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The distribution of benefits derived from Forest resources

A briefing prepared by ClientEarth

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Introduction

Purpose of this document

This document aims to give an overview of the rights of local communities to share in the benefits from the exploitation of forests on their lands. We will also look whether there are any gaps in the legal protection of this right to share in the benefits. To do so we have analyzed how benefit sharing is protected in national Ghanaian law (including the Constitution, acts and regulations). Subsequently we analyzed international treaties and conventions ratified by Ghana to see how they protect the right to share in benefits.

This legal briefing is a part of a series of five legal briefings. Each of them focusing on the legal protection of a key right that can support civil society and local community representatives in their work relating to natural resources and community rights.

Methodology

This legal briefing is based on extensive legal research into the Ghanaian national legal framework and related policy documents as well as into the international legal framework applicable to Ghana. A first draft has been developed as a reference document for a participatory training planned in November 2013. The goal of that training will be to support the sharing of legal knowledge on which it is based. The November workshop will also provide an opportunity to further improve the content of the briefing. We hope the legal analysis contained in this series of briefings will be the basis for developing strategies in support of law reform processes in the forest sector.

Law vs practice

In this document we will primarily focus on how benefit sharing is provided for in the law. We are aware that practice often differs from this. However we hope this briefing to be a tool to understand the legal framework. Starting from a thorough understanding of the legal framework, feedback from practice (whether positive or negative) can then inspire recommendations and strategies for legal change, improved implementation and enforcement

Link with ownership and use rights

The right to share in the benefits is intimately linked with the ownership of the resources that generate these benefits. Landowners, even if not exploiting the land themselves usually are entitled to a part of the benefits accruing from this exploitation. Similarly when resources are exploited on lands subject to use rights, the rights-owners are often entitled to a certain share of the benefits from this exploitation.

1 Our understanding of ‘the Right to Share in the Benefits’

The concept of benefit-sharing refers to specific forms of social responsibility to direct returns from the exploitation of natural resources, be they monetary or non-monetary, to local communities. The concept ultimately empowers communities to share in the wealth created by actions directly affecting the resources they rely upon and essentially reaffirms their role in ensuring the sustainability of external economic interventions. Even if the concept still remains somewhat undefined, it has been widely acknowledged to exclude general forms of taxation, consequently placing the focus on local communities at risk, rather than upon the general public.

The responsibility upon the State and private institutions to facilitate the sharing of benefits can be either obligatory or voluntary. Traditionally obligations are grounded in legal provisions, which will form the core part of this analysis. When of potentially substantial impact, we'll also include other (quasi-legal) instruments.

The benefits are calculated either as a proportion of the company's profits from the concession or as a percentage of product harvested. They may also be in the form of a flat sum, agreed at the outset of the concessions agreement. If benefits are conceived as a payment for certain behavior (for example, communities are paid in return for conserving a particular area of forest), the payment of those benefits might be conditional on that behavior being fulfilled (ie. if the community stops conserving the forest, the benefits will be withdrawn).

Benefits are in general differentiated between financial and social. Examples of social benefits include goods, training, preferential local hiring practices, construction of local infrastructure projects, and access to credit, local out growers' schemes, or local management rights and associated revenues.

The way the benefits are allocated is usually subjects to conditions: either they are disbursed through the creation of a local community development fund or through government institutions; either with the consultation of particular people, or only on certain types of projects, and according to fixed decision-making/consultation procedures.

Some include the right to compensation when property is compulsorily acquired within the concept of benefit sharing. For our analysis we will however the right to compensation in our legal briefing on ownership and use rights.

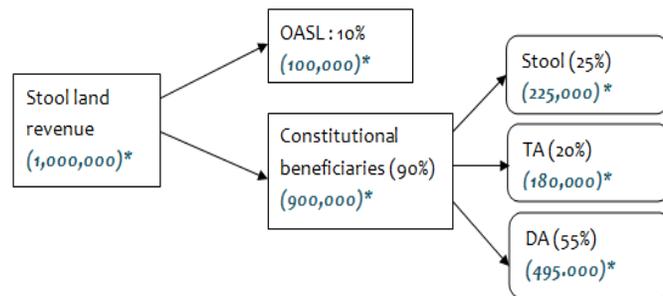
2 Benefit Sharing in National Law

2.1 The 1992 Constitution

The constitution only provides for limited rules on benefit sharing

The Constitution mentions a number of resources that are vested in the President¹. The President is however not the owner of these resources. He is a fiduciary² charged with the obligation to discharge his functions for the benefit of the people of Ghana, who are the true owners of these resources³. In addition the constitution states that one of the underlying principles of a sound and healthy economy is that the State has to ensure that individuals and the private sector all bear their fair share of social and national responsibilities⁴.

Article 267 provides for a formula on benefit sharing in relation to Stool and Skin lands. 10% of all revenue accruing from these lands has to be paid to the Office of the Administrator of Stool Lands (OASL) to cover administrative expenses. The remaining revenue has to be disbursed between the following constitutional beneficiaries: stool (25%), traditional authority (20%), and district assembly (55%).



* numbers included in between brackets are examples

The Constitution Review Commission proposed some amendments to the Constitution in relation to natural resources

The Constitution is currently under review. In January 2010 the Constitution Review Commission (CRC) was set up to consult with the people of Ghana on the operation of the 1992 Constitution and any changes that may need to be made to it. This resulted in the publication of a comprehensive (960 pages) report titled 'From a Political to a Developmental Constitution'⁵. In July 2012 the Ghanaian government released a white paper⁶ in which it accepts a number of the recommendations made by the constitutional review commission and explains the rejection of others⁷. Currently the Constitutional Review Implementation Committee is working to

¹ The Constitution, 1992, Article. 257: public lands and minerals are vested in the President in trust for and on behalf of the people of Ghana

² In a fiduciary relationship, one person vests trust in another whose aid, advice or protection is sought in some matter. In such a relation the fiduciary is required to act at all times for the sole benefit and interest of the one who trusts

³ The Constitution, 1992, Article. 36 (8)

⁴ The Constitution, 1992, Article 36 (2) (c)

⁵ <http://www.ghana.gov.gh/index.php/information/reports/2573-report-of-the-constitution-review-commission>

⁶ A white paper is a type of document presenting government policy preferences

⁷ <http://www.ghana.gov.gh/index.php/information/reports/2572-white-paper-on-the-report-of-the-constitution-review-commission-presented-to-the-president>

complete the process of constitutional reforms by proposing bills for amendment and preparing Ghanaians for a referendum on the changes to some entrenched provisions.

In its chapter 12 on lands and natural resources the Commission observes that at the National Constitution Review Conference it emerged that family lands should be identified within the definition of Stool and Skin lands⁸. The CRC has included this in its recommendations for constitutional and legal change⁹. Therefore, according to the national conference, where Family lands are subsumed under Stool or Skin lands the heads of Family should be given an percentage of the royalties given to the Stool or Skin¹⁰.

At the same conference it also emerged that natural trees should be vested in the communities where the trees are found and farmers who cultivate these trees should enjoy the benefits from the proceeds of the sale of these trees¹¹. However, the CRC does not seem to have taken this recommendation from the national conference on board entirely because it subsequently recommends for the constitution to provide that lands (without specifying which lands) and natural resources (without making the exception for natural trees) should be owned by the people and vested in the president in trust for and on behalf of the people of Ghana¹².

Finally the CRC recommends the inclusion of basic principles in relation to natural resources in the Constitution. The second principle states Ghana's natural resources must be managed in order to ensure equitable distribution of both burdens and benefits of the exploitation of those resources. It adds that the State will regulate the extraction and utilization of resources so that bearing and fringe communities are not disadvantaged and that the numerous human rights abuses occurring in those are addressed. The various acts of parliament that deal with the management of natural resources have to be amended without delay to incorporate and further elaborate these basic principles¹³.

2.2 How are Different Benefits, Fees and Rents linked to timber shared?

Law sometimes includes distinctive rules for naturally occurring and planted trees. Similarly, the distribution of benefits linked to timber is dependent on the natural or planted state of the tree, and are accordingly, treated separately below

Naturally Occurring Trees

Currently, the majority of the timber which is harvested from Ghana's forests stems from naturally occurring trees. The rights to naturally occurring trees are vested in the State in trust for and on behalf of the stools concerned regardless of their on- or off- reserve status¹⁴.

Provisions for benefit sharing exist for Timber Utilization Contracts, which are the only way of attributing timber rights¹⁵. However, a number of other types of logging permits like salvage

⁸ This definition can be found in Article art 267 (1) of the Constitution of 1992

⁹ Report of the Constitutional Review Commission, 'From a political to a Developmental Constitution', Chapter 12, N° 73 and 74

¹⁰ Idem, Chapter 12, N° 65 (c)

¹¹ Idem, Chapter 12, N° 65 (d)

¹² Idem, Chapter 12, N° 71

¹³ Idem, Chapter 12, n° 150 and 151

¹⁴ The Concessions Act, 1962 (Act 124), section 16

permits and timber utilization permits exist. Benefit sharing provisions may be included in the terms of these permits but there is no legal provision which obliges the issuing authority to do so. Consequently we will focus on the various royalties, fees and benefits and their distribution which apply to timber rights holders on the basis of a Timber Utilization Contract (TUC).

Box 1: Acts and regulations create rights, manuals of procedure only provide for guidelines

The procedure for obtaining a TUC is regulated by the Timber Resource Management Act, 1998 (Act 547) as amended (Act 617, 2002) and its implementing Regulations (LI 1649, 1998 as amended by LI 1721, 2003). Rights that are created by these texts can be enforced in court. The acts and regulations are complemented by the Manuals of Procedure. These manuals are built up out of information sheets explaining more in detail the various aspects of forest management. They are written to guide forest officers in their work and can be used to clarify some of the provisions found in the acts and regulations. They are however not legally binding. This means a breach of procedures included in the manuals (as far as it is not a breach of the acts or regulations at the same time) cannot be brought in front of a court.

Below we have included a short summary of fees, rents and benefits accruing from forest exploitation. For each of them a short description is included, followed by an indication of who collects and distributes the benefits, at what distribution and at which moment.

Social responsibility Agreements

Description: The Social Responsibility Agreement (SRA) is an annex to the TUC that has to be signed by local communities and logging companies. Contractors bidding to obtain a timber right must include a proposal SRA in their application¹⁶. The SRA obliges the contractor to provide for amenities, services or benefits to assist the communities and inhabitants of the traditional paramountcy, at a cost of no less than 5% of the value of the stumpage fee of timber that is harvested. The minister has to nullify TUCs if the SRA is not signed following the notification of grant.

Instruction Sheet 3.2 in the manual of procedures section C provides more detail on SRAs. They consist of 2 parts. The first part of the SRA is a 'Code of Conduct'. For both on- and off-reserve TUCs this code should include the right of landowning communities to access the concession to collect forest produce for domestic use and the right to receive a prompt share of the revenue from harvesting. For off-reserve TUCs the code should in addition include a provision for farmers to receive payment for tree tending and the rights of landowners to receive prompt payment of concession rent and royalty¹⁷.

¹⁵ The Timber Resources Management Act, 1998 (Act 547) Section 1

¹⁶ The Timber Resources Management Act, 1998 (Act 547), section 3 (3) (e)

¹⁷ Manual of procedure, Instruction Sheet C.3.2. paragraph 3

The second part of the SRA is called 'Social Obligations'. This part contains specific agreements over and above legally controlled royalties and fees, like the building of infrastructure, employment of a certain number of local workers. This part is more open to negotiations between the contractor and communities, during which the District Forest Officer will act as an arbiter¹⁸.

Collected/Distributed by: All payments above the royalties and rents prescribed by law (which are treated separately below) should be paid directly to the communities or in the case of infrastructure be paid directly by the logging company. The value of payments and social amenities should be equivalent to minimum 5% of the stumpage fee.

Distribution & Beneficiaries: Rents and royalties (described in the sections below) will be distributed according to the formula included in the Constitution¹⁹. The part that is specific to the SRA (equivalent to 5% of value of the stumpage fee) is entirely destined for the communities concerned by the SRA.

Timing: Key provisions of the SRA will be negotiated by the Forestry Service in advance of the contract being advertised²⁰. The SRA subsequently has to be finalized and signed after notification of the grant of a TUC²¹. A timeline for the proposed benefits should be included in the contract.

Timber Rights Fee

Description: The Timber Rights Fee is an annual lump-sum payment for the entire concession paid by the logging company. Timber rights are awarded to the bidder who offers the highest annual timber rights fee²². In the absence of the payment of the first timber rights fee the minister has to nullify the grant of the timber right. Absence of subsequent payments of timber rights fees can result in termination of the TUC.

Collected/Distributed by: In practice the Forestry Commission collects all timber rights fees. The Constitution prescribes however that all rents, royalties and revenues from stool land have to be collected by the Office of Administration of Stool Lands²³. So even if the FC in practice collects the fees the OASL remains the responsible institution for this collection.

Distribution & Beneficiaries: The Timber Resource Management Acts and Regulations remain silent as to what has to happen with the proceeds of the timber rights fee. Apparently they have been transferred into the Consolidated Fund of the government. There have also been proposals to share the revenues from the timber rights fee between the Consolidated Fund, the industry incentive program, afforestation program and the forest owners²⁴. One could

¹⁸ Idem

¹⁹ The Constitution, 1992, Article. 267 (6)

²⁰ Manuals of Procedure, Section C, Instruction Sheet C.3.2. paragraph 3.2

²¹ Timber Resource Management Regulation, 1998 (LI 1649) as amended (2003, LI 1721), Regulation 13 (12)

²² Idem, Regulation 13 (9)

²³ The Constitution, 1992, Article 267 (2) (b)

²⁴ Report on policy options on benefit sharing in Ghana, Ministry of Land and Natural Resources, April 2012

however question whether this practice (as well as the proposition) respects the Constitutional formula for benefit sharing²⁵.

For Forest reserves an old legal provision exists allowing the FC to retain no more than one third of the gross revenue from forest reserves for expenditure on the improvement of the forest in the interest of the owners²⁶. Again, one could question whether this provision can be considered to be in accordance with the benefit sharing formula included in the Constitution.

Timing: The first payment of timber rights fees is due after notification of the grant. Subsequent payments are due on a yearly basis throughout the duration of the TUC.

Contract Area Rent

Description: Contract Area Rent refers to the annual payment per hectare to the OASL in the case of stool lands and in any other case to the owner of the land²⁷. The rent equals GHc 1200/year/Ha for forest reserves and GHc 1000/year/Ha for off-reserve areas²⁸.

Collected/Distributed by: The contract area rent has to be paid to the OASL in the case of stool lands, and to the owner in any other case. However, similarly as for the timber rights fee the contract area rent is in practice collected by the FC.

Beneficiaries and distribution between them: If the rent concerns Stool or Skin lands the OASL, after retaining 10% as administration fee, is obliged redistribute the rest as stated in the Constitution²⁹:

- 25 % to the Stool through the Traditional Authority for the maintenance of the Stool.
- 20 % to the Traditional Authority.
- 55 % to the District Assembly, within the area of authority of which stool lands are situated.

However, in practice the FC withholds 50% of the collected contract area rent³⁰. The remaining 50% is afterwards considered 100% and distributed according to the formula included above. It is unclear where the legal backing for this retention lies. Moreover, where the contract area rent concerns Stool lands, one could question whether the retention of 50% by the FC is in accordance with article 267 (2) (b) and 267 (6) of the Constitution.

If the rent concerns other lands, the landowner is entitled to the full amount of contract area rent paid.

Timing: Contract Area rent is due on a yearly basis, throughout the duration of the TUC³¹.

²⁵ The Constitution, 1992, Article 267 (6)

²⁶ Forest Act, 1927, section 18 (2) (as amended by 21 of 1949 s15)

²⁷ Timber Resource Management Act, 1998 (Act 547), section 8 (f)

²⁸ Timber Resource Management Regulation, 1998 (LI 1649), regulation 27 and schedule 4

²⁹ The Constitution, 1992, Article. 267 (6)

³⁰ Stumpage/rent disbursement report for 01-01-2011 to 30-06-2011, Forestry Commission, http://www.fcghana.org/assets/file/Publications/Forestry_Issues/Stumpage_Disbursement_Report/Stumpage%20jan_jun_2011.pdf

³¹ Timber Resource Management Regulation, 1998 (LI 1649), schedule 4

Stumpage fee

Description: The stumpage fee is a species-specific, volume-based fee charged on harvested timber. It represents royalties which provide basic return to the landowner and contribute to the cost of forest management and timber regulation³². No timber can be lifted from its stump unless its measurements have been taken and stumpage fee has been calculated in presence of the landowner, contractor and District Forest Officer³³.

Collected/Distributed by: The stumpage fee is collected by the Forestry Commission. However, similarly as for the timber rights fee and the contract area rent, the Constitution empowers the OASL to collect revenues in relation to stool lands, so irrespective of practice, they hold the final responsibility for the stumpage fee collection.

Distribution & Beneficiaries: The distribution of stumpage fees is the same as the distribution of contract area rent. If it concerns Stool or Skin lands the OASL, after retaining 10% as administration fee, has to redistribute the rest as stated in the Constitution³⁴:

- 25 % to the Stool through the Traditional Authority for the maintenance of the Stool.
- 20 % to the Traditional Authority.
- 55 % to the District Assembly, within the area of authority of which stool lands are situated.

Like for the contract area rent, the Forestry Commission withholds 50% of the collected stumpage fees³⁵. The remaining 50% is afterwards considered 100% and distributed according to the constitutional benefit sharing formula. Again, it is unclear where the legal backing for this retention lies and one could question whether this practice is in accordance with article 267 (2) (b) and 267 (6) of the Constitution.

There are no legal provisions clarifying how stumpage fees from lands, other than Stool or Skin lands, are divided.

Timing: A person harvesting timber under a TUC has to pay the stumpage fee in respect of the harvested timber within 30 days of billing³⁶.

³² Timber Resource Management Regulation, 1998 (LI 1649) as amended by (2003, LI 1721), regulation 21

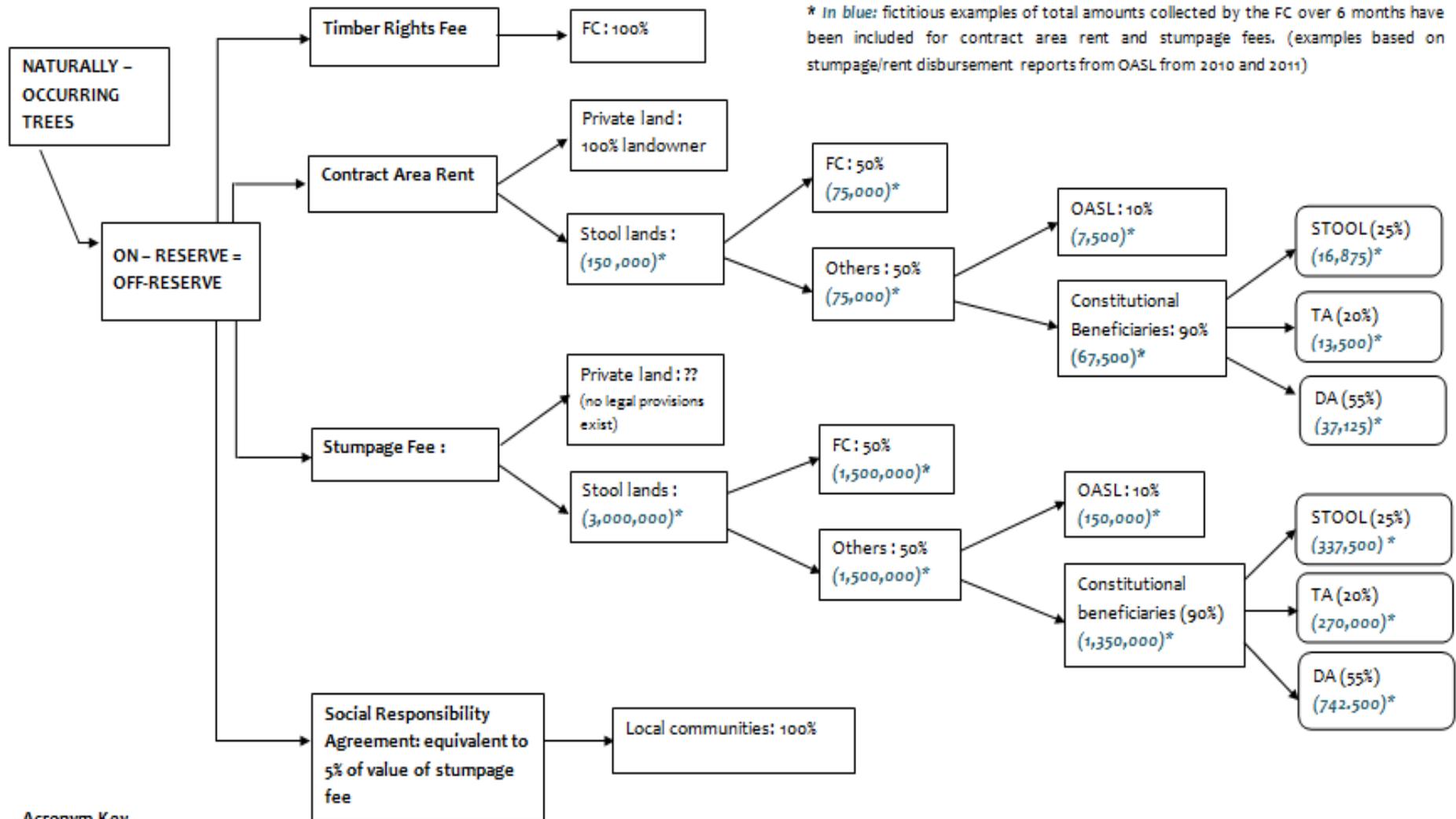
³³ Timber Resource Management Regulations, 1998 (LI 1649) Regulation 23

³⁴ The Constitution, 1992, Article. 267 (6)

³⁵ Stumpage/rent disbursement report for 01-01-2011 to 30-06-2011, Forestry Commission, http://www.fcghana.org/assets/file/Publications/Forestry_Issues/Stumpage_Disbursement_Report/Stumpage%20jan_jun_2011.pdf

³⁶ Timber Resource Management regulation (LI 1649), regulation 25

Diagram 1 - Naturally Occurring Trees (practice)



* In blue: fictitious examples of total amounts collected by the FC over 6 months have been included for contract area rent and stumpage fees. (examples based on stumpage/rent disbursement reports from OASL from 2010 and 2011)

Acronym Key

TA – Traditional Authority

DA – District Assembly

FC – Forestry Commission

2.3 Planted trees

The law on rights to planted trees has been amended to support afforestation, reforestation and private plantations. The law prohibits the granting of timber rights on private forest plantations and land with trees grown or owned by private persons³⁷.

Except for this prohibition and the creation of the Forest Plantation Development Fund (including a Board managing this fund)³⁸, the law and regulations say very little on planted timber and the sharing of benefits in relation to it. However, historically as well as under the more recent National Forest Plantation Development Plan, a number of different plantation schemes, some with provisions for benefit sharing, have emerged.

Where the distribution of benefits is done differently from the constitutional benefit sharing formula, one could question whether this distribution is in breach of the Constitution. However, this constitutional benefit sharing formula is included in chapter 21, titled '*Land and Natural Resources*'. This would suggest that planted timber, because it is not a natural resource, is not targeted by the constitutional provision on benefit sharing.

Included below is a brief overview of the different plantation schemes and the possible benefit sharing mechanisms included within them.

On-reserve Government Plantation Development Program

Description: The government has supported the establishment of industrial plantations utilizing hired labor and contract supervisors. This strategy was funded through the Highly Indebted Poor Countries (HIPC) funds. Under this scheme the plantations developed are owned by the government and the respective landowner.

Collected / Distributed by: Revenue for these plantations is collected and distributed by the FC.

Distribution/Beneficiaries: According to the yearly reports of the National Plantation Development Fund landowners are entitled to royalties. It is however unclear how much royalties will be given to them.

Timing: At harvest

³⁷ Timber Resource Management Act, 1998 (Act 547) as amended (Act 617, 2002), Section 4 (3)

³⁸ Forest Plantation Development Fund Act, 2000 (Act 583)

On-reserve State allocated degraded land

Description: The Forestry Commission is permitted to allocate proportions of degraded reserves to private entities for the establishment of forest plantations³⁹. This is encouraged by offering the majority of the revenue from the harvest of timber to the private entity.

Collected/Distributed By: Revenue from the forest plantation is collected by the planter, who subsequently has to pay a part to the Forestry Commission. It is the FC who further distributes between other beneficiaries.

Distribution and Beneficiaries: Revenue from private plantations on state allocated degraded land primarily goes to the planting entity. The FC, landowners and local communities are only entitled to a small proportion of the generated revenue:

- Private entity (90%)
- Landowner (6%)
- Forestry Commission (2%)
- Local Community (2%)

Timing: At harvest.

Modified Taungya System

Description: Under the Modified Taungya System farmers are allocated shares of land in degraded parts of forest reserves and are given seedlings to reforest the area. They are also permitted to plant food crops on the same land during the first years of plantation establishment until the forest cover closes (intercropping). In spite of being mentioned in the Forest and Wildlife policy, the MTS does not have a specific legal basis in one of the acts or regulations governing the forest sector. In some cases the terms and conditions have been laid down in signed agreements. The community forest management project (CFMP) used the same approach to establish community plantations

Collected / Distributed by: Farmers collect the revenues from intercropping activities themselves. Revenue from the trees on the plantations is collected and distributed by the FC.

³⁹ Forestry Commission Act, 1999 (Act 571), section 2 (2)(c)(iii)

Distribution/Beneficiaries: Farmers are entitled to 100% of the benefits accruing from intercropping. Benefits from the planted trees are distributed as follows:

- Forestry Commission (40%)
- Farmers (40%)
- Traditional landowner (15%)
- Local community (5%)

Timing: At harvest.

Off-reserve private plantations

Description: Private entities, communities or farmers who want to reforest the land they own can apply for support from the Forest Plantation Development Fund. A beneficiary of the Fund who observes the conditions determined by the board is entitled to exercise ownership over the timber produced⁴⁰. This means that, unless differently determined in the conditions, he is entitled to the full revenue from the timber he planted.

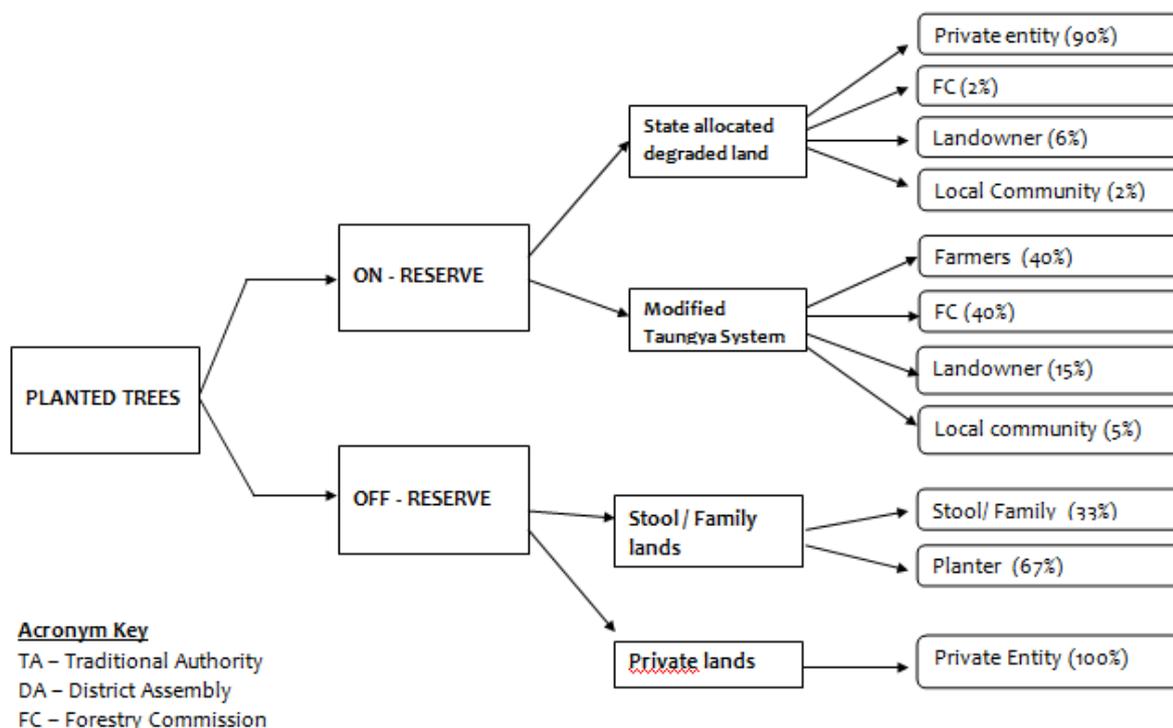
Collected / Distributed by: All revenues are collected by the planters.

Distribution/Beneficiaries: 100% of the revenue belongs to the planter if he is at the same time landowner. Where trees are planted on land not owned by the planter, agreements may exist to share the revenue between the planter and the landowner. In situations where the farmer is a tenant on chief or traditional lands, usually 33% of timber proceeds is given to the landowner.

Timing: At harvest.

⁴⁰ Forest Plantation Development Fund Act, 2000 (Act 583), section 3

Diagram 2 – Planted Trees (practice)



2.4 Forest and wildlife policy

The new Forest and Wildlife Policy (2012) aims (forth part) at the conservation and sustainable development of forest and wildlife resources for environmental stability, continuous benefits from ecosystems services in the present and the future whilst fulfilling Ghana’s commitments under international agreements. This aim is further clarified in 5 policy objectives.

The first policy objective is titled ‘*Managing and enhancing the ecological integrity of forest, savannah, wetlands and other ecosystems*’. Under this policy objective a fund is provided for which will be established to support CSO and communities for tree planting along ecologically sensitive areas.

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The second policy objective, '*promoting the rehabilitation and restoration of degraded landscapes through plantations development and community forestry*', provides for the development of incentives to support public, private and community investment in forest plantation development. In addition a national reforestation plan will be developed and the Plantation Development Fund will be reviewed to set up a National Reforestation Fund.

Under the forth policy objective, 'Promoting and developing mechanisms for transparent governance, equity sharing and peoples participation in forest and wildlife resource management', the Ministry of Land and Natural Resources will ensure the enactment of the necessary legislation to enable communities to benefit from the trees on their land (by providing off reserve tree tenure security). Efforts will be put in place to define property, tree and forest tenure rights and rationalize the forest fees and taxation systems and ensure resulting equitable distribution.

3 Benefit Sharing in International Law

Among the various international instruments relating to human's rights and the environment more than 60 are applicable in Ghana. In this section we have handpicked some of the most relevant treaties and provisions included within them that focus on the sharing of benefits from the timber and wildlife resources management and exploitation. Maybe surprisingly, the United Nations Declaration on Rights of Indigenous peoples is not among the instruments selected. Although this is an authoritative text in relation to indigenous peoples and their rights, the right to share in benefits from resources exploitation on their land seems only to be included in a marginal way. The only mentioning of benefit sharing concerns the commitment of state parties to eliminate all forms of foreign exploitation to enable their peoples to fully benefit from the advantages derived from their national resources.

3.1 African Charter on Human and Peoples' Rights

This international instrument was created to protect the human rights and freedoms of people living in Africa. Ghana ratified the African Charter the 24th of January 1989.

What makes the African Charter especially interesting is the fact that its provisions can be enforced through the African Commission and the African Court. The African Commission on human and Peoples 'Rights has the power to interpret all the provisions of the present Charter at the request of States, NGOs and even individuals. Ghana is one of the only five countries allowing nongovernmental organizations and individuals to also make an individual complaint to the African Court.

Quick reference

- **Full name:** African (Banjul) Charter on Human And Peoples' Rights
- **Common Name:** African Charter
- **Year:** 1981
- **Ratification by Ghana:** 1989
- **Entered into force:** 1986
- **Legal status:** legally binding

Article 22 of the Charter defines the right of people to their economic, social and cultural development and compels States to enforce it in a free and equal manner. The African Commission has indicated that benefit sharing is a part of this right to development (see box

below). Like many other treaties the African Charter obliges states who are part of it to adopt legislative and regulatory measures to give effect to the rights recognized by the Charter⁴¹.

Box 2: The Endorois case:

Benefit sharing is included in the right to compensation which in turn is included in the right to free disposition of natural resources

In the 1970s, the Kenyan government evicted hundreds of Endorois families from their land to create a game reserve for tourism. The Kenyan Centre for Minority Rights Development and the Minority Rights Group International submitted a claim before the African Commission on behalf of the Endorois Community (after domestic legal efforts and action failed to constitute an effective remedy for the alleged violations).

The Commission found that the Kenyan government had violated the Endorois rights to religious practice, to property, to culture, to the free disposition of natural resources, and to development, under the African Charter (Articles 8, 14, 17, 21 and 22, respectively). With respect to the lack of benefit sharing, the African Commission stated:

“In the present context of the Endorois, the right to obtain “just compensation” in the spirit of the African Charter translates into a right of the members of the Endorois community to reasonably share in the benefits made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival”.

in this context, pursuant to the spirit of the African Charter benefit sharing may be understood as a form of reasonable equitable compensation resulting from the exploitation of additionally owned lands and of those natural resources necessary for the survival of the Endorois community”.

Therefore the guaranteed right to free disposition of natural resources including the right to compensation (art 21) includes the right of local communities to share in the benefits from

⁴¹ African Charter on Human and Peoples' Rights, 1989, Article 1

the exploitation of resources on their lands.

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003

Source: <http://www.achpr.org/communications/decision/276.03/>

3.2 Convention on Biological Diversity

The CBD was inspired by the world's growing commitment towards sustainable development. As specified in its article 1, it regulates the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.

Article 8 of the convention provides that State parties shall strive to respect and maintain knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity. For example, many widely used products, such as plant-based medicines, health products and cosmetics, are derived from traditional knowledge. Benefits arising from the use of such knowledge, innovations and practices should be shared in an equitable way.

The Convention is supplemented by the Cartagena and Nagoya protocol both of which have been signed by Ghana but have not yet entered into force. The Nagoya protocol on access and benefit sharing recognizes the economic value attached to ecosystems and biodiversity and considers that the fair and equitable sharing of this economic value is a key incentive for their conservation. In its article 5, the Protocol invites State Parties to take appropriate measures to ensure that benefits arising from the utilization of genetic resources that are held by indigenous and local communities are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms. An annex to the protocol provides for a non exhaustive list of monetary and non-monetary benefits.

Quick reference

Full name: Convention on Biological Diversity

Common Name: CBD

Year: 1992

Ratification by Ghana: 1994

Entered into force: 199

Legal status: legally binding

3.3 Maputo Convention

By ratifying the African Convention on the Conservation of Nature and Natural Resource, the Contracting States have undertaken to adopt all necessary measures to ensure the conservation, utilization and development of soil, water, floral and faunal resources with due regard to the best interests of the people⁴².

Similarly to the CBD, the Maputo convention provides for the fair and equitable sharing of benefits arising out of biotechnologies based upon genetic resources and related traditional knowledge with the providers of such resources⁴³

In its Article 14 (1) (b), the Convention also provides that in the formulation of all development plans, full consideration should be given to ecological, as well as to economic, cultural and social factors in order to promote sustainable development. In spite of benefit sharing not being explicitly mentioned, it can certainly be implied within the right to development (like is the case for the African Charter).

In its annex II, the Convention specifically provides that protected areas (managed mainly for landscape/seascape conservation and recreation) should contribute to the welfare of local communities through the provision of natural products (such as forest and fisheries products) and services (such as clean water or income derived from sustainable forms of tourism).

Quick reference

Full name: African Convention on the Conservation of Nature and Natural Resources

Year: 1968; amended 2003

Ratification by Ghana: 2007

Entered into force: yet to enter into force (8 more ratifications needed)

Legal status: Future legally binding

3.4 Voluntary Partnership Agreement (legally binding)

⁴² Maputo Convention, 2003, Article 2

⁴³ Maputo Convention, 2003, Article 9 (2) (k)

The Voluntary Partnership Agreement (VPA) is a trade agreement concluded between Ghana and the EU. It aims to provide a legal framework to ensure that timber and timber products imported to the EU have been legally produced. In addition the agreement aims to enhance forest law enforcement and governance.

In the legality definition and the legality assurance system a number of elements in support of benefit sharing have been included. For timber to be legal, the logger needs to demonstrate he has complied fully with his obligations under the social responsibility agreement. In addition he must have paid all ground rents and stumpage fees (part of which are subsequently shared with traditional authorities, stools and district authorities).

Quick reference

- . **Full name:** Voluntary Partnership Agreement between the European Community and the Republic of Ghana on Forest law enforcement, governance and trade in timber products into the Community
- . **Common Name:** VPA
- . **Year:** 2009
- 0. **Ratification by Ghana:** 2010

Conclusions

The 1992 Constitution may not say much about benefit sharing, it does however include a formula for sharing benefits from Stool and Skin lands. The constitution provides that **all** revenue from stool lands, after deducting 10% for the Office of the Administrator of Stool Lands (OASL) to cover administrative expenses, has to be disbursed between the following constitutional beneficiaries: stool, traditional authority, and district assembly (art 267 (6)). Mindful of the constitutional benefit sharing formula, it seems however that one could question whether a number of legal provisions and practices respect these constitutional provisions;

- Timber right fees, even if part of revenues accruing from stool lands are not shared
- Revenue accruing from salvage permits and so-called special permits is not shared
- The Forestry Commission keeps 50% of forest revenue accruing from stool lands before sharing the rest with the OASL, Stools, traditional authorities and DA
- The Forest Act limits the amount of forest revenue which the Forestry Commission can deduct from the total forest reserve revenue to one third.

The current practice where it is the forestry commission who collects timber rights fees, local area rent and other revenues accruing from stool lands does not free the OASL from its constitutional responsibility in this regard: the Constitution provides for the OASL to be responsible for this collection in its article 2674 (2) (b)

Finally, very little is included in the forest legal framework in relation to Social Responsibility Agreements, and even less for planted timber. This further weakens the position of local communities to be able to share in the benefits of timber exploitation on their lands. If the Forestry Commission is to shift its management approach to collaborative resource management, thus asking communities to increasingly share in management responsibilities then the share of the latter in the benefits should also increase .

ClientEarth is a non-profit environmental law organisation based in, London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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