

# Benefit sharing and community contracting: from legal design to full operation

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## Intro

The global challenge of tackling climate change increasingly revolves around actions to reduce deforestation and forest degradation, and protect and restore rainforests. These actions are known as nature-based solutions. For these to be successful, it is important that they go beyond a 'no-harm' approach and truly take into account forest communities' rights and bring positive outcomes for their livelihoods.

The Special Report on Climate Change and Land published by the Intergovernmental Panel on Climate Change in 2019 recognises the importance of community tenure in climate outcomes. In that context, rights-based approaches aimed at securing customary tenure and implementing community rights are key in order to safeguard forests.

Such approaches transpire from laws applicable in West and Central African countries designed to ensure communities have a say in the way forests are managed.

In the Republic of Congo, Gabon, Ghana and Liberia, the law requires logging companies to share benefits with the state, but also directly with impacted forest communities. The latter is known as community benefit sharing or community contracting.

**Community benefit sharing** refers to fair and equitable arrangements aimed at distributing revenues in the forest sector to local communities, in cases where a third party is using the forests they depend on for their livelihoods. **Community contracting** refers to forest communities who own or manage their forests, contracting directly with a third party to undertake forestry activities (harvesting timber, non-timber forest products, etc.).

Benefit-sharing agreements and community contracts are intended to ensure affected communities are involved in and benefit from the management of forest resources, but communities have often been left feeling short-changed.

In some countries, the law is quite clear with regard to benefit-sharing responsibilities for timber companies or the community contracting rights of forest communities, but implementation of the law leaves much to be desired. In other countries, there are major gaps in the law. Both situations lead to companies being able to avoid sharing the benefits of their forest harvesting activities with communities. This also results in vague and incomplete agreements and contracts, which frustrate communities who feel that they are left with too little by logging companies, and then cannot rely on the agreements they signed for compensation.

Against this background, ClientEarth has been developing guidance tools in order to support communities in the Republic of Congo, Gabon, Ghana and Liberia who are involved in negotiating benefit-sharing agreements and contracting with timber companies.

In addition to strong legal frameworks, community members who negotiate the agreements and contracts need the information, knowledge and skills to enter into these discussions confidently and successfully. The guidance tools ClientEarth contributed to aim to empower communities in their negotiations, through the provision of the main relevant legal texts, as well as templates and suggested standard terms and conditions, which can act as a starting point for discussion. The aim is that, in using our guidance tools, communities will be able to negotiate stronger and more effective agreements and contracts, which will reduce the chances of conflicts and illegal harvesting of timber. These tools are also designed to help community members improve their legal negotiation skills and confidence.

The way benefit sharing and community contracting are implemented is a critical indicator of both communities', decision-makers' and the private sector's understanding of their respective rights and obligations under the law. It also demonstrates the capacity and willingness among the private sector and regulators to recognise community rights. If national law recognises and respects the livelihood interests of communities, this will have far-reaching, positive impacts in terms of forest use and management.

This briefing note provides an overview of the functioning of community benefit sharing and community contracting in the Republic of Congo, Gabon, Ghana and Liberia, through ClientEarth's experience. It also draws out key considerations on benefit sharing and community contracting mechanisms.

One should note that beyond legal frameworks, the political contexts matter. While laws governing benefit sharing and community contracting are important, forest governance systems should, in the first instance, empower communities to use their own forests to generate income and sustain their livelihoods.



## Republic of Congo

In the Republic of Congo, natural forests cover 21 million hectares of forest, i.e., 65% of the territory, and 14 million hectares are dedicated to logging.<sup>1</sup> In these areas, until the adoption of the new Forest Law n°33/2020 of 8 July 2020, the legal framework did not comprehensively recognise benefit-sharing rights for local communities and indigenous peoples (LCIPs). The main benefit-sharing schemes in the logging sector were considered to be the so-called '**contractual specifications**' ('cahier des charges particulier') and the **local development fund** ('fonds de développement local'). However, these schemes had inherent limitations.

On the one hand, under the previous Forest Law n°16/2000 of 20 November 2000 and its implementing regulations, contractual specifications were one of two legal components of concession agreements and were geared towards logging companies' commitments in favour of socio-economic local development. However, they did not directly involve affected LCIPs. They were negotiated with the Ministry of Forests and provided mainly equipment to the local administration and to large towns such as vehicles, fuel, or school desks. Consequently, many communities did not receive any benefits. This is the case for the village of Mimbéli, in spite of being affected by the operations of two logging concessions operated by Thanry Congo and CIB-Olam. This village, of about 3,000 people, including a large share of indigenous people, is situated more than 200 kilometres away from the Likouala department administrative centre. The community's livelihood revolves mainly around subsistence agriculture and non-timber forest products harvesting. In Mimbéli, the pharmacy, primary and secondary schools do not function due to lack of staff and equipment while access to electricity, drinking water and sanitary infrastructure is non-existent.

<sup>1</sup> <https://www.euflegt.efi.int/republic-congo>

Local development funds, on the other hand, were not regulated by Law n°16/2000 of 20 November 2000, but by forest concession-specific Ministerial Orders. As a result, they were only mandatory for thirteen concessions out of the fifty-one operating in the country – and subject to varying rules.<sup>2</sup>

Where they operate, local development funds consist of a fixed amount, 200 FCFA (0.30€) per cubic meter of forest exploited, which is paid by logging companies into a fund managed by a local multi-stakeholder committee. This amount is one of the lowest in the region.<sup>3</sup> To benefit from this fund, LCIPs must submit project proposals, which must then be accepted by the multi-stakeholder committee. In practice, this has been difficult to implement because the members of the local multi-stakeholder committee are located in different areas of the department. Its functioning is therefore costly. In addition, the eligibility criteria for community projects is not clear; the need for sign off, coupled with the low amount of the mandatory contribution, has meant that community projects are effectively rarely funded. Villages like Mimbéli remain, therefore, deprived of basic infrastructure.

Since, 2018, ClientEarth and our partner Comptoir Juridique Junior (CJJ) have supported evidence gathering on the strengths and weaknesses of these benefit-sharing schemes while supporting LCIPs to take part in benefit sharing in six villages affected by Ipendja, Mimbéli-Ibenga and Mpoukou-Ogooué forest concessions, in the Likouala and Lékoumou departments.

Our activities have contributed to building communities' capacities in order to input in contractual specifications. The new concession agreement for UFA Mpoukou-Ogooué's includes contractual specifications requiring the concession holder to negotiate benefit-sharing arrangements directly with LCIPs.<sup>4</sup> Our activities also coincided with the issuance of a series of Orders extending logging companies' obligation to set up a local development fund.

Unfortunately, implementation remains slow. In UFA Mpoukou-Ogooué, the multi-stakeholder committee managing the local development fund has only been set up in March 2021, despite a Ministerial Order adopted in September 2019. Moreover, other contractual specifications do not target LCIPs and little progress has been made on the implementation and enforcement of the local development fund put in place in UFA Ipendja (as it appears that no contribution has been made to this fund since 2018).

At the policy level, the Voluntary Partnership Agreement (VPA) between the EU and the Republic of Congo<sup>5</sup> has created space for the review of the Forest Law and has offered an opportunity for civil society organisations to advocate for improvements to the design of these schemes on the grounds of lessons learned from their implementation. As a result, the new Forest Law n°33-2020 of 8 July 2020 addresses two of the limitations of the Congolese benefit-sharing legal framework:

- contractual specifications must now systematically be negotiated directly with affected LCIPs, before logging commences;
- in addition to ensuring that communities can tailor benefit sharing to their needs, this innovation provides an information mechanism for communities prior to the government allocating logging concessions on the land that communities use;

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<sup>2</sup> ClientEarth (2014) 'Droit au partage des bénéfices des communautés locales et populations autochtones'.

<sup>3</sup> Fern (2017) 'How much do communities get from logging? Social obligations in the logging sector in Cameroon, Ghana, Liberia and Republic of Congo'.

<sup>4</sup> See, Order n°9018 of 2 May 2019; Order n°15951 of 10 September 2019; Order n°15950 of 10 September 2019.

<sup>5</sup> It should be noted that among the evidence of compliance to the Congolese legislation, the VPA lists logging companies' compliance with obligations regarding the financing of a local development fund. (See, Article, 7; Annex II, Indicator 4.9.2). This requirement was used by civil society organisations during the law reform to call for comprehensive benefit sharing regulation.

- the creation of a local development fund is now required for all concession holders. This ensures a level playing field among logging companies as well as the same rights for all LCIPs affected by logging.

The Forest Law is, however, general and will require implementing regulations to flesh out these principles and ensure that benefit sharing is truly operational in the Republic of Congo. In addition, LCIPs will need support to better understand how to benefit fully from their rights.



## Gabon

In Gabon, benefit sharing has been embedded in law for about two decades, much longer than in the Republic of Congo. Law n°16/01 of 31 December 2001 provides that concession holders must financially contribute to public interest actions developed by local communities. The nature and level of this contribution are set in '**contractual specifications**' ('cahier de charges contractuelles').<sup>6</sup>

Despite its inclusion in law, this provision was largely inapplicable, due mainly to the lack of implementing regulations. Against this background, between 2012 and 2016, ClientEarth supported the development of the benefit-sharing legal framework in Gabon and helped to test its implementation. Through partnerships with civil society networks and the Ministry of Forests, ClientEarth facilitated a multi-stakeholder process to adopt a collaborative implementing regulation on benefit sharing in 2014.<sup>7</sup> The new framework, Order n°105 of 16 May 2014 established a contract template and prescribed the logging company's contribution, 800 FCFA (1.225€) per cubic meter. However, it did not resolve all issues. ClientEarth therefore supported civil society's legal working group (LWG) to develop the guidelines for the implementation of the Order.

These guidelines<sup>8</sup> explain step-by-step how a multi-stakeholder committee should be set up by the local authorities, how its LCIPs members should be identified and how sharing benefits between communities

<sup>6</sup> Law 16/01 of 31 December 2001, Article 251.

<sup>7</sup> Sartoretto E., Henriot C., Sossoukpe S. L., Ondo Tsame R. (2015), 'Rôle de la société civile dans l'adoption d'un texte de loi sur le partage des bénéfices au Gabon', World Forestry Congress.

<sup>8</sup> Ministry of Forests (2016) 'Guide d'application de l'arrêté n°105/2014 du 6 mai 2014 fixant le modèle de cahier de charges contractuelles en République Gabonaise'.

should operate in practice. They also describe the steps taken by LCIPs to develop projects and monitor the funds available.

Once the draft Guidelines were completed, the legal framework was tested in the Ogooué-Ivindo department between June and October 2015 (together with Association Gabonaise pour les Nations Unies) and between March and December 2016. The Guidelines were formally signed off by the Ministry of Forests in June 2016, recognising their usefulness as well as CSOs' expertise and appropriate approach. In practice, the piloting of the new benefit-sharing framework led to the signing of benefit-sharing agreements by 26 communities affected by 8 concession holders in August 2016. Since then, Gabonese organisations, particularly Brainforest, have continued to support the implementation of benefit sharing in other parts of Gabon and advocated for benefit-sharing agreements to be properly executed.

In Ogooue-Ivindo, most communities still have not received their share of benefits, and decided in 2019 to bring a case against non-compliant concession holders. In September 2019, a court ruling ordered companies to pay everything owed to the communities from 2014 to 2018. However, no sanction was imposed on concession holders for the delay because none is provided by law.<sup>9</sup>

In Gabon, the lack of a complete legal framework (namely, the lack of an implementing regulation) affected the operation of benefit sharing for a long time. The adoption of a Ministerial Order and its guidelines help to formalise a comprehensive framework. Today, this framework has not yet been successfully implemented, due to the failure to establish proper sanctions and enforcement measures by authorities.



<sup>9</sup> CIDT (2021), 'Impunity is not what it used to be: 17 communities stand up to logging companies'.

## Liberia

Compared to Gabon and the Republic of Congo, Liberia has a more progressive legal framework on community forest rights. The Community Rights Law 2009 (CRL) was the first law that provided ownership rights to forest communities.<sup>10</sup> By following a step-by-step process of authorisation, communities could legally own their forests, represented by a Community Forestry Management Body (CFMB). The CRL intended to ensure communities benefit from their forest resources, including – if they choose – by leasing it to third parties for logging. Over 70 per cent of all timber being exported from Liberia now comes from these community forest areas. Hence, most logging is happening in community forests, but not by communities. Logging companies seem to be the main beneficiaries to date.

One issue with the CRL (and its regulations) is that no direction, support or guidance has been provided to communities on how to contract or what contractual terms they should negotiate. This is despite the fact that CFMBs must negotiate a legally binding contract (known as a Commercial Use Contract) outlining full terms and conditions, similar to that included in a government-issued concession agreement. This is a tall ask for forest communities, many of whom have low capacity to draft such complicated contracts, due to living in remote areas with limited infrastructure and access to electricity and technology. When logging companies arrive to negotiate with communities for their forests, they provide the draft contract, with terms favourable to themselves.

In addition to CUCs, Liberian law also establishes a well-defined benefit-sharing regime, mandated by the National Forestry Reform Law (2006).<sup>11</sup> The law requires that communities who are affected by logging concessions granted by the government (these communities are represented by Community Forest Development Committees, or 'CFDC's) receive two financial payments. One is a fee per cubic metre of logged forest, which goes directly to communities and the amount is specified in Social Agreements, negotiated between logging companies and communities. The law sets a minimum cubic metre fees of \$1.50 (USD). While there is a template Social Agreement provided, many flaws remain in Social Agreements that are being signed between communities and timber companies.

The second is a land rental fee that companies pay to the government, who should pass it on to the multi-stakeholder Benefit Sharing Trust Board, to which communities can apply for community projects. However, there has been no payment into the Benefit Sharing Trust Board for years, and CFDCs are owed many millions of USD.

ClientEarth, along with our partners Heritage Partners and Associates (HPA) and in close collaboration with community representatives and the Forestry Development Authority, has developed two guidance tools in Liberia:

- a template and guide for negotiating Commercial Use Contracts (CUC) to be used by CFMA communities and third parties interested in logging in their forests (November 2020);<sup>12</sup> and
- a Social Agreement Negotiation Guide to be used by CFDC communities, for benefit sharing (May 2017).<sup>13</sup>

Both guidance tools aim to strengthen community governance and are important to help avoid common pitfalls, ensuring communities have strategies to advocate for their needs. For example, many CFMBs

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<sup>10</sup> Community Rights Law with respect to Forest Lands (2009).

<sup>11</sup> National Forestry Reform Law (2007).

<sup>12</sup> ClientEarth, NUCFMB, HPA (2020) 'Commercial Use Contract Legal Guide'.

<sup>13</sup> ClientEarth, HPA, Accord, NUCFDC (2020) 'Social Agreement Negotiations Guide'.

entered into contracts with a logging company, only to find that the actual work was being undertaken by a third party, after the original logging company had assigned their logging work to another company. However, they did not assign their responsibilities towards the community. The third party claimed to have no responsibilities to provide the community benefits and the communities were left in an uncertain legal situation. In the template CUC, ClientEarth and HPA have included a provision to ensure that any assignment of responsibilities includes the full contractual responsibilities.

Through a training of trainers' methodology, ClientEarth has also supported the national unions of the CFMBs and CFDCs to support the communities they represent on how to use the guidance tools. The national unions have run radio programmes to raise awareness of the guidance documents and run clinics to provide legal support to communities who are thinking about negotiating or renegotiating their Social Agreements or CUCs.

While progress has been made, consistent and prolonged efforts by the national unions are still needed to support individual communities during negotiations.





## Ghana

Until 2017, unclear rules and procedures characterised the benefit-sharing regime in Ghana, and there was uncertainty around whether all logging companies were required to negotiate Social Responsibility Agreements (SRAs) with communities.<sup>14</sup> While guidelines and a code of conduct existed, these were not legally binding and were subsequently ignored by some companies.

ClientEarth together with our partners TaylorCrabbe Initiative (TCi) and the NGOs in our Legal Working Group considered the contents of a regulation to clarify these uncertainties. After a multi-stakeholder process of legislative drafting, the Timber Resources Management and Legality Licensing Regulation 2017 (L.I. 2254)<sup>15</sup> was passed. This regulation includes a clear requirement for all logging companies holding a timber right to negotiate an SRA with communities in and around the concession. In addition, L.I 2254 codifies into law the guidelines and code of conduct on SRAs.

While concluding an SRA is a legal requirement, and most companies do comply, this does not necessarily ensure that affected communities really benefit from timber producing operations. For SRAs to make a difference in practice, they need to contain specific, enforceable and relevant provisions that respond to the needs of affected communities.

ClientEarth, along with our partners TCi and the national NGO Rights and Advocacy Initiative Network (RAIN), has developed an SRA Negotiation Guide<sup>16</sup> to help representatives from affected communities negotiate SRAs that bring them real benefits. This guide contains a number of practical tips for communities, including how to prepare for SRA negotiations, and how to get the best out of an SRA. It suggests standard terms and conditions that can serve as a starting point for negotiating the different SRA provisions, and contains the official SRA template, highlighting which sections must be negotiated and which are required by law. The guide also sets out the criteria and legal requirements specific to SRAs, so that communities have a better understanding of where their rights and obligations in relation to SRAs come from.

ClientEarth has also worked with RAIN to provide direct SRA negotiation support to communities. Together with officials of the Forest Services Division of the Forestry Commission, RAIN ran community-level training on SRAs in six communities in the Dunkwa region. During these trainings, RAIN raised awareness in the communities on the concept of SRAs; facilitated the establishment of SRA committees in the communities to lead negotiations, implementation and monitoring of SRA processes; and introduced loggers ready to engage with the communities.

RAIN has also been directly involved in supporting communities who did not have an SRA in place to lead SRA processes with logging companies. This was especially important in the context of the second Joint Assessment of the Voluntary Partnership Agreement (VPA) in 2020, during which independent assessors reviewed Ghana's system for tracking and assuring that its timber is legal. The VPA requirements mirror Ghana's law, in that for timber to be considered legal under the VPA, an SRA must be in place between the logging company and affected communities. This is one example of how international initiatives can help to promote and provide incentives for the implementation of national laws.

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<sup>14</sup> Timber Resources Management Act (1997), section 3 (e).

<sup>15</sup> Timber Resources Management and Legality Licensing Regulation 2017 (L.I. 2254), section 26.

<sup>16</sup> [ClientEarth, TaylorCrabbe Initiative \(2020\) 'Social Responsibility Agreement Negotiation Guide'](#).



## Key considerations

In all four countries, there has been growing interest in and recognition of benefit sharing and community contracting, particularly promoted through international forest governance initiatives, such as the VPA, which include community benefit sharing requirements within their legality definitions. Benefit sharing and community contracting mechanisms are important complements to tenure rights as they help ensure that communities are involved in and benefit from land-based investments. However, where legal frameworks are unclear, the regulation of these mechanisms is insufficient.

In practice, it is a complex thing to be negotiating a contract or agreement and it requires a skill set that many communities do not have. When negotiated poorly, then unclear or unbalanced contracts or agreements can be difficult to implement and lead to conflicts between communities and logging companies. It is therefore important for legal frameworks to adequately regulate benefit sharing and community contracting for the communities that they seek to benefit. ClientEarth has found that this requires the legal frameworks to be more detailed and provide more guidance to communities.

The following considerations aim at supporting the development of approaches for communities to grant their consent to land-use projects, and particularly the design and operation of benefit sharing and community contracting in the logging sector.

1. Forest communities manage about one third of forests globally, whether legally recognised or informally. Growing evidence shows that upholding and improving their rights over these resources is key if we want to tackle the climate crisis and the loss of biological diversity. In that context, community forestry – i.e., the statutory management of forests by communities – could be the last best chance to reverse deforestation and forest degradation rates.
2. Even for communities who are not granted management rights, where communities' customary rights overlap with logging concessions, their rights to share in benefits with logging companies should be recognised and implemented, as well as their rights to be informed and participate in decision-making.

3. Each country has its own unique set of laws regulating benefit sharing and/or community contracting. However, beyond national differences, the minimum elements should include the explicit identification of duty holders (e.g. logging companies) and beneficiaries (e.g. local communities directly affected by the logging), as well as clarity over the basis on which the revenue redistribution is made (e.g. an area-based fee).
4. Active community participation in benefit sharing and community contracting is key and should be promoted by national laws. Sometimes, communities are not actively involved in these schemes although they are targeted as beneficiaries of the revenue redistribution. Disenfranchised communities tend to be less informed about and have less trust in benefit sharing or community contracting functioning and progress. In order to achieve more transparency and accountability, community members should be a core part of these schemes, and where applicable negotiate agreements directly with logging companies.
5. Laws should set principles to enshrine benefit sharing and community contracting, but often do not (and arguably cannot) provide all the necessary details to ensure their failsafe application. Implementing regulations, guidance documents and template contracts are therefore important complements to the law, to explain the details behind effective benefit sharing and community contracting.
6. Template contracts can help embed protective standards into benefit-sharing agreements or community contracts. They are effective tools to ensure an even playing field among logging companies and provide legal certainty to communities. When templates exist, but are not required by law, it is still best practice to use them. Nonetheless, it is important to acknowledge that they are general and each community must determine its own needs and wants from the negotiation and amend the template to fit the specific situation.
7. In addition to comprehensive legal frameworks, clear, comprehensive and simple guidelines - developed in a participatory manner and taking into account the experience of communities (both good and bad) - are instrumental to putting the law into practice. Guidelines on negotiating and implementing fair agreements should go hand-in-hand with capacity and skills building of stakeholders, particularly communities. Guidelines alone cannot, however, replace binding legal foundations aiming to ensure that communities are sufficiently informed, not coerced, and have the final say.
8. At community level, safeguards designed to prevent elite capture may be important but should not be overcomplicated. Multi-stakeholder approaches, such as committees that manage payments to communities, risk alienating beneficiaries by being too burdensome and risk hampering implementation due to high costs. Where the law includes transparency provisions, community-level representative structures and capacity building on representation and accountability may be preferred to burdensome multi-stakeholder bodies. The following principles should be prioritised:
  - a. community members, particularly the most vulnerable, should be empowered;
  - b. inclusive governance should be promoted;
  - c. community representatives should be accountable; and
  - d. third party facilitation from local NGOs should be promoted.
9. The amount of benefits paid by logging companies to communities should be sufficient to facilitate change for the community. In some countries, the law itself sets an inadequately low percentage or

amount of benefits for communities. A comparative approach shows that these amounts vary substantially from country to country.<sup>17</sup>

10. In addition, where communities are able to negotiate or apply for in-kind contributions, the range of projects available to them should remain broad. Restrictions to the types of projects that communities can fund may hinder their potential to serve local development needs. In addition, communities should be able to determine their priorities themselves, not be required to choose from a list of options.
11. Redress and complaint mechanisms, access to justice and dissuasive sets of sanctions are key to ensuring the proper implementation and enforcement of benefit sharing and community contracting schemes. In the absence of such mechanisms, open dialogue and conflict resolution may prove difficult. Often isolated, communities may use road blocks or other physical means of making their voices heard, and therefore compromise the likelihood of a fast and fair resolution. Such situation may affect logging companies' activities.
12. While benefit sharing and community contracting are important elements of community rights, forest communities should be empowered and skilled to use and manage their own forests for livelihood activities. Ecosystem conservation, small-scale timber harvesting and processing, non-timber forest products are all options open to forest communities, if offered the appropriate capacity building and market access.



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<sup>17</sup> Fern (2017) 'How much do communities get from logging? Social obligations in the logging sector in Cameroon, Ghana, Liberia and Republic of Congo'.