

Briefing note 4: Beyond biodiversity offsetting; trading away community rights in Gabon



Trading away nature and community rights in Gabon

On 1 August 2014, Gabon passed a new Sustainable Development Law (SDL).¹ It establishes the framework for a scheme to attempt to offset harm caused to nature and communities through the purchase of environmental and social credits. Offsetting has been trialled in a handful of countries across the globe. It is part of a trend to make environmental legislation more flexible so that those who wish to continue exploiting natural resources can do so as long as they attempt to make amends.

The focus of this trend has mainly been on offsetting damage to biodiversity or the environment, but the SDL goes much further by trying to apply this theory to communities. This briefing outlines what is presently known about the SDL, gives the history of other offsetting schemes and explains why the idea of offsetting community rights is such a problematic development.

Global context

Though offsetting is a relatively new phenomenon in Gabon, it has been trialled in a handful of countries across the globe. It is part of a trend to make environmental legislation more flexible so that those wishing to continue exploiting natural resources can do so as long as they attempt to make amends. The focus has mainly been on offsetting damage to biodiversity or the environment – Gabon’s SDL goes much further by trying to apply this theory to communities too.

The most mature biodiversity offsetting schemes have been implemented in the United States of America (USA), Canada, South Africa, Australia, France and Germany, though offsets are also a part of the World Bank Safeguards² and the International Finance Corporation (IFC) Performance Standards on Environmental and Social Sustainability³. To a limited extent they have also been used on a voluntary basis by companies pursuing development projects in the global South. The European Commission is currently investigating whether a “no net loss” tool could be used to offset biodiversity in the EU.⁴

These offsetting policies have met with significant controversy, and in many cases have resulted in increased damage to the environment they claim to protect.⁵ Experience to date should arouse serious concern about the development of a social and environmental offsetting system in Gabon. First, such a system could violate communities’ human rights; second it could lead to an expansion of agricultural commodities and production of fossil fuels in Gabon, undoubtedly increasing the rate of deforestation.

What does the new law in Gabon say?

The SDL is a “framework law”, meaning that details will be elaborated in future implementing decrees. At present it simply sets the groundwork for a national credit-trading market, called the *sustainable development register*. It proposes the setting up of sustainable development concessions and various types of credits (explained below). A group of European consultants⁶ funded by the European Commission is offering technical advice on how to turn it into reality. The basic details set out by the law are as follows:

1.1 Sustainable development concessions

The SDL does not go into detail about sustainable development concessions beyond saying that *sustainable development credits* are generated by *sustainable development concessions*.⁷ Gabonese civil society believe they could include the full range of Gabonese concessions including logging concessions, palm oil plantations, mining projects, infrastructure projects and REDD+ concessions.

1.2 Sustainable development credits

Sustainable development credits are “generated by the creation or preservation of sustainable development assets during the project’s activities.”⁸ For example, a credit could be generated by a conservation project preserving an area of high biodiversity, or by a palm oil plantation project creating jobs.

These sustainable development credits are divided into four different types, each of which will be difficult to measure (see 5.1):⁹

- **Carbon credits** consists of a “metric tonne of carbon dioxide”
- **Biodiversity credits** are the “ecological biodiversity value contained in an ecosystem”
- **Ecosystem credits** are the “market and non-market value attributed to an ecosystem”
- **Community capital credits** are the “sum of the natural and cultural assets belonging to a community.”¹⁰



1.3 Sustainable development assets

Under the SDL, an annual *national sustainable development survey* will calculate the total level of *sustainable development assets*, which is equal to the sum of all biodiversity, community, carbon and ecosystem credits.¹¹ These credits will all be recorded in the national *sustainable development register*.¹²

1.4 Sustainable development register

The sustainable development register contains an inventory of concessions and projects. It is the place where the data about the projects, in particular the value of the credits is registered. It is a key component of the market mechanism for the buying and selling of the sustainable development credits.¹³

1.5 Trading of sustainable development credits

According to the SDL, if a project operator *generates sustainable development credits* during the course of running the project (for example by preserving an area of biodiversity, or creating a certain number of jobs), it can place the credits on the *national sustainable development register*, which will be administered by a government-run *management body*.¹⁴ Other project operators can then buy these credits to 'compensate' negative impacts of their own projects, such as polluting a stream or damaging local communities' crops.¹⁵

This trading mechanism system seems to allow full exchangeability across all credit types, meaning it would be possible to trade, for example, community rights with biodiversity. In practice, this could mean taking away community land in one province and planting trees in another, or polluting a water source in one area and building a school for a community in another. Moreover it is unclear if the trading of development credits will be limited to trade within the territory of Gabon; there is no provision that excludes the international trading of credits.

1.6 Measurement of sustainable development credits

The SDL does not provide any details as to how to value the sustainable development credits.



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A threat to human rights and the environment

2.1 Incompatibility with international human rights law

Gabon is party to numerous international conventions (see box A) which guarantee people the right to property and to free disposal of their wealth and natural resources. The SDL does not appear to treat communities as the legal owners of their 'community capital', meaning that it could and probably would be used to deprive communities of their right to property, thereby breaking international law.

Box A: Gabon's international legal commitments

Gabon has made binding international commitments to adhere to the standards laid down in international and regional human rights documents. Gabon is legally bound to the following relevant human rights instruments:

- the UN Declaration of Human Rights
- the African Charter on Human and Peoples' Rights of 1981 (ratified by Gabon in January 2011)
- the International Convention on Economic, Social and Cultural Rights of 1966 (ratified by Gabon in January 1983)
- the Nagoya Protocol to the Convention on Biological Diversity (ratified by Gabon in November 2011 and Party since October 2014)

Gabon is committed to respect:

- **The right to self-determination:** According to Article 1 of the International Covenant on Economic, Social and Cultural Rights all peoples have the right of self-determination meaning they freely pursue their economic, social and cultural development. The States parties to the Covenant shall promote the realisation of the right of self-determination and shall respect that right conform the provisions of the UN charter.
- **The right to property:** According to Article 17 of the UN Declaration of Human Rights and Article 14 of the African Charter on Human and Peoples' Rights everyone has the right to own property, alone as well as in association with others. This includes the right not to be arbitrarily deprived of that property.
- **The right to free disposal of wealth and natural resources:** According to Article 1 of the International Convention on Economic, Social and Cultural Rights and Article 21 of the African Charter on Human and Peoples' Rights, all peoples have a collective right to freely dispose of their wealth and natural resources. In no case shall communities be deprived of their means of subsistence.
- **The right to an adequate standard of living:** Article 11 of the International Convention on Economic, Social and Cultural Rights Article 11 recognises the right of everyone to an adequate standard of living. This includes, but is not limited to, the right to adequate food, clothing, housing, and "the continuous improvement of living conditions".
- **The right to development:** Article 22(1) of the African Charter on Human and Peoples' Rights provides that "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."
- **The right to participation:** Articles 14 and 22 of the African Charter on Human and Peoples' Rights include the right of local communities to participate in decision-making processes regarding any development, investment, exploration or extraction within their lands. Article 6 of the Nagoya Protocol to the Convention on Biological Diversity requires states to take measures to ensure the prior informed consent or approval and involvement of indigenous and local communities, in cases where access to these communities' genetic resources is sought. The right to participation was endorsed by the Endorois ruling by the African Commission on Human and Peoples' Rights.

The main concern is that whilst the SDL is clear that natural and cultural assets belong to a community,^{16,17} it also suggests that such community capital will be calculated at the national rather than community level. If community capital is under the administration of the state rather than the community, this would violate communities' human rights to property and to free disposal of their natural resources.

Gabon's many forest-dependent people are heavily reliant on forests for their culture, food, water, flood mitigation and building materials, among other things. The introduction of *community capital* offsetting could mean that if their resources were affected, communities would not have these resources replaced, as long as other resources were replaced elsewhere. This would probably lead to an overall decrease in living standards which would violate international law (see box A).

The SDL may therefore have significant negative consequences for communities, yet they were not included at any stage of the drafting process of the law. Although the SDL sets out a guiding principle of



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allowing the participation of local communities,¹⁸ none of the mechanisms established contain any mention of community consultation or participation.¹⁹ The actors responsible for choosing whether to generate, use, sell and buy sustainable development credits appear to be sustainable development concession operators, not communities themselves. All of this means that decisions about the value of a community's rights, lands and resources—and whether it is “worthwhile” to trade this value for something else—will be made by a closed government body and by concession operators, with no involvement from communities.

2.2 Increased damage to environment

As well as violating human rights commitments, past experience with biodiversity offsetting means it is likely that the SDL will actually result in increased damage to the environment.

In terms of environmental conditions, the idea that biodiversity levels can be reproduced in different locations has received little support in the academic literature.²⁴ A global study examining 108 examples of habitat restoration showed that restoration implies long time delays and a low certainty of success. The scientists concluded that there is “*little support that current theory and practice leads to a no net loss of biodiversity a solid empirical foundation for restoration offsets to match the elaborate theory is currently lacking.*”²⁵

The main problems include:

- **Lack of transparency and subjectivity over measurement**

Problems with measurement have beset previous offsetting schemes for carbon and biodiversity, partly because the method chosen dictates the number of credits that result and therefore the amount of profit to be made. There is therefore a tendency to make pragmatic choices about what to measure to make the offset possible. In the case of tree planting projects for carbon, for example, there has been a tendency to always go for a best case scenario of the level of carbon sequestration that can be achieved.²⁶

Biodiversity offsetting suffers from the same concerns. In a proposed site in north-western France a measurement methodology was used that was “so excessively complicated it was unintelligible”, and the project has now been stalled.²⁷ The expense and time required to conduct a proper survey of biodiversity creates a strong temptation to cut corners: the UK government has boasted that its site surveys for measuring biodiversity only take 20 minutes. This can only be achieved by reducing the factors to be measured to the point of meaninglessness.²⁸

- **Overlooking ecological time-scales of restoration**

Offsetting does not take account of the time-scale with which ecosystems evolve. This has proven to be a problem in biodiversity offset schemes. In the United Kingdom (UK), for example, an area of countryside created as compensation for damage from building a new road over the Twyford Downs was later paved over to build a car park.²⁹ Wetland offsets in the USA, forest offsets in Brazil, and Canadian fish habitat offsets have faced the same fate.³⁰ The results in countries with weak rule of law could be devastating.

- **Legitimisation of greater environmental damage**

The biggest problem with using offsetting to address environmental and social protection is that it becomes a means of continuing business as usual. Rather than responding to growing pressure to curb the rate of environmental destruction, the Gabonese government is creating a system that legitimises destruction. Despite the fact that the SDL claims to pursue a principle of damage prevention,³¹ the law itself contains no provisions for avoidance or mitigation: it is purely based on the compensation of negative impacts.

Conclusion

Attempts to offset sulphur pollution, carbon and biodiversity have consistently failed to achieve intended reductions.³² They have also often actually harmed communities either caught up in the original destruction or the offset site.³³ The SDL is therefore a very concerning precedent as it tries to apply an already flawed theory to communities and their land and rights. This is a step in the wrong direction and support from the EU and European consultants should be withdrawn.

The SDL does not offer any protection for the rights of communities as requested by international human rights law, nor has it given them any say in the drafting of the law or the mechanisms it proposes to establish. It contravenes communities’ rights to property, to free disposal of natural resources, to development, to an adequate standard of living, and to participation in decision-making.

Moreover, the SDL avoids the creation of strong rules to protect the environment and communities in favour of a system that allows damaging plantation expansion to continue so long as the operator can afford to pay. This will almost certainly achieve the opposite of sustainable development - increased overall damage to environment and communities.

Neighbouring countries, communities, policy-makers, and donors all need to be aware of the dangers at the heart of this new piece of legislation, and look at systems that have previously worked to achieve sustainable development before developing any further legal texts. Without community input and consent, any attempts to achieve sustainable development are bound to end in a trail of destruction.

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ENDNOTES

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This is the fourth in a series of briefing notes that assesses EU policy to achieve 'No Net Loss' of biodiversity. The briefings show that biodiversity is inherently site specific and fundamental to human existence. In most cases, damage to biodiversity cannot, in the lives of a community, be compensated for. Nature is a common good that we all share rights to and have responsibility over. To be effective, any policy to protect biodiversity must also take these considerations into account.

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