



The Forests Dialogue

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The Forests Dialogue

Field Dialogue on Free, Prior and Informed Consent

21–25 May, 2012 | Bas Congo and Kinshasa, DRC
Co-Chairs' Summary Report

by Marcus Colchester, Fabien Monteils, Rene Ngongo and Gabriel Mola

The Forests Dialogue (TFD) and Forest Peoples Programme (FPP) with the Ministry for the Environment, Nature Conservation and Tourism (MECNT), the National REDD Coordination (CN-REDD) and “le Cercle pour la Defense de l'Environnement (CEDEN)” held a five day field dialogue on Free, Prior and Informed Consent (FPIC) in Bas Congo and Kinshasa in the Democratic Republic of the Congo (DRC). The dialogue brought together over 100 participants from a great variety of backgrounds including indigenous peoples, local communities, non-governmental organisations, development agencies, government bodies and the private sector. The meeting was the second in a planned series of field dialogues which have the main aim of exploring how in practice government agencies, commercial enterprises and non-government organizations should respect the right of indigenous peoples and local communities to give or withhold their free, prior and informed consent, as expressed through their own freely chosen representative organisations, to activities that may affect their rights. The series of field dialogues was preceded by the preparation of a Scoping Paper¹ and the holding of a Scoping Dialogue in Yale in April 2010.² The first field dialogue had then been held in Pekanbaru, Indonesia, in October 2010.³

This, the second, dialogue held in Kinshasa focused on how the right to FPIC should be respected in the national programme to reduce emissions from deforestation and forest degradation (REDD) and it was authorised and sponsored by the Ministry for the Environment, Nature Conservation and Tourism. Prior to the main dialogue a field visit was conducted to Bas Congo to review the situation in the Luki Biosphere Reserve near the mouth of the Congo River. Participants visited two communities, Kiobo and Kifulu, within and on the edge of the reserve and then held an afternoon dialogue with the agencies in charge of the reserve. The Luki Reserve, originally established as a Forest Reserve in the colonial era on the lands of the Kongo people, without their consent or effective recognition of their rights, is one of last areas of substantial forest left in the lower Congo and is under heavy pressure

from illegal logging and hunting. It is now being considered for a REDD project. The field visit was followed by an intensive two days of discussions in the national capital, Kinshasa, to draw lessons from the field and from participants' wider experiences.

BACKGROUND AND LEGAL FRAMEWORK

'Free, Prior and Informed Consent' is a recognised right in international law, respect for which ensures that developers enjoy a 'social licence to operate' and do not impose their plans by force on communities to their detriment. Previous TFD dialogue streams, notably on Intensively Managed Planted Forests, REDD Finance, Forests and Poverty Reduction and Investing in Locally Controlled Forests, have all affirmed the need for companies and governments to respect this right. However, while the right to FPIC has been widely accepted, the practicalities of how this right is respected have received less attention. Accordingly, TFD has embarked on a series of dialogues to seek to elucidate practical lessons for those seeking to respect this right.

FIGURE 1: THE DEMOCRATIC REPUBLIC OF CONGO



*DRC contains some 145 million hectares of forests
(Source CN-REDD)*

The Democratic Republic of Congo (DRC) was chosen as the site to host the second field dialogue for a number of reasons, because: it retains extensive areas of forests; there are notable obstacles in law and policy to observe the right to FPIC; the country is piloting REDD schemes, and aims to respect the right to FPIC; and because DRC's REDD programme is considered the most advanced national REDD pilot programme in Africa. It was thus felt that DRC was a critical location both to teach and to learn practical lessons about FPIC and REDD.



Co-chair Gabriel Mola

As noted in the briefing paper prepared for this dialogue,⁴ DRC is the second largest country in Africa with a national population estimated at 73 million people speaking some 200 different languages. The country is endowed with considerable natural resource wealth and has the second largest extent of tropical forests in the world. The forests themselves are inhabited by some 40 million people. Owing to a sorry colonial and post-colonial history of foreign intervention, violence and weak governance—between 4 and 6 million persons are thought to have died in civil wars since the mid-1990s—despite this natural resource wealth, DRC suffers extreme poverty. The UNDP (2011) ranks DRC as the world's poorest country.



Kifulu village resident

DRC has ratified the main African and international human rights instruments including those which require respect for customary rights to lands and to FPIC and the relevant treaty bodies which oversee compliance with these treaties have repeatedly called on DRC to revise its laws and policies to ensure these rights are respected. Under the Constitution and current laws on land, forests and mining, lands and natural resources are held by the State and customary rights to use lands and resources are only weakly recognised. Although the Forest and Mining Codes require that companies obtaining exploitation rights should consult with local communities to provide compensation (*cahiers de charges*), the right of communities to FPIC is not secured.



Co-chair Fabien Monteils

On the other hand, DRC has advanced relatively fast to develop a national REDD programme with the assistance of the UN-REDD programme (UNDP, UNEP and FAO) and the World Bank's Forest Carbon Partnership Facility programme. First REDD operations on the field are also being launched with support from the Congo Basin Forest Fund, and scaling up programming is fostered by the Forest Investment Programme of the World Bank. In DRC, authorities at the Ministry of Environment insist on the participative and empowering nature of REDD. The REDD strategy in DRC, currently under preparation, is expected to focus on investing to sustainably transform and improve local communities' economies and lifestyle, rather than distributing compensations for reduced access to forest resources. This strategic approach is considered crucial in a country where 70% of population lives in poverty, and even more in rural forested areas, and where culturally "external intervention" is spontaneously expected and welcome by local communities. It impacts the way FPIC can be implemented, because beyond securing the right to opt in or out of a project, it's not only about discussing compensations with indigenous people and local communities but mainly focusing on how people can move toward more sustainable productive activities while increasing their revenues and standards of living. Supporting economic development and improving livelihood are one of the two strategic goals of the REDD vision in DRC, and FPIC is key to make sure that such an objective is met.



Kiobo village resident

Although consultations with civil society and other interested parties have been held in developing this process, it is accepted that social and environmental safeguards still need to be made more operational in order to ensure the programme benefits the country and forest peoples. The UN-REDD programme and the ministry of environment, nature conservation and tourism pilot currently the process through the national programme CN-REDD. Meanwhile, FPP has identified some 20 pilot projects claiming REDD recognition in the country which are exploring ways of reducing emissions—through stronger enforcement and protection of wildlife laws and protected area, afforestation and reductions in shifting cultivation—and, in the longer term, securing payments for these reductions. These projects imply restrictions to local peoples' livelihoods but—given the current lack of agreed benefit-sharing mechanisms, insecure tenure, weak governance, lack of respect for rights and weak community capacity—it remains unclear whether and on what basis these costs to communities will be compensated for. FPP's field research shows that most communities in these pilot project areas remain uninformed and uninvolved.

DRC's REDD process is still in its early stages and lacks a fully crafted, legally-binding implementation framework. Many projects claiming the 'REDD' label are pilot schemes or independent initiatives which have not yet been officially endorsed but which are teaching useful lessons as this framework develops. A February 2012 regulation requires all projects seeking to claim REDD credits to register publicly, set safeguards and comply with nationally-agreed social and environmental REDD standards, developed to be in line with international REDD guidelines. Respecting the right to FPIC is likely to be one of these requirements. A complicating factor is that some REDD projects are being implanted in places where there is a legacy of past conflicts. These issues need to be addressed if REDD is to be seen as an opportunity to resolve conflicts rather than a new imposition.

REDD also faces the dilemma of both slowing forest loss, which may require restrictions on forest use, and addressing community livelihood needs. The Luki Reserve in Bas Congo, which was visited during this field dialogue, is an island of forest in a sea of deforested grasslands and well-illustrates this dilemma. Preserving this forest has been achieved by restricting the communities' rights and livelihoods but it remains to be seen if REDD can now reward the communities for this avoided deforestation.

FIELD VISITS

Most of the international visitors for the dialogue, accompanied by local NGO partners and a staff person from UN-REDD, were able to spend three days (21st-23rd May) visiting the Luki Biosphere Reserve in Bas Congo, which included prepared visits to two communities living in and around the reserve. The Reserve had initially been set up in 1937 under the Belgian colonial administration and included an agricultural research station which had responsibility for managing the reserve. In 1979, the Reserve had been redefined as a Biosphere Reserve, as part of UNESCO's Man and the Biosphere (MAB) programme. The Reserve is currently managed by INERA (the National Institute for Agronomy Research and Studies) in collaboration with the national MAB office and, since 2007, has been over-



Luki Biosphere Reserve

seen by a Steering Committee comprising INERA, MAB, local government, WWF, a local NGO called Grefik and one representative of the local government-recognised traditional authorities to represent the communities. Today, the 32,968 ha Biosphere Reserve is zoned into a 6,816 ha core Conservation Zone, a 5,216 Buffer Zone, where limited activities are allowed and which includes four ‘enclaved’ communities, and a 20,936 Production Zone, where community activities are allowed and where more than 50 further communities are situated. The participants were able to visit two of the communities, the enclaved community of Kiobo, situated in the buffer zone, and the road-side community of Kifulu, on the southern margin of the reserve.



Co-chair Marcus Colchester

The 115 people in Kiobo live within a 355 ha enclave about 2 kilometres to the east of the research station, itself some 7 kilometres from the main road between Boma and Mayumbe, which passes through the western margin of the reserve. In conversation with the participants, the community explained that they had been in the area long before the Belgians arrived. Their lands were taken by force, without their consent, and the scattered communities were then relocated down to the sides of the new roads, thus emptying the forests of many communities before the reserve was established. When the research station was constructed on the Kiobo village site, which at that time was on the course of the Boma-Mayumbe road, the community relocated to its present location. The main road was later re-routed to run past the reserve further west. The community members note that although they never signed any agreements with the Belgians ceding their lands, the reserve’s colonial administrators nevertheless treated them as the original owners and so they were provided medical services, agricultural support and help with funerals. It was only around 1980, they told us, that this situation changed. Now, they no longer feel respected as the original owners and get minimal support from the Reserve.



Kifulu village residents

The community of Kiobo lives from small scale farming, coffee production and makes use of the forests for non-timber forest products. They also produce charcoal. As an enclaved community, they complain of a lack of clean water, medical services and educational facilities and have themselves to keep the road open. A bridge across the, allegedly polluted, stream from which they draw water is in disrepair and unusable. They thus lack ready access to markets to buy provisions and sell agricultural produce. As a result, the evidently impoverished, enclaved population has been in long-term, gradual decline. While the community members feel their livelihood options are restricted, they complain that outsiders are very actively carrying out illegal logging and hunting within the reserve. Even when chainsaw operators are arrested and their machinery impounded, they are soon released and operating again, allegedly after making payoffs. Night hunting with flashlights is common around the village. The community explained that they had not been consulted about the proposed REDD



Co-chair René Ngongo



Field Dialogue in Kiobo Village, in the Luki Biosphere Reserve, 22nd May 2012

project in the Reserve, neither by INERA nor WWF, and only learned what REDD is during preparatory workshops prior to the visit, carried out by FPP's local partner, ADEV. Village representatives expressed the view that they want services provided, wished to remain in the reserve, would like the Reserve's regulations properly enforced against outsiders and would like to participate more directly in management of the Reserve.

By contrast, the population in the village of Kifulu, on the Boma-Matadi road which runs on the southern edge of the reserve, is expanding and now numbers some 366 persons. While the original population of long term residents were also there long before the reserve was created, the village now includes a large number of newcomers. Unlike the forested area near Kiobo village, the immediate environs of Kifulu, which lies on the southern edge of the reserve, appear heavily deforested. The community makes a living from small-scale farming, charcoal production and brick-making, also using charcoal. The village also lacks medical services and a school but has ready access to markets as it is situated beside a main road. Villagers also asserted that they lacked enough land for their livelihoods, although visitors were not able to assess this from maps. It should be underlined that communities mentioned that big agricultural and forestry concessionaires also grabbed some of their remaining land after the reserve.

The community noted that their right to FPIC has faced three main challenges: when their lands were taken by the colonial power; when the area was handed out to the logging company SOFORMA without any consultations and; during the WWF reforestation project when despite consultations there were misunderstandings on both sides and the newly planted trees were destroyed. The villagers interviewed expressed the view that they feel powerless in relation to the Reserve but would like to have good relationship with it 'like a marriage contract'. It was observed that women do not appear to participate in decisions.



James Rycroft

Participants, accompanied by some of the villagers, then held a short dialogue, hosted by INERA at its research station, attended also by MAB and WWF. After a welcome by INERA, WWF explained that, since 2004, it has implemented two projects in the Reserve, with funds from the European Commission and Belgian Cooperation, which have researched the pressures on the reserve, identified potential management changes, built up community development committees and implemented systems for improving the livelihoods of local communities. The livelihood improvement initiatives had been successfully piloted, a view corroborated by two participating farmers interviewed in Kiobo, and have since begun to be extended to other community members. WWF explained that, since 2009, they have been seeking funds for a REDD project from the Congo Basin Forest Fund, managed by the African Development Bank, but this project is yet to be launched.



Michel Matondo Kiemba

During the ensuing dialogue, concerns were expressed about the extent to which communities land rights were recognised, whether they adequately participated in the management and protection of the reserve itself and why they had not been involved in conceptualising the proposed REDD project, in line with the 'Prior' and 'Informed' requirements of FPIC. It was also noted that some 90% of the violations of the reserve came from outsiders not long term residents. Villagers also noted that in Kifulu businesses are increasingly dominated by outsiders. As the last remaining major block of forest in the lower Congo in the vicinity of Boma and Matadi and near Mayumbe, the Reserve is subject to heavy pressure. Some visitors queried whether greater involvement of the local communities as eco-guards could enhance protection and secure livelihoods. It was generally agreed that much more could be done to involve residents in the management of reserve and that the setting up of the local development committees was only a first step.



Kiobo village residents

NATIONAL DIALOGUE: SETTING THE SCENE

On Thursday and Friday 24th-25th May about 75 participants from government, the private sector, development agencies, academia, local communities, indigenous peoples and civil society groups, attended the dialogue in Hotel Venus, in Kinshasa. Media professionals and protocol officials from the ministry of environment, nature conservation and tourism also attended the opening and closure of the meeting. The meeting was welcomed by the Swedish Ambassador, on behalf of the donor SIDA, who pointed out that any projects in forests were bound to impact on local people, that respect for the right to FPIC by REDD initiatives was therefore primordial and she hoped the meeting could help develop guidance on how this was achieved in the precise context of DRC.



Lambert Okrah

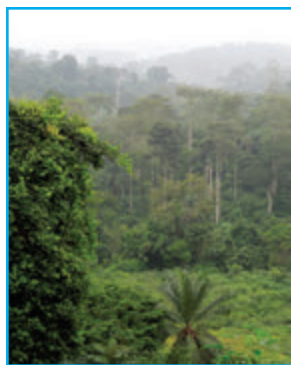
Then, speaking on behalf of the Minister, the Secretary General of the Ministry of the Environment, Nature Conservation and Tourism formally opened the meeting. The Secretary General noted the importance of respecting the right of indigenous peoples and local communities to FPIC in order to make REDD effective. He noted that FPIC is required by international human rights laws and associated jurisprudence and has been adopted in the norms of various sectors. To make this effective in REDD, respect for FPIC needs to be based on the UN Declaration on the Rights of Indigenous Peoples, improved livelihoods, equitable benefit sharing, valuation of environmental services and respect for the rights of all parties. For REDD to really benefit people, local communities must be able to participate in REDD initiatives in a supply manner and be able to control what happens on their customary lands. The Secretary General noted the need for national reforms in DRC and that FPIC must be embedded in the second phase of the national REDD process. To this end a multi-stakeholder collaboration would be needed to develop a common approach to FPIC, involving both national and international agencies involved in REDD, with a clear definition of the roles and responsibilities of each party. This would also need to be communicated to the international agencies supporting the REDD programme in DRC.

A presentation by TFD's Executive Director then summarised the way TFD had come to develop a specific dialogue stream on the practicalities of how to respect the right to FPIC. He noted that FPIC has emerged as a key consideration in previous TFD dialogue streams (see above) and has been identified as a core element of corporate best practice in a TFD-commissioned study on conflict resolution.⁵ While the international requirement to respect FPIC was well established in international law, the practicalities of respecting this right needed clarifying and implementing.

Turning to the national REDD programme, the UN-REDD's international adviser to the Ministry of the Environment, Nature Conservation and Tourism explored some of the challenges to implanting respect



Mr. Albert Likunde Li Botayi (right), Secrétaire General au Ministère de l'Environnement, Conservation de la Nature et Tourisme (MECNT) opens the national dialogue



Luki Biosphere Reserve



Jérôme Lewis



Kifulu village resident



Rubin Rashidi

for the right to FPIC in the REDD process. REDD is being implemented to reduce deforestation and forest degradation, which in DRC is directly caused by shifting cultivation, use of wood and charcoal for energy purpose, small-scale and illegal logging, mining and other land uses like industrial logging (in order of declining importance) and indirectly by population increase, poor governance, economic crises and infrastructure development (in order of declining importance). He noted that, depending on one's point of view, the requirement to respect FPIC could be seen as an international constraint, an extra cost, a way of maximising benefits or a way of securing projects from risk. To ensure that REDD initiatives were not unfairly made uncompetitive, compared to other ways of generating returns to the country, he noted that respect for the right to FPIC should not just be required in REDD projects and programmes but should be required of all sectors, even though REDD could help pave the way for such a global enhancement of practices. To ensure the right was respected effectively, conditions and modalities need to be clarified and a procedure for verifying that FPIC had been respected was also needed. FPIC therefore needed to be integrated into national norms, into procedures for Environmental Impact Assessments, community agreements and management plans. Capacity building of all stakeholders involved would also be needed to make it effective.

The Director of the Forest People Programme then provided an orientation about FPIC in an international context. Noting that the right to FPIC derives from the right of all peoples to self-determination which is a central principle of international human rights law and a right reaffirmed in the UN Declaration on the Rights of Indigenous Peoples, he noted that the UN treaty bodies have asserted this right in accordance with the main human rights conventions. Respect for the right to FPIC is thus a binding requirement of countries that have ratified the relevant conventions. The right has also been upheld by the African Commission and respect for this right is thus required by those African countries which have signed onto the African Charter on Human and Peoples' Rights. Prior and Informed Consent is also a requirement in various decisions of the Convention on Biological Diversity, and in other conventions and treaties as showed in Table 1 (page 10).

While private sector schemes have also made respect for FPIC a requirement of their voluntary certification standards, a number of international financial institutions—with the notable exception of the World Bank—and UN agencies now require respect for FPIC in well defined circumstances.

Global research now provides increasingly strong evidence that securing community rights can be a more effective way of ensuring conservation and controlling deforestation than strict protected areas. Respect for rights is explicitly required in the safeguard policies of REDD agencies, while UNREDD specifically requires FPIC. Experiences

TABLE 1: FPIC IN INTERNATIONAL NORMS

Private Sector— voluntary certification	Investors— 'Safeguards'	IGOs	CBD (1992)— Normative	Human Rights— Binding
FSC (1993)	WCD (2000)			ICCPR / ICESCR self-determination
	EIR (2003)			ILO 169 (1989)
RSP0 (2005)	WB—FPIC & BCS (2005)		COP Decisions	CERD 1990s–2000s–2010s
RTRS (2007)	IDB (2006), ADB (2009), EBRD (2008)	UNDG (2008)		UNDRIP (2007)
	IFAD (2009)	UNREDD (2009)	COP Decisions	IACHR (2007/8)
	IFC (2010)	UNREDD Draft Guidance 2010–12		AFCOM Endorois (2010)
RSB (2011)	Equator Banks (2012)	FAO Voluntary Guidelines 2012		

teach that respect for FPIC is not easy and local processes under community control are needed to ensure self-chosen representation, two-way flows of information, the absence of coercion or duress, and processes that build on customary decision-making.

A lively interchange of ideas then ensued. It was emphasised that respect for FPIC is not a one-off, box-ticking exercise but requires an iterative engagement that builds trust between parties. The close connection between the right to FPIC and rights to lands and resources was also emphasised. It was noted that local communities' and especially indigenous peoples' rights to FPIC and to their customary lands and territories are not secured in DRC's national laws. Although provisions exist requiring mining, forestry and agribusiness enterprises to consult local communities and provide benefit sharing, these requirements do not amount to the full respect for FPIC and, moreover, all too often, these legal obligations are not followed by enterprises. Even where local communities' traditional authorities are consulted, indigenous peoples are often overlooked. Much reference was made to the fact that the problematic legal framework had been largely inherited from the colonial era, which had wrested control of lands, forests and natural resources from communities. However, it was also urged that 'we can't go on blaming the past' and that action is needed now to change colonial laws.

It was also noted that while legal reforms are urgently needed there is much that can be done to ensure respect for FPIC in the absence of an ideal legal framework. It was also emphasised that REDD projects and the wider REDD process needed to be understood in the context of the much wider uncontrolled pressures on resources in the country.

The view was shared by all participants that FPIC needs to be made mandatory for the whole national REDD process in DRC, even if it is not yet required by law, but the requirement for FPIC should eventually apply to all sectors not just REDD. On the other hand, it was noted that there was a need for



Kifulu village

flexibility in the way FPIC was respected, adjusted to local circumstances and cultures. FPIC should not be prescriptive, as the whole point was that it allowed for bottom up engagement in decision-making through self-chosen representatives and self-chosen processes.

Reviewing the findings from the field visit to the Luki Biosphere Reserve, the meeting noted that the situation in Luki was typical of protected areas in the country as a whole. Most protected areas had been imposed in the colonial era, or in accordance with laws inherited from that time, in ways that denied rights and without community participation or even much consultation. The lack of direct community involvement in the management of Protected Areas is thus widespread and this now poses a big challenge for REDD projects being implanted in these areas with a requirement to respect FPIC. Current NGO efforts to remedy poverty and build up community development committees do not restore rights, so more engagement is now needed.



Justin Kenrick

There was extended debate concerning examples where communities were opposing REDD pilots. It was noted that the disputes cited were actually in places where communities' lands had been taken for reserves without consultations, let alone FPIC, but long before REDD proposals had been made.

LOCAL LEVEL CHALLENGES

Through break out groups and ensuing plenary discussions, the participants then considered the following questions. To respect the right to FPIC effectively in REDD projects at the local level: what information needs to be shared and how; how should people be represented; by what process should the affected parties seek to reach an agreement; how and on what basis should benefits be (equitably) shared?

To ensure good two-way flow of information, it was suggested that a first step should be to clarify who are the actors involved, including the authorities, while providing for neutral facilitators who could support the process, help build awareness and capacity and make connections between the various parties. It needed to be appreciated that communities, government and project proponents would all have the right to say 'no' to proposals.

The group recognised that an aim should be to build a common vision and accept that different players would need time to assimilate and share the information. This implied a joint, iterative and continuous process involving all parties, including local authorities, to build trust, which could start by identify knowledge gaps and then share information about process. Where possible, information about *inter alia* objectives, activities, benefits, costs, commitments and responsibilities should be generated collaboratively using



Kifulu village resident



David Yator Kiptum

tried and tested methods such as community mapping and through mutually agreed protocols, taking account of local realities of governance, culture and people's expectations.

Ensuring the fair representation of communities is a complex matter. The second group first asked itself what is a 'community' and noted that the DRC Forest Code of 2002 does provide a definition but it needed to be asked if this therefore ensured that all voices were heard. Communities thus need to define their own processes to ensure customary leaders are recognised and that others with appropriate skills and leadership qualities are selected and all are made accountable back the wider community. The relative powerlessness of communities which lack recognised land rights, in relation to companies or government agencies armed with authority or official permits was noted and some communities (see box below) have even been made virtually landless and destitute by prior interventions in their sites. Inclusive decision-making should also involve neighbours to make sure local forms of exclusion are not unintentionally encouraged. Since many communities are ethnically, economically and socially diverse, there is a need to allow for multiple forms of representation and special provisions may be needed to ensure that marginalised voices—such as women, youth, subordinate ethnic groups and so-called 'Pygmies' are represented.

In all cases it is necessary to ensure that representative organisations are self-determining and self-chosen rather than imposed, with scope for the free election of representatives. In larger scale enterprises there may be a need for tiered representation but then special measures will be needed to ensure local voices are not occluded.

The third group and ensuing discussions proposed an eight stage process for ensuring consent based agreement which would: first identify the area; then identify the actors and build their capacities; continually share information (positive and negative) linked to project; find out if people are in or out; negotiate based on community protocols; develop an implementation agreement; formally validate the agreements for the majority of the community in line with customary ways and rituals and; put in place mechanisms for monitoring. A system for addressing grievances or dealing with non-compliance would also be needed.

Equitable benefit-sharing needs to be based on first identifying the actors which might be local rights holders, the State and administration, project holders and intermediaries. It was noted that benefits could be in kind not only in money. Ensuring equitable and accountable benefit sharing would require capacity building and might need to be complemented with income generation initiatives. The most critical aspect would be to develop effective governance for the distribution of benefits and the management of funds, which should be based on agreements or protocols.

It was clear from the ensuing discussions about benefit-sharing that participants were unclear or disagreed about whether and how benefits should be shared based on rights, and if so which rights, or permits, or parties' contributions to REDD schemes in terms of their efforts or investments, or should be based on results, or a combination of these. It was noted that many communities may be more interested



Louise Kavira

in secure rights to land than payments in cash. A fundamental dilemma for all schemes will be how to deal with current inequities in custom, in law and in access to resources.

During the plenary discussions participants stressed the importance of clear land rights, the need for a national law on freedom of information, more consideration of gender aspects, and provisions for conflict resolution. It was pointed out that the proposals from the groups tended to assume good faith negotiations but this was not realistic and greater attention needed to be paid to redressing power imbalances. Also, inequalities within communities and in custom could not be ignored: it was noted that in Ghana customary chiefs have authority over the land and tend to make decisions favouring their own interests and not those of their wider community. A number of participants stressed the extreme marginalization of so-called ‘Pygmy’ peoples in DRC, who, some asserted, were sometimes still held in slavery-like conditions—an assertion disputed by others.



Kifulu village resident

A prominent theme in the discussion thus related back to the issue of legal reform and whether land rights need to be established before REDD can be implemented. Some felt that respect for FPIC could be used to make up for the lack of clarity about rights to land, while others felt that REDD was bound to be conflictual and ineffective if rights were not first defined, at least at the project level. One option might be to adopt a ‘learning by doing’ approach, as it was pointed out that just delaying the implementation of REDD would not stop other forces taking over forests and lands. That clarity about land rights was a critical matter was not however in contention. It was pointed out that in DRC every square centimetre of land is owned under customary law, even in what are now urban areas. FPIC is thus required and should apply to all sectors.



John Nelson

THE NEED FOR NATIONAL REFORMS

The meeting then considered the following set of questions. To ensure FPIC can be respected in REDD projects, what needs to be done at the national level: to provide secure tenure and rights to lands, forests and carbon; provide legal security for representation; ensure good governance and sound institutional frameworks and; provide for redress, grievance procedures and other forms of accountability?



Kifulu village children

In seeking to answer the first question, the first break out group and ensuing discussion brought out the point that for REDD to work in DRC, there must be clarification of land tenure, which should recognise the rights of customary owners, whose rights should therefore be reflected in all national legislation governing land, forest and carbon. However, the current laws reflect the constitutional provision that the State has sovereign rights over resources and thus the land law only provides customary owners

OVERCOMING SOCIAL EXCLUSION

From the point of view of the most marginalised forest communities in DRC, there is a need for special measures to secure their rights and address their current problems. Community participants to the dialogue shared some painful experiences with the way past schemes had been imposed on them and noted they now face significant challenges to voice their concerns.

One example mentioned is the case of the Twa people of the Kahuzi-Biega National Park in South Kivu Province:

The Park took away all our ancestral land, the land where our ancestors were born. We were forced out with guns, our houses were burned, our crops destroyed. No alternatives were offered us, there was no consultation. Now we have nothing, there is nowhere for us to dwell. We were never employed by the Park and now cannot profit from our own land.

Prejudice against so-called “Pygmies” remains prevalent. It was noted that at Ingende territory as in other territories such as Bikoro, Kiri, Inongo, Oshwe etc. “Pygmies” are not considered people and as inferior beings have to move out of the way of passing Bantu if they meet on footpaths. However, it was also noted that in many other parts of Congo such prejudices are now being overcome as people become more educated. However, it should be underlined that in general “Pygmies” camps are located either at the entrance or the exit of villages—and are rarely mixed with “bantus”. “Pygmies” are generally not counted with “bantus” during census operations. A village chief would say for instance that: “I have 300 inhabitants in my village plus 45 pygmies”.

In Walikale a 137,000 ha reserve has been established at Ksimba-Ikolo by Ministerial Decree in 2006 without prior consultation which overlaps the communities’ farms, fallows, homesteads and even villages and schools. All the land in the area belongs to about 1,000 different families each with customary rights over its own plot. The chief does not have the authority to reallocate this land. The communities have wholly rejected the Reserve which thus exists on paper only. The area is now planned for a REDD project but the people are insistent that they will not accept the REDD project until their rights are first secured, which under the current law means annulling the Reserve.

One Mbuti representative noted that they have a very egalitarian society which means that special care needs to be taken by them in the selection of their representatives and ensuring they report back to their communities. A Twa spokesperson noted:

When we choose someone to represent us and he is then established at a higher level, he will no longer know the situation at the local level: he no longer represents us. Can we then change our representative?

Commenting on the way this Dialogue had been carried out, Mbuti representatives Mupilanga Matope noted:

If we continue to work like this in Congo that will be very good and important. If the projects are implemented in our villages so we can say “yes” or “no” and respect our rights, that will be very good for us. So please don’t leave us out if more of these kinds of meetings are to be organised. When I go back to my community I will report back what has happened here and I think our wise people will also learn from what I say, and also the women and the children.

with what are, in effect, usufructuary rights on State land. Consequently, when the State allocates lands as concessions or titles to third parties for development through for example forestry, mining, oil or agricultural schemes, local communities are deprived of the right to exclude these actors.

The REDD programme has to deal with all these sectors. The current legal framework does not make clear in the context of REDD who owns and who can sell lands, forests and associated carbon. A system is needed to establish and verify rights, to provide adequate compensation for the acquisition of customary land and clarify how lands are valued - which may not be in monetary terms, especially considering hunting and gathering ways of life.

Furthermore, examining the gap between the national law and what happens in practice, it is clear that transactions are shaped by power dynamics. REDD activities will not only be implemented in forested



In a breakout group, Munganga Butachibera of Sud-Kivu explains the problems facing his people, the Mbuti

areas but will also encourage initiatives outside forests. To provide security for those reducing emissions there must be good incentives and secure rights. There are also dangers that changes in tenure can spark conflicts or even spur land speculation.

More thinking is therefore needed on the conflicting imperatives of moving ahead with REDD and ensuring the appropriate legal reforms are in place to secure rights, including rights to lands and to FPIC. Clear rights are needed to provide a framework in which benefits are allocated. A first step could be to have a clear statement of the Government's commitment to respect the right to FPIC within REDD, on which basis a road map could then be developed. Legislation for FPIC and REDD could then follow and later be extended to other sectors. As a national programme, REDD requires a national process of accountability, which it is proposed be instituted by setting up a National Register of holdings. This implies the need for community level land titling, at least in pilot areas. The legislation should also set out, clearly and transparently, a benefit-sharing mechanism.

The second group examined the challenges of ensuring that legal personality is provided to community groups so they can effectively control their lands and resources and enter into legally binding agreements. Such legal representation should not contradict but rather recognise existing systems of representation, such as through customary authorities. Current laws in DRC do allow for the recognition of 'local development committees' which are typically formed for specific projects. These committees may include existing government-authorised community representatives as well as others chosen for their leadership, skills or customary status.

Effective functioning of representatives groups requires both capacities and resources, which may imply the needs for capacity building and leadership training and these trainings need renewing. A key con-



Luki Biosphere Reserve

sideration is that representative groups must be assured of a clear mandate from the community they are supposed to represent, as occurs under the Panchayat system when applied to the indigenous peoples of Central India. Examples were cited from DRC and Kenya, where communities find themselves represented by multiple institutions some of which may be legally recognised by the government but which may not have the trust of, or a mandate from, the community they claim to represent. Community protocols setting out how the representatives will make decisions and refer back to their communities have been found useful in Kwa-Zulu Natal in South Africa. Even where legal personality is not assured, negotiated agreements can be given legal binding status as contracts, for example by being notarized and recorded in statements, tape recordings, videos and photographs.



Isilda Nahntumbo

It was recommended that a requirement be made for FPIC in the approval process for REDD projects, in somewhat the same way as *'cahiers de charges'* provisions are required for the authorisation of timber concessions. DRC should legally recognize customary representatives and help facilitate community representation by provision of training and resources, while respecting their independence.



Kifulu village resident

Assuring an adequate State institutional and governance framework for FPIC in REDD projects will require a national oversight committee, local follow up committees and mechanisms for evaluation and redress. However, the aim should be to avoid the multiplication of too many new institutions but rather to retrain and build the capacity of existing ones, taking into accounts the rights of local communities and the need for access to justice. These should be part of a decentralization of powers from the national to provincial to local levels. Tools are needed with clear indicators against which to evaluate transparency, the degree of participation and which provide for sanctions and redress in the case of non-compliance. Legislation to secure the rights of indigenous peoples is needed, implying also the rectification of existing laws and the harmonization of the legal system for recognising land rights and resolving land conflicts. Options need to be provided to allow for conflicts to be resolved out of court as well as through court proceedings.



Amity Doolittle

The best way of securing good governance is transparency. For the REDD process this implies setting out clearly the existing institutions and the roles and responsibilities and rules they should follow, again linking their transparent functioning to the decentralization process. This should be amplified through a communications programme to reach to rural areas and local communities using various media and tools such as the web, community radio and publications. Explanations of the FPIC requirement should be a part of this. The Co-Chairs recognise that achieving this in all communities will require a major investment.

The fourth break out group considered what needed to be done at the national level to provide for redress, grievance procedures, and other forms of accountability. The group noted that current sectoral laws make different provisions, which would need to be harmonised for REDD to incorporate accountability cross-sectorally. The group suggested either a periodic review procedure or an oversight committee with defined terms to ensure due process, while a legal basis would be needed to define the terms of payments based on protocols with the communities complemented by a national procedure for taking claims to courts. The process could be thought of as similar to that provided by World Bank safeguard policies but should be simple, well suited to the realities on the ground and developed through a participatory process. There was discussion about whether this should be instituted through an act of the legislature, a Ministerial Decree, a lower level regulation or instruction. Likewise there was discussion about how much new structures and procedures would be needed or whether REDD should instead be grafted onto existing systems.

FOLLOW UP

In the closing session, a number of participants proposed follow up actions to take this important work forwards. One proposal was to carry out a collaborative legal review to examine in more detail what aspects of national law would require reform to make respect for FPIC effective. It was agreed that national legal reforms are required to ensure DRC laws conform to the country's international obligations. A multi-stakeholder group should also work to develop national guidance suited to the circumstances of DRC to make FPIC effective. Some thought this could build on a draft document developed for DRC by WWF, although others thought this document had some serious deficiencies. The meeting was also reminded of various international guidance documents on FPIC and REDD, which could be drawn on, including the draft guidance of UN-REDD⁶ and that developed by the Center for Peoples and Forests and GIZ.⁷ It was highlighted that while legal frameworks and guidance can be developed at the national level, FPIC and REDD are achieved at the local level and so the direct participation of communities and indigenous peoples is crucial. Participants stressed the importance of ensuring the direct engagement of local communities and indigenous peoples in any national drafting process. Likewise independent verification of compliance should be mainstreamed and should be linked to wider REDD monitoring and reporting, while there is a parallel need to build up community awareness of their rights and of how to assert their right to FPIC. The possible connections between the yet-to-be applied decentralization law and representative community institutions exercising the right to FPIC also need to be explored with the Ministry of Rural Development.

The meeting organisers offered to help move this process forwards and the meeting sponsor, FPP, undertook through its SIDA-funded project to help ensure the continued involvement of community spokespersons. For its part TFD noted the intention to hold three further international dialogues on FPIC: one in Washington DC to be hosted by the World Bank, which would feed into the review of World Bank and GEF safeguard policies; a second in Latin America, likely Peru; and a final one in

either Canada or New Zealand, making clear that respect for the right to FPIC is both a challenge and a requirement that applies equally to developed countries.

The Secretary General of the Ministry of Environment, Nature Conservation and Tourism then made a closing speech. After thanking all the participants for their contributions to an effective dialogue and their achievement of a certain measure of consensus, he noted that while FPIC is a concept to which DRC subscribes, it is not yet inscribed in national law. Whereas the forestry industry has made progress towards ensuring logging operations benefit local people, there are still some real challenges to make FPIC effective, including the generation of trust between all parties. Respect for the right of local people to say ‘yes’ or ‘no’ to projects which do not secure their rights or provide them benefits, means that FPIC offers a big opportunity to ensure equitable development, secure rights and achieve environmental protection. However, the way FPIC is respected must be adjusted to national circumstances and it should be applied to all sectors not just REDD. Transparent and effective fund management would also be critical so that agreements made are honoured. Making all this effective will take time and will require both national efforts and international support, as well as capacity building especially at the local level. On behalf of the Minister, the Secretary General called again for the establishment of a working group to consult widely and develop a road-map for the effective operationalisation of FPIC in DRC. Amidst loud applause he then closed the meeting and a group picture was taken.

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ACRONYMS

ADB	Asian Development Bank
AFCOM	African Commission on Human and Peoples' Rights
BCS	Broad Community Support
CBD	Convention on Biological Diversity
CERD	Committee on the Elimination of Racial Discrimination
CN-REDD	Coordination Nationale REDD in DRC
COP	Conference of Parties
EDRB	European Bank for Reconstruction and Development
EIR	World Bank's Extractive Industry Review
FAO	UN Food and Agriculture Organisation
FPIC	Free, Prior and Informed Consent
FPICon	Free, Prior and Informed Consultation
FSC	Forest Stewardship Council
IACHR	Inter-American Court of Human Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
IDB	Inter-American Development Bank
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
IGOs	Inter-Governmental Organisations
ILO	International Labour Organisation
RSB	Roundtable on Sustainable Biofuels
RSPO	Roundtable on Sustainable Palm Oil
RTRS	Roundtable on Responsible Soy
UNDG	UN Development Guidelines
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
WB	World Bank
WCD	World Commission on Dams

ENDNOTES

- 1 Marcus Colchester, 2010, *Free, Prior and Informed Consent: making FPIC work for forests and peoples*, The Forests Dialogue and Forest Peoples Programme, New Haven: http://environment.yale.edu/tfd/uploads/TFD_FPIC_NewHaven_Co-ChairSummary.pdf
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- 7 UNREDD, 2011, *Guidelines on Free, Prior and Informed Consent*, draft for comments: http://www.un-redd.org/NewsCentre/FPIC_Guidelines_Open_For_Review/tabid/79163/Default.aspx
- 8 For DRC's REDD Readiness plans 2010–2012 see: http://unfccc.int/files/methods_science/redd/country_specific_information/application/pdf/eng_rpp_drc_version_020310.pdf

FURTHER READING AND INFORMATION

Meeting summaries and materials from all the dialogues in TFD's FPIC series are available on our website. The full set of materials relating to the Kinshasa meeting are available at: <http://environment.yale.edu/tfd/dialogue/free-prior-and-informed-consent/21-25-may-2012-second-dialogue-on-fpic-drc-field-dialogue/>. For more general information: about The Forests Dialogue, please see <http://environment.yale.edu/tfd/>; about CN-REDD please see www.redd.cd and www.mecnt.cd;⁸ about Forest Peoples Programme please see www.forestpeoples.org; and about CEDEN please see <http://www.forestpeoples.org/partners/cercle-pour-la-defense-de-l-environnement-ceden>