



Negotiating Carbon Concessions in Developing Countries: Issues of Capacity, Confidentiality & Corruption

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INTRODUCTION

In 2008, John Vidal wrote an article in the *Guardian* newspaper entitled 'The great green land grab', in which he discussed the boom in conservation-based land investments in developing countries and its potential pitfalls. Vidal focused mainly on land purchases by wealthy individuals and non-profit organizations ostensibly aimed at preserving areas of natural beauty and wildlife habitat, but today much of the activity in this area stems from the growing carbon-offset industry that seeks to plant or preserve forests (or plantations) as 'sinks' of carbon dioxide. The growing market for forest-derived 'carbon credits' – projected to grow from \$42.0 million in 2010 to \$65.1 million in 2015 (Environmental Leader 2011) has not escaped the attention of the UN Special Rapporteur on the Right to Food, who noted that carbon sequestration plantations and avoided deforestation projects are an important factor driving land acquisitions in many countries (De Schutter 2009: 6-7).

There is substantial long-standing controversy within the environmental community about the carbon offset industry and the very notion of carbon sinks. Critics point to the difficulty of ensuring that environmental benefits accrue from such projects, the issues of 'permanence' (even the best managed forests can burn down or be ravaged by pests) and 'leakage' (deforestation and degradation activities can simply shift elsewhere) being paramount (Humphreys, 2006: 206; Takacs, 2009: 58; Cotula and Mayers 2009:1). However, less focus, until recently, has been given to the issue of how much developing countries (which, with much more cheap land available, are likely to receive the bulk of investment) and local communities will benefit from these projects. While often touted as 'win-win' ventures, it is possible that developing countries that have been unsuccessful in accruing substantial benefits from other natural resources (i.e. minerals, timber) will also fail to reap the full benefits of their carbon sinks.

Critical in this respect is how the terms of carbon sequestration projects are negotiated between the project developer and the government and community. When the project developer is a foreign private investor, the key document will be some form of investment agreement. Investment agreements have often been overlooked in studies on the regulation of foreign investment in developing countries, in part because they are rarely disclosed to the public. However, recent research in the area suggests that establishing fair terms in investment agreements can be crucial in ensuring long-term benefits for countries and communities (Cotula 2010; Rosenblum and Maples 2010). Also highlighted in the literature are the myriad problems associated with traditional investment agreements and the confidentiality that generally surrounds them (Cotula 2010; Tienhaara 2009; Rosenblum and Maples 2010).

This paper aims to examine in greater detail the political and legal dimensions of foreign direct investment in forest carbon with a particular focus on investment agreements. The problems inherent in these types of investment and, in particular, the opportunities for corruption to arise will be highlighted with a case study of a carbon investment agreement in Liberia.

CARBON AS A COMMODITY

Forests play a very important role in the climate cycle as both sinks and sources of carbon dioxide, an important greenhouse gas (Humphreys, 2006: 206; Streck et al. 2008: 4). Forest loss and degradation contributes as much as 12-17% of annual greenhouse gas emissions globally (Global Witness 2010: 2; Cotula and Mayers 2009: 1). Sequestering carbon in forests is relatively inexpensive when compared to the efforts required to actually reduce emissions from petroleum-based economies. This is especially the case when sequestration occurs in developing countries where land is cheap and certain types of trees grow quickly.

A forest carbon offset project is defined by Takacs (2009: 56-7) as: “a project developer plants trees to reforest a degraded ecosystem, or ensures that a forest that would have otherwise been degraded or felled is, instead, preserved. The developer can then sell the carbon...now sequestered in the trees and soil, for a contracted period of time”.

WHO BUYS FOREST CARBON?

There are two markets for carbon: the compliance market and the voluntary market.

In the compliance market, governments and some firms purchase credits in order to meet their regulatory obligations for emissions reductions. To date, the international climate regime has not fully embraced the idea of allowing countries to meet their emissions targets through forest carbon offset projects. The Clean Development Mechanism, established under the 1997 Kyoto Protocol of the UN Framework Convention on Climate Change, allows Annex I countries (developed economies and economies in transition) to partially meet their emissions targets through funding projects in developing countries. Some forestry activities, notably afforestation and reforestation, are permitted, but avoided deforestation and degradation are not. At the regional level, forestry activities are completely excluded from the EU Emissions Trading Scheme (Cotula and Mayers, 2009: 1).

As a result, there is currently only a very small compliance market for forest carbon. However, this is almost guaranteed to change in the near future; proposed US legislation would allow forest carbon offsets and California's Global Warming Solutions Act will allow 49% of emissions to be offset and forest carbon will be an attractive option (Takacs 2010: 525). Additionally, and perhaps most significantly, any successor to the Kyoto Protocol is likely to contain rules on Reducing Emissions from Deforestation and forest Degradation (REDD). Plans for REDD (now REDD+) are rapidly developing. Although much of the emphasis has been on donor finance, REDD is also expected to involve private investment (Global Witness 2010: 3), and could therefore be an important driver of land acquisitions in the future.

Although there is not a large compliance market for forest carbon credits at present, there is a burgeoning voluntary market. In the voluntary market, the primary buyers are large businesses, often in energy intensive sectors, which purchase carbon offsets for marketing purposes (i.e. in order to claim a product is 'carbon neutral'), to meet voluntary corporate social responsibility objectives, to prepare for (or deter the development of) potential regulatory action, or to resell credits at a profit (Streck et al. 2008: 7-8; Hamilton et al. 2008: 293). According to Hamilton et al. (2008: 321), governments are also "increasingly purchasing carbon credits to offset activities or annual emissions." Finally, individuals that want to reduce their 'carbon footprint' also purchase credits, often through retail re-sellers (Global Witness 2010: 3; Takacs 2009: 57; Portela et al. 2008: 21).

Carbon credits in the voluntary market may be certified under schemes such as the Voluntary Carbon Standard (VCS) or the Climate Community and Biodiversity Alliance (CCBA). However, some companies will choose not to certify or to implement in-house certification schemes which are less accountable than third-party arrangements.

WHO SELLS FOREST CARBON?

The carbon supply chain can be relatively simple or quite complex. There will be an original 'owner' of the land or trees or the rights to the carbon stored in the trees. This owner can then either develop a project or sell or lease his or her land/carbon rights to a project developer. The project developer then either sells carbon 'credits' directly to individuals, governments and firms or instead sells them to an intermediary that will resell them at a profit (Hamilton et al 2008: 293).

This paper is primarily concerned with the transactions between the original owner of carbon rights and a project developer. However, the question of who is the original owner of carbon rights is far from straightforward and will vary from one country to the next (Barnes and Quail 2010: 7; Takacs 2009: 5). Although some governments have specific legislation clarifying carbon property rights, this is not yet common, particularly in developing countries. As such, carbon property rights have to be inferred from existing laws on other forms of property. To complicate matters further, in many situations there may be overlapping legal interests in a given area of land; for example, subsurface rights (i.e. minerals) may be separate from surface rights.

Legitimate project developers are likely to be dissuaded from investing in areas where land tenure is uncertain. It is crucial for them, in order to be able to sell credits accruing from a project, to establish carbon property rights that are sufficient to exercise long-term control over the land (Miller et al. 2008: 166). However, not all investors are equally concerned with this issue; entrepreneurs with no long term interest in forest management and sequestration, often referred to in the media as 'carbon cowboys', will be keen to take advantage of unclear tenure situations.

The focus of this paper is on the most common tenure arrangement in tropical countries: state-ownership rather than private or communal ownership of forests (Humphreys, 2006: 9; Cotula and Mayers 2009, 11). While some governments may consider carbon credits to be sovereign rights, which can only be owned and traded for profit by the government, in most developing countries where governments have limited capacity to develop carbon offset projects and sell credits on the market, it is more likely that they will enter into concession arrangements with organizations and private actors to manage the resource (Wilder et al 2005: 301; Miller et al. 2008: 169). In countries where more than one level of government is responsible for forest management, national and sub-national authorities may disagree over which level of government is vested with carbon property rights, but for the purposes of this paper the focus will be on national governments, which typically control any incoming foreign direct investment.

CARBON CONCESSIONS

Forest concessions have been in existence at least since the 1700s and are currently the dominant form of forest governance in tropical forests in Southeast Asia, parts of the Amazon, and especially in Central and West Africa (Agrawal et al. 2008: 1461; Gray 2002: 7). Gray (2002: 1) defines a forest concession as “a contract between a forest owner and another party permitting the harvesting (*forest utilization contracts*) and/or managing (*forest management services contracts*) of specified resources from a given forest area”. Because of their long-standing history in many countries, concessions are a likely model to be adopted for forest carbon offset projects.

From the perspective of a foreign investor, there are many advantages to concession agreements. First of all, the investor only has to deal with discretionary government decision making one time; as Madeira (2009: 9) notes, “Once the concession is issued, the project can continue for the duration regardless of inclination or disinterest among officials.” Second, concession agreements provide a proven means of managing risk and clear and enforceable long-term carbon tenure. Third, concession agreements often provide for dispute settlement in arbitration rather than in local courts, which foreign investors prefer.

It should also be noted that forest carbon rights may be conferred to foreign investors in concession agreements that are not principally focused on sequestration. For example, investors in rubber or palm oil plantations may seek carbon rights in their concession area.

BIDDING & NEGOTIATION

Historically, concessions have been allocated administratively in most countries. This is a slow process that invites inefficiency and corruption (Gray 2002: 3). In recent years there has been a push by international donors and other

organizations for countries to move to competitive bidding processes (Grut 2010).

In many countries, concessions and other investment agreements are negotiated and signed by a few government officials, behind closed doors and without the involvement of Parliament. When legislatures are involved in the process, it is often a matter of ‘rubber-stamping’ rather than genuine participation (Ayine et al. 2005: 3; Global Witness 2006: 41).

The negotiating capacity of government officials in developing countries is an issue regardless of the sector in which investment is taking place. However, the capacity problem is exacerbated when negotiators are dealing with a new type of investment that they have very little experience with. Lohmann (2006: 238-9) highlights the fact that “forest authorities often simply don’t know how much foreign companies might profit from carbon trading, or how long they plan to keep plantation land out of other uses to ensure that carbon continues to be stored on it”.

An additional problem that has come to the fore in recent years is that concessions and other foreign investment agreements are at times negotiated by authoritarian governments or transitional governments that lack accountability and are often corrupt. For example, mining companies acquired many favourable agreements in Indonesia in the years in which Suharto was in power. When Suharto’s government fell and a democratic government was elected, the US government insisted that the original contracts be fulfilled (Stiglitz 2003: 71). In Liberia, the transitional government in place following the country’s two civil wars concluded several major agreements including a controversial one with Mittal Steel (Global Witness 2006). Some of these contracts have since been renegotiated (Ford and Tienhaara 2010).

Of course, corruption can also occur under democratic regimes. Global Witness (2010: 6) has pointed out that the “intangible nature of ‘carbon rights’” makes fraud much easier to commit and more difficult to detect, because the only physical evidence of ownership might be a piece of paper or an electronic record.

KEY PROVISIONS

There are some aspects of a concession that should be spelled out clearly regardless of whether the agreement is for carbon, timber or other rights. These include a map of the concession area, the length of the concession term, a royalty/taxation scheme, a forest/environmental inventory, an environmental management plan, and a community development plan (Gray 2002: 4). Additionally, the concession should clearly define what the concession holder is gaining rights to.

Carbon rights

In the case of a carbon concession, rights to carbon, trees and land must be clearly defined. An example of how an agreement might define 'carbon rights' is available in a Concession Agreement between The Republic of Liberia and Sime Darby Plantation signed in April 2009. Although this concession is primarily concerned with the development of a palm oil plantation, the investor has additionally sought carbon rights in its concession area. These are very broadly defined in the concession agreement as:

Any current or future right, Credit, interest, certificate, offset, allowance, entitlement or benefit, whether recognized by Law, regulation, contract, regime, publication, policy, program or fund (now or in the future, and as created, amended, supplemented or replaced from time to time), that is conferred on any Person as a result of, or in relation to, emissions generated, abated or sequestered pursuant to its possession, occupation, use or development of the Concession Area and any Additional Area, including, in the case of emission reduction and sequestration activities, rights to the actual physical reduction in emissions underlying or caused by such activities.

Government take

There are three ways by which governments are most likely to obtain direct funds from carbon concessions: land rental fees, royalties and/or taxation.

It can be difficult for governments and investors to agree on fair and balanced fiscal arrangements in sectors such as mineral extraction where prices are volatile. However, this issue is even more problematic in a new sector like forest carbon where governments don't have experience with the value of the resource. The fact that two carbon markets exist (with credits in the compliance market generally fetching higher prices) and that numerous other factors such as certification can affect both the cost of a project and its potential profitability, further complicates the matter.

It also doesn't help that in many countries, forest fees have been kept well below the actual value of the timber (Gray 2002: 4). Because forests have been traditionally undervalued, it is easy for governments to continue to do so under carbon concessions. In particularly poor countries in desperate need of investment, governments are more likely to submit to investor demands leading to serious undervaluing of their resources.

According to one report, a company called TreeFarms leased an area of land in Tanzania at a rate of \$US1.90/year for a total term of 99 years (Lohmann 2006: 242) The result is that the company will pay the government \$US 565,000 over 25 years, while it could potentially earn about \$US 27 million (ibid). Another report, by the Center for Human Rights and Global Justice (2010: 56) on the same company's operations in Southern Sudan notes that the approximately US\$0.07 per hectare per year being paid "seems to be little more than a symbolic payment".

When governments choose to tax investors on their income from carbon offsets, they may lose out if they do not insert careful provisions into the agreement on what kinds of costs those investors can legitimately claim. For example, in the Sime Darby oil palm concession in Liberia, it is stated that:

To the extent Investor realizes certified emission reduction credits or other carbon or carbon-equivalent emission reduction credits, or any corresponding monetary value or cost savings that results from greenhouse gas emission reductions whether created by Investor or a third party acting under the direction of Investor, *less any associated costs which would be considered as an expense*, must be declared as taxable income and are taxable in accordance with Law (emphasis added).

Without clear language about what ‘costs’ are legitimate expenses, this clause is open for abuse by the investor.

Governments may feel extreme pressure to agree to deals despite relatively poor fiscal terms. Lohmann (2006: 238-9) reports one incidence when Ugandan officials tried to negotiate a better rental rate on a forest reserve with a German company but were told that if they didn’t sign the deal, as is, then the company would simply invest elsewhere. This suggests the possibility of a race to the bottom emerging in this area, where countries compete with one another by lowering taxes and royalties in an effort to capture limited investment (Takacs 2009: 73).

Term of agreement

Concession agreements vary greatly in length from a few years, to a century. In some industries, such as mining, where large upfront capital investments are required and profits do not begin to accrue for several years, terms are likely to be greater than twenty years. Because of the ‘permanence’ issue, the duration of the average forest carbon offset concession is likely to be very long.

There are several problems with long-term concessions. The first is that if the concessionaire mismanages the forest or fails to live up to its commitments to the local community, it will be very difficult for the government to cancel the concession without paying the investor compensation or ending up in a legal battle (Gray 2002: 21). Second, if land tenure arrangements are disputed or unclear, a long-term concession can, in practice, mean “a full alienation of the land” from the local community (Center for Human Rights and Global Justice: 50). Third, in long-term concessions governments may be locked into fiscal arrangements that do not adequately represent the changing value of carbon over time.

For these reasons, short-term or renewable concessions (renewable subject to performance) are preferable from the perspective of governments (Gray 2002: 21).

Forest Management & Access to Concession Area

One of the risks for both investors and governments in forest carbon projects is that fire, floods, pests or human encroachment can destroy the forest and thereby the value of the investment. One way to minimize this risk is for concession agreements to have detailed conditions of forest management concerning such things as firebreaks and pest control (Miller et al 2008: 174). It is also essential that forest management practices consider the needs of local communities. For example, certain types of plantations consume large amounts of water, which may lead to reduced availability in neighbouring areas (Center for Human Rights and Global Justice 2010: 58).

However, it is equally important that a 'fines and fences' or 'guns and guards' approach that displaces and disenfranchises local communities is not adopted (Cotula and Mayers 2009: 1; Takacs 2009: 26). In other sectors, particularly mining, oil and gas, such policies have led to serious concerns about human rights abuses. Rules not only about access to forests, but also about how such access will be enforced must be clearly spelt out in concession agreements with a view to avoiding conflict over resources.

Liability and Insurance

There are numerous types of risk associated with carbon offset projects: delivery risks (trees may not grow as quickly as modelled due to ecological or even climate change driven factors); permanence risks (natural disasters, illegal logging); demand-side risks (changes in the price of carbon); the risk of the project developer failing to meet obligations or disappearing; political risk (expropriation of carbon rights); and the risk of local hostility or civil unrest (Dutschke and Angelsen 2008: 79; Cotula and Mayers 2009: 3; Takacs 2009: 18).

Some of these risks will be covered in an agreement by 'force majeure' clauses that dictate that in the event of a natural disaster the concession agreement will be terminated. Additionally, some of these risks, political risk in particular, can be covered by investment insurance.

However, for other risks, liability should be clearly stated in the concession agreement. For example, is the government liable if illegal logging occurs on the concession or is it the investor's responsibility to control access to the site?

Dispute Settlement

Foreign investors have long argued that local courts in developing countries are incapable of fairly adjudicating claims brought against their own government. In response to their concerns, in the 1960s a system of dispute settlement emerged which allowed investors to initiate international arbitration proceedings with a host state. Provision for investor-state dispute settlement is now a standard feature of foreign investment contracts. However, even if arbitration is not covered in a concession agreement, it may still be an option for investors if they have access to a bilateral investment treaty (BIT).

It is possible for government action in relation to an investment protected under contract to amount to a breach of treaty, for example, in the case of an expropriation or when a state's actions or omissions amount to a denial of justice (Foy 2003: 75-6; Schreuer 2005). The relationship between concession agreements and BITs is further complicated by the existence of so-called umbrella clauses. Approximately 40% of BITs contain such provisions, which refer to the 'observance of obligations' undertaken by host states with respect to foreign investors (UNCTAD 2007: 73). Dolzer and Stevens (1995: 82) have asserted that umbrella clauses protect an investor's contractual rights against "any interference which might be caused by either a simple breach of contract or by administrative or legislative acts". In this view, a violation of a concession agreement automatically translates into a violation of an applicable BIT.

If this is the case, arguably investors can get around a contractual provision expressly placing disputes within the purview of the domestic courts of the host state (Subedi 2008: 96). However, this view falls into only one of several schools of thought on the nature of umbrella clauses (Maniruzzaman 2008: 153). As Cheng (2007: 1139) notes, the decisions of ten tribunals that have considered umbrella clauses are inconsistent, with five tribunals taking the view that the umbrella clauses in the respective BITs did not transform the purported contractual breaches of the host state into treaty breaches, and five tribunals finding that the umbrella clause could or did transform at least some contractual obligations into treaty obligations (though they differed on the precise scope of this transformation).

While investment arbitration is commonly framed in the literature as a neutral and depoliticized forum for dispute resolution (Alvarez and Park 2003; Coe 2005), several authors have recently pointed out that the system is structurally biased against states and plagued by other problems including a severe lack of transparency (Van Harten 2007; Tienhaara 2009). Coupled with this is the lack of capacity of developing countries to deal with this specialized and extremely expensive form of dispute settlement (Gottwald 2007; Tienhaara 2009).

CONTRACT DISCLOSURE

Once they are signed, concession agreements and other types of foreign investment contracts are typically not publicly disclosed. The standard justification given by governments for this confidentiality is that disclosure of agreements would negatively affect their bargaining power in future negotiations. However, as a guide produced by the International Monetary Fund (IMF 2007) notes, the terms of an agreement are likely to be widely known within the industry soon after signing. The IMF (2007: 17) concludes that:

Little by way of strategic advantage thus seems to be lost through publication of agreements. Indeed, it could be argued that the obligation to publish agreements should in fact strengthen the hand of the government in negotiations, since the obligation to disclose the outcome to the legislature and the general public increases pressure on the government to negotiate a good deal.

It must also be considered that some government officials may have a vested interest in keeping agreements confidential. As Ayine et al. (2005: 3) note: "Lack of transparency is a breeding ground for corruption." Confidentiality of contracts results in reduced accountability of both governments and foreign investors. As Ayine et al. (2005: 3) argue:

Without public scrutiny of foreign investment contracts, it is impossible for citizens to judge whether or not their elected governments are acting in their best interests and effectively pursuing or meeting public policy goals. It is also impossible for them properly to hold their governments to account for consequences of foreign direct investment.

Similarly, Global Witness (2006: 41) suggests that the lack of transparency and scrutiny of contracts has serious implications: 'it curtails civil society participation, it encourages lack of accountability and it provides an opportunity for corrupt behaviour'.

While traditionally NGOs, such as Publish What You Pay, have focused on the issue of transparency of government revenue from foreign investment projects, contractual transparency is increasingly recognized as a critical issue. There are also indications of some degree of response from investors, governments and international organizations. However, most of the progress has been in the extractive industries (e.g. mining, oil and gas) in response to the World Bank Extractive Industries Review and the Extractive Industries Transparency Initiative (EITI) and agricultural contracts and forest/carbon concession agreements are less likely to be disclosed.

MONITORING & ENFORCEMENT

The World Bank (2010) has identified lack of monitoring capacity as a major challenge for developing countries in monitoring large concession agreements. The World Bank notes that monitoring of concession agreements is important for two reasons: 1) it is not effective to expend large amounts of resources in negotiating agreements without effective mechanisms to ensure that stipulations are adhered to and 2) investments will be risky and some of them are likely to fail so it is important to ensure assets are not tied up in non-viable enterprises, and especially important to avoid incentives for speculation (World Bank 2010).

CASE STUDY: CARBON HARVESTING CORPORATION IN LIBERIA

It is difficult to say with any certainty whether any of the types of provisions outlined above are commonly included in carbon concessions, first because they are generally not accessible and, second, because this is a new sector and governments have not developed models as is the case in sectors such as oil and gas. Adopting existing models of timber concession contracts could be very dangerous for governments because there are very different issues involved. As for lessons to be learned from contracts in other areas, Cotula et al. (2009: 7)

found that agricultural contracts in Africa were often fairly “short and simple” with very vague provisions and are thus unlikely to be helpful models.

Unfortunately, some evidence suggests that existing carbon concessions are similarly ambiguous. One example, of a 99-year carbon concession in Sudan, analysed by the Center for Human Rights and Global Justice (2010) at the NYU School of Law, shows a complete lack of sophistication.

In this section we highlight the lack of government experience with this sector and the potential for corruption to arise in the negotiation of forest carbon offset concessions through a case study from Liberia.

THE LIBERIAN CONTEXT

As part of its efforts to rebuild following two decades of civil war, Liberia is focused on equitable development that draws heavily on the use of its abundant natural resources. Since 2006, Liberia has enacted a number of new pieces of legislation related to natural resources. These laws address a number of areas of generally agreed principles of good governance related to natural resources, including requirements for: competitive and transparent concession allocation processes, revenue/payment transparency; public participation and access to information; and benefit sharing requirements.

In her speech to the General Assembly on 24 September 2010, President Ellen Johnson-Sirleaf acknowledged the challenges her Government faces in combating corruption but also highlighted some of the progress they had made, including the establishment of an Anti-Corruption Commission. During the course of the past few years, various individuals and companies have alleged that payments are routinely requested before the legislature will ratify a contract (Smith et al 2008, 2010).

Carbon credits and concessions

Liberia’s total forest area (excluding degraded forests) is estimated at around 4.4 million hectares, which is forty-five per cent of Liberia’s total land area (Lawrence et al. 2009: 15). The majority of this forest area (3.2 million hectares) has not yet been allocated as either concessions or Protected Areas; although much of it has been designated as ‘commercial’, ‘conservation’, or ‘community’ areas under the 2006 Forest Code (ibid: 15). The Forest Code does not include provisions for dealing with carbon sequestration deals and issues. However, the Government has recognised the importance of this issue and has created a carbon strategy group to examine issues of carbon sequestration and credits. Liberia is also engaged in the REDD Readiness Preparation Proposal process under the World Bank’s Forest Carbon Partnership Facility

Lawrence et al (2009: 3-4) suggest that the financial viability of carbon concessions in Liberia depends on both timber export prices and the price of carbon. They found that the market in 2009 did not allow carbon concessions to

compete with logging concessions but noted that this could change with the introduction of REDD.

THE SCANDAL

During 2008, rumours of a pending carbon credit concession began to circulate in Liberia. The then Managing Director of the Forestry Development Authority (FDA) announced to a reporter from the London Times in the presence of other witnesses that Liberia was going to issue a carbon concession for 400,000 hectares in River Cess County (Panel of Experts on Liberia 2009). A document was circulating that proposed the allocation of this area to a UK-based company called Carbon Harvesting Corporation.

Investigations revealed that the document being used to justify the proposal was a fraudulent report mainly derived from a United States Forest Service study in California (Panel of Experts on Liberia 2009). The concession allocation process had not followed the required competitive bidding process and project documents were fraudulent (Panel of Experts on Liberia 2009). Memos from an Advisor at the Forestry Development Authority to the Managing Director highlighted the fraud as well as other concerns, including the risks for Liberia of the proposed terms of the contract. However, the Forestry Development Authority requested authorisation from the Liberian Public Procurement and Concession Commission to allocate a sole-source concession to the Carbon Harvesting Corporation in early 2008 (Panel of Experts on Liberia 2009).

Various international actors pressured the Government not to issue the contract since it did not appear to be in the interests of the Liberian Government or people, and by May 2008, the Managing Director informed the UN Panel of Experts on Liberia that it had withdrawn its request for a sole-source contract due to concerns about the company. The issue seemed to have faded away.

However, by early 2010, rumours about the carbon concession case were again circulating in Liberia and a request to issue a concession agreement for the company was proceeding through the regulatory channels. The UN Panel of Experts on Liberia was able to obtain a copy of the draft contract that was under development. However, other information was difficult to obtain at that point in time.

Then, a major development occurred; on 4 June 2010, police in the UK arrested the President of the Carbon Harvesting Corporation on charges of corruption related a 400,000 hectare concession area for carbon credits in Liberia (London Times 4 June 2010).

On 18 June 2010, the President appointed a special presidential investigative committee on the alleged carbon credit deal. On 5 October 2010, the Committee Chair submitted the Committee's report to the President. This report identified specific individuals involved who appeared to have taken bribes or been involved in negotiations related to the concession. The report made a number of

recommendations for further investigations and reprimands against high-level government officials.

On 12 October 2010, the President of Liberia issued a statement regarding the Committee's report in which she announced that she was acting on recommendations in the report, including forwarding requests to the Minister of Justice: to conduct further investigations and possible prosecution of a Senator and the former Minister of Internal Affairs; to dismiss a staff member of the FDA and the Technical Advisor and Executive Director of the PPCC and to forward them to the Ministry of Justice for further investigation and possible prosecution. In addition, the Presidential statement said she would direct the Ministry of Justice to reprimand the Minister of Planning & Economic Affairs for failure to exercise due diligence by issuance of a blanket Concession Certificate covering Forest Management Contracts.

Since the release of the report, there has been extensive criticism of the Committee and their report. Some individuals have challenged the Committee to support their allegations and recommendations. Two members of the Committee released their own press statement on 28 October 2010 defending their report. In addition, the Committee members have released audio recordings of interviews with the Minister of Planning and Economic Affairs and the staff of the PPCC supporting the Committee's citation of these interviews. Government follow-up and judicial action will be crucial if this report is not to be meaningless in addressing corruption and lack of oversight in the concession allocation process (Panel of Experts on Liberia 2010).

THE CARBON CONCESSION

As noted above, this contract was sole-sourced, meaning there was no competitive bidding process. While it appears that the deal was never finalised, it is clear that it was proceeding through the regulatory process despite allegations of fraud and the lack of application of relevant rules/procedures related to allocation of concessions. The draft carbon contract is also interesting in terms of the conditions it proposed.

The proposed concession contract states that the FDA ("The Principal") "has allotted 400,000 (four hundred thousand) hectares of virgin rainforest in Liberia to permit the Agent to harvest CO₂ emissions credits for sale by the Agent on behalf of the Principal under this Agreement."

It is unclear what exactly is meant by "CO₂ emissions credits". Despite the fact that contract clearly states that carbon credits will be sold in the voluntary market, the definitions section refers to Certified Emission Reductions (CERs) which are part of the Kyoto Protocol compliance market and are not applicable to avoided deforestation projects. Furthermore, "Emission Reductions" or "ERs" are also defined in the contract as "any right, interest, credit, entitlement, benefit or allowance to emit (present or future) arising from or in connection with any GHG Reduction by the Project and includes any right that may be created under

any regulatory or legal regime as a result of the GHG Reductions whatsoever". However, these terms are not found outside of the definitions section.

Under the contract, CHC acquires the right to "to harvest, promote and sell for the Principal the maximum available metric tonnes of CO₂ emissions over the term of the Agreement". The company does not appear to gain any other rights to the land and in fact, it does not appear that they even intend to manage the forest, or for that matter to establish any operations in Liberia. The main obligation of the company would be "to establish, implement and launch an effective accounting and administrative system to control and monitor the number of CO₂ emission credits created, harvested and sold from the designated area." This, they suggest, will be done from their base in the UK.

On the other hand, Liberia is required to leave "intact the virgin rainforest, all forest resources and to not undertake any activities which impact on the climate in the designated area for the term of this agreement" in order to "ensure the integrity of the source of supply & harvesting of the CO₂ emissions credits". These requirements are not only unnecessarily far-reaching, they are impossible for the government to meet. However, it is also worth noting that the "integrity" of the forest as the source of the carbon credits need only be assured for two years, as that is the term of the agreement. Such a short contract term is not only bizarre it also suggests that the company knows very little about carbon markets. The contract suggests that the company will find a third party to certify the carbon credits but it is impossible that any legitimate body would agree to certify a project with such a limited lifespan. Nor would any knowledgeable customer want to buy credits from a project that only guaranteed the existence of the forest for such short time.

As for the government take, the company commits to paying a percentage of "the sale price received for each CO₂ emission credit harvested and sold by the Agent from the designated area" every six months. It is not possible to assess the fairness of this provision as the actual percentage is not identified in the draft contract. Furthermore, it is unclear what the sale price of the carbon is likely to be. In a further provision it is noted that:

The Agent undertakes wherever possible to maximise the sale price of the CO₂ emission credits but this does not compromise the Agent's responsibility on behalf of the Principal to maximise the volume of sales of the CO₂ emission credits from the designated area.

With respect to liability, the contract imposes a number of serious obligations on the FDA. In the case of a shortfall of carbon credits, the company can require the FDA "to, at its cost, provide Replacement CO₂ emission Credits in the same quantity as the shortfall amount which will enable full delivery of the contract CO₂ emission credits". The company would also have the right to "recover liquidated damages from the Principal in an amount that represents a genuine estimate of the losses, damages and costs suffered by the Agent as a result of the Production Failure or Transfer Failure." In essence, the government would adopt

all of the risk associated with the project while the company would extract a fee for doing little more than setting up a website and facilitating transactions.

Finally, any disputes that might arise under the contract were to be resolved under the rules of the Permanent Court of Arbitration.

CONCLUSIONS

The case study from Liberia highlights the serious danger that foreign investors involved in forest carbon offset projects will take advantage of situations where government officials are inexperienced and susceptible to corruption to impose contracts on countries that are not only unfair, but impose substantial financial risks. The proposed contract between the Republic of Liberia and the CHC appears to have been developed for the benefit of the company and not the Republic of Liberia, with most terms favourable to the corporation's interests.

The loss of 400,000 hectares of commercial timber land through the allocation of this carbon concession would mean that Liberia would lose up to \$8 million in annual timber revenues according to the calculations of a former Finance Technical Advisor to the FDA. It is also unlikely that the Carbon Harvesting concession would ever produce any revenue for Liberia and if the project produced less than 165 million tons of credits (which would be highly likely) the CHC could force the FDA to purchase the shortfall on the open market. This could cost the country more than \$2 billion.

The Government of Liberia has set a high goal for Liberia to be a middle income country by 2030. It has also identified a central role for natural resources in achieving that goal. The Government has allocated large areas of land since assuming power in 2006 and is proud of the investments corporations have committed in the natural resource sectors. However, Liberia currently lacks capacity to regulate field activities in both the informal and formal sectors and the ability to monitor concessions is crucial on a number of fronts including ensuring that: contracts are allocated and negotiated to the benefit of Liberia and its citizens; that required payments are made by companies; that social, health, education and employment provisions of contracts are met; and that environmental terms and conditions are met (Smith, Bosworth-Davies and Gonsolin 2010).

Liberia is not the only country facing such challenges. With interest amongst foreign investors in forest carbon offset projects likely to grow in the near future, it is imperative that governments receive more assistance with contract negotiations and monitoring of the activities of foreign investors. It is worth noting that there was, at one time, a body that had the expertise to do so; the UN Centre on Transnational Corporations (UNCTC). Prior to being dismantled in 1992, the UNCTC provided advice to developing countries on issues related to foreign investment and was developing a database of foreign investment contracts. Perhaps the time has come for a new agency that could take on this role.

Increased transparency of contracts and contract negotiations is also imperative. Efforts on the part of NGOs and international donor agencies to push for contractual transparency in the extractive industry should be extended to other sectors. In this respect, Liberia is actually quite progressive, at least on paper; the government has included agriculture and forestry in its EITI implementing legislation.

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