Location of area studied

The concession investigated is located in Bas-Congo province in the Muanda territory, which covers 4,265 km² and is home to 152 villages spread over three sectors: Assolongo, Boma Bungu and La Mer. The location of Muanda territory is attractive as it runs along the Congolese coast of the Atlantic Ocean, from the mouth of the Congo river to Matadi city, the seat of the governmental administration of Bas-Congo province, where two international ports are located: Boma and Matadi. Bas-Congo is the only province of the Democratic Republic of Congo to have access to the Atlantic Ocean.

Communities living in the area

The customary lands within the Muba Reserves are traditionally owned by a single tribe, the Woyo, and two clans, the Mbalamuba and Mamboma. These communities do not self-identify as indigenous. Most consulted communities affirmed that their ancestors had sold part of their customary lands to the Belgian colonial administration in order to create the Muba Reserve. However, a number of them expressed doubts as to the validity of this surrender of lands, notably because it was forced upon them under unfair conditions and because those who approved the surrender did not have the authority to do so.

Some communities pointed out that although their ancestors ceded part of their lands to create the Muba Reserve, they did not know the surface area surrendered and wished for...
the government, in collaboration with the affected communities, to clarify the extent of the surrendered land.\(^7\) Two communities declared not having surrendered part of their customary lands for the creation of the Muba Reserve.\(^8\) Two of the consulted communities are planter ("planteur") communities who rent plots in the Muba Reserve for their agricultural activities.\(^9\) These communities are not customary owners of the lands that they rent.

All consulted communities access the Muba Reserve for their subsistence activities. Many enter it illegally without the knowledge of the forestry guards, whereas for others, access to the Reserve is tolerated. Some community members admitted that there are very few forestry guards supervising the Reserve and that it is easy to access it without being caught.

With regards to the land occupation system, the study revealed that for customary communities, the land belongs to the family and is transmitted through the family. It is possible to rent part of a family’s land in exchange for monetary compensation or goods, but in this case, the family Chief must bring together his family and discuss the transaction. Once the transaction has been concluded, the family Chief must ensure that an equitable sharing of received goods is achieved for all family members. He must under no circumstances carry out a transaction for his own personal profit. Normally, land cannot be sold, except under very rare circumstances.\(^10\) In such a case, the family must also be consulted.

In cases of conflict between community members, the involved parties must seek to resolve their dispute through the village Chief. If this fails, the group Chief will attempt to resolve it. If a community wishes to make a complaint regarding any matter related to its lands, it must appeal to the Site Manager (Chef de Chantier) who transmits the complaint to the Brigade Chief, who in turn informs the Provincial Coordination of the Ministry of Environment, who in turn informs the Provincial Ministry of Environment, and in turn, the National Ministry of Environment. It can take a considerable amount of time before a complaint is taken into consideration by the National Ministry of Environment.\(^11\) It
should be noted that this process appears to be relatively informal rather than regulated by formal rules.

Relations between the State and communities

Several community members consulted affirmed that the State is present when it comes to tax collection or the collection of payment for services, or for ‘swindling’ (‘rançonner’). Some claimed that there had been intimidation from the authorities, ‘taxing’ and arbitrary arrests. The overall perspective expressed by the communities was that the State did not care about their wellbeing and that when it came to investing in the communities and improving their living conditions, communities were often left to their own devices. The poor condition of roads was the object of recrimination on the part of many communities. Two planters’ communities consulted spoke of the difficulties they faced in selling their agricultural products, given that markets are difficult to reach because of the poor road conditions. Representatives of these two communities said that they welcomed the project because they hoped that it would bring about an improvement in roads (although this is not based on any engagement on the part of the concessionary company).

Company investigated

The 10,000 ha concession was granted to Congolese Company Congo Oils and Derivatives SARL (COD). Although the company was created in DRC and its technical Director affirmed that it is entirely Congolese and that no foreign interests are involved, it seems however, that this is not the case. A guarantee from MIGA (Multilateral Investment Guarantee Agency) was in fact approved in 2009 to promote the investment of Lebanese companies in COD. The guarantee appears to have been approved for a period of ten years, in order to cover the risks of transfer restrictions, expropriation, war and civil unrest. The project being subject to a guarantee includes the establishment and operation of a vegetable oil refinery in the port city of Boma. It is expected that the factory will produce refined, bleached and deodorised palm oil, as well as degummed soya bean oil, and will have a capacity of 140 tonnes of oil per day. This production would serve local markets which depend partially on imports, and possible neighbouring markets, including in Angola. Furthermore, COD’s website is a sub-page of the website of a Lebanese ‘holding’ company which seems to be very much implicated in the agriculture industry. Apart from COD, each company mentioned on this website is of Lebanese origin.

COD has already established a factory for the production of edible oil and biocarburants in Boma, which allows it to process and commercialise edible oil imported from Malaysia. The company expects to produce bio-carburants from locally produced palm oil and soya oil. It is unclear whether the MIGA guarantee has allowed for the establishment of this factory or if it will allow its expansion. It should be noted that a report from the Bank Information Center (BIC) of December 2011 reveals that the guarantee is inactive. It is not possible at this stage to know if the guarantee has always been inactive or if it became so for a particular reason.
In their meeting with the technical Director of the organisation, the researchers were informed that COD had already begun a project in collaboration with the Dutch NGO SNV, in which COD will buy the production of small-scale oil palm planters in Mayombe region and train them in the management of oil palm and fresh fruit bunches, in order to ensure the quality of produced palm oil. The technical Director indicated that the small-scale oil palm planters were happy with this project because it would allow them to sell their products without having to travel long distances to reach markets. The project is still at its initial stages and consultations are underway between COD, SNV and the producers.

When asked about the 10,000 ha concession acquired by the company, the Director expressed the fact that he did not agree with the project and that he had expressed this view to the Director General of the company. According to him, the project is too costly and not profitable. He thinks that the exploitation of the concession is a long-term project and that if the first project with the smallholders does not work out, then the company can turn towards the concession. He also claimed to know very little about the project and the plans of the Director General with regards to it. He believed, however, that the plan would be to first evaluate the state of the land which is the object of the concession, and then to clear it (‘there are many old trees there’). COD will then work in collaboration with an agronomist in order to determine how to introduce a new type of palm tree: the dwarf palm tree. This type of palm does not exist in Bas-Congo at the moment.

When asked whether the company had consulted local communities owning land or having access to land within the concession, the technical Director replied with surprise that he did not even know that there were communities in this area.

We don’t even know if there are people who are going to be able to work for us! Who is going to establish themselves there? For now, there is nothing there, there is no project.

The technical Director claimed not to be aware of any plans for soya production. It came out from the meeting that no consultation or ESIA had been undertaken by the company prior to obtaining the concession.

**Legal status of the company’s rights to land**

The concession contract

An examination of the concession contract reveals that it was concluded on 11th June 2009 between the Bas-Congo Province Governor, Mr. Simon Mbatshi Batshia, and Congo Oil Derivatives SARL, ‘represented by Mr. Pierre Muanda Mvumbi Général Manager, pursuant to a proxy by Monsieur Ralph Freiha President of the company’. It is interesting to note that Mr. Ralph Freiha is one of the beneficiaries of the MIGA guarantee and is the Vice President of Freiha Holding (the company under whose website the COD web page is located).

The contract is very short and consists of two pages only. Its preamble indicates that COD ‘will establish a vegetable oil refinery with a production capacity of 300 tons per day.’

In order to guarantee on the medium-term, the provision of raw materials to this refinery, CONGO OIL company projects to cultivate dwarf palm plantations and soya plantations in the Bas-Congo province.

The contract also reveals that COD initially approached the Bas-Congo Governor in 2008 to obtain 10,000 ha of arable lands in the forest reserves of MUBA and KIEMI/TETI

...designed for reforestation, in the form of 5,000 ha in each of these reserves for the cultivation of dwarf palm trees and soya.
The Governor would have referred COD to the Brigade Chief of the Reforestation Project of Mayumbe. The preamble of the contract states that the Brigade Chief considered the request...and submitted a project for a contract with the company for the perennial plantation for signature by the Province Governor. The latter then transmitted the contract project to the National Ministry of Environment...given that the management of forest reserves was under his exclusive competence.

On 5th May 2009 after having raised the existence of a moratorium suspending the attribution of new forest concessions, [the National Ministry of Environment] nonetheless authorised the Governor of Bas-Congo Province to ‘consider the possibility of leasing a forest concession to CONGO OIL AND DERIVATIVES SARL of the order of around 10,000 ha on one of the targeted sites, in order to carry out the cultivation of palm and soya.

The Governor of Bas-Congo then approved the granting of the concession to COD. The seven clauses of the contract reveal that:

- The concession covers an area of 10,000 ha, of which 5,000 ha are in the Muba forest reserve and 5,000 ha in the Kiemi/Teti forest reserve (Art. 1). It is strange that the contract projects 5,000 ha to be allocated in Kiemi Reserve, as this Reserve itself only covers an area of 2,150 ha. Some expressed fears that this undoubtedly meant that nearly the entire concession would be located in Muba Reserve.20
- The lands will be subject to delimitations (Art 2) and will be used exclusively for the plantation of dwarf palms and soya without burning exploitable scented woods (Art 3).
- COD must respect the conditions imposed by the Mayumbe Reforestation Project (conditions which are specified in a separate company contract in line with Article 6) (Art 4).
- Failure to comply with these conditions or changes in the use of the land concession constitutes a cause for the automatic termination of the contract (Art 5).
The company contract for perennial plantations

A second company contract was signed between COD’s Director General, Mr. Muanda Mvumbi, and the Mayumbe Reforestation Projet Chief, on 13th June 2009, in line with the concession contract. It must be noted that the contract was in some parts illegible and it is impossible to decipher some of its contents. A number of important elements were identified in the contract:

- It is of a duration of forty years and renewable (Art 23).
- It allows the cutting of underbrush to plant, and the cutting of ‘useless trees’, but the felling of timber is subject to a ‘felling authorisation issued by the Province Governor’ (Art 4, difficult to read).
- COD can exploit trees cut down for clearing and with market value, for sale or personal use, in line with the restrictions formulated in article 6 (illegible) (Art 7).
- COD must pay ‘the Democratic Republic of Congo a single flat fee calculated on the basis of 100 Congolese Francs per hectare to cover the costs of demarcation of the granted concession at the time when the land is acquired’ (Art 12). The Brigade Chief of the National Reforestation Service stated that companies typically pay 500 to 1,000 Congolese Francs per hectare.²¹
- It seems that the oil palm plantation will be established to include scented wood trees such that for each hectare, 216 palm trees and 40 scented wood trees will be planted (Art 15).
- Drainage and intoxication of rivers running through the forest reserves is ‘strictly forbidden’ (Art 14).
- Hunting in ‘these state forest Reserves intended for reforestation, and initially established for the protection and conservation of all within it’, is forbidden (Art 14). It is strange to include a reference to ‘the protection and conservation of all that is there’ since the felling of trees is planned for the establishment of the plantation.

Neither the concession contract, nor that of the company, mentions riverine communities or their rights to the lands granted as concession, despite the fact that the Forest Code stipulates rights of use for them (Art 36 – 39).

Legality of the concession

A study of the concession contract reveals that it is in blatant violation of the Forest Code. The Muba and Kiemi Reserves are classified Reserves and usage rights in this type of forest are strict and limited, and are to be exercised exclusively by riverine populations (Art 36 – 39, Forest Code). The commercialisation of forest products collected under usage rights is not allowed, except for certain fruits and products specified in a list determined by the provincial Governor (Art 37, Forest Code). Only protected forests and permanent production forests can become concessions. Concessions must be allocated for a maximum period of twenty-five renewable

Concession contract between the Governor of Bas-Congo and Congo Oil and Derivatives / Stéphanie Vig

Congo Oil and Derivatives, Democratic Republic of Congo

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years (COD’s concession contract is for forty renewable years).

The concessionary is responsible for developing a management plan for the forest and the administration in charge of forests must ensure that riverine populations have been consulted on this matter (Art 71 – 76, Forest Code). Information gathered during the field study reveals that no consultation was carried out with riverine populations and that no management plan for the forest has been developed.

The attribution of forest concessions (on non-classified forests) must be achieved through adjudicatory means (Art 83, Forest Code) and must be preceded by a public investigation, with the aim to establish the nature and extent of rights of parties on the forest to be conceded, with a view towards their eventual compensation (Art 84, Forest Code). The concession contract must be composed of two parts: the contract itself which determines the rights and obligations of parties, and a ‘cahier de charges’ which determines the specific obligations of the concessionary (Art 88, Forest Code). The ‘cahier de charges’ must include a clause pertaining to the establishment of socio-economic infrastructures for the benefit of local communities (Art 89, Forest Code).

The forest concession contract must be signed by the Minister on behalf of the State (it seems that this is the Minister of Environment, but this is not specified in the Forest Code, Art 92). These conditions have all been violated in the case of the contract in question.

Furthermore, it would appear that no ESIA has been undertaken. The Cabinet Director of the Bas-Congo Ministry of Environment and the Coordinator of the Provincial Coordination of the Bas-Congo Ministry of Environment indicated that their offices should normally have been involved in the process of concession granting, but that they were not. A delegation of the provincial Coordination should have visited the targeted land, carried out a preliminary study and produced a report for the Ministries of Environment (national and provincial) and for the Governor of Bas-Congo. The Coordinator of the Provincial Coordination confided that he would never have given a favourable opinion to the Governor if he had known that the 10,000 ha concession would be located within a forest (as opposed to savannah). He added, just as the Cabinet Director did, that he had not seen the contract despite the fact that he had attempted to get a copy of it several times. The Coordinator confided that if the concession has been allocated in forest, then he would seek to put pressure on the Governor to revise this decision. The Cabinet Director also confided that the Bas-Congo Ministry of Environment supported our work and hoped to obtain our report in order to shed light on the circumstances under which the concession was granted and its consequences.

It is interesting to note that the Coordinator mentioned that his services always take into account the rights of local communities.

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What has the government and/or company done (or not done) to recognise the rights of communities to customary lands, or to respect their right to FPIC?

It appears that no measures have been undertaken to ensure the recognition of rights of communities to their customary lands, or to FPIC. No community reported having been consulted with regards to the COD concession project. It must also be noted that the Technical Director of COD admitted not knowing if there were communities within the concession land or in close proximity to it. Some communities were only vaguely informed of the project whilst others were only informed of it during the researchers’ own field investigation. No community knows what will happen to their lands and to their usage rights over these lands once the concession is established, and many expressed their fears for the future and for the destructive impact that this project will have on their subsistence.

It is interesting to note that the Coordinator mentioned that his services always take into account the rights of local communities.
before giving their views to the Ministry of Environment and the Governor of the Province regarding a particular project. Although this has not yet happened, if a community were to oppose itself to a project, he thinks that the project in question could not go ahead ‘as this would cause unending conflicts’²⁶.

The Site Management Head who takes part in the demarcation of the concession indicated that he would seek to avoid the fields of planters in the delineation of boundaries. To this end, he will draw the concession borders around these fields and affirms that ‘no planters will be prejudiced (lésé).’²⁷ The Chief of the National Brigade Service also affirms having asked those responsible for delineating the concession not to touch the planters’ fields.²⁸ The community planters’ representatives of Farabola have confirmed this.²⁹ However, it should be noted that the planters are not the traditional owners of the lands targeted for the concession and no discussion has taken place over the rights of its customary owners.

What understanding do communities have of the FPIC process?

Communities indicated that prior to any project, the State had to consult the Group Chief, the village Chiefs, the village leaders and the affected communities. The State must respect the opinion of the communities and must abstain from establishing projects which they oppose.³⁰

In one village, community representatives pointed out that given that their ancestors had surrendered their lands to the colonial administration, they had no say regarding the use of these lands, but hoped that the State would take decisions that are ‘reasonable for its population.’³¹ In another village, community representatives admitted that they did not know that they have a right to be consulted in relation to projects that may have an impact on their lands.³²

What is the government doing to allow companies to act in conformity with international norms and voluntary industry standards?

It would appear that the government has not yet established measures to ensure that the right of communities to their land and to FPIC are respected. Although the Coordinator of the provincial Coordination of the Ministry of Environment indicated that he always takes into account the rights of communities in preliminary investigations, there is reason to question the veracity of his statement.³³

Consultations with members of Weka village community, Bas-Congo / Stéphanie Vig
In practice, how are States laws or policies supporting or creating obstacles to the realisation of the right to FPIC?

In the researchers’ meeting with the Coordinator of the Provincial Coordination of the Ministry of Environment of Bas-Congo, the Coordinator pointed out that even if the contract violated the Forest Code, ‘it is often the politics that determine the outcome’. This statement reflects well the cleavage which exists between laws ‘on paper’ and in practice. Attempts to discuss the legal framework with regards to forest concession grants with different governmental authorities consulted revealed that several among them do not fully understand and do not respect the rules prescribed by the law. Furthermore, the Cabinet Director of the Ministry of Environment of Bas-Congo indicated that there are disfunctionalities between the National and Provincial Ministries of Environment.

All the money in the country is managed at the national level, there are not enough transfers of money to the provincial level.

This lack of funds is the reason stated by the Provincial Coordination of the Ministry of Environment for the fact that a preliminary study was not carried out.

There is reason to question the fact that the Provincial Coordination and the Ministry of Environment of Bas-Congo had, prior to our visit to the field, never yet seen the concession contract, even though this was two and a half years after it was signed. These key actors should have been involved in the granting process and their exclusion from this process raises a number of questions.

In practice, what are the main obstacles to the realisation of the right to FPIC and to lands of local communities?

One of the main obstacles which came out of the case study was the fact that the communities were not informed of their rights, and more particularly, of their right to FPIC. For example, community representatives of the group of Lele Sikila village claimed that they were ignorant of the fact that they had the right to be consulted in relation to activities that may have an impact on their lands. Furthermore, as illustrated by the case study, communities are often placed in a situation of fait accompli, where they only obtain information on a project after it has been established or approved. Community members do not have the necessary resources to protect their rights. They claim to feel helpless in the face of authorities and many of them report already having suffered from harassment from the authorities.

Other important elements

The site operations Chief of Kiemi and the Brigade Chief of the National Reforestation Service both claimed that the concession was legal, as the forest was intended for reforestation and that the concession would allow for the plantation of dwarf palm and soya. They were unable to provide clear explanations for their statement, but it does not appear to be backed by the Forest Code which states, at article 13 that

Reforestation perimeters belonging to the State or decentralised entities are also subject to classification.
Article 1 of the Forest Code defines reforestation as

...an operation consisting of the planting of essential woods in a forestry area.

In the light of the fact that classified forests

...are those subject, based on a classification act, to a restrictive legal regime concerning rights of use and exploitation (Art 10, Forest Code)

and that they cannot be granted as concessions, it would be very surprising if part of the reforestation perimeter could become part of a concession for the establishment of plantations considered as ‘reforestation’. When asked his view on the clearing of 10,000 ha of virgin forest to establish a plantation, the Brigade Head of the National Reforestation Service replied that

you must not think that in one or even ten years the whole forest will be cleared!...The forest is there to be exploited. If you don’t want the forest to be reconstituted, how will we live? The trees in this forest are mature, it is important for it to renew itself, we are not going to expose the forest to desertification, are we?

The Site Chief of Kiemi and the Brigade Head of the National Reforestation Service also both stated that the concession was granted for reasons of national security. The concession is indeed located near the border with Angola, and according to them, several rebels are hiding in the forest and entering DRC illegally. The Site Chief and the Brigade Head believe that establishing a plantation will help resolve this security problem.

Finally, it is worth pointing out that it would appear that two petroleum blocs have already been allocated to Energulf Petroleum and Sorestrum Petroleum respectively, in Muba Reserve. In the light of the fact that Muba Reserve covers 12,244 ha, that the COD concession is of 10,000 ha and that two petroleum concessions have already been allocated, it is possible that conflicts will emerge between the different companies and that local communities will lose all access to the Muba Reserve.37

References


Congo Oil and Derivatives. Available at http://www.freiba.com/congo-congo-oil


Endnotes

1. The authors would like to thank Robert Lelo, Patricia Mayolongo, Étienne Mbaki and Pascal Tsasa Luemba for their participation in the field study.

2. The classification order, pursuant to Article 16 of the Forest Code, would have allowed us to know the location and boundaries of the forest in question, its category, name, its resource management, the restrictions applied to use rights and the institution responsible for its management. Unfortunately, this document could not be obtained.

3. These are the communities of Nteve (Groupement Tshikayi), Muba, Weka, Lele Sikila, Phuela II, Lotshi and Beke villages.

4. Consultations with Muba village, 11th February 2012.

5. Consultations with Nteve village, Tshikayi group, 11th February 2012.

6. Meeting with Beke village chief, 14th February 2012.

7. Consultations in Weka, Lele Sikila and Lotshi villages, 12th and 14th February 2012.

8. Consultations in Kalombo and Phuela I villages, 14th February 2012.

9. These are the planting groups of Yana and Farobola.

10. It was impossible to obtain information on the circumstances under which land could be sold.

11. Meeting with Supervisor of the Ministry of Environment, Muanda territory, 10th February 2012.

12. Consultations in Nteve, Groupement Tshikayi, Muba, Yana, and Phuela II villages, 11th and 14th February 2012.

13. Consultations with planting group in Farabola, 12th February 2012.

14. Consultations with planting group in Yana, 11th February 2012.
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18. Meeting with the Technical Director of COD, 13th February 2012.
20. Meeting with Head of Environment Office of Bas-Congo, 8th February 2012. Meeting with Coordinator of ADEV, 9th February 2012.
21. Meeting with Brigade Head of the National Reforestation Service, 13th February 2012.
22. These are the communities of Nteve, Groupement Tshikayi villages and Muba, Yana, Weka, Farabola and Lele Sikila villages, 11th, 12th and 14th February 2012.
23. These are the communities of Kalombo, Beke, Phuela I, Phuela II and Lotshi villages, 14th February 2012.
24. These are the communities of Nteve, Tshikayi Group and the villages of Muba, Weka, Lele Sikila, Kalombo, Beke, Phuela I, Phuela II and Lotshi, 11th, 12th and 14th February 2012.
25. Meetings with Cabinet Director of Ministry of Environment of Bas-Congo and Coordinator of Provincial Environmental Coordination, 8th February 2012.
26. Meeting with Coordinator of Provincial Environmental Coordination, 8th February 2012.
27. Meeting with Kiemi Site Manager, 11th February 2012.
29. Consultations with planters’ group Chief of Farabola and community representatives.
30. Consultations with Group Chief of Tshikayi and community representatives from the community of Nteve village, and consultations with village Chief of Muba and community representatives, 11th February 2012.
31. Consultations with village Chief of Weka and community representatives, 12th February 2012.
32. Consultations with Group Chief of Lele Sikila and representatives from Lele Sikila village, 14th February 2012.
33. Meeting with Coordinator of Provincial Environmental Coordination, 8th February 2012.
34. Ibid.
35. Ibid. and meeting with Head of Environment Office, 8th February 2012.
36. Consultations with Group Chief of Lele Sikila and community representatives from Lele Sikila village, 14th February 2012.