Just Energy Transition—Engaging Indigenous Peoples and Local Communities (Democratic Republic of the Congo and Mozambique)

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Abstract

It is estimated that indigenous communities protect 80% of the world's biodiversity and that 70% of critical raw materials are located within indigenous and local communities' land. Hence, should the private sector and/or international or domestic public institutions/entities fail to properly engage indigenous and local communities and accommodate their concerns, the international climate, sustainability and energy transition agendas will hardly have a chance to succeed. Even though often having different approaches to the concepts of "indigenous peoples" and "indigenous rights" and protection thereof, most African countries adopted legislation aimed at implementing international rules on the protection and engagement of indigenous peoples and/or local communities. Understanding and complying with domestic legal and customary rules is critical in preventing conflicts with local communities and minimise reputational and litigation risks. This article offers some insights on the similarities and the differences between the legislation aimed at protecting local communities and indigenous peoples in two countries with rather different social, cultural and legal backgrounds—the DRC and Mozambique.

"Just transition" and "indigenous peoples"

While the concept of "just transition" is not new, it gained momentum during the last decade, with the acknowledgment of the anticipated and unprecedented changes required to achieve the goals set out in the Paris Agreement. There is no strict definition of this concept, and perception in connection thereto certainly varies depending on the countries, regions, communities and/or business sectors considered. However, a common ground seems clear: "just transition" means that the shift from a fossil fuels past to a net-zero future must be made in a fair and inclusive manner. Hence, it is generally understood that, so as to implement effective climate action measures and ensure a "just transition" towards a new energy paradigm, engaging with indigenous peoples and local communities, and effectively involving them in the decision-making process, is critical.

When discussing this topic, one of the first questions often asked is: *who are "indigenous peoples"*? One of the conclusions of the study on discrimination against indigenous populations—carried out by the United Nations (UN) Special Rapporteur Mr José R. Martinez Cobo,[1] between 1973 and 1983, at the request of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities—was that providing a definition of "indigenous peoples" was neither simple nor needed. In line with this view, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), approved by the UN General Assembly by means of Resolution No.61/295, of 13 September 2007,[2] does not provide a definition of such concept. However, certain criteria are commonly accepted by the UN-system to identify indigenous groups notably: (i) self-identification as indigenous peoples at the individual level and accepted by the community as their member; (ii) historical continuity with pre-colonial and/or pre-settler societies, (iii) strong links to territories and surrounding natural resources; (iv) distinct social, economic or political systems; (v) distinct language, culture and beliefs; (vi) form non-dominant groups of society; and (vii) resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities. On the other hand, some international bodies, including the Intergovernmental Platform for Biodiversity and Ecosystem Services (IPBES),1 commonly opt to resort to a broader concept of "Indigenous Peoples and Local Communities" (IPLCs), which refers to "individuals and/or groups who self-identify as indigenous or as members of local communities who maintain an inter-generational historical connection to place and nature through livelihoods,

[1] "Study of the Problem of Discrimination Against Indigenous Populations: Final report submitted by the Special Rapporteur, Mr José Martinez Cobo", *United Nations* (8 September 2014) at *https://www.un.org/development/desa/indigenouspeoples/publications/2014/09/martinez-cobo-study/*.
[2] Resolution adopted by the General Assembly on 13 September 2007, Resolution No.61/295 (United Nations).

cultural identity, languages, worldviews, institutions, and ecological knowledge". For the purposes herein, and for ease of reference, we shall primarily resort to this broader concept of IPLCs.

Irrespective of definitions (or lack thereof), it is estimated that indigenous communities protect 80% of the world's biodiversity,[3] and the Intergovernmental Panel on Climate Change (IPCC) affirms that "indigenous, local and traditional knowledge systems and practices, including indigenous peoples' holistic view of community and environment, are a major resource for adapting to climate change".[4] Hence, recognising and empowering indigenous stewardship for biodiversity conservation and environmental protection purposes may be critical for countries to meet their international commitments on climate action. Other than that, 70% of critical raw materials required for batteries and other renewable energy technologies deemed key for energy transition purposes are located within indigenous and local communities' land, notably in Africa. Thus, engaging indigenous and local communities in the land access decision-making processes, securing their Free, Prior and Informed Consent (FPIC) and ensuring fair indemnification in cases of loss of land, expropriation and/or resettlement is of paramount importance.

That said, despite having similar challenges in what concerns climate action and energy transition, African countries often have different approaches to "indigenous rights" and protection thereof. For the purposes herein, we shall focus our analysis on the key legal frameworks governing protection of IPLCs' rights in the Democratic Republic of the Congo (DRC) and Mozambique.

Democratic Republic of the Congo

Indigenous peoples—Concept and specific legislation

The Democratic Republic of the Congo has long recognised the importance of custom in the domestic legal and administrative system. The DRC Constitution art.207 formally recognises the role of "traditional authority" (*autorité coutumière*), which is based on local custom, subject to compliance with Constitutional provisions. Traditional authorities are notably charged with the duty to promote national unity and cohesion. In 2015, a specific law was enacted approving the role and status of traditional chiefs,[5] which was adopted with a view to stress the subordination of traditional authorities to the Constitutional framework and laying down their rights and obligations in the broader administrative landscape.

That said, in addressing issues relating to the rights of IPLCs, DRC laws generally refer to the broader notion of "vulnerable groups" or "local communities". Notwithstanding, the concept of "indigenous peoples" is broadly accepted in the DRC, and typically refers to the *Mbuti*, *Baka* and *Batwa* pygmy peoples. Pygmy peoples are acknowledged as the first inhabitants of the national rainforests and are estimated to correspond to 1% to 3% of the population in the DRC. On 15 July 2022, the DRC Parliament passed a Law on Pygmy Peoples[6] which aims at protecting and promoting the rights, traditions and heritage of pygmy peoples, and represents a significant legislative response to the demands of pygmy peoples for environmental, socio-economic and cultural justice. Apart from specific civil and politic rights, education and health rights, the Law on Pygmy Peoples provides for specific rights which must be taken into account when preparing and/or implementing projects in areas where pygmy communities are located, notably: (i) *Economic Rights*—pygmy communities have the right to intervene in the drafting and implementation of any project which, directly or indirectly, affects the life of indigenous pygmy peoples, notably by including representative structures of the community or representatives chosen by the community, including women, men and youth, using a language that is understood by the community and respecting the FPIC principle; (ii) *Religious, Cultural and Social Rights*—pygmy peoples have the right to observe their cultural traditions, notably, and without limitation, the right to maintain, protect and develop their archeologic and historic sites; (iii) *Environmental Rights*—the State and public entities must ensure the protection and promotion of pygmy peoples' traditional environmental management, including by ensuring FPIC and participation of pygmy peoples' communities in the governance and management of ecosystems; and (iv) *Land & Resettlement Rights*—pygmy peoples have rights to the lands and natural resources which they own, occupy or use, and further have the right to fully benefit from all natural resources, as well as from environmental services deriving therefrom.

It is also worth noting that, under the Environmental Law[7]—which lays down the fundamental principles for environmental protection in the DRC—a new principle was introduced, specifying that "the fight against climate change must be made by guaranteeing the welfare of the Congolese population and pursuing the sustainable development of the DRC". Furthermore, the Law on the Conservation of Nature[8] also expressly acknowledges the role of traditional knowledge and states that the traditional authority is responsible for identifying "legitimate holders" of the former. This statute further emphasises that the State encourages access to traditional knowledge associated with genetic resources held by local communities, with a view to improving use and practical capabilities in respect thereof.

[3] Australia State of the Environment 2021 at *https://soe.dcceew.gov.au/climate/graphs-maps-and-tables*.
[4] "Risk Management and Decision-Making in Relation to sustainable Development", *IPCC* (2022) at *https://www.ipcc.ch/srccl/chapter/chapter-7/*.
[5] Law No.15-015 of 25 August 2015.
[6] Law No.22/030 of 15 July 2022.
[7] Law No.11-009 of 9 July 2011.
[8] Law No.14-003 of 11 February 2014.

Natural resources

In mineral-rich DRC, the mining sector plays a pivotal role in economic development. In recent years, laws and regulations governing mining activities in the DRC have become increasingly stringent with regards to obligations and requirements applicable to holders of mining titles vis-à-vis local communities, defined under the Mining Code[9] as "peoples traditionally organized based on custom, united by clan or parental solidarity, and characterized by, notably, their connection with the land where mining projects are to be developed".

Under the Mining Code, holders of mining titles have a number of obligations vis-à-vis local communities affected by the implementation of the mining project. Entities applying for issuance of a mining exploitation permit are notably required to submit a report on consultations with IPLCs and their representatives. Such consultations are also required as part of an Environmental and Social Impact assessment, which must allow for active participation of IPLCs affected by the project. Furthermore, in addition to payment of a financial contribution to be allocated towards community development projects, the mining title holder is responsible for contributing to the establishment of projects aiming at ensuring social, economic and industrial development of neighbouring local communities, based on specifications drawn up with a view to improving life conditions for such IPLCs.

Under the Land Law,[10] land is deemed exclusive, inalienable and imprescriptible property of the Congolese State. While individuals may own buildings erected on State land, as regards the land itself, only certain rights of use and benefit may be granted to natural persons. The Land Law came into force in 1973 and repealed a number of pre-independence statutes, including statutes relating to indigenous peoples and their land. This statute was clear to establish in art.387 that all "land occupied by local communities shall become, State domain land as of the date of coming into force". While the law defines "land occupied by local communities" as land that may be inhabited by the latter, or land cultivated or operated by any other means (individually or collectively) according to local custom and use, it does not elaborate on the specific rights granted to IPLCs in respect thereto.

The law on expropriation for public interest reasons[11] specifically states that local communities' rights of use and benefit of State domain land can be subject to expropriation on public interest grounds. Article 34 of the Constitution provides for the State's obligation to guarantee individual or collective property rights, in accordance with the laws or applicable custom. Expropriations on public interest grounds may not be carried out without fair and prior compensation. Finally, other than setting up an additional formality for communicating the expropriation decision to local communities verbally, the expropriation law fails to set out additional indemnities or rights granted to IPLCs in case of expropriation for public interest reasons.

This principle appears to have been enshrined in more recent statutes, such as the Law on Pygmy Peoples, referenced above, whereby displacement or resettlement of pygmy peoples is not allowed without FPIC, and always subject to fair and equitable compensation. Compensation is made in the form of equivalent land and resources in terms of quality, surface and legal framework, or a monetary payment or any other means of reparation deemed adequate.

The Mining Regulations,[12] contain a detailed annexure (Annexure XVIII) on the Directive relating to delocalisation, indemnification, compensation, displacement and resettlement of communities affected by mining projects (Directive) which applies to all cases of physical and/or economic displacement in connection with or caused by the implementation of mining projects. Under such statute, IPLCs affected by the mining project are entitled to, notably: (i) be informed and actively participate in all stages of the process; (ii) be granted indemnification and fair and equitable compensation and/or other forms of resettlement-related allowances; (iii) be given reasonable prior notice before displacement; and (iv) be resettled at the expense of the holder of the mining title.

FPIC principle

References to the FPIC principle can be found in multiple statutes in DRC. From the outset, the Law on Pygmy Peoples defines the FPIC principle as a collective right by which indigenous pygmy peoples may grant or withhold consent in connection with any project potentially impacting the land and resources which they traditionally hold, occupy or use. This statute goes as far as to break down and define the underlying concepts of the FPIC, as follows: (i) *Free Consent*—approval or rejection without coercion, intimidation or manipulation; (ii) *Informed Consent*—meaning approval or rejection based on objective and complete information conveyed in a language that can be understood and respecting the traditions of indigenous pygmy peoples, relating to the decision or the project that would impact such peoples; and (iii) *Prior Consent*—meaning approval or rejection occurring before the adoption of any decision in respect of the project likely to affect indigenous pygmy peoples.

Furthermore, pursuant to the Ministerial Order on the homologation procedure for REDD+ investments in the DRC,[13] as part of the verification process for REDD+ homologation, authorities will notably verify whether the application file contains an implementation plan for compliance with the FPIC principle. Additionally,

[9] Law No.007-2002 of 15 July 2002, as amended by Law No.18-001 of 9 March 2018.
[10] Law No.73-021 of 10 July 1973.
[11] Law No.77-001 of 22 February 1977.
[12] Decree No.18-024 of 8 June 2018.
[13] Ministerial Order No.047/CAB/MIN/EDD/AAN/MML/05/2018 of 9 May 2018.

investors and developers of REDD+ projects are also required to respect the rights of local communities and vulnerable social groups and abide by the applicable regulations in what concerning the FPIC principle.

Benefit sharing and community development

In recent years, the DRC has made considerable legislative efforts aimed at strengthening and promoting benefit sharing and community development schemes in a number of activity sectors, most notably, in connection with larger scale projects. This is notably the case of the instruments making up the legal framework governing REDD+ projects, forestry exploitation and carbon regulation. On the carbon regulation front, recent amendments to the DRC Environmental Law, determine that benefits deriving from sale of carbon credit is distributed among several entities, including local communities/indigenous peoples. On this topic, one must stress that, in June 2023, the Authority for Regulation of the Carbon Market (ARMCA) was set up. One of the main purposes this Authority is to promote participation of local communities in the production, purchase, sale and resale of carbon credits and ensure that income derived from credit sale and carbon tax contributes to sustainable social and economic development of communities neighbouring forestry concessions.

Just transition

No specific rules or policies expressly aimed at governing just transition have been enacted thus far in the DRC. Scattered references to "energy transition" or "just transition" may be found in some legal instruments though.

Mozambique

Indigenous peoples—Concept and specific legislation

In Mozambique, the majority of the population is of Bantu origin and comprises different ethnic groups including Swahilis, Macuas-Lomues, Ajauas, Chona, Angoni, Tsonga, Chope and Bitonga. That said, it is commonly accepted that "indigenous peoples", as per international law, do not exist in Mozambique.[14] Hence, domestic laws do not resort to the concept of "indigenous peoples", rather referring to broader concepts such as "most vulnerable groups" and/or "ethnolinguistic minorities". Notwithstanding, several statutes do provide for specific rules aimed at protecting IPLCs.

Natural resources

Pursuant to the Constitution,[15] the Mining Law[16] and the Petroleum Law,[17] all natural resources located in the soil and subsoil, inland waters, territorial sea, continental shelf and economic exclusive zone are deemed ownership of the State which, alongside with the municipalities and environmental associations, shall ensure a rational use of the same.

As a rule, under the law, both the Mining Contract and the Petroleum Exploration and Production Agreement (EPCC) set forth specific local content provisions aimed at protecting local communities, corporate social responsibility programs and the manner how local communities shall participate and benefit from the relevant project(s). Specifically in what concerns the extractive industry, reference must also be made to the corporate social responsibility policy[18] (CSR Policy) and the CSR Guidelines,[19] both aimed at regulating CSR activities in the mineral resources' industry. Pursuant to said statutes, petroleum and/or mining title holders are required to proceed with certain social investments, as set forth in both the Mining Contract and the EPCC and/or specific Local Development Agreements (applicable during the development and/ exploitation phase) and/or Memorandums of Understanding (applicable during the prospecting and exploration phase and/or during the development and exploitation phase where the project has no sufficient scale to be subject to the execution of a Local Development Agreement). Amongst others, these instruments shall detail the social investments to be carried out and the benefit-sharing schemes applicable.

Land ownership, resettlement and expropriation

Moreover, under the law, all the land belongs to the Mozambican State and cannot be sold, traded, mortgaged, pledged or by any other means disposed of. This notwithstanding, the Land Law[20] and the Land Regulations[21] provide for the award of Land Use and Exploitation Rights (*Direito de Uso e Aproveitamento da Terra*—DUAT) and recognise the lawfulness of the occupation of land by local communities without a material title—whether based on customary rights or occupation in good faith. Foreign investors (whether natural persons or corporate entities) can only be granted a DUAT under an authorisation and subject to obtaining

[14] "Review of the National Laws and Policies that Support or Undermine Indigenous Peoples and Local Communities", *Natural Justice* (December 2014) at *https://naturaljustice.org/wp-content/uploads/2015/09/Mozambique-Legal-Review.pdf*.
[15] Approved on 16 November 2004.
[16] Law No.20/2014 of 18 August 2014.
[17] Law No.21/2014 of 18 August 2014.
[18] Resolution No.21/2014 of 16 May 2014.
[19] Ministerial Diploma No.8/2017 of 16 January 2017.
[20] Law No.19/97 of 1 October 1997.
[21] Decree No.66/98 of 8 December 1998.

an Investment Authorisation approved by the relevant authorities (typically the Investment Promotion Agency—APIEX).

Where the implementation of projects causes displacement or relocation of local communities, the resettlement-related obligations set forth in the resettlement legal framework—i.e. the Resettlement Regulations[22] and the Resettlement Directive[23]—shall apply. Under said statutes, in addition to finding "alternative land" and/or housing, affected households are also typically entitled to (i) have their level of income and standard of living, reinstated or improved; (ii) transportation of their assets to the new place of residence; (iii) live in a physical space with social infra-structures; (iv) have space to practice other activities of livelihood; and (v) provide their opinion throughout the entire resettlement process.

Mozambican laws—including the Constitution, the Mining Law, the Petroleum Law and the Expropriation Law[24]—provide for the payment of "fair compensation" to the land owner in all cases of expropriation which, as a rule, shall encompass resettlement costs, compensation for losses, community development programs and preservation of cultural heritage. Furthermore, the Expropriation Law sets forth a fairly detailed formula and criteria for purposes of computing the compensation amount, to be based, amongst other factors, on the location of the relevant asset to be expropriated, proximity to infrastructure, public transportation and equipment and the quality and date of the construction (if applicable). Amongst others, compensation for expropriation purposes shall cover (i) loss of tangible and intangible assets; (ii) rupture of social cohesion; and (iii) loss of production goods and further stresses that compensation shall cover the real and actual value of the lost assets as well as the owner's damages and loss of profit.

One must, however, stress that, from a strict legal standpoint, the rules on expropriation do not directly apply to the loss of land use rights, while no private ownership over the land exist. Hence, expropriation would only apply where the termination of ownership rights occurs by virtue of the implementation of the project—in our view, this would be the case of the loss of urban properties (houses and similar premises qualified as urban tenements), crops and/or any other assets owned by the affected households.

FPIC principle

Specific rules aimed at materialising the general FPIC principle may be found in different Mozambican statutes. From the outset, pursuant to the Land Law and the Land Regulations, a critical step of the authorisation process for the granting of DUATs is the community consultation, which aims to assess the local community's opinion on the project, including the expectations and compensation measures required as to implement the project in the target area. The procedure applicable for such purpose is detailed in the so-called Community Consultation Regulations.[25] As a rule, for obtaining the local community's opinion in the process of awarding the DUAT, a Joint Deliberation Group shall be formed[26] which shall hold at least two mandatory meetings. Furthermore, when resettlement operations are needed, for preparing and implementing the Resettlement Plan, public consultation is also mandatory. The REDD+ Regulations[27] also sets forth that the REDD+ Project Document[28] shall encompass information on the community consultation process carried out, including a summary in connection thereto. The Forestry Law[29] also provides for the participation of local communities, local committees, and the civil society for purposes of the management of forestry resources. Furthermore, the Mozambican Environmental Law[30] provides for a general principle of public participation for purposes of environmental management, which is further regulated under the Environmental Impact Assessment (EIA) Regulations[31] and the EIA Directive.[32] Under said statutes, carrying out at least two public consultation meetings is mandatory for EIA purposes.

The FPIC principle is also stressed under the Mining Law, the Petroleum Law—for both the granting of mining and/or petroleum rights and resettlement operations in connection thereto—and the CSR Policy and the CSR Guidelines under the scope of the decision-process in connection with the relevant social investments to be carried out, notably in what concerns investment amounts and allocation of the same.

Benefit sharing and community development

As per our above comments, the CSR Policy and CSR Guidelines provide for the execution of Memorandums of Understanding and/or Local Development Agreements (as applicable) whereby the social investments to be

[22] Decree No.31/2012 of 8 August 2012.
[23] Ministerial Diploma No.156/2014 of 19 September 2014.
[24] Ministerial Order No.181/2010 of 3 November 2010.
[25] Ministerial Diploma No.158/2011 of 15 June 2011.
[26] Under the law, the Joint Deliberation Group shall comprise different entities notably: (i) the District Director and/or the Administrative Post and District Consulting Councils; (ii) a representative of the Land Cadaster Services; (iii) the members of the Village and Area Consulting Council; (iv) members of the local community; (v) the holders or users of neighbouring land; and (vi) the DUAT's applicant (or its representative).
[27] Decree No.23/2018 of 3 May 2018.
[28] A comprehensive and explanatory document to be submitted by the REDD+ project applicant, for analysis and approval purposes, which mainly triggers the REDD+ project homologation procedure.
[29] Law No.17/2023 of 29 December 2023.
[30] Law No.20/97 of 7 October 1997.
[31] Decree No.54/2015 of 31 December 2015.
[32] Ministerial Diploma No.129/2006 of 19 July 2006.

carried out and benefit-sharing schemes to be implemented under the scope of a given project are detailed. Specific rules in connection thereto may also be found in the Mining Contract and/or the EPCC. Additional provisions governing benefit-sharing schemes are also governed under the so-called Mega Projects, Public-Private Partnerships and Business Concessions Law[33] (PPPs Law) and Regulations[34] thereto (PPPs Regulations). Pursuant to said statutes, the relevant contracts (including Mining Contracts and/or EPCCs) shall include specific provisions on financial benefits—e.g. local participation, taxes and fees and allocation thereof to local communities—and socio-economic benefits—e.g. infrastructure projects, labour and training programs, incentives to local businesses and CSR projects.

Just Transition Guidelines

In addition to the foregoing, Mozambique recently approved the National Just Energy Transition Strategy (NJETS), which key purpose is to accelerate the implementation of a low-carbon economic development trajectory. Amongst others, the NJETS provides for specific guidelines which shall be implemented by the State and/or developers and are expressly aimed at protecting local communities and/or vulnerable groups, notably: (i) *Job Creation and Economic Inclusion*—energy transition shall ensure equitable jobs and business opportunities, and respect gender equality and inclusion of the most vulnerable segments of the population; (ii) *Training and Capacity Building*—specific programs will be developed to ensure that workers benefit from the opportunities resulting from the energy transition; (iii) *Access to Goods and Services*—equitable access to energy products/services shall be ensured; (iv) *Social Protection*—risks and costs for local and most vulnerable communities must be minimised (e.g. displacement of communities, job losses); (v) *Community Engagement*—ensuring participation of local communities in the decision-making/consultation processes shall be key, and their views shall be taken into account in the planning and implementation of energy solutions, to ensure that local needs and preferences guide government and private sector support; and (vi) *Gender Equality*—including the inclusion of women in energy governance; the empowerment of women through electrification; the acceleration of clean cooking programs; the funding of programs targeted at women; and the provision of support to women employment in the energy sector.

Hence, new statutes and or amendments to existing legislation aimed at regulating the guidelines set forth in the NJETS may be enacted in the near future. These new rules are not only expected to strengthen the role of local communities in the energy transition process, but also to ensure that benefit sharing and/or community development programs are effectively implemented as to mitigate potential negative impacts and promote a fair and inclusive transition.

Going forward: Ensuring good governance is key

Securing the approval of IPLCs and stakeholders—the so-called *Social License to Operate* (SLO)—is key for companies to implement their projects. Lack of popular support may impair the envisaged activities and/or prevent governmental authorities from approving the relevant project(s) and/or granting the regulatory licences/permits required. Engaging IPLCS is therefore critical to ensure social acceptance of the envisaged project.

Furthermore, with the increasing relevance of ESG commitments and reporting obligations, developers and financiers must ensure that indigenous rights are respected and that local communities indeed benefit from the projects implemented on their land.

Hence, respecting indigenous rights and engaging local communities is not a choice but an imperative. Should the private sector and/or international or domestic public institutions/entities fail to properly engage indigenous and local communities and accommodate their concerns, the climate, sustainability and energy transition agendas will hardly have a chance.

Irrespective of the legal frameworks in place, African countries do face a common challenge: ensuring that companies and/or other stakeholders engaged in different activities towards the energy transition do implement and actually comply with good governance principles. While this is hardly an easy task, implementing some key measures is warranted, notably: (i) enact mandatory corporate governance and sustainability reporting rules; (ii) create a strong institutional framework with financial and human resources capable of monitoring compliance with the rules in force; and (iii) implement effective anti-corruption measures.

[33] Law No.15/2011 of 10 August 2011.
[34] Decree No.16/2012 of 4 July 2012.