Land Commission

Memo

To: All Commissioners; Director MacArthur PayBayee; All Program Officers; Dr. Mark Marquardt; Dr. Jeanette Carter

From: Caleb Stevens, Esq.

CC:

Date: 10/17/2011

Re: Legal Issues Raised by the Interim Policy on Land Surface Rights Where Minerals Are Found

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I. Introduction

This memo is a legal commentary to the *Interim Policy on Land Surface Rights Where Minerals Are Found* (Interim Policy Statement). For each section of that document the relevant language will be quoted and each legal issue discussed with reference to Liberian law and, when appropriate, international law and other countries' laws.

II. Analysis

A. "Mineral rights are separate from land surface rights; severance of these rights is through constitutional provision. Both rights are equally fundamental parts of the Liberian Constitution and must be harmonized by ensuring that the government obtains access to minerals in a way that protects private property rights."

Legal Issue: What support for this view can be found in Liberian law?

The Interim Policy Statement correctly states that the Constitution separates land surface rights and mineral rights. However, the relationship between surface land rights and the government's mineral rights should not be viewed as a hierarchical one, with the latter dominant over the former, but rather as two equally fundamental constitutional provisions that can be harmonized. Article 2 of the Constitution states, "This Constitution is the supreme and fundamental law of Liberia . . . ."[1] The Constitution's provisions are equally fundamental and supreme and to create a hierarchy between them would belie this concept as suggestive that one law is more or less fundamental than another. On the contrary, as the Liberian Supreme Court has noted, "If there is an apparent discrepancy

[1] Constitution of Liberia, art. 2 (1986).

between different provisions [of the Constitution], the court should harmonize them if possible."[2] This is a rather black letter idea. In the US context, courts routinely use proportionality or balancing tests in order to harmonize or reconcile equally fundamental laws that may otherwise conflict.[3] For example, free speech jurisprudence must reconcile that constitutional provision with laws concerning national security, elections, and commerce.[4] Similarly, South Africa gives priority to the rule of law when addressing the tension between the public interest and individual rights.[5] The rule of law should be dominant—not the public interest, mineral rights, or private property rights. The result is the South African government's attempts to strike an "equitable balance in its duty to guard individual's rights vis-à-vis public and social needs."[6]

The provisions to be harmonized under Liberian law are Articles 22(a) and 22(b). Article 22(a) provides, "Every person shall have the right to own property alone as well as in association with others . . . ."[7] Article 22(b) states:

> Private property rights, however, shall not extend to any mineral resources on or beneath any land or to any lands under the seas and waterways of the Republic. All mineral resources in and under the seas and other waterways shall belong to the Republic and be used by and for the entire Republic.[8]

What is important to note at the outset is that there is nothing in the Constitution that places the government's mineral rights *per se* in a dominant or superior position vis-à-vis private property rights. On the contrary, Article 24, which lays out the conditions for the exercise of eminent domain, references the "inviolability of private property."[9] The government's mineral rights are nowhere referred to as inviolate.

The misconception that the government's mineral rights are dominant over private property rights may have two bases: (1) the Minerals and Mining Law, and (2) conflating the eminent domain power with the government's mineral rights.

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[2] *Tolbert v. Gibson-Sonpon*, 37 Liberian Law Reports, 113, at 123 (1993). Conflicts between constitutional provisions which cannot be harmonized do occur of course, as was implicitly recognized by the Liberian Supreme Court in *Tolbert*. US courts have dealt with this issue by relying on two principles: (1) last-in-time, and (2) the civil law concept *lex specialis derogate lex generalis*. *See Carrollton-Farmers Branch v. Edgewood* (Tex. 1992) ("In construing apparently conflicting constitutional provisions, a general provision must yield to a special provision."); Mia So, Note, *Resolving Conflicts of Constitution: Inside the Dominican Republic's Constitutional Ban on Abortion*, 86 Indiana Law Journal 713, 719 ("If neither provision is more specific than the other, then the provision most recently adopted wins out as the 'latest expression of the will of the people.'") (quoting AM. JUR. 2D *Constitutional Law* § 67 (2009)).

[3] Stephen Breyer, Making Our Democracy Work: A Judge's View 163-64 (2010).

[4] *Id.*

[5] MLV Attorneys, *Restitution by Expropriation of Land Rights: What About Market Value?* (2008).

[6] *Id.*

[7] Constitution of Liberia, art. 22(a).

[8] *Id.* at art. 22(b).

[9] *Id.* at art. 24.

First, Section 11.3 of the Minerals and Mining Law (Minerals Law) states that the government's mineral rights are "absolute and supersede the rights of Landowners or Occupants of Land in respect of the Exploration or Mining of Minerals."[10] There is no *constitutional* basis for this. The quoted language would lead one to believe that surface land rights are completely subordinate to the government's mineral rights. As stated above, this is an incorrect view because private property rights must be harmonized with the government's mineral rights as equally fundamental constitutional provisions. The one does not dominate the other.

Second, the government's use of the eminent domain power to acquire surface land rights should not be confused with the government's mineral rights. As the Interim Policy Statement sets forth, the conflict between government's mineral rights and private surface land rights can be avoided by the surface land rights holder reaching an agreement with the concessionaire after extensive community consultations. But when an agreement cannot be reached, the government may seek to exercise its eminent domain power to acquire the land surface rights. The eminent domain power, by its very nature, does trump private property rights. But it cannot be emphasized enough that eminent domain includes numerous conditions and procedures designed *to protect private property rights* from government overreach.

A hypothetical case illustrates the difference between the government's eminent domain power and its mineral rights. Suppose the government grants a concession to a Liberian company for the mining of minerals, but that concession does not provide for any government revenue sharing or public infrastructure projects by the concessionaire. In essence, the Liberian government grants the concession for free. In granting the concession the Liberian government simply wants to support a Liberian company and indirectly the Liberian economy. However, the surface land rights holders who have indisputable fee simple title to the land refuse to reach agreement with the concessionaire. Assume for the sake of argument that the granting of a mineral concession under these circumstances (i.e. essentially for free) does not qualify as a "public purpose" under the Liberian Constitution thereby barring the use of eminent domain. Could the Liberian government demand that the surface land rights holder permit mining simply by claiming that the government's mineral rights are dominate over the private property rights of the land surface owners?

My point is that this would be contrary to the Liberian Constitution. Admittedly in almost all cases the granting of a mining concession will qualify as a "public purpose," and thus permit the Liberian government to exercise its eminent domain power if the surface land rights holders fail to reach an agreement with the concessionaire. But that is not the same as saying that the government's mineral rights *per se* are dominate over private property rights. An accurate equation is the government's mineral rights, plus a "public purpose", plus eminent domain procedural protections are dominate over

[10] Minerals and Mining Law, Title 23, Liberian Code Revised, Sec. 11.3 (Sept. 20, 2000) [hereinafter "Minerals Law"].

private property rights. And this last accurate equation is another way of saying that the government's mineral rights and private property rights are equally fundamental constitutional provisions that can be harmonized.

B. "Affected individuals and communities should be allowed prior, free and informed consent (PFIC) similar to that outlined in the Interim Guidelines and Procedures for the Sale of Public Land."

Legal Issues: Does Liberian law and international law require prior, free and informed consent? Have other countries adopted this standard? Under what circumstances is PFIC required?

1. Prior, Free and Informed Consent in International Law

PFIC is an "evolving principle" of international law.[11] According to the Inter-American Commission on Human Rights (CHR), PFIC "requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives."[12] In the CHR's view, PFIC is especially applicable to "the granting of concessions to exploit the natural resources of indigenous territories."[13] It is an open question whether PFIC should be extended to all customary communities, not just applied to indigenous communities. But there is evidence that the PFIC principle is evolving in that direction.[14]

Additionally, African treaty law recognizes the PFIC principle. Article 22 of the African Charter provides for a right to development.[15] The African Commission has interpreted this right as consisting of five main elements: "it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development."[16] For the participation element to be fulfilled "prior, informed consent" is required,[17] "*especially when dealing with sensitive issues as land*."[18] At least based on the facts of the Erdorois case, the African

[11] South Africa Legal Resources Center, *Outline of the Historic and Current Legal Regime for Natural Resources Extraction* (2011).
[12] *Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., para. 142.
[13] *Id.*
[14] South Africa Legal Resources Center.
[15] "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind." African Charter on Human and Peoples' Rights, art. 23, 21 I.L.M. 58 (1982), entered into force on Oct. 21, 1986 [hereinafter "African Charter"].
[16] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya African*, C.H.R. para. 277 (2010).
[17] *Id.* at para. 290.
[18] *Id.* at para. 281.

Commission was emphatic, "the State has a duty not only to consult with the community, but also to obtain their free, prior and informed consent, according to their customs and traditions."[19] Affected communities must be "given an opportunity to shape the policies."[20] This standard is met in the Community Rights Law, but not on the face of the statutory language in the Minerals and Mining Law or New Petroleum Law.

2. Prior, Free and Informed Consent in the Community Rights Law

The Community Rights Law incorporates the international standard of prior, free, and informed consent. And, in line with the expansion of PFIC to include all customary communities, expands the principle to include not just indigenous communities but any community that shares "common customs and traditions."[21] The Community Rights Law thus mandates that "any decision, agreement, or activity affecting the status or use of community forest resources shall not proceed without the prior, free, informed consent" of the affected community.[22] The term "community forest land" is broad, including "forested or partially-forested land traditionally owned or used by communities for socio-cultural, economic and developmental purposes."[23]

This has implications for land surface rights. A mining operation on community forest land would certainly have sufficient impacts on that land to trigger the statute's protection of prior, free and informed consent. This creates an anomaly because why should community forest land receive more protection than other community land that may not be sufficiently forested to qualify for the protections of the Community Rights Law? This anomaly was noted in the report, Reform of Liberia's Civil Law Concerning Land (Land Law Reform Report), as the Community Rights Law and its companion legislation, the National Forestry Reform Law, deal with "fundamental land tenure issues but from a forestry perspective."[24]

However, the statutory language of the New Petroleum Law and the Minerals Law allow enough room for regulations to be enacted which recognize the PFIC principle in-line with that found in the Community Rights Law. Although the New Petroleum Law supersedes any conflicting laws,[25] the

[19] *Id.* at para. 291.
[20] *Id.*
[21] An Act to Establish a Community Rights Law with respect to Forestry, Sec. 1.3 (Oct. 20, 2009) [hereinafter "Community Rights Law"].
[22] *Id.* at Sec. 2.2(c).
[23] *Id.* at Sec. 1.3.
[24] John W. Bruce & Boakai Kanneh, *Reform of Liberia's Civil Law Concerning Land* 13 (2011) [hereinafter "Land Law Reform Report"].
[25] An Act Adopting the New Petroleum Law of the Republic of Liberia, Sec. 11.6 [hereinafter "New Petroleum Law") ("This Act supersedes any and all Acts, Decrees, or Regulations; or provisions contained in any such other Decree, Act or Regulations found to be inconsistent with this Law or provisions hereof. Accordingly, other than the Act establishing the National Oil Company of Liberia . . . all Regulations, Decrees, Acts or Laws that are inconsistent with this Law, are hereby repealed and declared null and void, to the extent of such inconsistency.").

Community Rights Law's *additional* protections in the form of PFIC are not in conflict with the New Petroleum Law. This is so because the New Petroleum Law does not expressly bar the provision of prior, free and informed consent to surface land rights holders.

3. Consultation/Consent Requirements in the New Petroleum Law, Minerals Law, & LEITI Act

Section 2.4.7 of the New Petroleum Law lists the conditions for issuance of a petroleum contract or exploration or exploitation permit. Nothing is mentioned about consent or consultation with affected individuals or communities. However, there is interpretive room for requiring PFIC through regulation. Section 2.5 lays out the general requirements of performance under a petroleum contract, and it requires that holders be "in compliance with the current practices in the international petroleum industry." The phrase "current practices of the international petroleum industry" could be interpreted to mean prior, free and informed consent because such practices should arguably comport with even evolving principles of international law.

There are other provisions in the New Petroleum Law which would permit regulatory imposition of PFIC. Section 8.4.2 concerns the acquisition and occupation of lands needed for the pipelines and related installations. Acquisition and occupation of lands "shall be in accordance with the Laws of the Republic of Liberia, the provisions of these laws and related regulations." A transportation permit authorizes the holder to construct pipelines, etcetera "on parcels of land which may belong to others provided the appropriate legal requirements are adhered to." These are not elaborated on in the statute, which gives considerable policy and regulatory leeway to include a PFIC requirement.

The Minerals Law is similarly silent on prior, free and informed consent. Agreements for reconnaissance licenses,[26] prospecting licenses,[27] exploration licenses,[28] mining licenses,[29] and mineral development[30] are all between the permit holder and the government. Affected individuals and communities are formally excluded. But to receive each of these licenses requires submitting some type of work plan or program, except for some reason Class C mining licenses. Regulations could be enacted that would set minimum protections for surface land rights holders as part of those work plans/programs.

Moreover, there is a rather peculiar provision in the middle of the Minerals Law, "Mineral Rights are always issued subject to existing rights of other Persons in the lands subject to such Mineral Rights."[31] Regulations could interpret this provision as requiring PFIC because the language "subject to" suggests that surface land rights in some way place limiting conditions on the exploitation of minerals.

[26] Minerals Law, Sec. 5.1.
[27] *Id.* at Sec. 5.2.
[28] *Id.* at Sec. 5.3.
[29] *Id.* at Sec. 6.3-6.5.
[30] *Id.* at Sec. 6.6.
[31] *Id.* at Sec. 9.2.

There is no comparable provision in the New Petroleum Law. The Minerals Law also has a section on Fundamental Rights, but these deal only with the fundamental rights of the license holders.[32] There is no comparable provision for surface land rights holders. Regulations could fill the gap.

Finally, the LEITI Act of 2009 has a somewhat aspirational provision regarding one of the objectives of the Liberia Extractive Industries and Transparency Initiative (LEITI). LEITI is charged with promoting the "effective participation of civil society in the design, implementation, evaluation and modification of actions, activities, processes and institutional arrangements associated with resource governance . . . ."[33] While appropriate from the standpoint of concession transparency it is a far cry from requiring FPIC for surface land rights holders. Nevertheless, LEITI should be given a role in ensuring that FPIC requirements are adhered to.

4. Prior, Free and Informed Consent in Other Countries' Laws

In Botswana if a minerals permit is to cover land that is not owned by the permit holder, then the holder must obtain the consent of the owner, even if tribal territory.[34] The application must be accompanied by evidence that consent was obtained.[35] The law does not specify a standard for the evidence or the consent. Applications for prospecting, retention, or mining licenses do not require consent of the owner or evidence to that effect unless there is overlap between the prospecting, retention, and mining areas and a minerals permit.[36] Consent is also required of the surface land owner or "lawful occupier" for mining concessionaires to exercise a right within, among other things, 200 meters of habitations, 500 meters of agricultural land, or 100 meters of certain water sources.[37]

Although in Botswana there may be a policy rationale for requiring consent in some of these cases but not others, Liberian policy will be more closely aligned with international standards if PFIC is required in all instances in which the natural resources of customary communities will be exploited (i.e. their land), even if that exploitation is incidental to extracting minerals or petroleum.

Gambian law imposes tougher consent requirements for mineral rights holders. For land "actually under cultivation" a mineral rights holder must obtain consent from the "occupier of the land."[38] Holders of prospecting licenses must give notice to land owners or occupiers before they enter the land "when practicable" and if they fail to do so they are fined.[39] Similarly, applicants for exclusive

[32] *Id.* at Sec. 20.5.
[33] An Act Establishing the Liberia Extractive Industries and Transparency Initiative (LEITI), Sec. 3.2(c) (2009).
[34] Botswana Mines and Minerals Law, Sec. 52(b).
[35] *Id.*
[36] *Id.* at Sec. 52(3)(c).
[37] *Id.* at Sec. 60(1)(b).
[38] The Gambia Minerals Act, Sec. 8(1)(ii).
[39] *Id.* at Sec. 12(1)(c), (2).

prospecting licenses and mineral leases must give notice to owners or occupiers of the land covered by the proposed license "if practicable" before the exclusive license or lease is granted.[40]

Although Ghanaian land policy does not expressly mention PFIC, it does declare that the "principle of community participation in land management and land development at all levels . . . is vital."[41] Yet, the Ghanaian Minerals and Mining Act provides for no community participation. Licenses are issued without their consent or even formal notification.[42] Surface land rights are almost completely subordinated to mineral rights.

Ugandan law requires a holder of an exploration license to provide written proof of an agreement with the "landowner of the area he or she intends to mine" before issuing a mining lease.[43]

C. "Legal framework should be developed for ensuring that mineral concessionaires have the right to as much of the land surface as reasonably necessary for the exploration and exploitation of minerals, while at the same time causing the least possible interference with the individual and communal land rights holders use of the land."

Legal Issue: How does this language, especially the "reasonably necessary" and "least possible interference" phrases, conform with current Liberian law and other countries' laws?

1. Texas Law

The "reasonably necessary" language comes from Texas law, which is rather extreme.[44] Companion rules to this "reasonably necessary" language are: no independent permission from the surface landowner is required for mining the minerals; and there is no obligation to pay for surface damages unless the mining is either beyond what is "reasonably necessary" or negligently performed.[45] There is a high bar to a finding of negligence; completely draining the surface landowner's sole domestic and agricultural water supply does not constitute negligence under Texas law.[46] These rules can be changed through negotiations. But these negotiations are between the company leasing the minerals and the owner of the minerals—the surface land owner is not necessarily included unless they also own the minerals.[47] This is an inadequate framework for Liberia given that the surface land owners may be communities with customary tenure over their land since time immemorial. Needless to say, to not formally include them would be unsustainable.

[40] *Id.* at Sec. 14(1), 35(3)(b).
[41] Ghana National Land Policy, Sec. 3.1 (1999).
[42] *Id.* at Sec. 34, 39, 41, 49.
[43] Ugandan Mining Act, Sec. 42(3) (2003).
[44] Judon Fambrough, *Minerals, Surface Rights and Royalty Payments* (2009).
[45] *Id.*
[46] *Id.*
[47] *Id.*

Moreover, given that there will likely be significant disparities in sophistication and power between the surface land rights holders and mining companies, the default minimum requirements for Liberia should be those very protections which parties may negotiate for under Texas law. That is, whether or not surface land rights holders are protected cannot be left up to them. It must be required under Liberian law. In brief, this "reasonably necessary" language should be revisited in light of Liberia's desire to ensure prior, free and informed consent and compensation for even reasonable loss of value to the surface land rights holder.

2. New Petroleum Law

The language in the New Petroleum Law closest to the above is the phrase "unjustifiable interference" with respect to fishing, "The Licensee shall not carry out any operation or authorize any operations in such a manner as to interfere unjustifiably with navigation or fishing . . . ."[48] "Unjustifiable" offers weaker protections for fishermen than if the modifier "unreasonable" were used. What is a bit peculiar is that no similar language is included for land surface users. Regulations could correct this.

3. Other Countries' Laws

Ghanaian law turns the Policy Statement formula on its head. It is not that the mineral rights holder must operate in a way that causes the least interference with the surface land rights holder; it is the surface land rights holder that must cause the least interference with the mineral rights holder. For example, land occupiers are permitted to retain their grazing or cultivation rights only if those rights do not "interfere with the mineral operations."[49] The surface land owner/occupier is not permitted to build in the mining area without the consent of the mineral rights holder.[50] Furthermore, land owners/occupiers may not plant higher value crops without the consent of the mineral rights holder.[51] This inverts the principle of PFIC as well as the above proposed policy language.

In Botswana, before a license is granted the government must be satisfied that "the proposed mining area extends to cover only that area reasonably required for surface mining and treatment facilities."[52]

Ugandan law limits mining leases to areas "reasonably required" for the proposed mining.[53] Moreover, mineral rights are to be "exercised reasonably and in such a manner as not to adversely affect the interests" of landowners/occupiers.[54]

4. Land Excluded from Drilling/Mining

[48] New Petroleum Law, Sec. 2.9.
[49] Ghanaian Minerals and Mining Act, Sec. 72(3) (2006).
[50] *Id.* at Sec. 72(4).
[51] *Id.* at Sec. 72(6).
[52] Botswana Mines and Minerals Law, Sec. 39(1)(c).
[53] Ugandan Mining Act, Sec. 43(3)(a).
[54] *Id.* at Sec. 79.

Petroleum operations cannot extend to land located less than 50 meters from "any building whether religious or not," government buildings "or those in use by a public entity," "walled enclosures, courts and gardens, residence and groups of residences, villages, settlements, cultural reserves, burial grounds, wells, water sources, reservoirs, roads, paths, railroads, water drains, pipelines, work declared to be of public interests and works of art," land less than 1000 meters from a foreign border or airport, or land in national parks, protected areas, "or comparable Reserves."[55]

In most ways the above is broader than the exclusion found in the Minerals Law, "Mineral Rights shall not be granted with respect to any lands located within the boundaries of any cities, commonwealth districts, municipal districts, cemeteries, transportation or communication facilities, aqueducts, military base, port, Poro or Sande grounds, and other grounds reserved for public purposes, except with the consent of the officials-authorized to administer or control the affairs of such entities, and subject to such special terms and reasonable conditions as may be prescribed for the protection of surface users."[56]

Ugandan law takes a different approach to excluding land from drilling or mining. Rather than a blanket prohibition for so many different types of land, it creates several gradations. Only land with cemeteries, places of "religious significance," and public buildings are categorically prohibited from being mining areas.[57] Consent is irrelevant. However, for other types of land consent may be given for mining operations. But who must give that consent varies with the land types. For example, the landowner/occupier must consent to mining when the land is reserved for railway track.[58] But consent of the relevant township authority must be given for mining within 200 meters of a lake.[59] This is a more refined approach and one that Liberia might consider adopting.

D. "Locating areas for exploration shall not require prior, free and informed consent of affected individuals and communities unless the exploration will…."

Legal Issue: Under what circumstances, if at all, does exploration require PFIC under international law or other countries' laws?

1. New Petroleum Law & Minerals Law

The New Petroleum Law and Minerals Law do not require PFIC when undertaking reconnaissance or exploration.[60] Under the New Petroleum Law at least, a reconnaissance permit allows the holder to drill exploration wells at depths of 300 meters or less, and the drilling can be to greater depths if

[55] New Petroleum Law, Sec. 2.9.
[56] Minerals Law, Sec. 10.1.
[57] Ugandan Mining Act, Sec. 78(1).
[58] *Id.* at Sec. 78(1)(c).
[59] *Id.* at Sec. 78(1)(e).
[60] *E.g.* New Petroleum Law, Sec. 2.4.6 (no mention of consent before determining areas open for reconnaissance, exploration or development).

"specifically provided for in the reconnaissance permit."[61] This could have serious adverse effects for surface land rights holders. The Minerals Law does not permit reconnaissance license holders to drill or sink pits,[62] but drilling is permitted by exploration license holders.[63] This could also have serious adverse effects for surface land rights holders. Thus, consideration should be given to requiring PFIC for reconnaissance and exploration permits under the New Petroleum Law and exploration licenses under the Minerals Law.

2. International Law & Other Countries' Laws

There is evidence to support the view that international best practices require PFIC for exploration. The Philippines Indigenous Peoples Rights Act (1997) requires PFIC "for all activities affecting [indigenous] lands and territories including . . . *exploration*, development and use of natural resources."[64] The International Labor Organization's Indigenous and Tribal Peoples Convention (1989) requires consultation "prior to *exploration* or exploitation of sub-surface resources."[65]

PFIC is not a prerequisite for the issuance of a reconnaissance license in Ghana, but that country's minerals law expressly prohibits reconnaissance license holders from drilling or excavating.[66]

Finally, the International Council on Mining and Metals has issued a position statement for its membership, which consists of 10 mining and metals companies as well as 30 national and regional mining associations. It exhorts its members to "engage and consult with Indigenous Peoples in a fair, timely and culturally appropriate way throughout the project cycle."[67] Thus, at the earliest possible stages of even "potential mining activities" indigenous communities must be engaged.[68] Liberia would do well to adopt this policy and extend it to include also customary communities.

E. "Surface Rights Agreements for the extraction of minerals should cover many issues and should be specific to each situation. They shall at a minimum contain the following protections . . . ."

Legal Issues: Under the Minerals and Mining Law and New Petroleum Law, what are the current requirements for mineral agreements? How do these compare with other countries' laws?

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[61] *Id.* at Sec. 2.5.14.
[62] Minerals Law, Sec. 5.1(d).
[63] Minerals Law, Sec. 1.3(n).
[64] Parshuram Tamang, UN Department of Economic and Social Affairs, *Review of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices* (2005) (referencing The Indigenous Peoples Rights Act (1997)) (emphasis added).
[65] *Id.* (referencing ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries169, art. 15.2 (1989)) (emphasis added).
[66] Ghanaian Minerals and Mining Act, Sec. 32.
[67] ICMM, *Mining and Indigenous Peoples* (May 2008).
[68] *Id.*

1. New Petroleum Law & Minerals Law

Both the New Petroleum Law and the Minerals Law provide weak minimal protections for surface land rights holders. The New Petroleum Law separates occupation/utilization from expropriation and there are different rules for each. Occupation and utilization of land "are subject to mutual agreements between the holder of a petroleum contract and the owners of the land"[69] If no agreement is reached, then the National Oil Company of Liberia can intervene to mediate." Intervention, while discretionary, can only be "so as not to delay the normal course of petroleum operations without prejudice to the rights of legitimate owners of the land or the beneficiaries."[70] The Law does not go into more detail as to what these mutual agreements must contain.

The terms "legitimate owners" and "beneficiaries" are interesting. Even if communal land rights are not recognized as legitimate in a strictly legal sense, as customary users of the land they are arguably beneficiaries.

The New Petroleum Law provides more detail as to the contents of permits and "Petroleum Contracts."[71] Permits for extraction must include the location, metes and bound, duration and amount of compensation to be paid.[72] Petroleum Contracts must contain "[t]he conditions under which the exploration and the exploitation are carried out.[73]" This could be interpreted in a regulation to allow for more protections of surface land rights holders. The requirement of a "financial and fiscal provision"[74] in Petroleum Contracts could be interpreted to ensure revenue sharing for individual and communal surface rights holders. Also to be included are: arbitration procedures for resolving disputes;[75] the "perimeter of an area under an exploration permit;"[76] duration of the contracts and "conditions for periodic review, renewal and extension, *including the surface rights*;[77] and an "environmental impact study."[78] Additionally, they must contain a statement of the investment obligations of permit holders.[79] This could be interpreted to mean building of schools, hospitals, etc.

[69] New Petroleum Law, Sec. 9.3.
[70] New Petroleum Law, Sec. 9.3.1.
[71] The law treats Petroleum Contracts differently from Petroleum Agreements. Petroleum Contracts include production-sharing contracts and hydrocarbon exploration permits. Petroleum Agreements are between the license holder and the National Oil Company granting the license holder an *exclusive right* to explore and develop hydrocarbons.
[72] New Petroleum Law, Sec. 9.3.1(iii).
[73] *Id.* at Sec. 2.2.2.
[74] *Id.* at Sec. 2.2.4.
[75] *Id.* at Sec. 2.2.9.
[76] *Id.* at Sec. 2.2.11.
[77] *Id.* at Sec. 2.2.12.
[78] *Id.* at Sec. 2.2.25.
[79] *Id.* at Sec. 2.2.13.

for affected communities. Finally, there is the broad requirement that Petroleum Contracts include the "reciprocal rights and obligations of the contracting Parties."[80]

The Minerals Law also provides more detail as to the contents of mining licenses. There is significant room in the statutory language for more detailed regulatory protections. Section 6.7(b) of the Minerals Law requires that the "application for a mining license shall include such information, and be in such form, as may be specified in the Regulations *including but not limited to* . . . . the Minerals expected to be mined, the boundary of the area subject to the Mining License Area, the metes and bounds of the area, and an accurate survey of not less than 1:10,000 accompanied by a map which shall show the geographic position of the claim with reference to adjacent natural landmarks . . . ."[81] This may need to be amended to raise the bar for survey accuracy. Additionally, class A mining license applicants must provide a "detailed map and descriptive statement based on actual surveys which shall set forth the boundaries of the proposed Production Area, identified by metes and bounds, and the boundaries and size of the Deposit from which Minerals are to be Mined."[82]

2. Other Countries' Laws

Ugandan law is similar to Liberian law in that the specified elements of mineral agreements lack express protections for affected individuals and communities. Mineral agreements in Uganda must include, among other things: (1) a timetable for mining operations, (2) minimum expenditures, (3) "the manner in which exploration or mining operations shall be carried out," and (4) a dispute resolution provision.[83]

Neither does Ghanaian law set very stringent minimum requirements for mineral agreements. Even for development agreements, which are mineral agreements where the investment exceeds US$500 million,[84] Ghanaian law specifies provisions that such agreements "may" contain.[85] And these are broadly worded.[86]

F. "Legal framework should be developed which ensures that issues related to environmental degradation are minimized and that restoration and/or compensation for surface damage is made during and upon completion of activities."

Legal Issues: What is Liberia's current legal regime governing environmental damage by mineral concessionaires? What are the regimes of other countries?

[80] *Id.* at Sec. 2.2.15.
[81] Minerals Law, at Sec. 6.7(b).
[82] *Id.* at Sec. 6.5(b).
[83] Ugandan Mining Act, Sec. 18.
[84] Ghanaian Minerals and Mining Act, Sec. 49(1).
[85] *Id.* at Sec. 49(2).
[86] *Id.* ("provisions . . . relating to the mineral right or operations . . . .").

1. New Petroleum Law & Minerals Law

Both laws require compliance with Liberian environmental laws and environmental impact studies. Section 2.5.2 of the New Petroleum Law states, "All holders of petroleum contracts or reconnaissance licenses shall abide by the Environmental Protection Laws of Liberia."[87] Section 12.3 requires all permit holders to "conform to internationally accepted standards of the industry with respect to environmental protection and regulations."[88] The section goes on to list specific actions permit holders must take: use materials , equipment, and techniques "necessary to ensure maximum public safety and security;"[89] meet internationally accepted standards "that are conducive and adaptive to the region and locale;"[90] and undertake environmental impact assessments[91] if the operation "is likely to have [sic] significant impact on the environment.[92] If the energy operation "will or [is] likely to generate hazardous waste" then a cradle-to-grave tracking system must be implemented.[93] Additionally, the polluter must clean up and pay for the pollution,[94] as well as reimburse victims of the pollution.[95] Finally, the National Oil Company can exempt areas from petroleum operations for environmental reasons.[96]

Under the Minerals Law, holders of mineral licenses "shall take reasonable preventive, corrective and restorative measures to limit pollution or contamination of, or damage to, streams, water bodies, dry land surfaces and the atmosphere as a result of exploration or mining."[97] It also imposes restoration requirements such that land and water needs to be returned to its "prior state" if feasible. Otherwise, the land must be made "useful for economically and socially desirable purposes."[98]

As with the New Petroleum Law, class A and B mining license applicants must submit an Environmental Impact Assessment Study prior to being granted the license, and "[s]pecial attention shall be paid to any adverse effects on nearby communities."[99] In addition, the mining license holder must submit an Environmental Management Program with respect to the surface land.[100] On-going mining operations are subject to periodic environmental assessments "as shall be defined in the

[87] New Petroleum Law, Sec. 2.2.
[88] *Id.* at Sec. 12.3.
[89] *Id.*
[90] *Id.* at 12.3.1.
[91] *Id.* at 12.3.2.
[92] *Id.* at 12.3.8.
[93] *Id.* at 12.3.9.
[94] *Id.* at 12.3.9(i).
[95] *Id.* at 12.3.9(ii).
[96] *Id.* at 12.3.11.
[97] Minerals Law, Sec. 8.1, 8.3.
[98] *Id.* at Sec. 8.2.
[99] *Id.* at Sec. 8.4.
[100] *Id.* at Sec. 8.5.

Regulations."[101] It is important to note that affected individuals and communities are not formally included in this process of monitoring environmental impacts.

2. Other Countries' Laws

Botswana requires applicants for prospecting licenses to show that the proposed prospecting operation "makes proper provision for environmental protection."[102] License holders must also repair any damage done to the land surface.[103]

Gambia empowers the Inspector of Mines "in his discretion" to require any mineral rights holder to take "reasonable measures" to prevent soil erosion or "reasonably to restore any area used for prospecting or mining operations."[104] If such an order is issued then it automatically becomes part of the lease and a condition thereto, even if retroactive.[105]

It is the land policy of Ghana that mining rights holders must restore the land "to the state it was before the [mining] operation."[106] The policy states clearly, "the 'Polluter Pays.'"[107] Moreover, to further the policy of environmental conservation forest cover is not to be cleared in order to establish a mining activity.[108]

Ugandan law is similar to Liberian law in that it requires an environmental impact assessment by the mineral rights holder.[109] Mining operations may commence only after securing a "certificate of approval" from the National Environmental Management Authority.[110] Environmental audits are required of the mineral rights holder.[111] Ugandan mining law also requires mineral rights holders to take "all necessary steps to ensure the prevention and minimisation of pollution" as provided by national environmental laws.[112] This law may be contravened if the mineral rights holder is granted a pollution license.[113]

G. "Dispute resolution mechanisms must be established for those who object to the mineral extraction. These mechanisms should be contained in statutory law but subject to change by mutual consent of the surface owner and concessionaire."

[101] *Id.* at Sec. 8.6.
[102] Botswana Mines and Minerals Law, Sec. 14(1)(b).
[103] *Id.* at Sec. 21(1)(g), 32(1)(c)(iii).
[104] Gambian Mining Act, Sec. 82.
[105] *Id.*
[106] Ghana National Land Policy, Sec. 3.1 (1999).
[107] *Id.* at Sec. 4.4(h).
[108] *Id.* at Sec. 4.5(a).
[109] Ugandan Mining Act, Sec. 108(1).
[110] *Id.* at Sec. 108(2).
[111] *Id.* at Sec. 108(3).
[112] *Id.* at Sec. 109(1).
[113] *Id.* at Sec. 109(2).

Legal Issues: What are the dispute resolution mechanisms under current Liberian law? Does Liberian law expressly permit those mechanisms to be altered by mutual agreement (e.g. arbitration clauses)? How do other countries address dispute resolution over mining?

1. New Petroleum Law & Minerals Law

The New Petroleum Law guaranties the land surface owner the right to seek redress in Liberian courts, including those over just compensation when eminent domain is exercised.[114] Some interpretive issues that should be clarified in regulations: (1) does this guarantee extend to all differences arising out of negotiations between the surface land rights holder and the permit/contract holder?; (2) does the provision require good-faith efforts to resolve a dispute prior to taking the case to court?, and (3) What is the relationship between the arbitration clause requirement in petroleum contracts, mentioned above, and this guarantee to surface land rights holders?

Section 11.2 seems to grant priority to the terms of the contracts, licenses, or permits with respect to dispute resolution, "The appropriate provisions in the respective contracts, licenses or permits shall govern the procedure for the settlement or resolution of disputes."[115] This suggests that alternative dispute resolution provisions in agreements between the surface land rights holders and permit/license holders would be permitted.

The Minerals Law is rather terse concerning dispute resolution. If a land surface rights holder refuses to allow a permit/license holder to explore or mine then the holder may ask the Ministry of Lands, Mines and Energy to intervene.[116] These administrative hearings are to be conducted in accordance with Ministry regulations.[117]

Section 19.1 provides that the agreements between mineral rights holders and the Government shall govern disputes arising under the Minerals Law. Except for administrative hearings, there is no dispute resolution provision for surface land rights holders.

2. Other Countries' Laws

The Gambian mining law contains a provision on disputes when a mineral rights holder is injured by another, which is settled by the relevant Minister who may also refer the case to arbitration or the courts.[118] Similarly, if a dispute arises as to the compensation to be paid by prospecting rights holders to land owners/occupiers for damage or disturbance to their rights, the Commissioner determines the

[114] New Petroleum Law, Sec. 9.3.3(i), 9.4.3.
[115] *Id.* at Sec 11.2.
[116] Minerals Law, Sec. 11.5.
[117] *Id.*
[118] Gambian Minerals Act, Sec. 83.

compensation.[119] If either of the parties are dissatisfied with the Commissioner's decision they may appeal to the relevant Minister for final resolution. The Minister may refer the matter to arbitration.[120]

Also, compensation disputes between surface landowners and mineral lessees are referred to arbitration unless the party claiming compensation is Gambian and he or she requests the Commissioner to settle the dispute.[121] Either party may appeal the Commissioner's decision to the relevant Minister whose decision is final unless the Minister refers the case to arbitration.[122]

In Ghana, all mining disputes are subject to arbitration.[123] Every agreement granting a mineral right must contain a dispute resolution provision.[124] However, compensation disputes between the owner/occupier of the land and the mineral rights holder may go to the Ghanaian High Court.[125]

H. "If prior, free and informed consent cannot be obtained by the concessionaire and government then the government may exercise its eminent domain power provided the following procedural and substantive protections are followed . . . ."

Legal Issues: What are the requirements for eminent domain under Liberian law? What additional protections are needed in accordance with international best practices?

1. Prior, Free and Informed Consent & Eminent Domain

Because eminent domain by its very nature is exercised when consent is not forthcoming, the principle of PFIC must be reconciled with the power of eminent domain. International law does not directly address this issue.[126] However, one commentator gleaned the following standard from international law cases:

> *[G]ood faith* efforts to obtain [prior informed consent] with a view to reaching mutual agreement are required when indigenous peoples and other local communities with *significant*

[119] *Id.* at Sec. 20(2).
[120] *Id.*
[121] *Id.* at Sec. 38(3).
[122] *Id.*
[123] Ghanaian Minerals and Mining Act, Sec. 27, 35(3), 36(4), 38(3), 39(3), 42(2), 72(2).
[124] *Id.* at Sec. 27(4).
[125] *Id.* at Sec. 75(2).
[126] Anne Perrault et al., *Partnerships for Success in Protected Areas: The Public Interest and Local Community Rights to Prior Informed Consent*, 19 Georgetown International Environmental Law Review , 475, 495 ("No official interpretation of international law exists, however, to describe specifically how the rights to [prior informed consent] of indigenous and other local communities relate legally, or in practice, to the rights of states to manage natural resources in the public interest."). The Proposed American Declaration of the Rights of Indigenous Peoples permits the transferring or relocation of indigenous peoples without their consent if "exceptional and justified circumstances so warrant in the public interest." Sec. 5, art. XVIII(6).

> *ties* to natural resources are involved, when *impacts to these communities may be significant*, and *when discriminatory barriers* exist to full recognition of their rights.[127]

The point is that if prior, free and informed consent cannot be obtained, the efforts to obtain that consent must be made in good faith, rather than merely *pro forma*.

2. Eminent Domain under Liberian Law

The Constitution allows for the use of the eminent domain power for "public purposes."[128] The government's exercise of its mineral rights would presumably qualify. Yet, the exercise of the eminent domain power is not a decision but a process that takes time and is subject to challenge.

In line with the Land Law Reform Report, Liberia needs to enact procedural protections for the exercise of eminent domain.[129] The Constitution does impose certain requirements on eminent domain, which would apply to acquisition of land surface rights:

- Government must state it's reasons for expropriating
- Government provides "prompt payment of just compensation"
- The decision to expropriate and the compensation paid may be freely challenged in court by the owner of the property
- When public use of expropriated property stops, the former owner has right of first refusal to repurchase the property[130]

There is no provision on eminent domain in the Minerals Law, but owners of lands that lose value or are either disturbed or disfigured are entitled to "just, prompt, and adequate compensation."[131] It is not clear if this applies to eminent domain or even for mining activities where the eminent domain power is not exercised.

Section 9.4 of the New Petroleum Law allows for the use of eminent domain by the government when "for the purposes of public interest, convenience and necessity."[132] The State may only expropriate upon the request of the National Oil Company. Permit holders may request expropriation through the National Oil Company.[133] Permit holders are responsible for the costs of expropriation.[134]

[127] Perrault, *supra* note 126, at 495 (emphasis added).
[128] Constitution of Liberia, art. 24.
[129] Land Law Reform Report, *supra* note 24, at 5.
[130] Constitution of Liberia, art. 24.
[131] Minerals Law, Sec. 11.3.
[132] New Petroleum Law, Sec. 9.4.
[133] *Id.*
[134] *Id.* at 9.4.1.

Compensation for eminent domain is determined by "use of the land prior to the expropriation or, as the case may be, prior to the occupation."[135]

Finally, the Investment Act of 2010 contains provisions on expropriation, but these only apply to "enterprises" (meaning in essence any business entity)[136] and not individuals or communities. Nevertheless, its provisions are instructive. Expropriation must be: in the "national interest for a public purpose," "the least burdensome available means to satisfy that overriding public purpose," "made on a non-discriminatory basis," and "in accordance with due process of law.[137] Finally, it must be done "under a law" which provides for "fair and adequate compensation" "equal to fair market value of the property . . . taken as a whole" and made "without undue delay."[138]

2. Other Countries' Laws

As recommended in the Land Law Reform Report, Liberian eminent domain law will need to incorporate additional procedural protections for private property rights,[139] including land surface rights.

US law lays out several policies that guide federal agencies in the exercise of eminent domain. "Reasonable effort" must be made to acquire the land by negotiation.[140] The land must be appraised before the negotiations begin, and the landowner must be allowed to accompany the appraiser.[141] Before negotiations begin the head of the relevant agency must establish an amount that she or he "believes to be just compensation" and make a "prompt offer" to acquire the land.[142] This offer cannot be below the appraiser's determination of "fair market value."[143] Decreases in value between the time the appraisal occurs and the agency's offer are disregarded except for those "within the reasonable control of the owner."[144] The agency must provide the landowner with a "written statement" of the just compensation amount including a summary of the basis for coming to that amount.[145]

US law states clearly, "No owner shall be required to surrender possession of real property before the . . . agency concerned pays the agreed purchase price . . . ."[146] Landowners must be given "at least

[135] New Petroleum Law, Sec. 9.4.2.
[136] Investment Act of 2010, Sec. 2.7.
[137] *Id.* at Sec. 7.2.
[138] *Id.* at Sec. 7.2-7.4.
[139] Land Law Reform Report, *supra* note 24, at 5.
[140] Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs, 42 U.S.C. 4651(1) (2010).
[141] *Id.* at Sec. 4651(2).
[142] *Id.* at Sec. 4651(3).
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.* at Sec. 4651(4).

ninety day's written notice" of the date on which the landowner will have to move.[147] Liberia may want to extend this notice time as well as apply it to those instances in which the land surface rights holder is not required to move. This would apply if, for example, the Government acquires private property for just compensation but then allows the former landowner to occupy the land on the condition that rental payments are made to the Government. US law advises federal agencies that the rental amount "shall not exceed the fair rental value of the property to a short-term occupier." If acquisition of only a portion of the land would leave the owner with an "uneconomic remnant" then the agency must offer to acquire the remnant.[148]

The Gambian Mining Act only refers to eminent domain with respect to the mining lessee's property rights. If the land covered by a mining lease is required for "any public purpose" then the government must pay compensation for interference with "ways, works, building and plant" but not the lessee's mining rights. And compensation is to be determined by arbitration.[149]

The Ghanaian Minerals and Mining Act implicitly conflates the Government's mineral rights with eminent domain by empowering the President to acquire land if necessary for securing minerals.[150]

Tanzanian land policy states that compensation for eminent domain is based on opportunity cost and includes: (1) market value, (2) disturbance allowance, (3) transport allowance, (4) loss of profits or accommodation, (5) cost of acquiring or getting the land, (6) other costs or capital expenditures in developing the land, and (7) if compensation is not paid promptly then the land rights holder receives market rate interest on the unpaid amount.[151]

Finally, the South African Constitution states what must be considered in determining compensation in the case of expropriation: "reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation."[152]

South Africa's Expropriation Act provides for additional procedures. The property owner must be given sufficient notice of the expropriation which must include: clear description of the subject property; and the date of expropriation (i.e. when it will be used and for how long).[153] Furthermore, the notice informs the property owner that after a certain number of communication exchanges the

[147] *Id.* at Sec. 4651(5).
[148] *Id.* at Sec. 4651(9).
[149] Gambian Mining Act, Sec. 73(1).
[150] Ghanaian Minerals and Mining Act, Sec. 2.
[151] Tanzanian National Land Policy, Sec. 4.2.20 (1997).
[152] South Africa Constitution, Sec. 25 (1996).
[153] MLV Attorneys, *supra* note 5.

owner will be deemed to have accepted an offer unless within a certain time period the owner brings a claim to the courts.[154] The Minister may, at his or her discretion, offer the owner a compensation amount in the expropriation notice.[155]

Market value is generally the basis for determining the compensation amount.[156] But this is a factual issue and the Expropriation Act does not provide a definition.[157] Factors that courts may use to determine a "just and reasonable" compensation are: property use at the time of expropriation, expropriator's actions causing an increase or decrease in the property value, potential property uses, and market demand for the property.[158]

Factors which courts are prohibited from rely upon are, among other things: unwillingness of owner to sell, special suitability for purpose of expropriation, unlawful or detrimental use, improvements after expropriation notice, and indirect damage.[159]

I. "Just compensation to surface land rights holders should be made through transparent processes in a timely manner. Such compensation must be derived from established processes of valuation which conforms to industry and international best practices."

"Compensation should consider the following: (1) Entry fee for land granted to the concessionaire, (2) Land value for the surface area granted to the concessionaire, (3) Initial nuisance, inconvenience and noise resulting from mineral exploration and extraction, (4) Loss of use of land at sites being used by concessionaire, (5) Adverse effects and other related factors which limit or cause difficulty for the surface land rights holder to farm or otherwise use the land."

Legal Issue: What does current Liberian law have to say about compensation for surface land rights holders, apart from compensation for eminent domain? How do other countries and international law address this issue?

1. New Petroleum Law & Minerals Law

Under the New Petroleum Law if no agreement is reached between the permit holder and the land surface owner, then the National Oil Company of Liberia can intervene to mediate, which "may include the payment of the reasonable and just compensation to the legitimate owners of the land."[160]

[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] New Petroleum Law, Sec. 9.3.1.

It is not clear if this means the Government may exercise eminent domain as part of its intervention or if the Government may elect to pay the landowner on behalf of the permit holder.

The law also states that occupation entitles the landowners to compensation from the permit holder, which shall be "reasonable annual compensation equal to the value of the land or the equivalent of the income the owner was receiving from the land prior to the occupation."[161] Payment is to continue for the duration of the occupation.[162] If occupation lasts more than two years then the owner of the land "may" require the contract holder to purchase the land at "fair market value."[163]

Compensation to land surface rights holders "shall be made only where the claimant can present a *bonafide and convincing title to the property*."[164] The government should operate as if community tenure arrangements, even those based solely on custom, are "bonafide and convincing title." Not only is this consistent with the Community Rights Law but it is also consistent with the likely enactment of a Community Land Law. Similarly, the Minerals Law defines a landowner as "a person who owns Land by legal title."[165] "Occupant of land" is "any person who is in lawful possession of real property."[166] This should also be interpreted as including owners with customary tenure.

Even if the permit holder only needs to use "ground materials," the landowner is entitled to receive from the permit holder "fair compensation" or "the appropriate and corresponding fees for the utilization of ground materials extraction."[167] Additionally, if pipelines or associated installations encroach upon or encumber land then the owner is entitled to just compensation from the permit holder.[168] If the pipelines or associated installations interfere with the "normal use of the land" then the permit holder must acquire the land.[169] If the owner does not consent to sell the land to the permit holder, the government may exercise eminent domain and "pay the appropriate compensation due in accordance with the law."[170]

Under the Minerals Law owners of lands that lose value or are either disturbed or disfigured are entitled to "just, prompt, and adequate compensation."[171] As stated earlier, it is not clear if this applies to eminent domain as well as for mining activities where the eminent domain power is not exercised.

2. African Treaty Law & Other Countries' Laws

[161] *Id.* at Sec. 9.3.2.
[162] *Id.* at Sec. 9.3.2(i).
[163] *Id.* at Sec. 9.3.3.
[164] *Id.* at Sec. 9.3.3(iii).
[165] Minerals Law, Sec. 1.3(x).
[166] *Id.* at Sec. 1.3(mm).
[167] New Petroleum Law, Sec. 9.1.4.
[168] *Id.* at Sec. 8.4.4.
[169] *Id.*
[170] *Id.* at Sec. 8.4.6.
[171] Minerals Law, Sec. 11.3.

The African Charter on Human and Peoples' Rights, Article 21, protects the right of individual and communal land ownership, "All peoples shall freely dispose of their wealth and natural resources . . . In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an *adequate compensation*."[172]

Ghanaian law states that the surface land owner/occupier may claim compensation from the mineral rights holder with the parties to reach agreement on the amount.[173] If the parties cannot agree then the relevant Minister determines the compensation amount.[174] If the land owner/occupier prefers to be resettled then they are guaranteed "suitable alternate land, with due regard to their economic well-being and social and cultural value."[175] The mineral rights holder must bear the cost of resettlement as with compensation short of expropriation.[176]

Surface landowners/occupiers are entitled to compensation from the mineral rights holder for being deprived of land use, immovable property loss or damage, loss of earnings or subsistence for cultivated land "having due regard to the nature of their interest in the land," and loss of expected income.[177] Regarding the third criteria, basing compensation on the nature of owner/occupier's interest seems like a formula for devaluing customary land tenure. Ghanaian law expressly excludes compensation for entry onto the land, the value of the minerals, and damage that cannot be monetized.[178]

There is a curious provision in the compensation section of the Ghanaian minerals law which states if the Minister must determine the compensation to be paid by the mineral rights holder (i.e. if the parties cannot agree) then he or she must "observe" the constitutional requirement of "prompt payment of fair and adequate compensation" for expropriations.[179] Does this mean that even if the parties agree on the compensation amount that amount must be promptly paid as well as fair and adequate? Is this a minimum requirement that binds mineral rights holders as well as the government in the case of expropriation? If it is meant only to bind the Minister such a provision could disincentivize land owners/occupiers from agreeing to compensation. If the government must ensure prompt, adequate, and fair compensation comparatively unsophisticated landowners/occupiers would be well served to wait for the Minister's decision on the compensation amount. Otherwise they may unwittingly agree to a lower standard of compensation.

[172] African Charter, art. 21.
[173] Ghanaian Minerals and Mining Act, Sec. 73(1), (3).
[174] *Id.* at Sec. 73(3).
[175] *Id.* at Sec. 73(4).
[176] *Id.* at Sec. 73(5).
[177] *Id.* at Sec. 74(1)(a)(b)(c)(d).
[178] *Id.* at Sec. 74(1)(e)(f)(g).
[179] *Id.* at Sec. 74(2).

Gambian law empowers owners or occupies of land to request "security for the payment of any compensation . . . for disturbance or damage" caused by the mineral rights holder.[180] In addition, prospecting rights holders must pay "fair and reasonable compensation" on demand to surface land owners or occupiers.[181] The compensation is for damage done to the surface of the land or any "disturbance" of the owners/occupier's land rights.[182] Mineral lessees are also obligated to pay for damage to the land surface but only to "owners" of the land.[183]

Also, 'owners' of land subject to a mineral lease are entitled to state in writing the amount of rent they want the mineral lessee to pay "if practicable."[184] Only referring to owners of the land presumably excludes customary rights holders. These rental payments are separate from compensation for damage to the land.[185]

Ugandan law requires holders of prospecting licenses to repair or "make good any damage" caused to the land surface "to the satisfaction of the Commissioner."[186] Interestingly, the law does not require the land surface owner/occupier to be satisfied. More generally, mineral rights holders must pay the landowner/occupier "fair and reasonable compensation for any disturbance" of their rights provided the landowner/occupier demands compensation.[187] The same is true for owners of crops, trees, buildings, and works damaged by the mineral rights holder during mining operations.[188] Compensation is based on reduction in market value as a result of damage by the mineral rights holder.[189] Compensation claims must be made within one year of the act which is the basis of the compensation claim.[190]

J. "Revenue from mining should be shared with individuals and communities most directly affected by the mining in a way that both ensures the primary benefit goes to all Liberians and recognizes the disproportionate costs mining imposes on local communities."

Legal Issue: How specifically have other countries dealt with the issue of revenue sharing? How does current Liberian law deal with revenue sharing, if at all?

[180] Gambian Minerals Act, Sec. 12(1)(c), 14(2), 24(2) ("The provisions of . . . section 14 shall apply, *mutatis mutandi*, to an application for and grant of a mining right.").
[181] *Id.* at Sec. 20(1).
[182] *Id.*
[183] *Id.* at Sec. 38(2).
[184] *Id.* at Sec. 35(3).
[185] *Id.* at Sec. 35(4)(b).
[186] Ugandan Mining Act, Sec. 24(d).
[187] *Id.* at Sec. 82(1).
[188] *Id.*
[189] *Id.* at Sec. 82(1)(ii).
[190] *Id.* at Sec. 82(3).

1. Liberian Law

The Minerals Law establishes a Mineral Development Fund for, among other things, "Such other purposes as the Minister, with the advice of the [Minerals Technical] Committee, shall designate."[191] This would allow the MLME to issue a regulation allowing for a portion of these funds to be used to benefit the communities that are most directly affected by the mining. The Fund is financed by the holders of Class A mining licenses or parties to mineral development agreements, fines on license holders, and 25% of all royalties paid by license holders.[192]

The LEITI Act of 2009 stipulates that one of the objectives of LEITI is to "encourage and facilitate discussion and adoption of appropriate policies for fair sharing of the benefits" from natural resource exploitation.[193] Thus, LEITI will have a role to play in ensuring that affected individuals and local communities receive a share of revenues from mining and drilling.

2. Other Countries' Laws

Ghana is in the midst of preparing a bill concerning a Mineral Development Fund. In its current version it would entitle local communities in mining areas to 9% of the mining royalties.[194] The Ghanaian Chamber of Mines would like to see this percentage increased to 30%.[195] The Fund is to be managed by a Board, but there is concern that this board may not be sufficiently insulated from politics and government malfeasance.[196] This concern is partly a result of the composition of the proposed Board, which does not include representatives from the mining companies or civil society.[197] Liberia could learn from the current debate in Ghana and alter its policy accordingly.

Ugandan law allows landowners/occupiers to *either* receive compensation from the mineral rights holder *or* receive 3% of all royalties paid by the mineral rights holder.[198] Royalty payments are based on the gross value of the extracted minerals at the prevailing market price.[199] Liberian law should perhaps have a similar provision for minerals and petroleum but in addition to compensation, not in lieu of.

[191] Minerals Law, Sec. 18.3(h).
[192] *Id.* at Sec. 18.4.
[193] LEITI Act of 2009, Sec. 3.2(h).
[194] Dan Owiredu, *Annual Chamber of Mines Presidential Review*, at 4 (May 27, 2011).
[195] *Id.*
[196] *Id.*
[197] *Id.* at 5.
[198] Ugandan Mining Act, Sec. 83, 98, Second Schedule.
[199] *Id.* at Sec. 98(1).

The Philippines mining law mandates the establishment of a trust fund for "the socioeconomic well-being of the indigenous cultural community" into which is paid royalties from mineral extraction.[200]

K. Additional Legal Issues

> Legal Issue: Should communal/community surface land rights be treated on par with individual surface land rights?

There is also, of course, the additional problem of the law's murkiness with respect to communal holdings, tribal reserves, and customary tenure generally.[201] The Interim Policy Statement correctly assumes that these various forms of communal land rights should be afforded the same protections as individual surface land rights. Even if strictly speaking the current law in Liberia does not require this, it is likely that Liberian law in this area will be changed to explicitly grant communal land rights protections on par with individual land rights.

> Legal Issue: Under Liberian law who has the authority to enact regulations in accordance with Interim Policy Statement?

The Minerals Law covers extraction of all minerals except for hydrocarbons.[202] The New Petroleum law fills the gap. Ministry of Lands, Mines & Energy is empowered to issue regulations pursuant to the Minerals Law.[203]

Under the New Petroleum Law the President/CEO of the National Oil Company of Liberia "shall promulgate or institute such other rules and regulations necessary for the achievement of the purposes and promotions of the policies set forth in the Act establishing the National Oil Company of Liberia."[204]

[200] An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation, Sec. 17 (1995).
[201] See discussion in Land Law Reform Report, *supra* note 24.
[202] Minerals Law, Sec. 1.3(ee) ("'Mineral" shall mean . . . but not including hydrocarbons.").
[203] Minerals Law, Sec. 21.1, 2.
[204] New Petroleum Law, Sec. 4.1.