usurpation while also generating revenues channeled to private militias and corrupt enrichment (Reno 1999; Global Witness 2004).

<sup>2</sup> The author was the International Lawyer on the Technical Secretariat of the concession review.

<sup>3</sup> For a summary of the methodology of the concession review see Rochow 2006, esp. p. 89.

<sup>4</sup> Rochow 2006. .

<sup>5</sup> GOL 2006.

<sup>6</sup> The National Forestry Reform Law of 2006, Part III, Liberian Code of Laws Revised (hereinafter "New Forestry Law").

<sup>7</sup> K. W. J. Rochow, "The Far Side of Paradox," 81 W. Va. L. Rev. 559 (1979) (included in *Land Use & Environment Law Review* [1980]).

<sup>8</sup> One could identify a fourth stage of alternative, market-based regulation, which depends upon the foundation of comprehensive command and control regulation for market signals and baseline standards.

<sup>9</sup> Section 3.1 b. of the New Forestry Law.

<sup>10</sup> Section 1.3 of the New Forestry Law (definition of "Forest Resource License").

<sup>11</sup> Sections 5.3 b. (iii) and 5.3 b. (iv)) of the New Forestry Law.

<sup>12</sup> See Section 5.2 of the New Forestry Law.

<sup>13</sup> Section 13.5 of the New Forestry Law.

<sup>14</sup> Section 20.11 of the New Forestry Law.

<sup>15</sup> Section 20.9 b. of the New Forestry Law.

<sup>16</sup> It is possible to cobble together an approach focused on administrative remedies even given the second stage limitations of the Forest Law. Notices of violation accompanied by a proposed consensual fine (something like a traffic ticket) with a signature line could constitute one such procedure. But it still would not obviate the enforcement problems stemming from non-coercive remedies and the consequent overreliance on the courts – it would be easy enough for violators not to sign the notice of violation “ticket” and force the Forest Development Authority of Liberia to chase them through the Liberian court system for even minor violations.

<sup>17</sup> Judicial training courses are planned as part of the forest sector reform effort.

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