Meeting 6: Rights and natural resources: contradictions in claiming rights

Speakers: David Brown, Overseas Development Institute
Mac Chapin, Native Lands Centre

Chair: Duncan Brack, Royal Institute for International Affairs

Meeting Summary

The first speaker, David Brown, began by explaining that his primary interest is the role of development assistance in supporting the realisation of claims in the forest sector. He presented a number of reasons why a rights perspective is problematic in this sector, in particular the contention surrounding the legal framework and the illegality debate. Brown also discussed the prioritisation of sustainability by external actors and the consequent categorisation of groups within the forest sector and the subordination of their rights. He concluded by outlining why a rights perspective remains important for the forest sector but stressed that the approach must move beyond the simple application of the law if it is to be pro-poor.

The second speaker, Mac Chapin, focused on the relationship between conservation organisations and indigenous people. He explained that the focus of his recent article on this subject was not explicit abuse by the large conservation NGOs; rather, it was on the increasing exclusion of indigenous people from NGO programmes and the subordination of indigenous people's priorities. Chapin described the process whereby the conservation organisations and their funding sources grew dramatically and discussed the consequences of these developments. He concluded by suggesting that the way forward lay in increasing the accountability of the large conservation NGOs and through donors targeting indigenous people.

The benefits of utilising a rights perspective given the complexity of power dynamics in the forest sector was echoed during the discussion. The need for a progressive realisation of rights was raised but caution was also called for with respect to such claims because of the danger that they might lead to a hierarchy of claimants.

David Brown

I should stress that I am going to be talking about rights perspectives rather than rights-based approaches. There is a slight difference of emphasis and I do not want to be too concerned about the narrow technical and legalistic aspects of the topic. What I am concerned about is looking at the role that development assistance can play in facilitating a shift in perspective in order to realise the legitimate claims that citizenry can make against the state and its derived duty-bearers. An underlying concern is that support should be provided for process rather than policy outcomes. My own view is that, particularly in the conservation field, there is an excessive concern with desirable outcomes as defined by outsiders rather than with governance processes that lead to desirable outcomes. Given the interests of the forestry group at ODI, I will be focusing on forests with high commercial value but what I say might have relevance beyond those.

Rights and the forest sector

For those of you who do not know the forest sector (and I am told that there might be a few here), we need to bear in mind that we are dealing with a resource that is usually managed as the sovereign territory of the state and, because it is a sovereign resource, national law tends to be in the ascendant. The rights-holders, who are the subject of interest, tend to be small-holders and independents. International work covenants therefore do not normally apply to these people, with the result that there is a stream of international law that is not really relevant to their circumstances.

Forests are also an acutely emblematic resource (and I will return to this later) in that they tend to be labels on to which other environmental concerns and crisis narratives can be tagged. It is also an interesting sector in relation to rights because of the multiple interests that it serves and the massive power imbalances that exist within it. A final point is that, as a development assistance sector, the forest sector has been particularly problematic for a long period of time because of the characteristics just described.

'The starting point is the legal framework but this is itself particularly problematic in this sector ...'

The question I would like to address is: how successful has official external aid to the forest sector been in helping to develop a rights regime in a way that promotes good governance and contributes to poverty alleviation? I will be mainly looking at one area – forest law enforcement – but, if we have time, I will turn to some issues to do with wildlife.

ODI's research interests

As background, I would like to situate this presentation within the research interests of the forestry group at ODI. We have a particular concern with governance reform and the contribution that the forest sector can make to it. Within this field, we have an interest in mechanisms of public accountability, in particular mechanisms that span the international boundary – what might be called 'third dimension accountability'. There has been quite a big debate recently concerning forms of public accountability and, in particular, on what Goetz and Jenkins and others have called 'hybrid' forms of public accountability (Goetz and Jenkins, 2001). These refer to situations where non-governmental actors, who have previously exerted pressures from below, exert horizontal accountability as a substitute for agencies of the state, for instance as independent monitors. We have been researching this issue and will continue to do so in our current programme. What sorts of messages prevail when actors across international frontiers are involved in public accountability within developing countries?

Representing the rights of the poor in the forest sector

The starting point from a rights perspective must be how the rights of the poor are represented in the forest sector. What are society's obligations to the forest-dependent poor? What capacity do the poor have to make claims with respect to resource tenure and in terms of legal processes? I think in both of these areas the answer will usually be: very limited indeed. Resource tenure is obviously a major bridge into the rights language but it tends to be extremely weak in the forest sector because post-colonial governments, like the colonial governments before them, are usually loathe to reinstate the rights which they have taken from the traditional resource users. Rights-holders in the forest sector also tend to have limited leverage in terms of legal process and are unable to claim their rights through this mechanism. We are therefore starting from a fairly low base.

Contesting the legal framework

To begin, I will refer to three quotations relating to rights issues. The first one is a quote from Julia Häusermann speaking some years back at ODI and making a statement that is in some ways uncontroversial: 'The legal framework is the alpha and omega of a rights-based approach' (Häusermann, 1999). Fair enough, but what if the legal framework is fundamentally in contention? The second statement by the World Bank and the WWF Alliance is again not problematic in itself, although it does need some qualification: 'One of the most significant improvements that can be made to forest management (in the tropics) ...is simply the enforcement of legislation' (World Bank and WWF Alliance, 2003: 1). Again, this is OK provided that the legislation is also healthy, reasonably consistent and just. The third statement from an IFAW teaching pack does concern me because I think that it is, by and large, factually untrue: 'Question: True or False? Most countries where... bushmeat is a problem do not have laws against hunting or the trade. Answer: False! Many ... have very good laws to protect wildlife' (IFAW, 2004).

You can see where I am going with these quotations.

The starting point is the legal framework but this is itself particularly problematic in this sector and cannot be taken as a given. So, if we are promoting rights perspectives in relation to the established legal framework, we have a problem from the outset.

Here are some statistics that further substantiate the point: there are over 900 pieces of legislation in Indonesia relating to the forest sector and there have been over 100 new pieces of legislation enacted in Brazil during the past 25 years. This is an area where new legislation proliferates.

Phases of development assistance and the primacy of sustainability

I turn now to rights within the evolving discourse of development assistance to forestry. We have had various speakers at ODI in the past who have talked about the phases of development assistance within the forestry sector, such as: industrial forestry (1960s-1970s); social/community development forestry (1970s); environmental forestry (1980s); and sustainable management of renewable natural resources (1990s). These are the main phases and they demonstrate the emblematic role of forests in the sense of taking on the issues and crises in other fields. If I were to comment on these successive phases, the first remark would be that there is an amalgam of concerns here and, at least in theory, no single issue is dominant (except in so far as I will qualify that in a moment). However, rights have not been central to these debates. Instead, there have been two continuing foci of interests: sustainable forest management and poverty alleviation.

The next quotation is from the World Bank and the WWF Alliance: 'A basic requirement for implementing SFM is ... a permanent forest estate. However, enforcement of land use designations remains a major challenge. *The rights of local communities* ... interacting with the forest *should generally be respected* – insofar as this does not reduce the flow of desired benefits from the forest' (World Bank and WWF Alliance, 2003: 5). The first part of this statement is standard in technical approaches to sustainable forest management, where the fundamental requirement is to control the parameters and set a clearly defined forest boundary. The second part of the statement may or may not be problematic depending on what is actually implied.

The third part of the statement is unproblematic given the precepts of sustainable forest management but is deeply problematic from the perspective of forest-user rights. You can see that the notion of rights that is being promoted here is not within the conventional definition of the term 'right'. They are not fundamental principles to be respected and upheld whatever the circumstances, and they are clearly contingent on other technical concerns. This happens because of the primacy of the interests of 'future generations', which is widely accepted in sustainable forest management discourse but it is very problematic in the rights discourse. So there is a contradiction right from the start.

Sustainable forest management is a little out of fashion perhaps but what is in fashion is a lower order interpretation of the same concept – that is, 'legality'. Attention has shifted in the last few years from sustainability – which has proven to be a hard concept to unravel – towards legality, which is assumed to be a rather easier one to handle. Notions of legality in the forest sector inevitably raise problems about the extent of illegality.

Illegality and barriers to legality

I will thus turn now to the promotion of rights perspectives within the current discourse on illegality in the forest sector, in relation to which there has been a fair number of recent policy positions.

'... barriers to legality are a main cause of the high levels of "illegality".'

What do we mean by 'illegality'? Firstly, there is illegality in the sense of 'forest crime' (and there is a fair amount of straight-forward crime in this sector as anyone who has worked in it knows). I do not think that the label of crime is problematic to the same extent in the forest sector that it is in relation wildlife and bushmeat, where the main players tend to be smaller, more local and have greater claims to act outside the law with some legitimacy. Of course what counts as criminality varies from context to context. For example, in the tropics, logging out of boundaries – outside of licensed areas – is a recurrent problem, in a way that it is not in, say, Canada where water pollution issues are more problematic.

But there is an additional dimension to illegality relating to 'barriers to legality', which I do not think we can avoid in this debate. This has been the subject of quite a lot of recent interest and research, much of it funded by DFID through the Centre for International Forestry Research (CIFOR). Adrian Wells from our group has been involved. This work has emphasised that barriers to legality are a main cause of the high levels of 'illegality'. If we are talking about illegality in the forest sector, we are therefore dealing with a major and complex problem that does not have simple solutions, and which cannot be reduced to 'forest crime'.

Actions to combat illegality have been heavily donor-driven and linked to the forest law enforcement, governance and trade (FLEGT) process. The discussion has centred on the role of independent monitoring and the funding of international environmental watchdogs, together with some industry measures, some pending trade restrictions, such as the European Union voluntary partnership agreements (VPAs), and so on.

FLEGT is still in its early years, and we have to recognise this if we are trying to discern its positive and negative effects. There have obviously been some positive effects, although not all of them are to do with rights. It has created enormous leverage in terms of bringing the governance debate into the open and so there is the prospect of long-term benefits on the governance front. There are also benefits from a rights perspective. It has brought

the issue of rights into the public domain and that must be regarded as a positive.

There are problem areas, however. There is a tendency to oversimplify the legal framework and to squeeze out of the discussion some of the complexities that I referred to earlier. How does that happen? Through a number of mechanisms, I suspect, but I do not think that simple distortion by development assistance partners is necessarily the primary one. There has been recognition that this is a complex issue, as I have noted, and not amenable to simplistic solutions. The origin of the problem is that forests are a sovereign resource. Illegality is therefore a sensitive issue to deal with and any attempts to address it tend to call for sequential approaches that deal with the big issues first. This has downstream consequences for other players for whom some of the supposedly 'smaller issues' may well be of great significance.

Anybody who has ever done an evaluation of a conservation project will know the problems that I am talking about here. There are certain issues that you cannot debate within the discourse on legality and illegality. For example, the issue of whether national parks gazetted as a result of external pressure should be counted as a legitimate part of national land use cannot be debated by outsiders once you are 'within the discourse' because they are part of a sovereign process, and sovereign law is not amenable to challenge once it is on the statute books. There is an issue of closure here in the sense of closing down of contentious areas of discussion.

Subordination of local agendas and the 'undeserving' poor

However, there is also another problem in terms of the subordination of local agendas to external ones (which my co-speaker will deal with in detail) and the way in which this reduces the space for local actors to contest their claims. With regards to the poor, my concern is that, within forestry, the notion of rights tends to become subordinated to the demands of sustainable forest management, which itself creates a hierarchy of claims on resources, albeit often a fairly superficial and self-serving one. At the top of the hierarchy there are those whose claims are not problematic, internationally or nationally, which tend to be a small proportion of local users, particularly hunter-gatherers and those who appear to live in harmony with their environment. Local claimants of this type tend to have good public relations, and their interests can easily be championed by outsiders, though not always very effectively. They do have important rights but they tend to be a very small proportion of the population in question. They do not threaten the long-term conservation of forests, and indeed, their livelihoods depend to a large extent on forest conservation.

'A rights perspective puts an emphasis on process rather than outcomes ...'

There is another category – usually a much bigger one – that tends to become characterised as the undeserving poor because the people within it appear to be abusers of their environment. These are the people who live by slash and burn agriculture and the commercial exploitation of natural resources. Their welfare is not necessarily dependent on forest conservation in ways that outsiders deem to be appropriate for tropical societies. They do not fit easily into the international rights discourse and their interests are being marginalised as a result. This is particular area of concern. When it is challenged, the reply one tends to get is that we have to take care of the interests of future generations and the rights discourse must therefore be subordinated to the need for sustainability.

The case of wildlife

I now turn briefly to the case of wildlife. We can see these tensions even more strongly represented in this instance. I have been dealing with international policy processes around bushmeat management for the past four and half years and I have become increasingly worried about the effects of growing international interest in hunting and bushmeat on the welfare of the poor. We are seeing a major loss of access rights as wildlife rises up the international policy debate. In the past, although people have not usually had formal access rights, their access has been tolerated. As this issue has become more prominent in international policy discourses, however, those access rights are increasingly denied. This has resulted in a major and systematic loss of rights for forest users, particularly in Central Africa.

Here again there is the problem of the idealisation of the poor. In this case a new category of purely 'subsistence users' has been created. Subsistence users are insignificant in Central Africa but it suits certain purposes to imagine that they do exist because, if they did, their needs would be small and finite, which avoids the problem of unsustainable off-take. In fact, most small hunters and trappers produce for the commercial market; they rarely consume much of their catch. Their association with the evils of commerce provides a convenient way to stigmatise them. By contrast, the rights of 'subsistence users' can be promoted as a useful counter-measure (and as proof of the absence of hostility to consumptive use of animal resources) even though they are probably not present in reality.

The point that I am making is that a rights perspective is important in this field, but it is very easily distorted to support external agendas. There are undoubtedly some major international issues of governance to be addressed in relation to illegal logging but there are also some real risks for the poor in the way that these issues are taken up and championed.

Why adopt a rights perspective?

Where can we go from here? I am of the view that a rights perspective is important in itself. If you take a rights approach and then seek to monitor the realisation of claims, then half the battle is already won. A rights perspective also justifies the presence of international players on sovereign territory, in particular in areas

where governance is bad. In the real world, this is likely to be essential. But such an approach does require a real democratic platform and it is this that we are not seeing enough of. There is also far too much external manipulation of local interests. I am rather distrustful of the claims by many environmental and conservations NGOs to represent local constituencies. They may do so but we need stronger evidence of the basis for such claims.

Why should we still adopt a rights perspective? Resource tenure is the main reason. It is still the critical challenge in the forest sector. A rights perspective puts an emphasis on process rather than outcomes and that seems to me to be a healthy development; to shift the policy focus away from the technical solutions which might address the problem of unsustainable management (though only in the short-term) towards the processes that can deliver such sustainability through good governance.

I am also concerned about the danger of 'inversion' in advocacy. In the environmental sector, there is always a great danger that advocacy will be reflected back on to the victims as a form of victim blaming. This is most evident when it comes to advocacy over forest conversion practices, such as slash and burn. A rights perspective should help us to avoid this and should instead encourage what I call an 'upward orientation' of lobbying and advocacy. That would be a definite gain.

However – and to conclude – we have to guard against the simple application of the law through repression. At present there are many claims that the law is unproblematic and what is actually needed is its rigorous application. I am very doubtful of this view. The legal framework is rarely 'pro-poor' in its orientation, and –given the inordinate power of a few stakeholders in the forest sector – its application tends to be profoundly anti-poor. Mere application of the laws is likely, therefore, to be repressive in its effects. It would be perverse if attempts to champion the rights of the poor ended only in the denial of those rights.

'The legal framework is rarely "pro-poor" in its orientation ...'

Mac Chapin

I am going to talk about some of the issues raised in my recent article, 'A Challenge to Conservationists', which appeared in the November 2004 issue of the magazine *Worldwatch* (Chapin, 2004). I wrote this article because I had noticed that in recent years the relations between conservationists and indigenous peoples had been steadily deteriorating. They were not working well together. Put simply, the conservationist NGOs, especially the large ones with substantial amounts of money and the power, were not including indigenous people in their programmes and, when they did, they tended to dominate the relationship and control the agenda. I was seeing this not only in my work with indigenous people throughout Latin American but also in other regions, for example this general trend was also evident in Cameroon and West Papau.

In June 2003, a number of foundations in the US, including the Ford Foundation and some smaller foundations, met to discuss this issue at a gathering of the Consultative Group on Biodiversity. The Ford Foundation announced that it was commissioning a study (Khare and Bray, 2004) to look into what it termed 'abuses' by the three largest conservation groups – World Wildlife Fund (WWF), The Nature Conservancy (TNC), and Conservation International (CI).

Initially, the sole target of the Ford investigation was CI, about which Ford's grantees in the field had received the greatest number of complaints; but later on it was decided to add in WWF and TNC, to add some balance and also to avoid the perception that the study was a bear hunt. I am glad they did because there are structural features that characterise all three NGOs.

Avind Khare, an economist with Forest Trends, and David Bray, an anthropologist at Florida International University, were contracted by Ford to do the study. As it was nearing completion, however, the foundation suddenly embargoed it. Behind the scenes, two Ford board members – Yolanda Kakabadse, head of the International Union for the Conservation of Nature (IUCN), and Kathryn Fuller, President of WWF-US – had seen the terms of reference and requested that the finished study be suppressed.

'The conservationists pushed their agendas, not those of their indigenous "partners".'

This was a very bad move. Word immediately leaked out and everyone became curious about the contents of the study, with many beginning to think that it must be equivalent to a cargo of dynamite. This proved to be unwarranted because, when the study became public (Ford was pressured to release it), it was apparent that it was nowhere near as volatile as expected.

The increasing exclusion of indigenous people from conservation programmes

Let me note that, in my article, I was not concerned with the outright abuses of the large conservation NGOs as much as with the way in which they had been increasingly excluding and ignoring indigenous peoples from their programmes. There are abuses, most certainly. For example, a recent article by Michael Cernea and Kai Schmidt-Soltau (2003), both of whom have worked with the World Bank, documents the forced resettlement of pygmies in the Congo Basin, with the solid backing of WWF. There are also rumours of other abuses in other regions.

This was not the focus of my article, however. I was more interested in documenting the steady distancing by the large conservation groups from earlier attempts, begun in the late 1980s, to work closely with indigenous peoples. At that time, there had been a lot of talk about the need to work with indigenous peoples. In the mid-1990s, WWF and INCN produced policies and a joint position statement on indigenous peoples and how they should work with them and respect their traditional knowledge of the environment.

In a sudden wave of activity, the conservationists developed what they called Integrated Conservation and Development Projects (ICDPs) and various kinds of 'community-based conservation'. These approaches became the rage during the late 1980s and early 1990s. Many donors threw their money behind them and there was extensive talk about alliances, partnerships, collaborative relationships, etc., between conservationists and indigenous peoples. This was during the years that everyone was talking about sustainable development.

Whose agenda?

Unfortunately, little of this worked. The various approaches were inventions of the conservationists and they were controlled by the conservationists, without much indigenous input. The conservationists pushed their agendas, not those of their indigenous 'partners'. Although there was talk about the overlapping, and even corresponding, agendas of indigenous peoples and conservationists, in truth there are usually areas of considerable difference.

When you talk to indigenous people throughout the world, they generally say that their first priority is gaining control over their land. They want legal title to their ancestral lands and they want to protect their natural resources. Conservationists, however, invariably say that they cannot get involved in this area because it is 'too political'. Another feature of indigenous agendas is the desire to strengthen their political organisations so that they can defend their land, their natural resources and their cultures. This is also seen by the conservationists as too political. Instead of these indigenous priorities, the conservationists generally want to begin with a management plan for the natural resources. It is not that the indigenous peoples are opposed to the idea of management plans; it is simply that this is not their priority. They want to begin

with land rights and the strengthening of their political base – then perhaps down the line they can think about management plans. The fact that the conservationists will not help them with their priorities makes for a doomed partnership.

The growth of the conservationists and their funding sources...

Up until the past two decades, WWF, TNC and CI were relatively small and had lean budgets. Founded in 1961 in Switzerland, WWF was initially tiny. It expanded slowly, founding chapters in other countries of Europe, and later moving into developing countries. In the early 1980s, WWF-US had around 25 employees and occupied one floor of a moderately-sized building in Washington, DC. TNC began with an informal group of concerned scientists in the 1940s. In 1961 the Ford Foundation gave them money to appoint a full-time President. (CI came into existence in 1987 as a break-away group from TNC.)

By the second half of the 1980s, all of them had begun to expand dramatically. They began with funding from private foundations and individual donors. Next they started tapping into private corporations and bilateral and multi-lateral donor agencies, diversifying their funding base. WWF now has four floors of a large, and very luxurious, building in Washington, and worldwide WWF boasts more than 4,000 employees. TNC holds the distinction of being the largest and most well-endowed conservationist group in the world, receiving US$ 225 billion from close to 2,000 corporate sponsors in 2002 alone. CI began small but has ballooned in size as a result of its fundraising skills. Over the past few years it has secured more than $550 million from the Gordon & Betty Moore Foundation; other large funders of CI are the MacArthur Foundation, the World Bank, and the Global Environmental Facility (GEF).

How did this transformation take place? The large conservation NGOs:

i. developed large-scale conservation schemes, covering large pieces of real estate. The size of the schemes enables the conservation NGOs to argue that that they need large amounts of money both because of the huge threats to the Earth's biodiversity and also because large schemes are more effective than a number of smaller isolated projects both in terms of impact and cost. CI, for example, recently suggested that it would need $500 million per annum to cover 25 of these schemes. Another feature of these large-scale strategies is that they are very distant from the ground, which means that indigenous peoples simply do not play a role in them;
ii. began mounting extremely aggressive fundraising campaigns. Their growing size meant that they needed to diversify their funding base, particularly because the amount of money available worldwide for conservation has roughly halved since 1980. They have been successful at this. As they have soaked up the lion's share of the available money, all three have grown in both relative and absolute size and wealth. However, whilst they have branched out to include private corporations and bilateral and multilateral donors in their funding strategies, they have also continued to approach foundations and individual donors.

...and the implications

What are the consequences of this trend? Obviously the larger these conservation groups become the more dependent they are on maintaining a certain level of funding. This means that, particularly when tough economic times hit, they have to take to the streets to secure as much cash as they can. The competition, both among the large NGOs and between the large and small NGOs, has become ferocious. The large NGOs have also become extremely territorial, laying claim to large chunks of land and denying access to their rivals. TNC guards the region of Bosawas in Nicaragua; CI controls Guyana and Suriname in South America (in Guyana, their country representative is the former commander of the Guyanese Armed Forces); WCS holds sway over the Bolivian Chaco; and so forth. A similar territoriality is in place with regard to funding sources; an example is the hold CI has on funding from the Moore Foundation.

'The political conditions that accompany many of the donations often make good conservation work impossible.'

Another recent shift has been in the rhetoric about strengthening the capacity of local NGOs. For some time, the big international groups talked about the need to support local NGOs. This has now virtually disappeared because the international NGOs realised that, once they had gained experience and a solid track record, these national groups would be able to bring in their own funds and would be in competition with the international NGOs. Consequently, the large international NGOs stopped supporting local groups and have instead established their own in-country offices. These often snatch up the best local talent, which impacts negatively on local capacity. The situation now exists where the local offices of the international NGOs fight amongst themselves over money and power.

Another feature that has emerged is the 'gatekeeper syndrome'. This is where donors, including foundations and bilateral and multilateral agencies, provide funding to one of the large organisations to manage and smaller organisations have to approach them to access it. This arrangement often amounts to a stranglehold. One of the most blatant examples is the Critical Ecosystems Partnership Fund (CEPF), which CI controls. It is bankrolled by the MacArthur Foundation, the GEF, the World Bank and the government of Japan, each of which contributes around $25 million. In theory, the CEPF is supposed to provide funds to local conservation groups in a series of 'critical ecosystems' around the globe. In reality, CI uses the bulk of the money – about 75% – for its own programmes and administration. Outside groups receive what amounts to crumbs.

The political conditions that accompany many of the donations often make good conservation work impossible. Money from the United States Agency

'There is therefore a need for objective evaluations ... to provide a solid foundation for constructive change.'

for International Development (USAID) often carries stipulations that limit who the recipient NGOs can work with and what can be done. Any NGO working with USAID money in the Andean region of South America must report incidents of drug trafficking – something that is rife in the region and extremely volatile. All three of the largest NGOs take money from oil companies who are drilling in ecologically sensitive regions of the tropics. This limits their ability to oppose such activities, even when the companies are causing ecological havoc.

It is indigenous people who lose the most because of these conflicts of interest. Most indigenous organisations in Latin America are fighting against the destructive exploitative practices of large multinational companies, which are often supported by their government and which therefore brings them into conflict with them also. The conservationists will not make alliances with indigenous peoples when they are receiving money from the likes of Chevron-Texaco, Dow Chemical, Shell, Enron and other such companies. There is a case in Ecuador where Oxfam America, based in Lima, is funding an Ecuadorian group battle against Chevron-Texaco. Chevron-Texaco supports all three big conservation groups.

The way forward

What can we do about this? It is a huge and incredibly complex problem, one that involves powerful forces and large amounts of money. I have two modest suggestions:

i. We need to increase our knowledge about what is actually going on in the field. We do not have many objective, thorough evaluations of the big conservation programmes. There is virtually no accountability. What we have is a public-relations smoke screen generated by the conservation organisations on one side and accusations of abuse from critics on the other. There is therefore a need for objective evaluations, including indigenous representation, to provide a solid foundation for constructive change.
ii. Donors must focus on targeting indigenous peoples. A lack of trust and understanding between donors and indigenous peoples will make this difficult and measures must be taken to improve communication and relations. It is also not easy for programmes to reach indigenous peoples because they often live in remote areas. Donors must therefore make the effort to fund them in the most effective way, which means providing grants directly where possible, rather than through intermediaries, and certainly not by using the large international NGOs as gatekeepers.

Public goods and private rights: The illegal logging debate and the rights of the poor

*David Brown, Adrian Wells, Cecilia Luttrell and Neil Bird**

1. Introduction

This paper explores the potential for applying rights perspectives in policy development in the tropical forest sector, focusing especially on an area of current concern: forest law enforcement and governance (FLEG). The argument presented here is based on the assumption that where the challenges are largely rights-related, adopting a rights perspective should logically provide a powerful way to address them, with positive effects on both the long-term condition of the forest resource and the distribution of benefits deriving from its exploitation. However, this is easier said than done, as the legal framework in the forest sector is often profoundly anti-poor, if not always in its conception, at least in its operation. In consequence, there is no guarantee that forest law enforcement will improve the welfare of the poor. Indeed, there are good grounds to argue that the reverse is much more likely to occur.

2. What is meant by 'rights in natural resources'?

Beyond its core meaning of 'justifiable claims', the concept of rights has been variously interpreted in the literature. Moser and Norton (2001: 23) set out a framework which draws together a wide variety of perspectives, and which connects universal human rights and duties (which apply to every individual) to the various domains of rights as they are perceived in law. Whereas the former are implemented and monitored inter-governmentally, the latter are enforceable through the courts, both nationally and supra-nationally (e.g. regional bodies such as the European Court of Human Rights). Such laws may derive from varying sources and are not necessarily consistent in their application (for example, customary and statutory laws may well conflict).

In this paper, we adopt an approach to 'rights' that covers not only universal human rights, but also rights as defined in national legal frameworks and implemented through the appropriate regulatory regimes. Although such a broad interpretation runs the risk of threatening the universality that is the defining element of a rights perspective, it has the advantages of focusing attention on the realities of resource claims and access rights, and of making concrete connections between international discourse and the actual livelihoods of the poor.

The concept of rights is particularly important in relation to livelihoods because of the centrality of issues of tenure and control. In the forest sector, long production cycles accentuate the importance of the tenurial regime. Often lacking even the most basic tenurial rights, the forest-dependent poor are not well placed to enjoy broader human rights pertaining to participation and public accountability, even where such rights are ostensibly guaranteed in law (see Bird and Dickson, 2005).

Development assistance has had a rather uneven record in helping local people to reassert their rights in the forest sector. Indeed, the overall trend has often been in favour of an expansion of the claims by the state, to the detriment of resource users. The lack of progress on tenurial rights remains a major obstacle – arguably *the* major obstacle – to improving forest governance.

3. What is special about rights in forests?

Forests are unusual among natural resources in terms of the extent to which external actors claim the right to intervene in their management. While the world's forests may have important global aspects, they are – in practical terms – almost always managed as sovereign resources. The primary duty-bearer is thus the state. However, other parties can also be involved, including international duty-bearers (whose influence over forests tends to be expressed through multilateral agreements and conventions) and private sector duty-bearers (both forest owners and 'derived duty-bearers' such as forest concessionaires).

The international dimension tends increasingly to be dominated by Western environmental interests. There is an emerging and provocative literature on the influence of Western environmentalism on public accountability in the tropical forest sector (see, for example, Brosius, 1997; Chapin, 2004).

The national dimension tends to be dominated by the timber industry. This is often very powerful in the forest sector; in forest-rich countries, there are frequent allegations of 'state capture' by the industry. The industry is often the only major presence in the more isolated rural areas, functioning to all intents and purposes in place of the state. In human rights

language, the duties of such derived duty-bearers relate both to the internal operations of their industrial activities (for example, safety at work) and to the effects of their operations on the livelihoods of the external actors with whom they interact (for example, relating to the damage they may cause to economic activities of rural dwellers, and the denial of public access which they may impose). However, in practice, these obligations may well conflict with – and to be overridden by – commercial claims of types which are powerful in free-market economies.

4. Rights and the issue of 'sustainability'

Tropical forests are particularly prone to motifs which justify external intervention. This derives from their global public goods dimension and the international character of the externalities (the additional benefits and costs) their exploitation generates. Such motifs often take the form of 'crisis narratives', which warn of impending disasters if affairs continue on their downward path. Over the last forty years or so, these crisis narratives have covered issues such as the energy crisis and its implications for the poor (concerns about fuelwood production), the global environment (the role of forest mismanagement in deforestation and desertification), conservation (the loss of forest biodiversity), and climate change (the role of forests as carbon sinks). A repeated call for the sustainable management of forests (SFM) has been one outcome of all these concerns, though the meaning of this is not unproblematic in natural forest environments. Juxtaposing demanding, but often imprecise, technical standards for sustainable management of public lands with other social and political concerns tends (like commercial interest) to downgrade the notion of rights, away from human rights principles (see Box 1).

Box 1: Balancing sustainable forest management and rights

'SFM is clearly not possible where there is extensive deforestation, as this reduces the forest's 'inherent values and productivity. For this reason, a basic requirement for implementing SFM is to have a clear legal definition of forestland, and, most importantly, to designate this forest land as permanent. In much of Africa, the importance of establishing a Permanent Forest Estate is understood. However, enforcement of land use designations remains a major challenge.

Reference to the social dimension of sustainability implies that *the rights of local communities and other stakeholders interacting with the forest should generally be respected* – insofar as this does not reduce the flow of desired benefits from the forest. Defining what is desired also implies democratic processes for deciding how the forest resource should be managed. This necessitates a degree of flexibility on the part of the forest administration which, in most African countries, retains ultimate ownership of the forest resource.' [Emphasis added.]

Source: SGS for World Bank/WWF Alliance (2003)

5. The issue of 'illegality' in the context of forest rights

Because of the plethora of parties with an interest in the resource, forest legislation tends to be extraordinarily dense and complicated, both nationally and internationally. International human rights instruments, standards and principles affect the interests of forest-dependent populations in a number of areas: protection of the land rights of indigenous and tribal peoples; non-discrimination; equal treatment before the law; and the right to participation in the political process. ILO Convention 169, 'Indigenous and tribal peoples in independent countries' (1991) provides one such instrument, albeit fairly limited in its scope.

The degree to which such instruments are translated into constitutional and statutory law varies among countries, and is difficult to generalise. However, what different systems do tend to have in common is low national ownership. Being largely externally generated, legislation at both national and international levels may not enjoy any real public legitimacy, or be amenable to application in any sensible way. Where the law lacks even superficial legitimacy, attempts to invoke this are unlikely to be effective. At most, this will increase the opportunities for rent-seeking by officials who exploit, to their individual advantage, the price increments that illegality confers in the market place, but with no beneficial effects for the management of the resource. This can damage the interests of the poor in at least two respects: increasing the costs of their compliance, and 'criminalising' their activities in ways that undermine both their livelihoods and the rule of law. Such criminalisation is particularly dangerous where there are no feasible legal alternatives.

The concept of 'legality' thus needs to be treated with caution, and views about the importance of suppressing 'illegal activities' need to be tempered by a recognition that such labels are often external constructs which do not automatically guarantee the presence of legal choices. Similarly, merely establishing a right of ownership does not necessarily confer on the holder an ability to benefit from that right. This fact has been at the heart of many of the problems encountered in community forestry, and many of the challenges the movement now faces (see Box 2).

The backdrop for any study of pro-poor rights in the forest sector is, therefore, one of ill-defined boundaries and relationships, ambiguities and contradictions in the regulatory regime, and massive differences in the power of stakeholders to influence

the application of the law. All these factors have implications for the pursuit of pro-poor rights.

Box 2: The power of state/private sector alliances in Central American forestry

In Nicaragua, constitutional and legislative provisions exist for the demarcation and titling of indigenous territories. Yet the state continued to grant industrial logging concessions on community lands without fulfilling these requirements. The Inter-American Court subsequently found Nicaragua in violation of the American Convention on Human Rights, including the right to property, for not ensuring that an effective mechanism for demarcation and titling was in place.

Despite being in possession of usufruct rights, small-scale forest producers in Honduras are frequently unable to meet transaction costs of securing permits and other approvals, owing to regulatory complexity and bureaucratic corruption. This forces reliance on well resourced timber traders to secure permits and other approvals. This in turn fuels collusion between traders and public officials, and elite capture of community forest management rights as a means to 'legalise' illegal timber production.

A conclusion that can be drawn from these two examples is that establishing rights may have little practical value unless supported by the state. As the Honduras case shows, where the state is not enabling, the poor may have little option but to collude with those who control the resource.

Source: Wells et al. (2004).

6. The movement for forest law enforcement and governance (FLEG)

Over the last four years, and at an accelerating pace, the thrust of development assistance to forestry has been focused on illegal logging and its suppression. A series of international initiatives have been launched (the G8 Action Programme on Forests [1999]; the US President's Initiative against Illegal Logging [2003]; the EU Action Plan for FLEGT [2003]; the regional FLEG processes [Asia, 2001; Africa, 2003; Latin America [pending]); and a number of bilateral agreements allied to FLEG (by e.g. UK, Norway, Finland and Indonesia [respectively, 2001; 2002; 2002). Timber-producing countries now find themselves under increasing pressure, from their development partners, international NGOs and consumer countries, to prove the legality of their timber exports. This represents something of a departure from the established principle (in which the onus of responsibility usually rests with the proof of illegality, not the confirmation of legality).

A range of donor-funded projects and programmes has already been funded in support of FLEG. Public attention in the West has been particularly drawn to the various attempts to use private sector and NGO providers (both national and international) to apply checks and balances on public institutions, as a form of global 'hybrid accountability' (see Goetz and Jenkins, 2001; Brown et al., 2004).

There is no doubt that illegality is a major problem in the tropical forest sector, often amounting to flagrant criminal activity (Box 3). In this regard, it provides further evidence of the low levels of governance and popular rights enjoyed in many forest-rich states. Its effects are felt at a number of levels, including loss of national revenues, distortion of international markets, and long-term damage to the condition of a resource on which the poor depend disproportionately. However, it does not necessarily follow that attempts to address the problem will automatically improve the welfare of the poor, nor strengthen their rights, and specific conditions may need to be met for these outcomes to be achieved. The next section considers some of the emerging issues, both positive and negative, as judged by the single standard of the promotion of the rights of the poor.

Some positives

The FLEG movement is intended to serve multiple purposes and benefit numerous actors, not only the forest-dependent poor. From a donor perspective, it may provide a powerful tool for leveraging broad governance reforms and introducing discipline into a sector well known for its anarchic tendencies. These reforms could generate wider benefits for the citizenry at large: for example, as regards overall public accountability and transparency, and enhanced revenue capture. Similarly, for the timber industry (or at least, its better operators), it could lead to an improved environment for future investment, both from improvements to the long-term condition of production forests and by creating a more realistic pricing regime that can sustain the investments needed for sound management.

Yet it is precisely because its focus is not necessarily, or only, on the rights of the poor that the movement needs to be carefully monitored; at first sight, it would appear to conform to a long line of forest sector initiatives where developmental and pro-poor agendas are grafted rather unsatisfactorily onto other and pre-existing concerns and interests.

In a comprehensive series of recent publications (themselves an output of FLEG-related work, and supported by DFID and PROFOR – the Program on Forests), a CIFOR-led team of researchers has drawn attention to the dangers that preoccupation with legality can entail in such complex legal environments, and the risks which are posed for the livelihoods of the poor (see Box 4).

Box 3: The extent and nature of illegality and 'forest crime'

The scale of illegality

- Percentage of the national/regional trade that is illegal: Cambodia [94%]; Amazon [90%]; Bolivia [90%]; Myanmar [80%]; Indonesia [>51%]; Cameroon [50%].
- Cameroon: Loss of government revenue estimated to be c. £56 million per year, and damages owing because of illegality, c$465million/year.
- Canada: Estimated that between C$300 million and C$1bn is lost to theft and fraud each year (1990 to 1995).
- Effects on timber markets:
- Estimated that 23–30% of international hardwood lumber and ply is traded illegally, depressing world prices by 7–16%.
- Losses to the US economy by the depressive effects of illegal competition estimated to be c. US$460 million/year.

Sources: Forest Trends (2003); Auzel et al. (2001); Flynn (2004).

The nature of illegality
Illegality as 'forest crime' typically means:

- Harvesting without, or fraudulent use of, title.
- Logging out of boundaries/encroachment on protected areas.
- Logging of unauthorised or undersized species.
- Excess harvest.
- False declarations of harvest.
- Non-compliance with licence, non respect of contract conditions.
- Pollution of the environment through industrial activities.

However, there are also some important barriers to legality which inhibit law-abiding citizens from operating 'legally' (see Box 4).

Box 4: Barriers to legality

These barriers include:

- *Complex and inconsistent laws*
  Environmental issues are typically subject to numerous competing jurisdictions, which profoundly affect the potential for effective forest management. Federal, state and municipal governments may have conflicting roles (as in Brazil and Indonesia). Legislation tends to proliferate bewilderingly. Over 900 legal instruments pertain to forest management in Indonesia (CIFOR, 2003). In Brazil, 141 new legal instruments were established in the period 1965 to 1998.
- *Regulations that victimise the poor*
  Regulations are often so impractical or out of tune with reality that they undermine the rule of law; e.g. expensive permits which need to be applied for in capital cities to allow the killing of one low-value game animal or the cutting of a single tree. Tree-cutting regulations are often biased towards the needs of industry (as in Cameroon, where industrial concessionaires are allowed three years of felling to cover the cost of preparing management plans, but communities have to pre-finance plans themselves).
- *Failure of the law to recognise legitimate claims*
  National laws are often ambivalent on the issue of indigenous rights. In Indonesia, the 1999 Forestry Act defines State Forest Lands as those 'unencumbered by rights'. Yet, it is not clear how these can be distinguished from forests with 'rights attached'. In particular, the law classifies customary forests (hutan rakyat) as falling within State Forest Lands. Customary rights are, therefore, seen merely as a form of usufruct on state land, rather than a form of collective ownership (CIFOR, 2003)
- *Unclear distribution of powers between levels of government*
  In Uganda, central government controls conservation areas and logging concessions, and trees on public and private lands, but local governments are responsible for monitoring and stewardship. Rules on sanctions, arbitration and enforcement are unclear (Bazaara, 2003). In Indonesia, Implementing Regulation (PP) 25 of Law 22/99 (now 32/04) on 'Decentralisation' devolves administrative authority for forest management to the regions, including licensing powers. As the same time, the Ministry of Forests has deemed community logging permits issued by the regions as illegal, under Implementing Regulation (PP) 34 of Law 41/99 on Forests. Arguably, PP34 (as a sector regulation) cannot diminish administrative authority devolved under PP25. The courts are still to rule on this, leaving communities in considerable legal uncertainty.
- *Such contradictions lead in turn to lack of coherence in national planning.*
- *Selective use of legal instruments to restrict access to the resource*
  Forest zonation frequently overrides existing claims, in the interests of industrial exploitation. Cameroon's plan de zonage takes customary claims into account only in relation to present usage (thus fallows are disregarded, though they are an essential part of the farming cycle), and seeks to restrict agriculture to narrow slivers of 'non-permanent forest estate', regardless of historical claims or future needs.

See also CIFOR (2003).

Problem areas?

It is apparent from the above discussion that focusing only on formal legal channels by upholding a legal framework which already fails to accommodate local rights could merely compound injustices. State agencies often enforce forest-related regulations more vigorously, and with less respect for the rules, when poor people are involved, leading to a tendency for law reform initiatives to develop into exercises in victim-blaming. Criminalising the vast majority of the resident population is unlikely to serve as a very positive incentive for governance reform.

A particular area of concern is with the ways in which external actors are drawn to some causes but not others in their desire to champion the rights of the forest-dependent poor. For example, Western publics often have no difficulty in identifying with local constituencies when these appear to live in idealised harmony with their environment. Forest-dwellers who live by hunting and gathering, in a primarily subsistence mode, tend to be perceived very positively. However, those elements of the poor who do not appear to support sustainable forest management – for example, peasant farmers who engage in 'slash and burn' agriculture (often by far the numerical majority) – tend to figure much less favourably, and are at best left at the margins of the development narrative, if not openly stigmatised. There is thus a danger that external attempts to champion the poor will end up – perhaps unintentionally – generating a hierarchy of rights claimants, in which the concept of 'rights' is promoted not because of its inherent merits, as a component of universal human rights, but only where it is seen to be supportive of the needs of sustainable forest management. It would be perverse if the notion of the 'deserving poor', as a positive factor in environmental policy, led to the emergence of a counter-category of the 'undeserving poor', with contrary effects.

7. Looking to the future

Tackling forest law enforcement has the potential to leverage greater accountability. But by upholding national laws, it also threatens to compound existing power imbalances. If the focus on legality is to improve the ability of poor people to claim their rights, there is a need to support the development of accountability mechanisms which provide democratic spaces for them to shape and uphold their claims. Box 5 suggests some of the areas in which forest policy can be developed in ways that enhance popular rights.

Box 5: Some areas of interest for policy development

- *Land demarcation and titling*
  Support to land demarcation and titling processes to reduce legal uncertainty, with an emphasis on community titling to minimise the risk of elite capture and an ultimate loss of tenurial rights by the poor.
- *Regulatory frameworks*
  Simplify administrative procedures, to reduce transaction costs of securing and benefiting from rights as well as the risk of capture by elites.
- *Open up and protect legal channels*
  Ensure that the poor have access to legal outlets for their legitimate economic activities, so as to minimise the risk that increased enforcement will merely generate new opportunities for official rent-seeking and corruption.
- *Protect space for the poor*
  Protect access by rural communities to the forest areas on which they depend for their livelihoods, minimising and regulating the involvement of the capital-intensive industry.
- *Monitor the environmental monitors*
  Widen the platforms for public involvement, to ensure that important national debates are not hijacked by well funded and internationally vocal external constituencies.
- *Lengthening time frames for development assistance*
  As community forestry experience shows, establishing the law is only the start – implementing it is a much bigger challenge. By its nature, forest sector activity demands a long time-frame.
- *Institutional mechanism to achieve reforms*

Many of these policy areas presuppose that there are effective institutional mechanisms to secure legal reform. Support is needed in the overseeing of decision-making in the forestry sector by other publicly mandated agencies, and to the capacity of citizens to access these agencies.

8. Conclusion

A conclusion that can be drawn from this discussion is that, while the record of development assistance in relation to rights promotion may have been mixed to date, it is nevertheless likely to have a vital role to play in promoting rights agendas. Indeed, there are few if any alternative champions of the poor in many forest societies, with the power to resist pressures of the politico-industrial complex. Though development assistance to the forest sector is strongly conditioned by sovereign control of the resource, there is much to be said for strengthening its ability to focus on rights. The holistic framework that a rights perspective demands helps to reconcile the local, national and international dimensions that are crucial to developing equitable forest policy, thereby ensuring an upward and 'non-victim-blaming' orientation for the formulation of environmental advocacy.

To this end, development assistance in the forest sector needs to focus not only on the enforcement strategies that promote sustainable production, but also on the ability of citizens to secure broader legal reform at national and local levels. In this way, a link can be made between social and economic rights (secure tenure and resource access) and fundamental human rights (democratic participation and accountability).

Endnotes

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