



Public Goods and Private Rights: the Illegal Logging Debate and the Rights of the Poor

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This briefing paper applies a rights perspective to understanding legal and institutional reform of the tropical forest sector. The sector is characterised by strongly competing interests, and massive differences in the power of stakeholders to influence the application of the law. The regulatory regime governing the sector often discriminates against the poor. This is of particular concern in the context of donor- and industry-led initiatives to combat illegal logging. Upholding legal frameworks which already fail to accommodate local rights could compound injustices. A rights perspective focuses attention on the channels by which the poor can contest and uphold their claims in the face of national and international interests in the forest sector.

Policy Conclusions

- A rights perspective to policy development in the forest sector explicitly addresses the relationships between international environmental discourse, the interests of national elites and the livelihoods of the poor. It focuses attention on the means to tackle these power imbalances, by linking the social and economic rights of the poor (secure tenure and resource access) with realisation of fundamental human rights (equality, democratic participation and accountability).
- The concept of rights is particularly important in the forest sector because of the centrality of tenure to securing forest livelihoods. Weak tenure prevents the poor from upholding their claims where these compete with those of international environmental groups, and where duty bearers are the state or commercial licensees of the state (timber concessions).
- Efforts to combat the illegal timber trade, within the framework of intergovernmental processes on Forest Law Enforcement, Governance and Trade (FLEGT), can enhance local rights by introducing greater discipline and public accountability into a traditionally anarchic sector. However, these efforts also risk compounding injustices where they uphold legal frameworks that fail to accommodate local rights. Where the law lacks public legitimacy, attempts to implement it are unlikely to be effective and can increase opportunities for elite capture.
- To improve the ability of the poor to claim their rights, donor assistance needs to balance enforcement strategies with the development of institutional mechanisms for the poor to shape and uphold their claims. This requires greater integration between forest-sector reform and parallel justice-sector initiatives. Priorities include promoting the role of judicial and legislative oversight of the sector and alternative dispute resolution, as well as access to these institutions by the poor.

Introduction

This paper applies a rights perspective to policy development in the tropical forest sector, focusing on an area of current concern: forest law enforcement, governance and trade (FLEGT). A rights perspective examines the legitimacy of legal frameworks governing national forest sectors. A particular problem in the FLEGT process is that the legal framework governing the forest sector is often profoundly anti-poor, in its operation if not always in its conception. There is no guarantee that strengthened capacity for law enforcement will improve the welfare of the poor. Indeed, there are good grounds to argue that the reverse is much more likely to occur. The challenge lies in linking law enforcement with pro-poor law reform, and in the institutional mechanisms to achieve this. This requires stronger engagement between FLEGT and donor efforts to secure justice-sector reform (in particular access to justice), in line with political commitment in the Millennium Declaration to 'human rights, democracy and the rule of law'.

A rights perspective on natural resources

Beyond its core meaning of 'justifiable claims', the concept of rights has been variously interpreted in the literature. Moser

and Norton (2001:23) set out a framework which draws together a wide variety of perspectives, and connects universal human rights and duties (see Box 1) to rights in law. While the former are implemented and monitored inter-governmentally, the latter are enforceable through the courts, nationally and supra-nationally (e.g. regional bodies such as the European Court of Human Rights). Such laws may derive from varying sources and are not necessarily consistent in their application. For example, national forest laws potentially conflict with the right to property in the Universal Declaration of Human Rights, where areas claimed by customary groups have been declared as state forest lands with no right to private or collective ownership.

In this paper, we adopt a definition of 'rights' that covers not only universal human rights, but also rights as classified in national legal frameworks, and implemented through the appropriate regulatory regimes. This focuses attention on the links between international discourse and the actual livelihoods of the poor, and on the mediating role of the state in resolving competing claims.

The concept of rights is particularly important in relation to forest livelihoods because of the centrality of issues of tenure.

In the forest sector, long production cycles accentuate the importance of the tenurial regime. Without even the most basic tenurial rights, the forest-dependent poor are not well-placed to enjoy broader human rights pertaining to participation and public accountability, even where such rights are ostensibly guaranteed in law.

Development assistance has had a rather uneven record in helping local people to reassert their rights in the forest sector. Indeed, the overall trend has often been in favour of an expansion of the claims by the state, to the detriment of resource users. The lack of progress on tenurial rights remains a major obstacle – arguably *the* major obstacle – to improving forest governance.

Competing claims on the forest sector

While the world's forests may have important global aspects, they are – in practical terms – almost always managed as sovereign resources of the nation state. The primary duty bearer is thus the state. However, other parties can also be involved, including private sector duty bearers (both forest owners and 'derived duty bearers' such as forest concessionaires), as well as international claim makers (often western environmental advocacy groups).

The national dimension tends to be dominated by the timber industry. This is often very powerful in the forest sector and, in forest-rich countries, there are frequent allegations of 'elite capture' of regulatory and administrative processes. In some cases, this has led to distortion of licensing, implementation, monitoring and enforcement in favour of specific interest groups. The forest industry is also a major presence in isolated rural areas, functioning to all intents and purposes in place of the state. In human rights language, the duties of such derived duty bearers relate both to the internal operations of their industrial activities (for example, safety at work) and the effects of their operations on the livelihoods of the external actors with whom they interact (for example, the damage they may cause to economic activities of rural dwellers, and the denial of public access which they may impose). However, in practice, these obligations may well conflict with – and be overridden by – commercial interests.

For many external observers, the global public goods dimension of tropical forest resources justifies external intervention. These interventions are often based on 'crisis narratives' which warn of the impending disasters if affairs continue on their downward path. Over the last forty years or so, these crisis narratives have covered issues such as the energy crisis and its implications for the poor (concerns about fuelwood production), the global environment (the role of forest mismanagement in deforestation and desertification), conservation (the loss of forest biodiversity), and climate change (the role of forests as carbon sinks). A repeated call for sustainable forest management (SFM) has been one outcome of all these concerns, though the definition of this is problematic in complex old-growth forests. Juxtaposing demanding, but often imprecise, technical standards for sustainable management of public lands with other social and political concerns tends to downgrade the notion of rights, away from human rights principles (cf. Box 1).

Multilateral agreements, such the Convention on Biological Diversity now confer duties upon states parties in relation to forest management, notwithstanding state sovereignty over forest resources. Indirectly, these duties also

confer legitimacy on the claims of western environmental advocacy groups against sovereign governments. There is an emerging and provocative literature on the influence of western environmentalism on public accountability in the tropical forest sector (for example, Brosius, 1997; Chapin, 2004). A particular area of concern is with the ways in which external actors are drawn to some causes but not others in their desire to champion the rights of the forest-dependent poor. For example, forest-dwellers who live by hunting and gathering tend to be perceived very positively, though peasant farmers who engage in 'slash and burn' agriculture (often by far the numerical majority) tend to figure much less favourably. There is thus a danger that external attempts to champion the poor will end up – perhaps unintentionally – generating a hierarchy of rights claimants, in which a concept of 'rights' is promoted, not as a manifestation of universal human rights, but rather in terms of the needs of sustainable forest management (including the permanent designation of forest lands). It would be perverse if the notion of the 'deserving poor', as a positive factor in environmental policy, led to the emergence of a counter-category of the 'undeserving poor', with contrary effects.

Box 1: Human Rights Principles of Relevance to a Rights-Based Approach

The UN 'Common Understanding on a Human Rights Based Approach to Development' provides some important principles for the forest sector. These include a recognition of the practical dimensions of:

- **Equality and non-discrimination:** given that every body has equal human rights, governments must ensure that everyone is treated with the same degree of respect.
- **Participation and inclusion:** as a right to take part in decision-making processes that influence one's life, and to engage in political activities.
- **Accountability and the rule of law:** duty-holders need to answer for how they realise rights, and if they do not do so, individuals can seek redress or compensation.

Inadequacies in national legal frameworks

International human rights instruments, standards and principles impinge on the interests of forest-dependent populations in a number of ways: protection of the land rights of indigenous and tribal peoples, as well as non-discrimination, equal treatment before the law and the right to participation in the political process. The International Labour Organisation (ILO) Convention 169 concerning 'Indigenous and Tribal Peoples in Independent Countries' (1991) is one such instrument, albeit fairly limited in its scope.

The ways in which such instruments are translated into constitutional and statutory law are difficult to generalise between countries. Low national ownership is common to most systems. Being largely externally generated, legislation at national and international levels may not enjoy any real public legitimacy, or be amenable to sensible application. Where the law lacks even superficial legitimacy, attempts to implement it are unlikely to be effective. At most, they will increase opportunities for rent-seeking by officials who exploit the price increments that illegality confers

in the market place. Rent-seeking can increase the cost of compliance to the point that the poor are forced into illegality. This undermines both local livelihoods and the rule of law. Such 'criminalisation' is particularly dangerous where the poor have no feasible legal alternatives.

The concept of 'legality' thus needs to be treated with caution. Views about the importance of suppressing 'illegal activities' need to be tempered with a recognition that such labels are often external constructs, which do not automatically guarantee the presence of legal choices. Similarly, merely establishing a right of ownership does not necessarily confer on the holder an ability to benefit from that right. This fact has been at the heart of many of the problems encountered in community forestry, and many of the challenges the movement now faces (see Box 2).

Box 2: The Power of State-Private Sector Alliances in Central American Forestry

In Nicaragua, constitutional and legislative provisions exist for the demarcation and titling of indigenous territories. Yet the state continued to grant industrial logging concessions on community lands without fulfilling these requirements. The Inter-American Court has found Nicaragua to be in violation of the American Convention on Human Rights, including the right to property, for not ensuring that an effective mechanism for demarcation and titling is in place.

Despite being in possession of usufruct rights, small-scale forest producers in Honduras are frequently unable to meet the transaction costs of securing permits and other approvals for forest management, due to regulatory complexity and bureaucratic corruption. This forces them into reliance on well-resourced timber traders to secure permits and other approvals. This in turn fuels collusion between traders and public officials, and elite capture of community forest management rights as a means to 'legalise' illegal timber production.

A conclusion that can be drawn from these two examples is that establishing rights may have little practical value unless supported by the state. As the Honduras case shows, where the state is not enabling, then the poor may have little option but to collude with those who *de facto* control the resource.

Source: CIFOR, 2004.

The backdrop for any study of pro-poor rights in the forest sector is, therefore, one of ill-defined boundaries and relationships, ambiguities and contradictions in the regulatory regime, and massive differences in the power of stakeholders to influence the application of law. All these have implications for the pursuit of pro-poor rights.

The movement for Forest Law Enforcement, Governance and Trade (FLEGT)

Over the last four years, and at an accelerating pace, the thrust of development assistance to forestry has been focused on illegal logging and its suppression. A series of international initiatives have been launched (the G8 Action Programme on Forests [1999]; the US President's Initiative

against Illegal Logging [2003]; the EU Action Plan for FLEGT [2003]; the regional FLEGT processes [Asia, 2001; Africa, 2003; Europe and North Asia, 2005; Latin America (pending)]; and a number of bilateral agreements allied to FLEGT). The latter include the negotiation of Voluntary Partnership Agreements between the EU and timber-producing countries on the legality of timber exported to the EU. As a result, timber-producing countries are under increasing pressure from their development partners, international NGOs and consumer countries to prove the legality of their timber production.

A range of donor-funded projects and programmes has been funded in support of FLEGT. Public attention in the North has been particularly drawn to the various attempts to use private sector and NGO providers (both national and international) to monitor and audit the national forestry agencies responsible for administering and verifying timber production - a form of global 'hybrid accountability' (cf. Goetz and Jenkins, 2001; Brown *et al.*, 2004).

Illegality is a major problem in the tropical forest sector, often amounting to flagrant criminal activity. In Cambodia, Bolivia and the Brazilian Amazona, for example, over 90% of timber is said to be harvested illegally. In Cameroon, losses of government revenue as a result of illegal logging are estimated at c.£56 million per year, and damages owing to illegality at c.\$465million/year.¹ Illegal practices include harvesting without, or with fraudulent use of, title; logging out of boundaries/encroachment on protected areas; logging of unauthorised or undersized species; false declarations of harvest; and non-compliance with licence conditions.

This provides further evidence of the low levels of governance and respect for popular rights in many forest-rich states. The effects of this are felt at a number of levels, including loss of national revenues, distortion of international markets, and long-term damage to the condition of a resource on which the poor disproportionately depend. However, it does not necessarily follow that attempts to address the problem will automatically improve the welfare of the poor or strengthen their rights, and specific conditions may need to be met for this outcome to be achieved. The next section considers some of the emerging issues, both positive and negative, as judged by the single standard of the promotion of the rights of the poor.

Some positives

The FLEGT movement is intended to serve multiple purposes and benefit numerous actors, not only the forest-dependent poor. From a donor perspective, it may provide a powerful tool to leverage broad governance reforms, and introduce discipline into a sector well known for its anarchic tendencies. These reforms could generate wider benefits for the citizenry at large - for example, as regards overall public accountability and transparency, and enhanced revenue capture. Similarly, for the timber industry (or at least, its better operators), it could lead to an improved environment for future investment, both from improvements to the long-term condition of production forests and by creating a more realistic pricing regime that can sustain the investments needed for sound management.

Some problem areas

There are, then, some positives in the drive to ensure the legality of timber production even as regards the interests

of the poor. However, it is precisely because the focus is not necessarily, or only, on the rights of the poor that the movement needs to be carefully monitored. Upholding a legal framework which already fails to accommodate local rights could compound injustices. Recent publications by a CIFOR-led team of researchers have drawn attention to the dangers that preoccupation with legality can entail in such complex legal environments, and the risks which are posed for the livelihoods of the poor (see Box 3).

This work found that state agencies often enforce forest-related regulations more vigorously when poor people are involved (for example, as regards alleged 'poaching' or chainsaw logging for domestic or petty trade purposes). Law enforcement initiatives thus have the potential to develop into exercises in victim-blaming. Criminalising the vast majority of the resident population is unlikely to serve as a very positive incentive for governance reform. An example is the law enforcement crack-down in Indonesian Papua, after an investigation by the UK-based Environmental Investigation Agency - 'The Last Frontier' - uncovered massive exports of ironwood (merbau) to China, in contravention of Indonesia's log export ban. Responding to the EIA report, the Ministry of Forests in Jakarta declared community logging permits issued by Papua Province illegal, without providing a viable legal alternative for local communities to manage timber resources sustainably. This disenfranchised rural people, even though the problem lay in the capture and abuse of these permits by powerful timber syndicates (DFID, 2005).

Bridging forest law enforcement with pro-poor legal reform

Within the framework of intergovernmental processes on FLEGT, there is a strong emphasis on using the market (in particular, demand for legal and sustainable timber in Europe and North America) to drive governance reform in the forestry sector. Amongst other initiatives, the EC will begin negotiating bilateral Voluntary Partnership Agreements (VPAs) with timber-producing countries. These would establish a clear legal standard, credible systems for verification of legality and possibly the introduction of an independent monitor to guarantee market confidence. Though voluntary, it is likely that timber-producing countries would need to subscribe to such an agreement to guarantee market share in Europe.

However, while VPAs and other instruments currently being promoted within the FLEGT framework may leverage greater transparency and accountability within the timber production chain, making the link to pro-poor legal reform remains a significant challenge. Indonesia is a case in point. There, the ambivalence of national forestry laws with respect to customary rights has proved a major obstacle in the determining a standard for verifying the legality of timber production. Amongst others, the development of a draft standard, based on existing law, gave rise to significant controversy over whether local communities have a right of Free and Prior Informed Consent for the designation of forest concessions by government. It has become clear that reforms to the current law may be necessary if this is to be accommodated.

Box 3: Barriers to Legality

These barriers include:

Complex and inconsistent laws

Environmental issues are subject to numerous competing jurisdictions and sector policies, which profoundly affect the potential for effective forest management. Federal, state and municipal governments may have conflicting roles (as in Brazil and Indonesia). Legislation tends to proliferate bewilderingly. Over 900 legal instruments pertain to forest management in Indonesia (Colchester, 2005). In Brazil, 141 new legal instruments were established in the period 1965 to 1998.

Regulations that victimise the poor

Regulations are often so impractical or out of tune with reality as to undermine the rule of law; for example, expensive permits which need to be applied for in capital cities to allow the killing of one low-value game animal, or the cutting of a single tree. Tree-cutting regulations are often biased towards the needs of industry (as in Cameroon, where industrial concessionaires are allowed three years of felling to cover the cost of preparing management plans, but communities have to pre-finance plans themselves).

Failure of the law to recognise legitimate claims

National laws are often ambivalent on the issue of indigenous rights. In Indonesia, the 1999 Forestry Act defines state forests as those 'unencumbered by rights'. Yet it also defines customary forests (hutan adat) as state forests that fall within customary law areas.

Unclear distribution of powers between levels of government

In Uganda, central government controls conservation areas and logging concessions, and trees on public and private lands, but local governments are responsible for monitoring and stewardship. However the rules on sanctions, arbitration and enforcement, by which local government must exercise their authority, remain unclear (Bazaara, 2003).

Lack of coherence in national planning because of such contradictions

Selective use of legal instruments to restrict access to the resource

Forest zonation frequently overrides existing claims, in the interests of industrial exploitation. Cameroon's *plan de zonage* takes customary claims into account only in relation to present usage (thus fallows are disregarded, though they are an essential part of the farming cycle), and seeks to restrict agriculture to narrow slivers of 'non-permanent forest estate' regardless of historical claims or future needs.

See: CIFOR, 2003

The link with justice systems

Pro-poor legal reform ultimately depends on an effective justice sector – in particular courts and legislative bodies, which lie on the nexus between conflict resolution, law reform and public oversight. In some countries, the justice system has been active in arbitrating claims in the forest sector, and holding executive agencies to account in safeguarding local peoples' livelihoods. The landmark ruling of the Court of Appeal in Malaysia, in the land acquisition dispute of *The Government of Selangor State and three others v. Sagong Bin Tasi and six others* 2005 [CA], upheld aboriginal rights at common law in land vested in the state, as well as a fiduciary duty on the state to protect such rights. The case sets an important legal precedent for the resolution of indigenous land claims in other areas. Another example, albeit supranational, is the 2001 ruling of the Inter-American Court in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (see Box 2). The ruling required the state to adopt 'legislative, administrative and any other measures necessary to create an effective mechanism for delimitation, demarcation and titling of the property of indigenous communities'.

The challenge for FLEGT initiatives lies in how to bridge effective law enforcement with appropriate support to justice systems in resolving underlying legal conflict, and in enabling the forest-dependent poor to uphold their rights. Amongst others, this calls for greater coordination of FLEGT with parallel donor efforts to secure sector-wide reform of justice systems. Particular areas of complementarity could include improved access to justice, spanning legal literacy campaigns, enhanced legal aid, work to simplify court procedures, as well as the development of alternative dispute resolution mechanisms. Justice-sector initiatives could themselves reap dividends from engaging in forestry, where institutional change is likely to carry greater momentum for wider reform than in some other sectors, given the high values and powerful vested interests involved.

Conclusions

In a high-value sector such as tropical forests, with massive inequality and strongly competing interests, the social and economic rights of the poor (in particular, secure tenure and resource rights) depend on the realisation of fundamental human rights principles. These include non-discrimination, equal treatment before the law, democratic participation and accountability. The key challenges are: (i) oversight and enforcement of the duties of the state and its commercial licensees with respect to the forest-dependent poor; (ii) institutional mechanisms for the poor to shape and uphold their claims in the face of often powerful groups (be these companies, forestry ministries or environmental organisations); and, (iii) the ability of the poor to readily access and use these institutions.

Certain FLEGT instruments to combat illegal logging, such as the use of independent monitors, have served to strengthen oversight of forest-sector operations. The question now is whether the FLEGT movement can also help to leverage reform of justice sectors to better address these challenges. Without this, the movement to combat illegal logging risks further expanding the claims of states over forest resources to the detriment of local resource users. That said, justice systems are inherently conservative, and independent oversight by judicial and legislative bodies is unlikely to be welcomed by powerful

executives governing the forest sector (Piron, 2005). This implies a willingness to engage in complex political processes and over longer periods of time than forest sector development assistance may currently be willing to contemplate.

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Footnotes

- 1 Sources: Forest Trends, 2003; Auzel et al, 2003; Flynn, 2004
- 2 Under the UK–Indonesia Memorandum of Understanding (2002) on Forest Law Enforcement and Governance.

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