The GLOBE Forest Legislation Study

The importance of a legal framework for REDD+ in the Democratic Republic of Congo: proposals for legislative reform

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Democratic Republic of Congo

1. Executive Summary

In January 2009, the DRC embarked on a process aimed at preparing for the future international arrangements stemming from the Reducing Emissions from Deforestation and Forest Degradation (REDD+) programme. The process is led by the Ministry for the Environment, Nature Conservation and Tourism (MECNT), on behalf of the Congolese government, in partnership with the United Nations (UN-REDD) and the World Bank (FCPF), the leading donors. Its Readiness Preparation Plan (R-PP) was approved by the UN-REDD Policy Board and the FCPF Participants Committee at the end of March 2010. Since then, considerable progress has been made in the REDD+ process. Thanks to its progress in its preparation for REDD+, the DRC received a grant totalling $60 million from the FCPF in June 2011, allowing it to start the transition from the preparation phase to the investment phase. The preparation phase had the noteworthy merit of highlighting the reforms that the DRC will need to undertake if it is to meet the requirements of REDD+, as expressed at the international level.

This report was prepared with this specifically in mind. Pursuant to its terms of reference, as proposed by GLOBE International after consultation with the REDD+ National Coordination (REDD-NC), it aims to show how the country’s legal framework deals with or could deal with a number of relevant issues with implications for REDD+. These issues, already set out in the terms of reference of this report, are contained in the following eight themes: (i) land and forest tenure and the national carbon scheme; (ii) planning; (iii) institutional arrangements for REDD+; (iv) public participation; (v) revenue sharing; (vi) social and environmental safeguards; (vii) the MRV system; and (viii) the level of implementation and enforcement.

The eight themes are addressed through an analysis of the full spectrum of laws in DRC relevant to REDD+. The most important of these laws are listed in Table 1.
Table 1. Principal laws relevant to REDD+ in DRC

<table>
<thead>
<tr>
<th>Existing laws</th>
<th>Constitutional provision</th>
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<tbody>
<tr>
<td>Law No. 011/2002 of 29 August, known as the DRC Forest Code</td>
<td><strong>Constitution</strong></td>
</tr>
<tr>
<td>Law No. 73-021 of 20 July 1973 on the general status of property, land and property regime and the system of guarantee, as amended and supplemented on 18 July 1980</td>
<td><strong>Law No. 73-021 of 20 July 1973</strong></td>
</tr>
<tr>
<td>Law No. 022 of 24 December 2011 on fundamental principles relating to agriculture</td>
<td><strong>Law No. 022 of 24 December 2011</strong></td>
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The consultation process carried out in the preparation of this report and analysis of interviews and documentary sources yielded the following main findings and recommendations.

**1.1. Current Situation**

*Land, forest and carbon tenure*

The DRC’s legal framework (Law No. 73-021 of 20 July 1973, hereinafter ‘Land Act’) institutes a *dual tenure system* recognizing the rights of both the State and local communities to land and natural resources. The rights of the State are defined as sovereignty and ownership rights, while those of local communities are defined as customary rights of occupancy and/or ownership. As such, the State’s rights are combined with the customary property and/or forestry rights, both collective and individual, of local communities. This means that no land use allocation can be decided by the State on its own initiative without first settling traditional customary land and forestry rights. These rights are settled in different manners in the land-use allocation process, depending on whether they relate to land or forest tenure. While forestry tenure gives local communities a right to free, prior and informed consent, the Land Act provides solely for consultation and allows the State to act without consent regarding the land-use allocation process.

*Spatial planning*

The current management system is characterized by normative and institutional deficits in terms of land-use planning, allocation and control. In addition to the fact that the DRC has neither a national land policy document nor a framework law laying down principles in respect of land-use planning, allocation and control, land management remains sector-based and under the exclusive control of individual government departments. It is not carried out in a concerted and integrated manner. This gives rise to conflicts in respect of land use by different sectors, rivalry between government departments and conflicts with local communities.
Institutional arrangements
An institutional framework to support the preparation of REDD+ during the period 2010–2012 was established by Decree No. 09/40 of 26 November 2009 on the establishment, composition and organization of the implementation structure of the process for reducing emissions from deforestation and forest degradation (REDD). Three bodies were established: (i) a national REDD+ Committee with an executive role; (ii) an Inter-ministerial Committee with a thematic coordination role; and (iii) a national coordination for the day-to-day management of the REDD+ process. The members of each of these structures still need significant training to discharge their respective duties. Leadership and technical skills are still largely the preserve of expatriate technical assistance providers within the REDD National Coordination. But a shift in favour of national expertise is gradually taking place.

Benefit sharing
A national debate has begun and is drawing to a close. It distinguishes two types of revenues from REDD+: (i) revenue in the form of international payments (payments for environmental services and grants) for activities aimed at reducing emissions from deforestation and forest degradation; and (ii) revenue from the carbon market. In the first case, we tend to talk about REDD+ initiatives; in the second, we speak of REDD+ projects. Procedures differ in each of these two categories.

Safeguards
A process of developing safeguards is underway, with a view to allowing the positive and negative impacts of REDD+ projects and/or initiatives on social and environmental parameters other than carbon stocks to be measured. However, the question of the institutionalization of the safeguards currently being developed is still under discussion.

Public participation
While the government took sole responsibility for preparing the DRC’s R-PIN, the initial document that triggered the country’s REDD+ process, it subsequently moved back into line during the preparation of the R-PP, which featured the involvement of stakeholders, especially civil society. Since then, the process as a whole has been conducted in a participatory manner, in consultation. Moreover, Congolese civil society is very actively lobbying for the process to remain participatory. However, public consultation conducted in the preparation of this report revealed a perception of insufficient commitment on the part of the private sector and private banks, as well as inadequate access to information on the REDD+ process in the country, especially for provincial and local actors.
Measurement, Reporting and Verification (MRV)
Controversy persists on the level at which accounting for carbon stocks should be performed. Experts advised caution and recommended against selecting a final method immediately, as this would carry the risk of preventing the country from benefiting from potential future technological innovations (community-based measuring techniques) that could be significantly cheaper. The debate remains open on this subject.

Implementation and enforcement
The study noted that the country’s political and institutional environment is relatively unfavourable to law enforcement, and that the business climate is not conducive to quality investment complying with international standards. The situation does not really promote compliance with safeguards. The genuine efforts of the current government do not yet appear to be paying off.

1.2. Options for Reform
The context in which the proposed reforms summarized below will be carried out is discussed in Section 2.2, which deals with the need for a specific legal framework for REDD+ in the DRC. This section merely outlines the options proposed in this report, theme by theme.

Land, forest and carbon tenure
Secure deployment of REDD+, in the same way as any other proposed investment in respect of land or natural resources, will require an adjustment of the legal framework governing land management. The aim is to take advantage of the specific context of land reform initiated by the government, the roadmap of which was laid down in July 2012. The report proposes:

- A clarification of land tenure, putting forward two options for legislative reform. The first aims to streamline the current system stemming from the aforementioned Land Act, by clarifying the principle of state sovereignty over land and natural resources, reinforced by that of their public ownership. In this context, other people should have no rights other than that of use: concessions for natural or legal persons other than local communities and indigenous peoples, and acknowledged customary rights of occupancy, with an option for their registration and the issuance of titles for local communities and indigenous peoples. The second option is based on the rehabilitation of customary ownership of land by local communities and indigenous peoples through the amendment of the aforementioned Land Act. The Congolese State would retain solely the right to exercise its sovereignty and its sovereign prerogatives, by virtue of which it retains the
power to levy and collect taxes, duties and other charges, to uphold public interest and common good, and to carry out expropriations in compliance with legally established safeguards. This option would also open up access to private property, which could be combined with the concession regime depending on prospective negotiations between the applicant and the customary owner(s) of the requested land: concession for a limited time and ownership when the sale of the land is final;

- The recognition of the land rights of indigenous peoples, in view of their extreme vulnerability, stigmatization and marginalization, due to local customs governing access to land and its resources;

- The integration of the carbon regime in the reform: the report outlines a few options, guidelines and benchmarks for the legislative approach to this issue. It recommends, in this regard, either taking advantage of the current land reform to define the carbon regime or, if a law or a decree from the Prime Minister on REDD+ is the preferred option, its use to define the said regime.

Spatial planning
The report proposes the adoption of a national land-use planning policy defining the country’s vision in this area, as well as guidelines for land-use planning, allocation and control, together with a framework land-use planning law to confer a binding character to the adopted principles. It is proposed that the principles of sustainable development, based on the balance between economic, social and environmental considerations, should guide the land-use allocation process.

Institutional arrangements
The report recommends conducting a review of how the existing REDD+ bodies functioned during the preparation phase, in order to draw conclusions to inform the future architecture of REDD+ for the duration of the implementation of the national REDD+ strategy once it is finalized. Pending this review, the report recommends incorporating the following considerations into the establishment of permanent REDD+ bodies: (i) reinforcement of representation on and the organization of the National Committee and the Inter-ministerial Committee; (ii) designation of REDD+ focal points within sectoral administrations; and (iii) reinforcement of the provincial deployment of REDD+, possibly in interaction with provincial forestry bodies. A law or a decree on REDD+ should define the new institutional framework if this is the option chosen. Failing that, and assuming that REDD+ is factored into the Forest Code revision process, it is recommended that the framework should be set by the law amending the said Code.
**Benefit sharing**

It is recommended that revenue-sharing mechanisms be developed, in accordance with the distinction between REDD+ initiatives and REDD+ projects. A REDD+ initiative is an activity liable to produce REDD+ outcomes without aiming to monetize them in the carbon markets. REDD+ projects, by contrast, are public or private investments aimed at achieving REDD+ outcomes to be certified in relation to recognized international standards and to be monetized in the carbon markets. The report also supports the establishment of a National REDD+ Fund, the resources of which would come on the one hand from international institutions, donor countries and special multi-donor funds in the form of development aid, and on the other hand from Congolese State budget appropriations to finance public-interest activities aimed at maintaining and/or increasing carbon stocks. Finally, more specific and detailed REDD+ revenue-sharing arrangements are subsequently proposed, based on the above distinction between REDD+ initiatives and REDD+ projects.

**Safeguards**

It is recommended that the DRC should clarify its position on the way in which these safeguards will be formalized. The report puts forward two options, the first being to make safeguards a legally binding national requirement, and the second being to leave them to the discretion of the project leader, in the same way as forest certification standards (FSC or other). In the first option, the Congolese State would be required to set up an administrative structure for the implementation of safeguards, with responsibilities including the review and approval of records and reports on compliance with safeguards. In both cases, a capacity-building programme aimed at helping stakeholders apply significant safeguards is proposed.

**Public participation**

The report recommends, in accordance with the reform of the Forest Code of 29 August 2002 (hereinafter ‘Forest Code’) and clear MECNT practice, that a solid legal basis be given to the principle of public participation in decision-making on REDD+. The legal framework for the implementation of REDD+ should contain this principle in its provisions and clearly indicate what is meant by public participation (information, consultation and consent), cases in which it should be mandatory, the actors involved and in what manner, the documents by which participation is established, penalties for non-compliance, legal remedies, etc.

**Measurement, reporting and verification (MRV)**

The report identifies two options as a response to the controversy around the level at which accounting for carbon stocks should be performed. The first advocates the national level, the second the project level. The report sets out the implications
relating to each of the two options, and the author concludes that the most important distinction is that between the level at which accounting is performed and that at which compensation is received. While accounting for carbon stocks should continue to be performed at the national level, compensation should be kept at the project level so as to continue to provide inducements for REDD+.

Implementation and enforcement
Because of identified governance shortcomings, the treatment of which will undoubtedly take time, it is recommended that an independent certification system for support operations be established, involving: (i) the use of independent certification experts recruited and accredited on the basis of a transparent and credible accreditation process designed notably to ensure the exclusion of any project leaders for which compliance with established standards cannot be demonstrated; and (ii) the establishment of mechanisms for managing public REDD+ funds subject to independent external audits and, more generally, the continuation of current efforts to improve the business climate and to remove the bottlenecks that currently prevent the business sector from blossoming.

2. Introduction

2.1. The Need for a Specific Legal Framework for REDD+

The DRC REDD+ Readiness Preparation Plan (R-PP) identifies the country’s legal framework as a critical factor necessary for the success of the national REDD+ strategy, once the latter is finalized. (See Annex I for an overview of the R-PP process to date in DRC.) A pre-assessment of the legal framework for REDD+, made during the R-PP development phase, states that the DRC may have to reform its policies, laws and institutions, and, more broadly, its governance system. Consequently, to make it easier for the countries engaged in the REDD+ process to identify the areas in which reform is necessary and expected, taking into account international discussions on the subject, GLOBE International has proposed eight (8) themes connected to the REDD+ process. As noted above, these themes relate to: (i) land tenure and natural resources; (ii) land-use planning; (iii) institutional arrangements for REDD+; (iv) public participation in decision-making related to REDD+; (v) mechanisms for sharing revenue derived from REDD+; (vi) social and environmental safeguards; (vii) the MRV system; and (viii) enforcement.

Congolese lawmakers, the main intended readers of this report, should have access to necessary information regarding REDD+ issues and the legislative and institutional reforms that they will be called upon to enact in Parliament.
In addition to potential reforms in each individual sector to meet the specific and REDD+-related demands, the REDD+ process calls for a specific instrument containing the body of rules, in order to formalize those requirements that should become binding. This instrument ideally should take the form of a law, due to the cross-cutting nature of REDD+, which relates to areas already governed by specific laws that can only be repealed by another law. It should take into account and integrate various issues bearing on the launch of the REDD+ process in the DRC, as addressed in this report, namely: (i) the institutionalization of the register of REDD+ projects and technical carbon standards; (ii) national requirements in respect of social and environmental safeguards; (iii) the legal framework governing carbon; (iv) the country’s requirements in terms of participation in decision-making on REDD+; and (v) mechanisms for sharing revenue derived from REDD+ projects and/or initiatives. This implies that a specific law will need to be enacted for the implementation of REDD+ in the DRC.

However, all experts are not in agreement on this option. Some constitutional experts believe that REDD+ issues cannot be dealt with by a law, as they are not on the list of matters that need to be addressed by laws under the Constitution of 18 February 2006 (hereinafter ‘Constitution’). Proponents of this school of thought recommend amending the existing Forest Code to include all issues relating to REDD+ in view of the connection between REDD+ and forest issues. A third school of thought supports a decree by the Prime Minister (seen as an ‘autonomous regulation’ under the provisions of Article 128 of the Constitution) to regulate all matters relating to REDD+ in the different aspects considered in this report.

Debate is ongoing in this respect, and it is to be hoped that a consensus will emerge on the best way of approaching the necessary reforms, in compliance with the provisions of the Constitution. Securing REDD+ investment is also necessary for a successful outcome in this regard.

This report also recommends the adoption in the DRC of national sector policy documents addressing land and forest tenure (theme 1), and land-use planning (theme 2) before adopting or amending the corresponding law on the basis of the options outlined herein. In the DRC, sector-based public policies are generally defined in documents that have been the object of a broad consultation process. Finally the government adopts the public policy, either by the relevant department

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1 The Constitution of DRC outlines matters that may be addressed by legislation under its Articles 122, 123 and 128.
(agricultural policy and rural development) or by the Council of Ministers (mandatory under the Forest Code for questions relating to national forestry policy). Public policy documents set out the country’s vision of each sector, its main options and guidelines for implementing this vision. They serve as a standard for the development or amendment of legislation relating to their sector. To enable REDD+, the DRC should establish an inclusive and participatory process for the development of strategic guidelines for the two aforementioned sectors, thus confirming the projections contained in the country’s R-PP.

2.2. Methodology

The study’s first phase consisted of: (i) collecting and analyzing background data; (ii) drafting the report, addressing all the concerns contained in the terms of reference for the study on the basis of the information collected; (iii) interaction between the GLOBE team and the IUCN Environmental Law Centre on the national report, in order to reach an agreement on the interim draft; and (iv) presentation of the study findings at UNFCCC COP 17, in Cape Town, South Africa, on 3 and 4 December 2011.

The second phase was essentially one of debate and consultation aimed at identifying legislative reform options for REDD+, reflecting different views at field level through: (i) interviews with national stakeholders and development partners involved in the country’s preparation for REDD+ (see attached list); (ii) deepening of the analysis of the various issues addressed; and (iii) further development of recommended legal and institutional reforms required under REDD+. This draft was in turn distributed for comments from a number of external experts and internally with the GLOBE International team; those comments were subsequently integrated. As such, this report is ready to serve as a working document to inform thinking on the reforms expected from lawmakers in respect of REDD+.

The present report has 11 sections. After its first two sections, the executive summary and introduction, it provides, starting with the third section, an analysis of each of the themes of the study, in three main subsections. The first subsection sets out the relationship of each theme with REDD+. The second subsection describes the issue in view of the country’s existing legal and institutional framework. The third subsection sets out the main avenues and options for prospective reforms, starting with the analysis of the situation and specific needs relating to REDD+ as they were identified during the consultation process.
3. Land, Forest and Carbon Tenure

3.1. Land and Forest Tenure: Current Situation

The link between land tenure and forest tenure
Analysis of the system of land and forest tenure in the DRC brings to light the following points, which cover both the system of access to land in the DRC and the securing of land rights.

Classification of forest and land based on their use. Depending on their use, land and forests are divided between the public domain and the private sphere. Public land consists of all land allocated to a public use or service,\(^2\) while private land comprises all other remaining land not allocated to a public use or service.\(^3\) The Forest Code only mentions the category of state forests, without explicitly defining it.\(^4\) As such, articles applicable to public land apply in the same terms to state forests. Accordingly, state forests comprise forests allocated to a public use or service, while private forests consist of all other forest areas not allocated to a public use or service.\(^5\) Public use or service in respect of forests stems from their classification as conservation areas by order of the minister in charge of forests, in accordance with the procedure laid down by decree.\(^6\) The latter category of forests is designated by the term ‘classified forests’. The Forest Code also introduces another classification of forests according to their use, dividing them into: (i) classified forests; (ii) permanent production forests; and (iii) protected forests. Classified forests are geographically designated, delineated, regulated forest areas managed with a view to achieving specific conservation goals. In forested areas, the category of classified forests corresponds to protected areas.\(^7\) Strict nature reserves, forests in national parks, conservation areas, botanical and zoological gardens, biosphere reserves, wildlife reserves and hunting areas are thus classified. The list also includes forests protecting slopes against erosion, forests protecting springs and rivers, forests necessary for biodiversity conservation, soil conservation, public health and the improvement of the quality of life, and the protection of the human environment. Permanent production forests are declared forest concessions and forests in the process of being allocated as forest concessions. This category includes forests removed from protected forests following a public

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\(^2\) Land Act, Article 55, paragraph 1.

\(^3\) Article 56, ibid.

\(^4\) Article 12, ibid.

\(^5\) Article 20, ibid.

\(^6\) Decree No. 08/08 of 8 April 2008 laying down the procedure for classifying and declassifying forests.

\(^7\) See Article 2, paragraph 2 of Law No. 11/009 of 9 July 2011 on basic principles relating to the protection of the environment.
inquiry, to be placed on the market as forest concessions, but which have not yet been awarded. Lastly, protected forests are forests located on State-owned land that are neither classified nor declared as permanent production forests. They are a sort of national reserve not yet assigned to a particular purpose. However, it is important to bear in mind that after enshrining the principle of the public ownership of forests, the Forest Code also recognizes the customary rights to forests held by local communities, which it terms ‘customary ownership’. This is what the Code refers to as ‘local community forests’. Customary ownership acknowledged in this way may now be registered, with a title being attributed to the applicant community in the form of a local community forest concession. This concession is a genuine title that gives the local community the direct right, as a stakeholder, to use all new modern forms of transactions, in both the domestic market and international markets, including REDD+.

A dual tenure system combining the rights of the State and the rights of local communities. This duality is reflected in the following observations:

- The State has sovereignty/ownership rights over land and forest. These rights are enshrined in the Constitution and provided for by the Land Act and the Forest Code.
- Local communities have collective customary rights of ownership/occupancy/possession of land and forests. These rights are also recognized by the Constitution and provided for by the aforementioned Land Act and Forest Code. As such, the State’s sovereignty/ownership rights on private land are combined with the customary land and/or forestry rights, both collective and individual, of local communities. This means that the State

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8 It is important to make the following two points: (i) protected forests and production forests are permanent categories that initially fell within the definition of protected forests and which were subsequently extracted from that definition, following a public inquiry, to be assigned either to conservation (protected forests) or to the industrial exploitation of timber or the monetization of environmental services (permanent production forests); and (ii) protected forests cannot be the subject of a concession for the exploitation of any natural resources liable to be found therein, or receive any other allocation incompatible with their purpose without having previously been declassified; rights of use are strictly limited in these forests, even those of the local population.

9 Forest Code, Article 7.
10 Forest Code, Article 22.
11 Constitution, Article 9.
12 Land Act (as amended and supplemented to date), Articles 53 et seq.
13 Forest Code, Article 7.
14 Constitution (Articles 34, 56 and 57).
15 Land Act (Articles 387, 388 and 389).
16 Forest Code, Articles 22, 111, 112 and 113.
and local communities are the primary holders of land and forestry rights: access to land and forestry rights for all other persons or entities, whether subject to public or private law, is subordinate to these rights.

It therefore follows that:

- **For local communities.** The simultaneous recognition of customary authority under the Constitution\(^ {17} \) and of traditional governance systems over land and forests under the Land and Forest respectively,\(^ {18} \) and their integration into the modern system of national statutory law,\(^ {19} \) does not allow the State, in spite of its sovereign or ownership rights, to allocate portions of land or forest to specific uses without consulting local community right holders. As the Land Act and the new Constitution prohibit the State from granting land concessions without taking into account the rights of third parties, including local communities in this instance,\(^ {20} \) the primary right holders (the State and local communities) must always be in agreement before land and forests can be granted to third parties (e.g. developers and project promoters). And it is precisely to achieve agreements on such concessions that the legal framework provides for a land vacancy inquiry\(^ {21} \) and a prior public inquiry.\(^ {22} \) The purpose of these inquiries is to verify and certify that the concerned land or forest clearly belongs to a specific community, pursuant to local custom. They also certify whether or not customary owners have accepted commitments (from the State or the project developer) in respect of a number of social demands in compensation for the waiver of their rights to a specific portion of land or forest.\(^ {23} \)

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17 Constitution, Article 207.
19 Constitution, Article 153, paragraph 4.
20 Land Act, Articles 65 and 193 et seq., and Constitution, Articles 56 and 57.
21 Articles 193 et seq. of the Land Act
22 Article 84 of the Forest Code. Note that while the forestry regime guarantees consultation, followed by the right to free, prior and informed consent, the land regime ends with consultation, going so far as to allow the sale of land if, within six months of the negotiation process, no agreement is reached between the concession applicant and the local community.
23 It should be noted that experience in the forestry sector shows that: (i) in the case of forest areas within the tendering procedure, it is the Congolese State that organizes the inquiry and provides compensation, in the event of agreement, in exchange for the pre-existing forestry rights of local communities. In this way, the forest is genuinely cleared of all rights. In the absence of a public inquiry (which is the case for all current industrial titles stemming from the legal review), the future forest concession holder must negotiate an agreement with local communities entitled to have access to the forest area in question, agreeing to provide
• *For the Congolese State.* The State’s acknowledged sovereign rights to land and natural resources\(^{24}\) and its claim of ownership (under all sectoral laws governing the various types of natural resources) entitle it in its capacity as guarantor of the public interest and common good, inter alia, to: (i) set the framework for land governance by establishing a national policy in this area, and by legislating and issuing regulations on the issue; (ii) generate public revenue deriving from the management of land and other natural resources, and claim it, where appropriate, in a manner determined by it; (iii) ensure the security of land tenure by establishing a mechanism for recognizing, registering and issuing titles to land rights; and (iv) deliver secure land titles.

The dualistic structure of land and forest tenure chosen by the DRC gives local communities a joint claim on land and forests alongside the State. Thus, in the context of modern land governance, as described above, any REDD+ project or initiative will require the State to issue a title in favour of the project developer, by virtue of its sovereign/ownership rights. However, any issuance of a land or forest title in view of REDD+ or for any other purpose will require the local community with a customary claim on the land or forest to consent to its transfer. These are the fundamental implications of the dual system that is a feature of the tenure system of the DRC.

*A system that does not provide for titles to enforce the property rights of the State and customary land rights.*\(^{25}\) Under current law, neither State nor customary rights require registration or title. Their existence and legal validity stem from their recognition by the Constitution and from land and forest law. Therefore, REDD+ projects and initiatives potentially led by the State and/or local communities do not require proof of any land or forest title if the State or relevant local community can demonstrate that, under the law, they hold sovereign and/or ownership rights or customary rights of ownership/occupancy/possession of the land or forest where the project is to be developed. However, the above statement needs to be qualified as follows: if the State and local communities do not have a legal title upholding their claim to land rights, they may only legally undertake land or forestry compensation in the form of economic and social infrastructures as requested by the said communities.

\(^{24}\) Article 9 of the Constitution.

\(^{25}\) An exception must be considered here, with regard to the customary forest tenure of local communities. Article 22 of the Forest Code provides for the possibility for a local community to harvest timber in all or part of the forests it owns by custom. This concession is a title that gives the said community access to modern markets of all types. Its issuance requires prior registration or recording and mapping procedures.
activities on a portion of the land or forest in question after the completion of an inquiry followed by a written report. This is termed a ‘land vacancy’ inquiry by the Land Act, and its organization is laid down therein. It is qualified as ‘public and prior’ in the Forest Code and is organized pursuant to provisions in that Code and in Decree No. 024. The above process is designed so that, before any allocation of land or forest for public use or prospective commercial or industrial operations:

- **in respect of the State**: consultations have been held with local communities with claims on the area concerned, and compensation has been provided if appropriate;
- **in respect of local communities with rights**: proof has indeed been provided as to their claim to customary land rights over the relevant area.

Thus, in the absence of a title, these written reports serve, in the case of the Congolese State, to verify that customary rights to land or forest have been expunged, and that the land or forest is free of all rights, enabling the proposed allocation, for a REDD+ project or initiative or any other undertaking, to go ahead.

A regime that defines and organizes the land rights of persons other than the State and local communities. As noted above, all persons or entities aside from the State and local communities lack direct access to land or forestry rights or the rights to exploit other natural resources under either public or private law. They may have access to such rights only in an indirect way, through some kind of agreement with the Congolese State and local communities, in the capacity of the latter as holders of primary rights to land and forest. Again, prior inquiries are mandatory (land vacancy or public inquiry, as appropriate). The ideal situation is one where the State has: (i) conducted the inquiry and was able to identify the local communities holding rights; (ii) confirmed their claim on the forest area in question; and (iii) received their consent to the waiver or limitation of their land and/or forest rights on the portion in question, generally in consideration for social and/or economic

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26 Naturally, this statement does not affect the exercise of customary rights to housing, farming or land use of any type. It does not concern rights in respect of forest use. These rights, which are basically customary, are free. They do not give rise to authorization or permits, or to the payment of a fee or tax of any kind.

27 Articles 193 et seq.

28 Article 84, Forestry Code.

29 Decree No. 024/CAB/MIN/ECN-T/15/JEB/08 of 7 August 2008 (laying down the procedure for public hearings prior to the granting of forest concessions).

30 This land-use allocation may entail the use of public land in the public interest (establishment of a nature reserve, a national park, a town or city, an urban park or green space, etc.) or the allocation of land for any form of commercial or industrial use.

31 Notably wildlife, mining, oil and gas, and even water.
compensation. In cases where the local community waives its rights fully and definitively, the forest or land is free and clear of any encumbrance. The relevant communities, and even their descendants, lose their rights to the land in question and waive all future claims on it.

Whether by waiver or limitation of rights, local community consent leaves the State free to undertake land-use allocation operations, which should be inscribed in a previously established land-use plan. These operations may include the allocation to a third party of a portion of land or forest extracted from the community claim, including: (i) land concession rights; (ii) forest concession and small-scale logging rights; and (iii) agricultural concessions. As such rights derive from primary rights held jointly by the State and local communities, they are known as derived or secondary rights. With regard to land rights, their validity stems from the registration process, followed by the issuance of land and/or property titles. In accordance with the new Constitution, the State is required to seek such agreements with right holders for all operations involving land-use and resource allocation. Failure to comply with this requirement may result in criminal action, for high treason or plundering, as appropriate, or other economic crimes under international conventions.

REDD+ projects and initiatives are also included in this series of derived or secondary rights. Thus, if the developer of a REDD+ project or initiative is an entity other than the Congolese State or a local community, it will be required to obtain a title to the relevant land or forest. This title, which may be in the form of leasehold (if the project is in a non-forest area) or a conservation concession (if the project is in a forest area), may be issued following an inquiry, as in the previous cases. The final report must certify that local communities with rights to the land or forest in question have given their free, prior and informed consent (FPIC). Such consent is required under international certification standards before carbon projects can lay claim to revenues, and has also become a formal requirement in the DRC’s forest management regime. With regard to land, although it is true that FPIC is not yet a

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32 See Article 89 of the Forest Code, Articles 69, 24, and Article 242 of the Mining Code
33 This stems from a requirement of the 1957 Decree on Urban Planning, which governs nationwide planning at different levels, for urban as well as semi-urban areas. This decree, which dates back more than 50 years, is currently being reviewed by the Ministry of Planning.
34 Holders of oil and mineral rights are also included in this category, but the process of allocating their rights is governed by the 1981 Law on Hydrocarbons and the 2002 Mining Code.
35 Articles 56 and 57 of the Constitution.
36 See Order No. 028 of 7 August 2008, Annex 2, Articles 7 and 13, adopted pursuant to Articles 88 and 89 of the Forest Code. See also Order No. 023/CAB/ECN/ECN-T/28/JEB/10 of 7 January
national requirement for forest carbon projects, the developer of any REDD+ project that brings a REDD+ project to market without proof of FPIC obtained from local communities or other right holders would fail to meet the international social certification standards applicable to carbon projects, for which FIPC is a basic requirement. This would block the issuance of emission reduction certificates entitling holders to carbon credits.

**Problems with the current system of land and forest tenure**

Controversy over the nature of rights held by the State and local communities arising from the interpretation of the Constitution. The 2006 Constitution abrogates the principle in previous Constitutions of public ownership of land and natural resources. All of these Constitutions used the same language: ‘The soil and subsoil belong to the State’. The 2006 Constitution states instead that the Congolese State exercises permanent sovereignty over natural resources. Many of the civil servants interviewed for this report expressed the view that sovereignty implies ownership. By contrast, members of civil society and people representing local communities, including the National Association of Traditional Chiefs, argued that this provision’s intention is to: (i) rescind State ownership of land and natural resources; and (ii) further strengthen collective and individual customary land rights and open the door to private ownership of land, going beyond the concession model but without abolishing it. Expert opinion is divided on this question. Some experts express unwavering support for the principle of public ownership of land and natural resources, advocating its rollover into the land reform currently underway. Others, however, argue that a review of the application of this principle shows that it has failed to encourage investment in land and the exploitation of national land and resources, while marginalizing local communities in rural areas. The controversy surrounding the status of land and other natural resources

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2010 providing for the standard agreement that constitutes the social clause of the specifications of the forest concession contract.

37 The Order establishing the approval process for REDD+ projects is silent on this subject. In the case of REDD+ projects and initiatives, it could have integrated FPIC into the approval process as part of socio-environmental standards, but it did not do so explicitly. Such ambiguity is not conducive for REDD+ projects and initiatives.

38 Article 9, 2006 Constitution.

39 Kalambay, L.G. 2012. Analyse de la loi foncière au regard de nouvelles dynamiques socio-économiques. Presentation at the National Workshop on Land Reform in the DRC, 19-21 July, Grand Hôtel Kinshasa, Kinshasa, DRC. (Note that Professor Kalambayi was a main architect in the drafting of the 1973 Land Act in the DRC.)

is a limiting factor for REDD+, as it raises once again the issue of land tenure security – an essential component for sustainable REDD+ projects or initiatives.

As it stands, Article 9 of the new Constitution actually implies that the constituent assembly sought to change the status of land and natural resources. The exercise of sovereignty does not necessarily imply ownership. In international law, sovereignty implies a higher power (one that cannot be constrained independently of its will), but which does not include ownership.41 This new constitutional language suggests a possible redefinition of the status of natural resources at the level of the various sector laws governing land and other natural resources.42

Moreover, the 2006 Constitution proclaims the sanctity of private property and requires the Congolese State to uphold individual or collective ownership acquired in accordance with law or custom.43 These provisions introduce a new status for land into Congolese land law, namely land ownership that may be private or customary. In this new configuration, customary ownership becomes a right, enjoying a status and guarantees of protection equivalent to those attached to other written land titles established and held under statutory law.

Thus, the 2006 Constitution does not make the State the owner of the land but rather strengthens the customary rights of traditional communities.44 It should be noted that the Land Act does not give customary ownership the same absolute and exclusive right to use and enjoy land as it has in Western law.45 Rather, it is a right that arises and endures without title, and applies even in the absence of effective

41 For instance, in the system prevailing in Europe and in several African countries (Ghana, Uganda, South Africa, Senegal, etc.), the State exercises sovereignty throughout the country but is not necessarily the owner of land. In Ghana, for instance, the State owns only 20% of the land, the other 80% being held under the customary ownership of traditional communities.
42 Specifically, the constitutionality of both the Forest Code and the Land Act is questioned, in addition to all other laws governing natural resources, insofar as these laws provide for an ownership right of the State that the Constitution no longer upholds or recognizes.
43 Article 34, Constitution.
44 This ‘historical restoration’ process can also be seen in Articles 56 et seq. of the 2006 Constitution, articles that prohibit any act, agreement, contract, arrangement or other fact that has the effect of depriving the nation, or natural or legal persons, of all or part of the livelihood derived from their natural wealth or resources. These provisions go further: they qualify such acts as pillage and high treason, depending on whether or not their authors, at the time of the offence, were vested with public authority. The text uses the term ‘natural wealth or resources’, thereby confirming the meaning that emerges from Article 34 in respect of private and customary ownership.
45 Article 14 defines ownership as: ‘the right to use something absolutely and exclusively, except in the case of restrictions resulting from the law and rights held by others’.
occupancy of the entire property, and without the need or obligation to improve it.\textsuperscript{46} This is a concept that is not found in Western law, in that traditional societies see the land as being sacred, belonging not only to the community of the living, but also that of the dead of the family or clan, as well as to unborn children.

\textit{Failure to recognize the right of local communities to free, prior and informed consent in land governance.} Consent is not only an international requirement arising from recent international conventions relating to environmental issues and natural resource management, but also one of the national (and nearly universal) requirements for contracts.\textsuperscript{47} The terms ‘free’ and ‘informed’ are required whenever one talks of consent, hence the concept of free, prior and informed consent. Agreements that are liable to result in the temporary or permanent waiver by local communities of their rights in order to allow the implementation of a project must therefore be preceded by negotiations allowing informed consent to be given freely.\textsuperscript{48}

\textit{Issues relating to the customary land rights of so-called ‘indigenous’ peoples.} While collective rights to rural land are recognized among local communities, the situation is different for pygmy hunter-gatherers. The pygmies claim legal recognition of their status as ‘indigenous people’, implying the recognition of their customary land rights as a fully fledged social category distinct from that of ‘local community’. At the local level, and in accordance with local customs, the only rights recognized to the pygmies are traditional hunting and gathering rights (forest use), which form the basis of their local economy. These rights allow them to come and go in forested areas and to gather the means necessary for their livelihood, subject to customary hunting and gathering fees paid to local Bantu leaders. However, pygmies are now also increasingly becoming farmers, and as such are claiming rights of land ownership that are not recognized by most local customs. These claims are being brought at the national level by indigenous organizations, on the

\textsuperscript{46} Kifwabala, T.J.P. 2004. Droit civil: les biens, Tome 1, les droits réels fonciers, PUL, p.80.
\textsuperscript{47} In Congolese civil law, as in most jurisdictions of the world, contracts are only valid if consent is given knowingly and freely. Article 9 of the Decree of 30 July 1888 on Contracts and Agreements, commonly referred to as ‘Civil Code, Book III’, states that ‘consent is not valid if it is given by error or extorted under duress or by fraud’. Article 18 of the same Decree deems null and void any agreement entered into by mistake, under duress or by fraud. Such agreements are subject to an invalidity or rescission action. As such, the requirement that there be no error, duress and/or fraud has given rise to the qualifiers ‘free’ and ‘informed’, which doctrine now associates with the notion of consent.
\textsuperscript{48} Failure to comply with this requirement would result in the application of the aforementioned constitutional provisions of Articles 56 and 57, and Articles 9 and 18 of the Decree of 30 July 1888.
basis of guidelines adopted at the international level (e.g., Convention 169, the UN Declaration on the Rights of Indigenous and Tribal Peoples). Special protection status for indigenous peoples generally arises due to the threat of their culture and livelihoods, and even their very existence, from larger, more dominant populations expanding their territories. International initiatives such as taken by the United Nations, World Bank and the International Labour Organization (ILO) aimed at defining and specifically protecting the rights of indigenous peoples are now considered an integral component of human rights and a legitimate concern of the international community.

In the DRC, the first step towards the recognition of indigenous rights was contained in the process of forest reform undertaken since 2002. The implementing regulations of the Forest Code and other operational tools developed by the Ministry for the Environment, Nature Conservation and Tourism (MECNT) since January 2008 include the concept of ‘indigenous peoples’ and use it to designate the pygmies, alongside ‘local communities’. The terms used in the new legal instruments are now: ‘local and/or indigenous peoples’. Pygmies are thus recognized as indigenous peoples. But this well-timed guidance has not yet been backed up by a clear provision in the Constitution or a law. Moreover, while forestry reforms have resulted in clear progress on this issue, the same cannot be said for other natural resource sectors, and especially land in the case in point. Land reform initiated by the government offers an opportunity to discuss this issue and to define the country’s position on the subject more clearly, as discussed next.

3.2. Land and Forest Tenure: Options for Reform

Most interviewees acknowledged the merits of land reform to ensure the secure deployment of REDD+ and agree that the DRC will have to adjust its land law. The opportunity is at hand to take stock after 40 years under the existing Land Act, with the government having launched the process of land reform in July 2012. Outlined below on the basis of information gathered during interviews are those issues that the current land reform will have to take into account in relation to REDD+, along with possible reform options.

Clarify tenure in respect of natural resources
The land reform currently underway will need to determine clearly the nature and content of rights held by both the State and local communities to land and other natural resources. This clarification should consider both: (i) the dual nature of the land tenure system in the DRC since the Congo Free State (1885), which it would not be prudent to call into question; and (ii) the constitutional guidelines as set out above (unless they are changed), taking into account the guidelines already
adopted on this issue under the Forest Code and its implementing regulations. This clarification is necessary for forest carbon projects, be they under REDD+ or the Clean Development Mechanism (CDM), and is determined chiefly by one central decision. The sovereign rights of the State⁴⁹ either entail the ownership of land and natural resources (Option 1), or they do not necessarily entail the ownership of land and natural resources (Option 2). A brief discussion is presented below.

Option 1. The State’s ownership rights over land and natural resources are constitutionally recognized and upheld

Under this option, as the State’s sovereignty over land and natural resources does not necessarily imply ownership rights, State ownership must be explicitly recognized at the highest level (i.e., constitutionally). In the context of the DRC, this option has the following implications:

- A constitutional amendment to uphold unequivocally the State’s ownership of land and natural resources, in line with all previous Constitutions, which explicitly stated that ‘the soil and subsoil belong to the State’. An amendment along these lines would have the advantage of settling the issue of the constitutionality of existing sectoral laws conferring to the State ownership of land and its resources, a principle that cannot be clearly inferred from the 2006 Constitution;

- The amendment of Article 34 of the Constitution, closing the door to any possibility of private or customary ownership of land and other natural resources, and of Article 56, removing the term ‘livelihood deriving from their natural wealth or resources’, which opens up the possibility of private ownership of wealth and natural resources;

- Maintaining the split between public land on the one hand, assigned to a public use or service, and privately owned land on the other hand, consisting of all other land;

- Maintaining the current framework of the right of use recognized for all other natural or legal persons, be they subject to private or public law, awarded under the terms of land concession contracts supported by a title, namely the certificate of registration;

- A decree providing for the rights of use held by local communities, which will remain collective and individual customary tenure rights to occupancy (as opposed to customary ownership) of rural or semi-urban land privately owned by the State; the decree should also lay down the terms and conditions governing access, security/guarantees and social safeguards, management and exploitation of the land occupied by local communities.

⁴⁹ As recognized by Article 9 of the present Constitution.
**Option 2. The State does not necessarily own all land and other natural resources**

This has the following implications:

- The State would not necessarily be the sole landowner, as in the prevailing context;
- The State would need to establish modes of access to land and property, including a process for State acquisition of land, backed up by a registration and title system to reinforce security;
- The limited time period (25 year) land concessions system, embodied by a concession contract and covered by a registration certificate, would be maintained;
- A private land ownership system of access (not limited in time), supported by a sale contract (as opposed to a concession contract) and a registration certificate, would be established;
- The recognition of local communities’ customary ownership of the rural land they occupy by virtue of custom, allowing them to register and map their collective customary land rights, plus mechanisms allowing the issuance of relevant titles;
- The ‘public land’ category would be maintained for land-use allocation in the public interest and for common good, by virtue of, as appropriate, an amicable settlement process (stemming from a mechanism along the lines of the ‘prior public inquiry’ provided for under the Forest Code) or an expropriation process in cases of public interest if there is no amicable settlement; the expropriation process would still need to comply with the requirement of prior, fair and equitable compensation.

**Recognize the right of local communities to exercise free, prior and informed consent (FPIC) in terms of land allocation**

DRC land and forest tenure systems, regardless of the options adopted, should integrate FPIC and comply with Congolese civil law, which will involve inter alia:

- The establishment of a mechanism providing for easy access to all relevant information on the proposed REDD+ project, as well as mechanisms for communicating this information to local communities in terms they can understand and that are culturally appropriate, to enable them to grasp all the issues raised by the project and assess the situation and associated risks;
- A simple consultation mechanism on the information provided, indicating the methods used to collect and process complaints, comments and views of local communities affected by the project and the action they can take to oppose the project. A prior public inquiry could serve this purpose;
- A procedure for obtaining and recording the free, prior and informed consent of local communities.
Integrate the land rights of indigenous peoples

The claims of indigenous peoples have resulted in some recognition of their rights as forest dwellers in the governance framework of Congolese forests. Similar recognition should be given in respect of their land rights, first to standardize the national response that the DRC intends to make on the issue of ‘indigenous peoples’, and second to comply with international guidelines on the topic. These different views are summed up below in terms of options.

Option 1. Considering themselves as marginalized by the socio-cultural contexts of the areas in which they live, the pygmies refuse to follow their Bantu neighbours by recognizing themselves as a ‘local community’, and are claiming recognition of a special status of vulnerability and marginalization, especially in terms of access to land and natural resources. This option will require the new land and forest policy currently being developed to recognize the claims made by the pygmies, thereby paving the way for a national response to this problem.\(^5^0\)

Based on the policy choices made in the documents relating to sectoral policies, land and forest law should be amended to:

- Recognize the pygmies as ‘indigenous peoples’, taking care to distinguish clearly this concept from that of ‘local community’, which is already defined in the Forest Code;\(^5^1\)
- After reviewing the forest legal framework, define in land and forest law relevant rights, enforcement and implementation arrangements, and legal remedies in case of violations of these rights.

Some proponents of a legal solution for the ‘indigenous cause’, including the leading network of DRC indigenous peoples DGPA (Group Dynamics of Indigenous Peoples) favour the adoption of a specific law. DGPA is already working to this end with a group of Congolese lawmakers to have this claim brought before Parliament.

Nevertheless, this option should not give the impression that local pygmies enjoy particular and sustained attention, despite the fact other local communities share the same precarious situation and are exposed to the same risks of alienation and marginalization. Thus a second option is considered.

\(^{50}\) Here international guidance on the subject is also relevant to consider (e.g., Convention 169 of the ILO, United Nations Declaration on Indigenous Peoples and COMIFAC guidelines).

\(^{51}\) Article 1, point 17, Forest Code.
Option 2. Some actors, generally from the non-forest public sector (e.g., land, mines, oil), believe that the interests and other property rights of the pygmies are already taken into account through the notion of ‘local community’, and fail to see why the DRC should recognize the pygmies as a social entity in their own right, benefiting from specific land rights. They point to the underlying trend of constitutional provisions placing all citizens on an equal footing,\(^\text{52}\) stressing that the Constitution fails to list the ‘indigenous issue’ as a specific matter that should be addressed by law for the establishment of special rights for specific social groups.

While this argument effectively precludes the first option, the issue of the vulnerability of the pygmies, on which all players agree, remains a matter of concern that warrants real attention. The Constitution, however, already requires the Congolese State to ensure the protection and promotion of vulnerable groups and all minorities, and to foster their development.\(^\text{53}\) The State could therefore, without enacting a new law or recognizing specific new rights, protect pygmies and promote their development.

To determine the rights for which recognition is sought, a review would be made and, where necessary or appropriate, such rights integrated into the provisions already recognized for local communities. If this option is selected, discrimination and marginalization rooted in local customs, of which the pygmies are victims, would not be addressed and dealt with directly through the recognition of rights, but through the implementation of strategies and intervention programmes aimed at minimizing as much as possible the discrimination, countering marginalization and avoiding the stigma of which these people are victims. This would avoid the need to adopt a law that has not been provided for by the Constitution and which likely would be subject to controversy.

Conversely however, this approach would result in the withdrawal or modification of any implementing regulations of the Forest Code that tended to recognize such rights. It would also complicate the whole dynamic of implementation that has already begun at field level. Measures to manage these situations should therefore be considered.

With regard to REDD+, regardless of the option taken, it is important that the legal instrument governing the implementation of REDD+ includes mechanisms, tools and procedures to ensure that REDD+ projects (and programs affecting local

\(^{52}\) Article 15, 2006 Constitution.

\(^{53}\) Article 51, 2006 Constitution.
populations) mitigate or at least do not exacerbate their extreme vulnerability and marginalization.

3.3. Carbon Tenure: Current Situation

To date, there is no legislation in the DRC covering carbon and/or carbon credits. However, thinking on the subject is already emerging, as part of the process of preparing the country for REDD+. As explained later in this report, according to the principle of accession the status of naturally stored carbon will always be dependent on the status of the resource that stores it naturally. However, the reasoning will be different in the case of carbon stocks, which require effort to be created, maintained and/or increased before they can be monetized in international markets.

This distinction may seem irrelevant given that carbon stocks sequestered by natural forests do not fit into the compensation process developed to date for the CDM. However, clarification of this process is necessary, as natural forests are now the focus of REDD+ projects aimed at monetizing carbon stocks that are maintained and/or increased therein. Traditional chiefdoms that customarily own the forest areas located in DRC forest reserves have already asserted their claims to stocks that are being actively maintained. Thus it will be necessary to start thinking about the status of carbon, whether it is captured, sequestered and stored naturally or as the result of an effort.

A few guidelines for legislative reform

In the DRC, the right to carbon applying to a portion of land or forest that are part of private State property is automatically recorded in the title to the forest or the land to which it is attached, under the Congolese civil law principle of

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54 To this end, in August 2011, the REDD+ National Coordination organized a workshop on the sharing of revenues from REDD+, during which the status of carbon was discussed because of its links with revenue sharing.

55 This is particularly the case of the forests that are part of the Tayna and Kisimba Ikobo Nature Reserves in Nord-Kivu Province. The Tayna Nature Reserve, created by Decree 012 of 2006, is located on land spanning the chiefdoms of Batangi (represented by Mwami Mwanaweka Stuka) and Carbamate (represented by its traditional chief Mwami Muhindo Mukosasenge) in the territories of Lubero and Walikale (Nord-Kivu Province). The Kisimba Ikobo Reserve was created by Ministerial Order No. 013/CAB/MIN/ECN-EF/2006 establishing the nature reserve known as the Kisimba-Ikobo Primate Reserve (RPKI under its French acronym), covering a total area of 1,370 km² in Walikale and the sector of Wanianga.
accession.\textsuperscript{56} Thus, the legal status of naturally stored carbon is already governed by the provisions of the Congolese civil law in respect of goods.\textsuperscript{57} This leaves two categories of stakeholders entitled to exercise rights relating to naturally stored carbon:

- \textit{The Congolese State, over all public or private forest or land area not subject to a concession contract.} As the rights of the State to its private land or forest are not registered or titled, it follows that its carbon rights will not be registered or titled; the sole recognition of sovereign rights to or ownership of State land and forest is sufficient, in that it automatically covers the carbon contained in these resources.

- \textit{Local communities and/or indigenous peoples in areas where they hold a traditional right of customary ownership, occupancy or possession.} As in the previous case, and in addition to the forests of a local community that may be registered and titled, the land occupied by local communities may not be registered or titled in their favour; in either case, the rights to land and forest containing carbon stocks automatically cover the carbon, under the principle of accession.

Therefore, for the reasons set out above, the Congolese State and local communities do not need a title to assert their rights to carbon that is created, maintained and/or increased naturally. By contrast, carbon that is actively created, maintained and/or increased by activities with a view to being monetized in a market will require a title. The nature of the title will depend on the capacity of the project developer:

- Assuming that the State and/or local communities lead a carbon project, no specific title shall be required if they can demonstrate that, under the law, they hold sovereign and/or ownership rights or customary rights of ownership/occupancy/possession to the land or forest where the project is to be developed. This is because these rights also cover the carbon, in accordance with the aforementioned principle of accession. However, both the State and local communities will be requested to provide a written report following a land vacancy inquiry certifying that the customary rights relating to the area have been expunged (where the State acts as project leader) or that the said rights do indeed belong to the community (where the community acts as project leader).

\textsuperscript{56} Land Act, Article 21. (‘Ownership of a thing, whether movable or immovable, entitles the owner to all that it produces and all that is attached to it incidentally, either naturally or artificially’.)

\textsuperscript{57} Land Act, Article 21.
If the project developer is a person other than the Congolese State or a local community, three cases are possible:

- In the first case, the State establishes a title to the land and/or forest covered by the project, in favour of the holder. This title, which may be in the form of leasehold (if the project is in a non-forest area) or a conservation concession (if the project is in a forest area) may only be issued to the project developer following an inquiry, the final report of which must certify that local communities with rights to the land or forest in question have given their free and informed consent (FPIC). In such cases, another question is whether the title covering the land or forest (leasehold title or conservation concession) will also automatically cover carbon that is created, maintained and/or increased, or whether a separate title will be necessary to cover this carbon. So far in the DRC, the CDM has not provided for a specific title covering carbon in addition to that of the land or forest. In contrast under REDD+, a recent order from the Minister for the Environment provides for a partnership agreement for the monetization of environmental services (PAMES) to cover carbon transactions.58

58 Order No. 004/CAB/MIN/ECN-T/012 of 15 February 2012 setting out the approval procedure for REDD+ projects.

59 These represent two contradictory guidelines for two types of markets that have the same issues in a single country. On analysis, PAMES appears to be superfluous. If the project developer already has a title giving it access to the land, it would only need to obtain national approval after recording the project and satisfying both technical carbon standards and social and environmental safeguards in order to claim the carbon credits potentially generated. This makes PAMES look inadequate and inconsistent with the notion of conservation concession, which is a legal notion (Articles 87 and 119 of the Forest Code) whose terms and award process are referred to on the one hand in Decree No. 08/09 of 8 April 2008 laying down the procedure for allocating forest concessions (Article 38) and on the other hand in Decree No. 011/25 of 20 May 2011 amending aforementioned Decree No. 08 (Article 1), before being governed by Decree No. 011/27 of 20 May 2011, which establishes the awarding procedure for conservation concessions, stating in Article 3 that a conservation concession gives its recipient the right to monetize emission reductions as environmental services. As they are primarily projects aimed at reducing emissions from deforestation and forest degradation, REDD+ projects should in theory only be deployed in forested areas, and should therefore result in the granting of a conservation concession to establish a right of access to the area in question for the benefit of the concession holder and/or its contractors as part of the project. Where appropriate, the contract carries an automatic right, by virtue of Article 3 of the aforementioned decree, for the beneficiary to sell the ensuing emission reductions on the market. It is doubtful whether an order can create a specific contract, organize it, define the obligations of the parties as well as all other legal effects, and determine its model, aside from an explicit legal authority, as is the case with the conservation concession contract. By doing so, the order would violate the provisions of the
The second situation is that where the project developer, without necessarily having any title to the area, receives a concession from the primary owners (the State and/or local community) in the form of an agreement mandating it to monetize in a market, in their name and on their behalf, stocks of carbon (carbon credits) created, maintained and/or increased, in consideration for a fee set under the terms of the agreement and in accordance with national standards if such standards are ever set;

In the third situation, when granting the developer access to land or forest to develop the carbon project, the State or local community, by virtue of an agreement, transfers to the developer, under terms and in a form to be determined, the ownership of carbon stocks to be created, maintained or increased on the project area. This third situation potentially contains the following two assumptions: (i) transfer of ownership of carbon to be created and carbon credits in exchange for the issuance of title to the land or forest covered by the project (leasehold title or conservation concession); or (ii) reliance solely on the agreement covering the transfer of rights to carbon to be created, maintained and/or increased.

As shown above, the State and local communities, by virtue of the recognition of their land and forestry rights as primary rights, remain the main players in carbon markets in all these cases.

Forest Code, which give the Prime Minister the power to organize the concession award procedure by decree. In addition to this, it is necessary to take into account the fact that by requiring the project developer to conclude a partnership agreement for the monetization of environmental services, Order 004 exposes it to the payment of the annual royalty for the area prescribed under the Forest Code for the conservation concession and the payment of another annual fee prescribed by the disputed order (Article 15), without specifying its nature, in respect of the partnership agreement for the monetization of environmental services. This results in double taxation of the same tax base. Finally, on a technical level, it is inconceivable – if not superfluous – to require a REDD+ project developer that has already obtained a conservation concession, which implicitly contains the right of access to the area covered by the project and to monetize the resulting environmental services, to negotiate and sign with the same Congolese State, represented by the same Government Minister, yet another contract in the form of a partnership agreement for the monetization of environmental services. It is for this reason that civil society organizations have lobbied against this Order and called for fresh discussions on it.
3.4. Carbon Tenure: Options for Reform

Some interviewees consulted for this report contended that it is too early to address carbon rights, instead recommending waiting until experience has been gained before determining the outlines of any reform. Other stakeholders, particularly those from civil society, argued that carbon rights must be settled first, allowing local communities to assess their rights and expectations with regard to REDD+, and to avoid once again being marginalized by experiments that may become a fait accompli, as has often been the case in similar processes in the past. That said, due to the legal status of carbon and the lack of a legal instrument governing REDD+ in the short term, the land reform initiated by the DRC government would be the ideal framework to define the carbon regime. The following recommendations are intended to serve as guidelines to this effect:

- **Recognize the status of carbon as a thing and a good**, since it is now recognized that it may be owned and that it has an economic value, as it is traded in carbon markets such as regulated by the Kyoto Protocol or voluntary agreements, in accordance with international standards;
- To determine its final status, **apply the principle of accession to carbon that is naturally captured and sequestered by land, forests and the seabed**, this principle having already been established and provided for by Articles 21 et seq. of the Land Act (see discussion above), in accordance with the system of dual tenure prevailing in the DRC;
- **Leave to the discretion of individual contracting parties the responsibility for negotiating and determining the ownership of carbon actively created, maintained and/or increased with a view to trading it in a market.** In other words, the legal status of carbon generated by human work, including forestation/reforestation activities, depends on agreements to be made between the project developer and the holder(s) of rights to the project area (State, local community, civil society).

4. Spatial Planning

4.1. Current Situation

*Normative and institutional gaps in respect of land planning, allocation and use*

The DRC has neither a national policy document nor a legal framework for land-use planning that lay down guidelines for planning, allocation and monitoring of land and forest use. Despite these normative and institutional gaps, the country has a few requirements in respect of land-use allocation (Constitution, Order establishing the powers of government departments, 1957 Decree on Urban Land Planning, Land Act, Agricultural Code), although they are not reflected in sectoral land allocation processes.
Failure to comply with sustainable development principles in the process of allocating rights to land and forest areas

In the absence of guidelines for land-use planning and allocation, mechanisms governing the allocation of rights to various areas tend to favour economic considerations over social and environmental concerns.

Absence of an integrated approach to the management of land and forest areas

As they currently stand, land allocation processes are carried out independently of each other, resulting in conflicts in the use of land and forest and situations of overlapping rights, potentially prejudicial for REDD+. Each department responsible for land use management delivers titles giving access to land and natural resources without taking into account titles already granted by other departments on the same area. This is reflected in many cases of overlapping titles, resulting in potential conflicts between title holders and rivalry between different government departments keen to defend the titles it has issued, as illustrated in Box 1 below.

Box 1. Recent Land Use Planning Conflicts in the DRC

The situations described below are indicative of sector-based pressure on land and forest, and illustrate the constraints in the land-use planning process.

Pressure related to oil and gas exploration and development
The Oil Ministry has awarded 25 blocks for oil exploration in the centre of the Congo Basin, each for a renewable five-year term. A map of these blocks shows that they overlap with forest concessions granted by the Environment Ministry and with national parks established at the initiative of the same department. Another more recent example is a production-sharing agreement dated 3 June 2010 in favour of a British company, SOCO Exploration & Production-DRC, operating in partnership with Dominion Petroleum. The area covered by the agreement, which was approved by Presidential Order No. 10/044 of 18 June 2010, is located within the boundaries of Virunga National Park and relates to Block V of the Albertine Graben in the DRC, covering an area of 7,105 km², meaning that it covers roughly 40% of the park’s current area.

Pressures related to mining
As of January 2011, the Mining Ministry had granted 7,732 mining permits covering 112,731,739 hectares, or 48% of national territory. These permits cover almost all of Bas-Congo and Katanga provinces, as well as significant portions in the east and west of Kasai, North- and South-Kivu, Maniema and Eastern provinces. While most of these permits are still in the exploration phase, 816 small- and large-scale operating permits have been listed, covering a total area of 4.8 million hectares. Most of these operating permits are listed as

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60 Oil blocks for the Oil Ministry, mining concessions for the Mining Ministry, forest concessions for the Environment Ministry and land and agricultural concessions for the Land Ministry.
already active (662 in total). It is considered that approximately 3.5 million hectares from these permits encroach on protected areas. Maps of protected areas and mining permits show considerable overlap. Mining permits have been issued on land allocated for public use and conservation, and as such belonging to the public domain, in violation of the 1969 Act on the Conservation of Nature and the provisions of the Land Act on public land. The Maiko National Park, the Sankuru Nature Reserve, the Upemba National Park, the Lufira Biosphere Reserve and two UNESCO World Heritage Sites, namely the Kahuzi-Biega National Park and the Okapi Wildlife Reserve, are affected by these encroachments. Lastly, it is also observed that game areas, including Mukufya and Basse-Kondo in southern Katanga, are entirely covered by mining permits.

As of January 2011, the mining cadastre showed 629 operating permits overlapping with protected areas. These permits were held by 196 entities, of which 10 alone were responsible for 53% of the total area of overlap. These 10 entities include public undertakings controlled by the DRC government, individuals, small Congolese operators and international mining companies, including publicly traded multinationals, such as Banro Corporation, BHP Billiton, De Beers, Anvil Mining and Freeport McMoRan, which alone hold 14% of the 629 permits. The amount of land held by these companies in protected areas varies greatly. For instance, Freeport McMoRan’s Tenke Fungurume project (operating permit) covers 7,000 hectares in the Basse-Kondo game area in Katanga, accounting approximately for 4% of the total area of Freeport McMoRan’s operating permits in the DRC. Banro Corporation controls 964,325 hectares in the DRC through two wholly owned subsidiaries, Banro Congo Mining and Mining Twangiza, of which 26% or 248,974 hectares overlap with various protected areas in the DRC.

Pressure related to logging and the creation of protected areas
The forestry and nature conservation sectors are managed by the Ministry for the Environment, Nature Conservation and Tourism (MECNT). Forest area currently occupied by forest concessions represents roughly 10% of the country, while that set aside for conservation in protected areas also represents about 10%. To date, the outlook provided by this department, stemming from its international commitments, is an increase in the size of protected areas from 10% to 17%, bearing in mind that tenders could be undertaken to increase the area set aside for the sustainable production of timber at the end of the current forest land allocation process.

Pressures related to farming
It was not possible, at this stage of the study, to obtain a map of agricultural titles across the country. Nevertheless, the government signed an agreement with Chinese company ZTE in October 2007, putting 3,000,000 hectares of land at its disposal for the cultivation of oil palms. 250,000 ha have already been granted; the rest will be made available in increments. Prior to that, the Kwilu Ngongo concession in Bas-Congo Province, with approximately 15,000 ha used to grow sugar cane, was the biggest agricultural concession allocated to a single farming company. In Katanga, a Pakistani company has been allocated 10,000 ha for growing corn. For the future, the Agricultural Code gives individual provinces the power to allocate, by order, rural or urban-rural land for agricultural purposes (Article 12).
Conclusion
The diversity of claims on areas, as noted above, raises some fears. A number of
government departments, such as mining and oil, may be eager to allocate large
portions of land for the extraction of minerals, oil and gas, without considering the
requirements of other uses. This could interfere with REDD+ and affect the
sustainability of REDD+ projects and initiatives already underway or in the land-use
planning phase. The guidelines established by the 1973 Land Act provide for the
possibility for the DRC to develop national land-use planning and infrastructure
laws, as well as concerted investments.61 It also provides for the organization of
specific procedures for land allocation and management, which could be based on
land use patterns or plans, in turn based on resource mapping, but also on a
prospective assessment of land requirements to meet sometimes conflicting needs
(e.g., food, energy, industry) at different levels. To date there is no such mechan-
isim. Another challenge will be to settle conflicts between various sector-based
titles.62 The requirements placed on the promoters of investment projects, such as
public inquiries and public participation, the completion of a prior environmental
and social impact assessment for all projects, including the exploitation of natural
resources, are all ways in which land use can be simplified. Also the option of
combining land uses in the same area will need to be resolved to allow for
overlapping titles but avoid potential use conflicts.

4.2. Options for Reform
Most interviewees regarded the issue of land use planning as fundamentally
important for REDD+, insofar as it can be used to identify areas that may be
reserved exclusively for maintaining or increasing carbon stocks sustainably. Thus,
in the context of the country’s preparation for REDD+, land-use planning is at the
top of the list of enabling activities. A report on the Support programme for the
implementation of a national land-use planning policy has been prepared for this
purpose by the REDD-NC. The programme is expected to run for five years and to
cost approximately US$152 million, of which US$52 million in the first two years.63
Below, we describe the options for legislative reform that the DRC could undertake
in this respect.

61 1973 Land Act, Article 56.
62 Notably sector-based land titling conflicts could be resolved via the fundamental principles
laid down in the Constitution, the 1957 Decree on Urban Planning, the new Framework Law on
the Environment (July 2011), the 2002 Forest Code and its implementing regulations, the 1973
Land Act and the Agricultural Code.
63 The fund is expected to be managed by a dedicated unit under the joint responsibility of the
Department of Planning and an executive body tasked with managing funds pending the
establishment of the National REDD+ Fund.
• **Adopt a national land-use planning policy**, laying down both the country’s vision in this area and guidelines for land-use planning, allocation and control. The guidelines referred to above, prepared by the REDD-NC, could help to develop terms of reference for this activity.

• **Adopt a National Land-Use Planning Act, as the legislative policy instrument in this area**, to organize the process of land-use planning, allocation and control, by: (i) balancing the rights of the State with those of indigenous peoples and other local communities; (ii) setting out guidelines providing integrated management principles to ensure a system of concerted land investment with a view to reconciling different land uses and eliminating or reducing potential sources of conflict; (iii) establishing legal and institutional mechanisms for the coordination of land-use planning and sector land-use allocation throughout the country; (iv) providing for the computerization of title-issuing processes and digitizing the various existing land registers in order to improve management of land-use planning, allocation and control in the DRC; and (v) establishing consultation and arbitration bodies in the process of establishing and implementing land-use plans at various levels.

• **Integrate sustainable development standards** into the national land-use planning process by balancing economic considerations with environmental and social safeguards.

5. Institutional Arrangements

5.1. Current Situation

*Establishment of a specific organic framework for REDD*

To operationalize REDD+ and support the country’s preparation phase (2009-2012), an institutional framework was established by Decree No. 09/40 of 26 November 2009 on the establishment, composition and organization of the structure of the implementation of the process for reducing emissions from deforestation and forest degradation (REDD). This decree established the following institutions: (i) a National REDD Committee, a policy- and decision-making body involving all stakeholders (representatives appointed by the President, the Prime Minister, various departments, the private sector, civil society and indigenous and local communities); (ii) an Inter-ministerial Committee[^64] tasked with planning and

[^64]: Environment, which chairs the body, Agriculture, Land Affairs, Urban Affairs and Housing, Rural Development, Planning, Finance, Mining, Energy.
coordinating cross-cutting issues; (iii) REDD National Coordination (REDD-NC) tasked with coordinating day-to-day matters, including UN-REDD and FCPF programme operations; and, optionally, (iv) a scientific committee comprising both domestic and foreign experts that the Minister for the Environment may call on to provide scientific and technical advice on the REDD+ process. For the development of the National Strategy, the REDD-NC has established 30 Thematic Working Groups (TWG) tasked with developing ideas on specific topics in small committees and with analysing the various options.

The institutional roots of REDD+ are not yet deeply entrenched
These three bodies managed and conducted the REDD+ process over the three-year period 2009-2012. The results of their operations indicate that the National Coordination played a pivotal role in promoting the REDD+ process in the DRC, giving it a steady pace, and drawing on both international expertise and the significant resources placed at its disposal. By contrast, the other two bodies did not operate on a regular basis. They only met a few times during the three-year period, and it proved impossible to draw up a regular schedule of meetings. While financial reasons have been invoked to explain the lack of meetings, they were not the sole cause of this problem. The operation of these decision-making bodies suffered from a lack of attention in the planning of the REDD+ process, thus raising the issue of the legitimacy and even the legality of various steering and management tools used in the REDD+ process, which are required to receive final approval in a process involving each of these bodies.

Decentralization is still in its early stages
The 2006 Constitution paved the way for decentralized management of the country by sharing powers and resources between the central government and the provinces. The new legal framework for decentralization in the DRC is outlined in Box 2.

Box 2. Recent decentralization legal framework in the DRC

Three organic laws were adopted in October 2008 to consolidate this constitutional principle: (i) Law No. 08/012 of 31 July 2008 on the fundamental principles of self-government for the provinces; (ii) Law No. 08/015 of 7 October 2008 laying down rules for the organization and operations of the Provincial Governors’ Conference; and (iii) Law No. 08/016 of 7 October 2008 on the composition, organization and operations of the decentralized territorial entities (DTE) and their relationship with the central and provincial governments. DTEs with legal personality are as follows: towns divided into municipalities; municipalities into districts and/or incorporated groups; territories into sectors and/or chiefdoms; sectors or chiefdoms into groups; groups into villages. The newly decentralized government configuration in the DRC has resulted in the following features:
• DTEs without legal personality are as follows: territories, districts, groups, and villages;
• Provincial institutions are the Provincial Assembly (legislature) and the provincial government (the province’s executive body);
• The provincial government consists of a governor (elected by the Provincial Assembly), a Vice-President (elected) and provincial Ministers (maximum of 10);
• The governor is the head of the provincial executive; he/she is in charge of public administration in the province. All provincial and national public services in the province are under his/her authority;
• The financial accounts of the provinces and DTEs are subject to review by the General Inspectorate of Finance and the Auditor General;
• The sharing of common interest tax revenues between the provinces and the DTEs is set by the law after consultation with the Provincial Governors’ Conference;
• Roughly 40% of national revenues are set aside automatically and allocated to the provinces.

Decentralization is also important for REDD to help improve dissemination of information and knowledge on REDD+ via local level institutions, given that information on REDD+ is currently more localized at the central government level. Some interviewees regarded the decentralization of REDD+ as fundamentally linked to the national decentralization policy. REDD+ arrangements are not intended to make up for failures preventing political, administrative and financial decentralized. Only when the State has implemented decentralization will we be able effectively to bring REDD+ to the provincial and local level. This points to the need first of all to settle cross-sectoral gaps, legal and financial issues and capacity problems associated with decentralization. Some interviewees contend that, while REDD mechanisms will not inform decentralization policy, they will nevertheless be able to help close cross-sectoral gaps at the decentralized level, including for instance the Rural Agricultural Management Councils (CARG), the instrument for the rural land allocation and development planning.65 The approach to REDD+ decentralization chosen by the REDD-NC, which entails first launching pilot projects at the local level, is valid for potential lessons on successes and failures. Nonetheless, many stakeholders interviewed thought that a handful of pilot projects will not be enough to achieve successful decentralization. This view prompted other stakeholders to note that if the national decentralization policy is slow to take root, it could be worthwhile with the decentralization of REDD+ by creating or improving existing local consultation and participation frameworks.66

66 Examples include advisory boards, local management, development and conservation committees (with WWF), the CARG for the agricultural sector.
However, as one REDD-NC interviewee noted, decentralization could divide the country into between 11 and 25 provinces with disparate regulations on REDD+ (such as in federal systems like Canada, USA and Brazil where each state or province has its own rules). Equally, decentralization could heighten the risk of double taxation from both decentralized and national taxation. The central government will therefore have to agree to transfer some resources to the provinces and local authorities to avoid a situation in which REDD+ is hampered by conflicts between central and provincial authorities in respect of powers and resources.

A permanent organic framework for REDD+, as envisaged by the R-PP
Following the adoption of the national REDD+ strategy in late 2012, the R-PP proposed that a more appropriate permanent institutional architecture for REDD+ be established for its implementation. A macrostructure based on the following bodies was envisaged:

- A decision-making body similar to the National REDD Committee as established for the period of the country’s preparation by the Decree of 26 November 2009;
- A sector-based planning and steering body for sector-based implementation similar to the existing REDD Inter-ministerial Committee;
- A coordinating body providing overall management of implementation as well as secretariat and advisory tasks for the decision-making body, similar to the current REDD National Coordination;
- A national carbon agency. This could be an independent body tasked with maintaining the national registry and the allocation of international financing to avoid double counting;
- An Integrated Climate Excellence Unit to create a regional benchmark for training, research and consultancy on the management of climate change and its various components, including REDD;
- A national REDD fund to centralize all international funding, both public and private, and to ensure its redistribution to national actors in accordance with perfectly transparent and evaluated rules.

When asked about institutional aspects, civil society actors deemed it necessary first of all to assess existing REDD+ institution operations before considering establishing new ones. Others argued that the DRC must maintain the same institutions, ensuring that they are also represented at the provincial and local levels. A third suggestion was to appoint focal points in respect of REDD+ issues and activities within each government department, which would also sit on the inter-ministerial body.
5.2. Options for Reform

Interviews with stakeholders brought to light the following reform options:

- Take stock of the functioning of the existing REDD+ bodies during the REDD+ preparation process in order to draw conclusions to inform the future architecture of REDD+. However, the following considerations should be taken into account in the establishment of permanent bodies for REDD+:
  
  - Strengthen the representation and organization of the National Committee and the Inter-ministerial Committee in view of the sectoral dimension of REDD+ and the need for inclusiveness in the process. This implies an extended representation on the National Committee and the Inter-ministerial Committee, to ensure that all departments and agencies whose functions have an impact on REDD+ are effectively represented. It also implies an extension of the representation of NGOs and the private sector on the national committee. This committee should have a clearly defined roadmap, with a clear identification of activities and a related timetable. This would have the advantage of facilitating control and possible inspections.
  
  - Designate REDD+ focal points within sector administrations. There are currently no REDD+ focal points within government administrations of sectors impacting REDD+; it is vital that they be established. Sector departments concerned by REDD+ should take the lead on specific issues related to REDD+ for which they are responsible. However, skills should be placed in a cross-sector and complementary perspective, rather than allowing each department to defend its own sector-based approach to REDD. The country’s participation in the REDD+ process has helped raise awareness but only on the issue of forests, largely ignoring the fact that other areas offer potential carbon opportunities and need to be involved (e.g., agriculture, finance). The issue of carbon finance provides an illustration of this problem, as complex funding arrangements require strong involvement by the Ministry of Finance. Given the potential for generating additional revenue and improving macroeconomic indicators, the Ministry of Finance should be in charge of these issues, together with the involvement of the private sector and banks. It is therefore up to each of these departments to create specialized structures, embedding them for instance in their studies and planning departments for the effective management of REDD+ issues within their respective departments.
Strengthen the provincial deployment of REDD+. There is a need to support provincial coordination bodies already in place for the management of REDD+ at the provincial level through the establishment of multi-stakeholder and multi-sectoral structures (REDD+ provincial committees) to develop provincial REDD+ strategies.

Formalize the new organizational framework through another decree. The new framework should establish permanent REDD+ institutions, building on lessons drawn from the three-year REDD+ preparation phase and the institutional architecture provided for under the R-PP.

6. Benefit Sharing

6.1. Current Situation

A national debate has been established and is drawing to a close

The issue of revenue sharing has already been the subject of fairly extensive debate in the DRC. It was first identified in the REDD+ Readiness Preparation Proposal (R-PP) as one of the main issues warranting an in-depth study towards the preparation of the DRC’s national REDD+ strategy. As such, following two workshops on the topic, one held at the beginning of 2011 and the other in July of the same year, a study was commissioned at the end of 2011 by the REDD-NC to recommend a mechanism for effective revenue sharing consistent with the DRC’s legal and institutional context. It should nevertheless be noted that no legislative provision in the DRC currently mentions rights related to environmental services or services relating to carbon storage.

Two types of funding for REDD+ coexist: (i) revenues derived from international payments (and grants); and (ii) revenues from the carbon market for the reduction of emissions from deforestation and forest degradation. Procedures differ in each of these two categories.

Aside from the distinction between the two aforementioned sources of REDD+ revenue, the study on REDD+ revenue sharing found that:

- The National REDD+ Fund is compliant with DRC law, insofar as it follows the provisions of Law No. 11 on Public Finance defining grants as funds of a non-fiscal nature provided by corporations or individuals to contribute to expenditure in the public interest, or income from legacies and grants allocated to the central government. They may be subject to specific

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procedures to ensure their allocation within the overall budget, an ancillary budget or a special account.\textsuperscript{68}

- REDD+ revenue or funding in support of REDD+ initiatives may also be shared. It will be divided among the various levels of REDD+ governance (central, provincial and local) to support policies, programmes, actions or capacity-building activities, as well as grassroots initiatives aimed at reducing carbon emissions; the share will be proportionate, in accordance with procedures laid down by the Constitution, the new Law No. 11 on public finance and new laws supporting decentralization, namely 60% for the public treasury and 40% for the provinces. Of the 40% awarded to the provinces, provincial governments will retain 60%, transferring 40% to the territorial entities governing the areas where projects are set up;

- The share of REDD+ revenue generated by REDD+ projects for the State as taxes could be channelled into the Treasury account and not that of the National REDD+ Fund, before being apportioned, transferred and allocated in accordance with the principles governing the management of public finance, as laid down in the Constitution, the new Law No. 11 and new laws in support of decentralization. See the previous paragraph;

- The share going to local communities could be preserved regardless of the REDD+ approach adopted (market or fund) if the project or initiative is conducted on land or forest on which they have acknowledged and unbroken collective customary land rights;

- Several other stakeholders should also be included in the process of REDD+ revenue sharing, regardless of the approach (REDD+ project or initiative), namely: (i) lenders or investors (banks or private companies) providing the funds needed to carry out the project; (ii) certification bodies in charge of verifying the compliance of the application with international standards and of issuing emission reduction certificates; (iii) buyers of certified credits; (iv) market intermediaries; and (v) insurance companies, law firms, audit firms, etc. All these participants must receive their share of REDD+ revenue in consideration for their respective services. Such payments, which should also be seen as part of REDD+ revenue sharing, will be subject to specific agreements between the project leader and each of the identified stakeholders. The rate of payment, payment terms and other relevant details will no doubt be left up to the parties (contract law). They will not need to be formalized by the aforementioned national REDD+ legislation/regulation. The project leader will recognize them as operating expenses.

\textsuperscript{68} Article 70, Law No. 11 on Public Finance.
6.2. Options for Reform

A review of the available literature, which mainly comprises the aforementioned study on REDD+ revenue sharing and the interviews carried out in the preparation of this report, points to the following recommendations with regard to revenue-sharing mechanisms:

Define a mechanism for REDD+ revenue sharing based on the distinction between REDD+ initiatives and REDD+ projects. To build an effective system of REDD+ revenue sharing, revenue-sharing mechanisms will need to distinguished between REDD+ initiatives and REDD+ projects.69

Establish a working National REDD+ Fund, the resources of which would come both from development aid (i.e., international institutions, donor countries and special multi-donor funds), and from budget allocations by the Congolese State to finance public-interest activities aimed at maintaining and/or increasing carbon stocks. The REDD-NC tends to favour the allocation of such funds to enabling activities, including those related to the improvement of policies, institutions, legal frameworks and capacity building, as well as to payment for environmental services (REDD+). The revenue generated by REDD+ projects will not be channelled into the National REDD+ Fund.

Ensure that REDD+ revenue and funding in support of REDD+ initiatives can also be shared between the various levels of REDD+ governance (central, provincial and local) to support policies, programmes, actions or capacity-building activities, as well as grassroots initiatives aimed at reducing carbon emissions.

Channel the share of REDD+ revenue generated by REDD+ projects on behalf of the State as taxes into the Treasury account and not to the National REDD+ Fund.

Preserve the share going to local communities on their behalf, regardless of the REDD+ approach adopted (market or fund) if the project or initiative is conducted on land or forest on which they have acknowledged and unbroken collective customary land or forestry rights.

69 REDD+ initiatives are activities liable to produce REDD+ outcomes without aiming to trade them in the carbon markets. REDD+ projects, by contrast, are public or private investments aimed at achieving REDD+ outcomes to be certified in relation to recognized international standards and to be traded in carbon markets. REDD+ initiatives relate to the fund-based approach and REDD+ projects to the market-based approach.

70 The option of a National REDD+ Fund has already been approved. The way in which it will be created is still under discussion.
Ensure revenue-sharing by various stakeholders, in the process of implementing REDD+ projects or initiatives.

7. Safeguards

7.1. Current Situation

A process of building social and environmental safeguards is underway

To measure projects’ positive and negative impacts in respect of social and environmental factors other than carbon stocks, the DRC has opted to establish national environmental and socioeconomic standards that are compatible with existing international and foreign standards, adapted to local context and to the diversity of Congolese ecosystems. These standards (or safeguards) are being developed in the form of a matrix comprising principles, criteria and indicators.71

The main challenges in the standardization of the REDD+ process in respect of environmental and social issues

Making social and environmental safeguards operational will require:

- Institutionalizing and formalizing safeguards. The majority of interviewees argued that safeguards should be formalized to make them binding and thus ensure compliance in the implementation of the REDD+ process in the DRC. This institutionalization should be part of the process of implementation of the new Framework Law on the Environment, which invokes the principle of environmental and social impact assessments prior to the approval of any proposed development or infrastructure project, or any industrial, commercial, agricultural, logging, mining, telecommunications or other activity liable to have an impact on the environment.72 This school of thought says that REDD+ should not be an exception. Others contend that the specific nature of REDD+ and the generally insignificant impact generated by REDD+ projects and initiatives mean that a specific framework should be devoted to it, thereby exempting it from the general rules of the Framework Law on the Environment. A third opinion argues that formalization should not be a formal requirement within the national set

71 This matrix was established on the basis of a variety of sources of information, including the legal texts of the DRC on the management of natural resources (forests, mines, land, agriculture, oil, biodiversity conservation, etc.), the safeguard policies of partners involved in the REDD process in the DRC (World Bank, UN-REDD, ADB, etc.) and the relevant texts of REDD+ standards of other countries and international institutions (CCBS, VCS, REDD+ socio-environmental safeguards in Brazil, Indonesian standards, etc.).

of standards. The idea is that the use of social and environmental safeguards should be left to the discretion of the project and/or initiative leader. This question has not been settled at the time of writing.

- **Developing adequate tools and instruments**, proving that safeguards have been adequately taken into account by REDD+ project and initiative leaders. These tools could be in the form of diagrams, models or formats of impact assessments or enquiry questionnaires.
- **Continued development of adequate national expertise** for compliance demonstration and verification. This refers to people who will be accredited for the production of tools demonstrating compliance with standards in the form of impact assessments or any other form, as well as third parties accredited to verify the statements of project developers.

### 7.2. Options for Reform

**Clarify the country’s position in relation to the formalization or otherwise of safeguards**

The idea is to decide whether or not to enforce compliance with national REDD+ standards in the development of projects/initiatives established in the DRC. Two main options appear to be the focus of debate in the country.

- **Option 1. Make safeguards a legally binding national requirement.** Majority opinion favours this option, arguing that, despite the existence of international safeguards, national approval of REDD+ projects and/or initiatives should be subject to compliance with domestic social and environmental safeguards in addition to the technical aspects relating to carbon stocks. In such cases, national standards will be developed by considering both the requirements of the national legal framework for environmental and social issues and the guidelines derived from international standards such as the Verified Carbon Standard (VCS) and Climate, Community and Biodiversity Standard (CCBS). This option has the advantage of ensuring compliance of REDD+ projects with safeguards, but the disadvantage of imposing additional costs and time on REDD+ projects and/or initiatives.

- **Option 2. Leave standards as an option at the discretion of the project leader.** This option would work in the same way as FSC (Forest Stewardship Council) certification for timber, i.e. as a market component, as opposed to a legal requirement of the State. It would have the advantage of reducing costs and saving time in project development, but the disadvantage of not guaranteeing compliance with safeguards. To overcome this obstacle, international certification standards such as CCBS give a higher price to credits and preference to buyers, or incentives for project leaders.
Establish an institutional framework to implement safeguards
This recommendation is only relevant if standards are made legally binding, and would entail setting up a specialized administrative structure for the implementation of safeguards, with responsibilities including the review and approval of records and reports on compliance with safeguards. This administrative structure would have to meet three major challenges: (i) transparency and fairness; (ii) operational capacity and administrative responsiveness; and (iii) the need to avoid putting too much decision-making power into the hands of one body in order to avoid various forms of abuse of power such as influence peddling, corruption and favouritism.

Establish a capacity building programme to ensure safeguard management
The review of applications so as to assess their admissibility and compliance with safeguards (environmental, social, economic impact assessments) and the analysis of verification reports require skills and qualifications. Because standards currently being developed are national and apply only to specific REDD+ activities, it is important to develop flexible mechanisms for the training and accreditation of domestic experts, including verification experts, with the government department in charge of the standard. These mechanisms must be acceptable at the domestic level and credible at the international level.

Define terms (conditions and procedure) for the accreditation of experts
This procedure should include an assessment of the scientific qualifications of the expert in charge of conducting studies and a verification of his or her reputation in the form of a signed statement or a declaration attesting to the absence of conflicts of interest and compliance with the codes of ethical/professional conduct applicable to the expert seeking accreditation. Experts in charge of verification should also be subject to similar accreditation procedures.

8. Public Participation

8.1. Current Situation

A promising start, particularly in respect of the participation of civil society
The DRC’s R-PIN, the document that triggered the REDD+ process in the DRC, was drafted by the government without stakeholder consultation. Fortunately, the involvement of stakeholders, and especially civil society, was much greater in developing the R-PP. Following early studies and initial thinking on the R-PP by experts, the various stakeholders helped identify common interests and guidelines allowing the establishment of an overarching REDD+ framework acceptable to all. The consultative process that characterizes REDD+ in the DRC is a strategy for
releasing international grants that have been paid or pledged, and applications for funds by the Congolese government through the REDD-NC to implement REDD+ incorporate significant civil society involvement. This collaborative model is similar to the institutionalization of a working relationship between partners.\textsuperscript{73} Collaborative work has been seen most in thematic working groups (TWG), which were intended as a framework for thinking and discussion for the various stakeholders, allowing them to interact and achieve consensus on the national REDD+ strategy. It thereby creates the conditions for a genuine debate on the various REDD+ projects and allows, as appropriate, a consensus to be reached on key actions.\textsuperscript{74}

\textit{A stain on the process}

However, despite the progress noted above, several incidents have stained the process of participation in the DRC. The first related to the signing by the Minister of Forests of the decree laying down the approval procedure for REDD+ projects,\textsuperscript{75} the signature process of which had a participation deficit. Civil society duly opposed the decree, voicing its opposition in a petition addressed to the relevant minister. To date, no response has been made to this petition.

\textit{Insufficient involvement by the private sector}

Participation by the private sector is still at the mobilization and awareness-raising stage. Even operators from the logging sector have not yet established a functional link between their operations and the REDD+ process currently being deployed. This highlights the need to develop mobilization, incentive and support strategies for the domestic private sector (e.g., contractors, project leaders and banks).

\textit{A system with limited access to information}

Finally, although dialogue between different stakeholders is now on-going, access to information is still insufficient, lacking mechanisms to enable relevant information to be disseminated on a large scale. The following observations are noteworthy in respect of access to information on REDD+ in the DRC: (i) information exists but is not always available; (ii) some information does not exist and must therefore be produced (e.g., studies, statistics, socio-anthropological data); (iii)

\textsuperscript{73} On top of the formalization of consultations between government and civil society, partnerships between FAO or the World Bank and civil society also emerged. For example, the World Bank has funded civil society through the REDD Climate Working Group, an environmental NGO, to conduct local and provincial consultations on the Forests Investments Programme (FIP) document, while FAO signed a contract with the same organizations to provide services to supplement data from the study on the drivers of deforestation and forest degradation in the DRC.

\textsuperscript{74} Mpoyi et al., Etude sur le partage des revenus, p. 74.

\textsuperscript{75} Decree No. 004/CAB/MIN/ECN-T/012 of 15 February 2012.
access to information is unequal; and (iv) a transparent and effective mechanism for disseminating information is lacking. The Information, Education and Communication component of the REDD+ National Coordination, which has barely functioned since the beginning of the process, is starting to tackle this question.

8.2. Options for Reform

The DRC already has a number of benchmarks for participation. The reform of the forestry sector, onto which REDD+ has been grafted, provides many examples of stakeholder involvement. Institutional mechanisms such as advisory boards, steering and coordination committees, etc. have been created for various projects, in addition to legal provisions establishing participation as one of the key principles of forestry governance. These mechanisms have promoted stakeholder involvement in decision-making on forest issues. With regard to REDD+, reform in respect of public participation could be based on the following recommendations:

- Provide a legal basis for participation: the legal framework for REDD+ should include this principle in its provisions and clearly indicate the terms of public participation (information, consultation and consent), cases in which it is mandatory, the social groups concerned by participation and the specific terms of their consultation, the relevant documents, penalties for non-compliance with mandatory procedures, legal remedies, etc.;
- Increase the level of involvement of other government departments concerned by REDD+ issues in the REDD+ processes and increase their knowledge and capacity in respect of REDD+. The aim here would be to enable them to grasp the relationship between their respective sectors and REDD+, and, where appropriate, to participate in a meaningful way in the construction of the national REDD+ strategy incorporating considerations specific to their respective sectors;
- Implement the Information, Education and Communication programme, notably by making the plan for consultation and communication on REDD+ operational;
- A mechanism is recommended to be defined by regulation, allowing all stakeholders, including individuals, local communities and indigenous peoples to bring their complaints and appeals in cases where any REDD+ projects or initiatives have deviated from the agreed implementation.
- Strengthen the capacity of communities to understand what is being discussed and to be informed by valid interlocutors.

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76 Articles 5 and 24 of the Forest Code.
9. Measurement, Reporting and Verification (MRV)

9.1. Current Situation

Controversy exists regarding carbon accounting levels
There is still debate on the question of how to account for carbon stocks and manage bonuses (carbon credits or payment expected for outcomes). Some believe that the DRC vision should develop rules and use national accounts disclosed to the international community, as the country has done during the year.

At a subnational level, some contend that MRV can only be carried out economically on a large scale. This group notes that the approval of REDD+ projects only concerns large investments, and excludes small projects and small-scale financing lacking the capabilities needed for MRV. They conclude that national grant programmes must be put together to enable actors to receive REDD+ funding, but without giving them rights to issue carbon credits. In the example of improved stoves, a company will not receive carbon credits, but may be funded in consideration for a particular outcome. This will allow it to achieve a return on its investment and expand its business. At a national level, grants will be awarded to develop a network of activities that are broadly in line with the REDD+ approach, with nationwide monitoring of deforestation at year’s end.

Another group expressed the need to adopt a national approach to accounting for carbon stocks that includes other levels, particularly the project level. Some noted that a national system would require the establishment of a system of access to raw data (e.g., raw satellite imagery, field carbon data), as well as clear guidelines on how to collect information. But it is noted that the DRC is a vast country where national monitoring requires enormous capacity and raises huge challenges. A national system would therefore not be easy to implement, nor can the DRC go as far as more developed countries such as Brazil and Mexico. An approach combining national and subnational levels therefore may be the most advantageous to the Congolese people.78

77 As envisaged by Decree No. 004 of 15 February 2012.
78 Work on this issue is ongoing at UCL (Catholic University of Leuven), under the leadership of Jean-Paul Kibambe, who is working on a nationwide deforestation risk map with national and subnational level coefficients linking observable variables (roads, topography, populations, proximity to cities, etc.) and deforestation. Project leaders will be able to apply the level of the specific area. This is work in progress, and concerns deforestation only; we do not as yet know how to do the same with forest degradation. Baselines could be allocated to a specific area, territory or sector, with specified goals to meet. If project developers achieve more in terms of reduction, they would be paid.
However, setting emission benchmarks nationally poses risks from concentrating REDD initiatives and investments in areas where emission levels are extreme. This will result in neglecting areas where it takes great effort and large investments to achieve the same results. Thus, a comprehensive national level approach at a program level would give erroneous results. Therefore, in this study, it is suggested instead to: (i) stratify the country using two criteria, including the type of vegetation cover and socio-economic dynamics, and (ii) define reference emission levels for each stratum thus defined. The study on the drivers of deforestation in the DRC has given enough evidence to make such stratification.

9.2. Options for Reform

The MRV system was one of the study’s most controversial issues. For this reason, reform recommendations can only be formulated in terms of the following options to define a framework for the implementation of an MRV system, which emerged from interviews and a literature review.

- Produce a policy proposal on the MRV baseline options identified and the adoption of the option most compatible with the interests of the country, including indigenous populations, local communities and project leaders;
- Propose draft provisions regulating issues related to baselines for both the accounting of carbon stocks and compensation arising therefrom.

With regard to medium- and long-term legal and institutional reforms, it is important to develop the decree status, organization and functioning of the National Environment Agency (to finalize the process of developing the full MRV system). Given the complexity of the MRV system, it is also essential to institute a program to strengthen capacity on MRV for the benefit of stakeholders to support reform now and in the long term, to ensure a functioning system of remunerations.

10. Implementation and Enforcement

10.1. Current Situation

The political and institutional environment is not conducive to law enforcement. The DRC is known for chronic governance issues hampering law enforcement. These issues can be summarized as follows: (i) a derelict civil service; (ii) an inadequate civil service wage policy, prompting the commodification of public services and documented cases of corruption and extortion; (iii) a judicial system distorted by impunity and riddled with corruption. These issues are among those that have put the DRC at the bottom of governance rankings.
In the forestry sector, in spite of past efforts to provide the country with a more or less comprehensive legal framework, the following points should be noted: (i) significant differences exist between legal provisions and actual practices within the MECNT (e.g., a controversial licensing system and dysfunctional special forestry tax system); (ii) the deployment of State and government agencies responsible for on-site monitoring of logging, traffic and marketing of timber and other forestry products is insufficient (resulting in cases of unlicensed logging on existing concessions, irregular marking of wood, undocumented wood); and (iii) conflicts persist over the respective powers of the different forest governance levels (central, provincial and local).

**The business climate is unattractive**
It is widely believed inadvisable to invest in the DRC due to various deeply rooted factors. In addition to cumbersome administrative procedures and the country’s asphyxiating taxes and special levies, political and administrative agents are focused on achieving personal enrichment, thus resisting reform. It will not be easy to make a turn in the right direction.

**Efforts have been made, but they have been mitigated by political, administrative and social inertia**
To address the gloomy picture described above, the Congolese government has set up a Steering Committee to improve the business climate, chaired by the Minister for Planning, and given it a roadmap. The World Bank, the International Monetary Fund and donors belonging to the Paris and London Clubs have also set as a prerequisite the reaching of the HIPC (Highly Indebted Poor Countries) Initiative completion point. Unfortunately, none of these measures has allowed the situation to improve on the ground. Their application has met with resistance related to political, social and administrative inertia that is hampering change, and control systems appear to be virtually irrelevant.

**10.2. Options for Reform**

In light of the above findings, the report makes the following recommendations to ensure implementation of the REDD+ mechanism:

*Define, in the future national strategy, a REDD+ administration system* that takes into account the gaps and pitfalls of Congolese government administration in general, the treatment of which will take time. To this end, the strategy should establish an independent certification system supporting operators, including: (i) the use of independent certification experts recruited and approved on the basis of a transparent and credible accreditation process ensuring the exclusion of any
project developers who do not comply with required standards; and (ii) the establishment of mechanisms for managing public REDD+ funds subject to independent external audits.

**Continue ongoing efforts to improve the business climate** so as to remove obstacles and bottlenecks undermining government actions in various national sectors and that may adversely affect investments in REDD+; this is a necessity as the country enters the REDD+ investment phase.

### 11. Overview of Legislative Reforms Proposed for REDD+

#### 11.1. Overview of Legislative Reforms Proposed for REDD+ by Theme and Relevant Sector Law

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<th>Democratic Republic of Congo</th>
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<td><strong>Existing laws</strong></td>
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<td>Constitution</td>
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<td>Law No. 011/2002 of 29 August, known as the DRC Forest Code</td>
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<td>Law No. 73-021 of 20 July 1973 on the general status of property, land and property regime and the system of guaranteed, as amended and supplemented on 18 July 1980</td>
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<td>Law No. 022 of 24 December 2011 on fundamental principles relating to agriculture</td>
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<td><strong>New laws</strong></td>
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<td>Law enacting fundamental principles in respect of planning</td>
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11.2. Summary of Proposed Legislative Reforms

A1: Constitutional reform. Constitutional reform relates to Theme 1 – Land and forest tenure and the national carbon regime. Two reform options aimed at clarifying the tenure of land and natural resources are recommended. The first upholds the State’s right of ownership to all land and all natural resources. The second does not necessarily recognize the State’s ownership of all land and all natural resources, but does not exclude this right of ownership to certain portions of land on which the State’s ownership can be recognized, subject to certain substantive and formal conditions. Under either option, a constitutional amendment could be recommended. In the first case, it would be up to the constituent assembly to state clearly and unequivocally the State’s right of ownership to land and natural resources, mirroring all previous Constitutions, which solemnly declared that ‘the soil and subsoil belong to the State’. This constitutional amendment would settle the question of the constitutionality of existing sector laws (e.g., Forest Code, Mining Code, Hunting Law, Land Act) that confer ownership of land and its resources to the State, whereas the current Constitution does not state this at any point. In the second option, it would be up to the constituent assembly to state, except in respect of land and forests that are already State-owned, the conditions under which the State would own land and other natural resources, thus outlining the guiding principles. This option would need to be consistent with Article 34 of the current Constitution, which recognizes customary land tenure.

B1: Reform of the Forest Code. This relates to Theme 1 – Land and forest tenure and the national carbon regime. The reform of the Forest Code will be a step towards recognizing pygmies as indigenous peoples (a concept that will also need to be defined) and, where appropriate, their forestry rights, thereby providing a legal basis for implementing regulations that have already made a step in this direction by recognizing the forestry rights of pygmies, qualifying them as ‘indigenous peoples’.

B4: Reform of the Forest Code. This relates to Theme 4 – Public participation. Articles 5 and 24 of the Forest Code laid the foundations for public participation, but did not explicitly incorporate the principle of free, prior and informed consent (FPIC) as part of public participation in forest land-use planning and allocation. It can, however, be found in the interpretation of some of the provisions of its implementing measures and the approach of the Department in charge of Forests. The reform of the Forest Code provides an opportunity to state this unequivocally.

C1: Reform of the 20 July 1973 Land Act. This relates to Theme 1 – Land and forest tenure and the national carbon regime. Three main issues must be
addressed by this reform: (i) clarification of tenure in accordance with the constitutional option chosen (see point A1 above); (ii) the recognition of the land rights of indigenous pygmy populations (see B1); and (iii) the integration of free, prior and informed consent (see B4). On the latter issue, the Land Act recognizes the right to information and consultation in the land-use planning and allocation process, but does not ensure the right to FPIC in these processes.

D1: *Reform of the Agricultural Code of 15 December 2011.* This relates to Theme 1 – Land and forest tenure and the national carbon regime. Article 19 of this Code excludes the possibility for local communities, and possibly indigenous peoples as well, to obtain title covering their land rights. It therefore precludes any possibility of reform providing title to cover customary land rights so as to reinforce the legal security of such rights. The reform of the Agricultural Code will remove this provision if a consensus is found for giving title to the customary land rights of indigenous peoples and local communities. Moreover, it is worth noting what has already been abundantly discussed in respect of Article 16: farming operations may be performed only by corporate entities subject to commercial law, the majority of whose capital is owned by Congolese investors. This construction does not seem fitting, and is liable to discourage foreign investment – something the country may need – in the agricultural sector.

E1: *The specific legal framework for REDD+.* This recommendation relates to Theme 1 – Land and forest tenure and the national carbon regime, and specifically concerns the national carbon regime. A law on REDD+ should clarify the legal status of carbon, distinguishing the status of carbon that is captured, sequestered and stored by natural forests, without human intervention (even though it is true that it is not yet traded on the market) from that which is captured, sequestered and maintained or increased via human effort. It may also, and notably, define carbon as a thing and a good, first because it may be owned, and second because it can be demonstrated that it is already traded on the market and that its value can therefore be measured in monetary terms.

F2: *The law enacting fundamental principles in respect of planning.* This relates to Theme 2 – Planning. Such a law does not exist either. It could build upon

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79 As already mentioned above, this legal framework could take the form of an amendment of the Forest Code that integrates the issue of REDD+ and any other residual questions, in view of the difficulty of having a specific REDD+ law, REDD+ not being on the constitutional list of matters falling within the scope of laws. This legal framework could also come in the form of decree by the Prime Minister, pursuant to the current Constitution, which states that matters not listed among those falling within the scope of laws fall within the scope of regulations.
the provisions of the 1957 Decree on Urban Planning, from which it could borrow a number of requirements before repealing it and extending its scope to cover rural areas (or rural land). As mentioned above, it may set out the guiding principles for land-use and occupancy planning, allocation and monitoring. These principles would be mandatory for all sectoral laws regarding land allocation processes and/or rights over natural resources. It may itself be preceded by (or concurrent with) a national policy in this area, which would have to select options, directions and guidelines for land use and/or occupancy planning, allocation and monitoring.

G3:  *The specific legal framework for REDD+*. This relates to Theme 3 – Institutional framework for REDD+. This legal framework would address the issue of the REDD+ institutional framework or, failing that, develop guidelines for a suitable institutional framework. It would lead to the repealing of Decree No. 09/40 of 26 November 2009. Based on the assessment of the functioning of the institutional framework established by this Decree for the REDD+ preparation period, it could also establish permanent REDD+ institutions.

H4:  *The specific legal framework for REDD+*. This relates to Theme 4 – Public participation. Its purpose would be to provide a legal basis for the principle of participation, which is central to REDD+. This legal framework would clearly indicate the terms of public participation (information, consultation and consent), including cases in which it is mandatory, the social groups concerned and the specific terms of their consultation, relevant documents, penalties for non-compliance with required procedures and legal remedies.

I5:  *The specific legal framework for REDD+*. This relates to Theme 5 – Sharing the revenues derived from REDD+. It would propose: (i) revenue-sharing mechanisms based on the distinction between REDD+ initiatives and REDD+ projects; (ii) the establishment of a *National REDD+ Fund*, the resources of which would come on the one hand from international institutions, donor countries and special multi-donor funds in the form of development aid, and on the other hand from Congolese State budget appropriations to finance public-interest activities aimed at maintaining and/or increasing carbon stocks; and (iii) practical recommendations for setting up revenue-sharing mechanisms.

J6:  *The specific legal framework for REDD+*. This relates to Theme 6 – Social and environmental safeguards. The report recommends: (i) exercising an option through this legal framework on the way in which safeguards could be formalized; (ii) establishing a specific institutional framework to make safeguards operational; (iii) setting out a programme of capacity building to allow significant safeguards to be introduced; and (iv) defining terms (conditions and procedure) for the accreditation of experts.
K7: *The specific legal framework for REDD+. This relates to Theme 7 – Measurement, reporting and verification (MRV). The report recommends that accounting for carbon stocks be performed at the national level, with compensation remaining at the level of individual projects.*

L8: *The specific legal framework for REDD+. This relates to Theme 8 – Enforcement. To address shortcomings in governance processes hampering effective law enforcement, the report recommends: (i) the establishment of an independent certification system in support of REDD+; and (ii) the implementation of mechanisms for managing REDD+ public funds subject to independent external audits. The report also calls for continued efforts to improve the business climate in the country.*

### 11.3. Options for Legislative Reform

**Options for short-term legislative reform**

- *Adopt a legal framework laying down detailed rules for the REDD+ process.* Such a framework should be implemented in the short term to clarify a number of pressing issues, failing which even REDD+ projects already underway in pilot format will not be able to monetize their emission reductions in the international markets. Such a reform would provide an opportunity to address inconsistencies laid down in procedures for the approval of REDD+ projects,\(^{80}\) and to deal with all the issues associated with REDD+ in a cross-cutting but orderly and integrated manner. The issues addressed by this report, with the exception of tenure and planning, could be addressed and settled by this prospective new legal framework. It could, for instance, redefine the approval process of REDD+ projects and initiatives to make it consistent with the existing provisions governing areas relating to REDD+, such as land, agriculture, forestry, conservation of nature and the environment, etc. It could also create and reorganize the national registry, by integrating both technical carbon standards (notably MRV) and social and environmental safeguards into the approval process for REDD+ projects and initiatives. It could also lay down guidelines governing the status of carbon and mechanisms for sharing revenues from REDD+ projects and/or initiatives, without forgetting fiscal arrangements associated with REDD+. Lastly, the institutional framework for the management of REDD+, including the establishment of administrative structures and independent bodies for the examination and certification of data relating to REDD+ projects and initiatives, as well as that relating to the National

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\(^{80}\) Order No. 004/CAB/MIN/ECN-T/012 of 15 February 2012 and its various annexes (1, 2, 3 and 4). See also the communication to the Minister in charge of forests by environmental NGOs, setting out their grievances against this order.
REDD+ Fund, could also be regulated by the same legal framework, taking into account considerations and tools already in place and the consensus achieved during the REDD+ preparation phase (2009-2012). Some of these issues are discussed in a scant and inconsistent manner in the aforementioned REDD+ project approval procedures. This complicates the implementation of REDD+ and is an obvious source of uncertainty for future REDD+ investments.

The prospective new legal framework will need to address all of these issues in an integrated manner facilitating the orderly deployment of REDD+, ensuring the security of investment and compliance with the rights of indigenous peoples and local communities, and protecting the interests of the Congolese State in accordance with the standards of sustainable development.

- **Begin the process of developing policy and legislative frameworks governing planning and land use.** The purpose of these instruments is to organize land-use planning, allocation and monitoring. In view of the extreme pressure on Congolese land today, the reality of the phenomenon known as ‘land grabbing’, the ever-increasing number of mining and oil and gas permits and upward revisions of targets with a view to increasing the amount of land placed under conservation regimes, it is essential that the country adopt such instruments. Each of these instruments could quickly be matched by a specific law. These recommendations will certainly take time to implement due to the complexity of existing land occupancy (excluding planning), the size of the country and the lack of consensus on the system of tenure governing land and other natural resources. National planning and land policies and any ensuing laws are essential for the success of all sector policies affecting land, including REDD+. While their adoption may be pushed back to the medium or long term, a start could be made in the short term on some measures that are part of the overriding objective. The process for establishing these strategic tools could be as follows:
  - The questions and issues they contain would be discussed in greater depth in the GLOBE Chapter of Parliament, ultimately resulting in a roadmap\(^\text{81}\) outlining the procedure for the establishment of both national policies and legislation regarding land and property. The tasks could be identified, defined and distributed among the GLOBE Chapter teams. A timetable would be set,

\(^{81}\) Such a roadmap has subsequently been produced and validated by the Legislative Working Group for REDD+ and Forest Governance in the DRC Parliament in May 2013, to be publicly presented in late 2013.
together with a methodology. Teams thus created would establish a working relationship and coordinate with the departments in charge of these portfolios and other stakeholders, such as specialized civil society organisations, research centres and universities. They could also draw upon thinking already carried out, documents previously produced and actions, and reform-minded initiatives already underway in the relevant departments. Ultimately, they would collect data that would help define the terms of reference for the development of the following instruments: (i) a draft national planning policy; (ii) a draft national land policy; (iii) a bill establishing fundamental planning principles; and (iv) a bill revising the existing Land Act.

- Two firms or specialized professional bodies could be recruited to produce the first drafts of these documents, namely: (i) a draft national land-use planning policy; (ii) a draft national land policy; (iii) a bill establishing basic land-use planning principles; and (iv) a bill revising the existing Land Act. These firms or agencies would be expected to undertake a comprehensive preliminary review of each of these areas, thereby collecting and updating all available information thereon.

**Options for medium- and long-term legislative reform**

- *Adopt national policy documents and laws in respect of land-use planning and land policy.* This would extend action already initiated in the short term, and would in turn entail further action in the medium and long terms:

In the medium term:

- Organization of multi-stakeholder consultation at all territorial levels (central, provincial and local) with the aim of informing all stakeholders and gathering their views and comments on four draft documents, with a view to their possible inclusion. This consultation would involve all land-related ministries (e.g., Mining, Oil, Energy, Environment, Nature Conservation and Tourism, Urban Development, Housing). It would be spearheaded by the Ministry of Planning, Urban Development, Housing, Infrastructure, Public Works and Reconstruction, and by the Land Ministry, with

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the participation of the GLOBE Chapter and the Planning Committees of both Houses of Parliament;

- Preparation of the draft of final consensus-based national land-use planning and land policy documents;
- Final draft of the law on the fundamental principles of land-use planning, and revision of the Land Act, with the support of all stakeholders. The draft would then be transmitted, either at the initiative of the members of the GLOBE Chapter (draft private Member’s bill), or that of each of the departments concerned (draft bill), to the office of Parliament in charge of tabling and voting;
- Adoption of the national policy document on land use in Cabinet, with its principles enshrined in a decree;
- Adoption by Parliament and promulgation by the President of the Republic of the framework law setting out basic principles in terms of planning and the revised Land Act;
- Implementation of a framework for interdepartmental and interagency coordination to ensure consultation and participation in decision-making in respect of land-use allocation.

In the long term:

- Assessment of the country’s potential in terms of renewable and non-renewable natural resources contained in its soil and subsoil prior to any planning in respect of land use and/or occupancy. Responsibility for this evaluation would be given to the department in charge of land issues;\(^{83}\)
- Implementation of land-use allocation processes based on the guidelines contained in the national policy document on land and the relevant fundamental principles laid down in the law, resulting in the adoption of land-use allocation documents at various levels and in pilot format. It will probably not be possible to establish a national land-use plan at the outset, possibly due to the size of the relevant investment in relation to the size of the country. The option of progressing in phases until the whole country is covered by a national land-use plan would be ideal. The plan could subsequently be updated.

\(^{83}\) Order No. 08/074 of 24 December 2008 establishing the powers of government departments.
Annex I: National Context of the Development of REDD+ in the DRC

The Democratic Republic of Congo joined the international REDD+ process in January 2009, following an initial exploration undertaken jointly by the UN-REDD Programme, represented by FAO, UNDP, UNEP and the Forest Carbon Partnership Facility (FCPF),\(^{84}\) which is managed by the World Bank.

A funding allocation of US$1,883,200 from the UN-REDD programme and a grant of US$200,000 from the FCPF helped mobilize all stakeholders in the development of the REDD+ Readiness Preparation Plan (R-PP). Adopted by the DRC in early March 2010 after many amendments by stakeholders, the R-PP was approved by the UN-REDD Board and the FCPF Participants Committee in late March 2010, before its final publication on 15 July 2010. Subsequently, in the three years following its adoption (2010-2012), the R-PP became a unified national action plan spanning all activities necessary for the country’s preparation for REDD+. As such, it lays out the main phases of the REDD+ process in the DRC: (i) initialization; (ii) preparation; (iii) investment; and (iv) implementation. The various phases in the country’s preparations for REDD+ are built around the following four components:

- Coordination, overall management, information, education and communication, consultation and mobilization, and community roots;
- Development of the national strategy and technical, institutional and regulatory preparations;
- Development and implementation of a pilot programme;
- Development and implementation of early deployment of the REDD+ strategy.

Thus, as a three-year roadmap, the R-PP sets out: (i) the institutions to guide the process; (ii) the causes of deforestation and forest degradation in the DRC; (iii) strategic options for REDD+ in the preparation of the national REDD+ strategy; (iv) the framework for the implementation of REDD+; (v) an assessment of social and environmental impacts; (vi) the development of a baseline scenario; (vii) the design of a monitoring system; (viii) a timeline and a budget; and (ix) the development of a monitoring and evaluation framework.

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\(^{84}\) UN-REDD and the World Bank were the main donors for the three-year REDD+ preparation phase, which ran from 2009 until 2012.
The preparatory phase from 2010 to 2012 was aimed at preparing and adopting a national REDD+ strategy by the end of December 2012, with a view to entering the investment phase in January 2013. But the preparation of the national REDD+ strategy is running behind schedule. Instead, and as part of the transition, the option was put forward – and endorsed by all stakeholders – of proceeding first by defining a national REDD+ strategy framework, which was launched in December 2012 at the 18th Conference of the Parties of the United Nations Framework Convention on Climate Change (UNFCCC). The intention was subsequently to use this framework to define, in a participatory manner, a national REDD+ strategy, together with specific commitments that have been integrated into the country’s overall development strategy.  

Nevertheless, much has been achieved during the preparation phase, based on two pillars: studies and field pilots.

**Studies**

Included in the R-PP, these studies were designed to inform the preparation of the national REDD+ strategy. Most of them were carried out and handed over to the REDD National Coordination component handling the preparation of the national REDD+ strategy, including: (i) study of the causes and agents of deforestation and forest degradation; (ii) exploratory study of REDD+ potential in the DRC; (iii) feedback on alternatives to deforestation and forest degradation with an impact on poverty reduction; (iv) study of the socio-environmental standards of REDD+ projects and initiatives; (v) national analysis of sector programmes; (vi) studies on the framework and the sharing of revenues derived from REDD+; (vii) studies on legal and institutional reforms stemming from the REDD+ process (including this report), etc.

**Pilots**

Pilots have focused on sector-based and geographically integrated pilot projects, the outcomes of which should provide practical lessons that can be used in the development of national REDD+ strategy projects. Some of them are funded by a grant from the Congo Basin Forest Fund (CBFF) of €29.5 million to the DRC, of which €16 million went to the implementation of six (6) REDD+ pilot projects and €13.5 million to the development of community agroforestry and promotion of community forestry.

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Illustrative list of projects being implemented in the DRC:

- **REDD+ Integrated Agroforestry Pilot Project in South Kwamouth**: located in Kwamouth (Bandundu Province), this project is being implemented by a private-sector company, NOVACEL/SPRL. It is an integrated rural development project based on agroforestry in a highly degraded part of the Kinshasa firewood supply basin.

- **Integrated Pilot Project around the Luki Biosphere Reserve** in Mayumbe (Bas-Congo Province): located in Moanda in Bas-Congo Province, this project is supported by WWF and is aimed at achieving integrated rural development in the Mayumbe forest, where deforestation is significant.

- **Isangi REDD+ Integrated Pilot Project**: located in Isangi (Eastern Province), this project is supported by national NGOs, led by OCEAN. It focuses on integrated rural development, land, community forest management and management activities in permanent production forests.

- **Mambassa Integrated Pilot Project**: located in Mambassa (Eastern Province), this project is supported by the Wildlife Conservation Society (WCS). Like the preceding project, it focuses on integrated rural development, land-use planning, community forest management and management of activities in permanent production forests.

- **Integrated REDD+ Pilot Project in the Maringa-Wamba-Lopori area**: located in Djulu and Befale (Equateur Province), this project is supported by the African Wildlife Foundation. It is focused on the sedentarization of slash-and-burn agriculture, improving market access conditions and promoting community forest management in an area of low pressure with extensive farming practices.

- **Integrated REDD+ EcoMakala Pilot Project**: located in Goma, Rutshuru and Nyiragongo in Nord-Kivu Province, this project is supported by WWF. It is focused on small plantations in the Goma basin, with the production and marketing of briquettes, distribution of improved stoves and improvement of carbonization techniques.
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## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>CARG</td>
<td>Rural Agricultural Management Council</td>
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<tr>
<td>CBFF</td>
<td>Congo Basin Forest Fund</td>
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<tr>
<td>CCBS</td>
<td>Climate, Community and Biodiversity Standard</td>
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<tr>
<td>CDM</td>
<td>Clean Development Mechanism</td>
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<tr>
<td>COMIFAC</td>
<td>Central African Forest Commission</td>
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<tr>
<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<tr>
<td>DTE</td>
<td>Decentralized territorial entities</td>
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<tr>
<td>ERA</td>
<td>Ecosystem Restoration Associates</td>
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<tr>
<td>FAO</td>
<td>Food and Agriculture Organization of the United Nations</td>
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<tr>
<td>FCPF</td>
<td>Forest Carbon Partnership Facility</td>
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<tr>
<td>FPIC</td>
<td>Free, prior and informed consent</td>
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<tr>
<td>FSC</td>
<td>Forest Stewardship Council</td>
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<td>GLFI</td>
<td>GLOBE Legislator Forest Initiative</td>
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<tr>
<td>HIPC</td>
<td>Heavily indebted poor countries</td>
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<tr>
<td>ICCN</td>
<td>Congolese Institute for the Conservation of Nature</td>
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<tr>
<td>IUCN</td>
<td>International Union for Conservation of Nature</td>
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<tr>
<td>MECNT</td>
<td>Ministry for the Environment, Nature Conservation and Tourism</td>
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<tr>
<td>MRV</td>
<td>Measurement, reporting and verification</td>
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<tr>
<td>NGO</td>
<td>Non-governmental organization</td>
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<tr>
<td>PAMES</td>
<td>Partnership agreement for the monetization of environmental services</td>
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<tr>
<td>R-PIN</td>
<td>Readiness Plan Idea Notes</td>
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<td>R-PP</td>
<td>Readiness Preparation Proposal</td>
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<tr>
<td>REDD</td>
<td>Reducing Emissions from Deforestation and Forest Degradation</td>
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<tr>
<td>REDD-NC</td>
<td>REDD National Coordination</td>
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<tr>
<td>TWG</td>
<td>Thematic Working Group</td>
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<tr>
<td>UN-REDD</td>
<td>United Nations Programme on Reducing Emissions from Deforestation and Degradation</td>
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<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
</tr>
<tr>
<td>UNEP</td>
<td>United Nations Environment Programme</td>
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<td>UNFCCC</td>
<td>United Nations Framework Convention on Climate Change</td>
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<td>USA</td>
<td>United States of America</td>
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<tr>
<td>VCS</td>
<td>Verified Carbon Standard</td>
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<td>WCS</td>
<td>Wildlife Conservation Society</td>
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<tr>
<td>WWF</td>
<td>World Wildlife Fund</td>
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