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How existing legal frameworks shape forest conversion to agriculture

A study of the Congo Basin

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PREFACE

The growing demands on agricultural products to satisfy both the industry with commodities and the global populations' need for food security has resulted in pressure on forest lands, especially in regions such as the Congo Basin. With the expansion of commercial agriculture involving forest clearing for palm oil production, forest lands will continue being transformed into agricultural lands. If this phenomenon is not well managed through policies and regulations, it will have negative impacts on the ecosystem, and increase deforestation. Natural resources' policies and regulations can play an important role in preserving and facilitating sustainable use of forest lands, and protecting the rights of local communities.

In this context, the main challenge is to find legal tools that promote sound agricultural extension in forest areas, and at the same time protect the rights of communities to equitable access to land resources. Legal mechanisms should be provided to recognize and strengthen the rights of local communities and forest dwellers over the forest areas on which they depend for their livelihoods and food security. In those countries of the Congo Basin region, where the formal legal system has recognized customary title over forests, problems can still arise even though the lands subject to the title are clearly identified, especially in the cases of competition with agricultural investments. More often, in forest land allocation processes, the public administration fails to recognize community-based rights in such resources, or to give community users clear rights.

Apart from the protection of community-based tenure and forest rights, policies and regulations should address the impacts of forest land conversion and deforestation. Most of the deforestation around the world is caused by commercial agriculture. This is a big challenge in the Congo Basin and will continue to grow if policies and regulations do not address the integration and protection of natural resources through public and private investment partnerships. Current practice shows that the legal tool for conversion of forest land to agricultural lands is primarily through granting of concessions and licences to those who clear forests and establish farms. Unfortunately, concessions and licences are sometimes accompanied by subsidies and tax incentives. These methods have long-term impacts, both on the environment by contributing to massive deforestation, and by undermining community-based rights and livelihoods.

This publication will contribute to the thinking on sound and appropriate legal tools and measures to protect the environment and local communities in the growing operations of converting forest lands into agricultural farming.

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ACRONYMS AND ABBREVIATIONS

EIA	Environmental Impact Assessments
FAO	Food and Agriculture Organization of the United Nations
FLEGT	Forest Law Enforcement, Governance and Trade
FPIC	Free, Prior and Informed Consent
IM	Independent Monitor
LCB	Land Consultative Board
LCIP	Local Communities and Indigenous People
NGO	Non-governmental organizations
NLUP	National Land Use Plans
NPFE	Non-permanent Forest Estates
PFE	Permanent Forest Estates
REDD	Reducing Emissions from Deforestation and Forest Degradation in Developing Countries
UFA	Unités forestières d'aménagement
VPA	Voluntary Partnership Agreement

INTRODUCTION

Up to 40 percent of deforestation in developing countries is associated with intensive commercial farming, which requires vast portions of land.¹ In tropical areas, this percentage rises to 73 percent.² In order to carry out intensive production of a single crop, such as soya or palm oil, on forestland, natural forests must be cleared. This conversion process is generally irreversible.

In the Congo Basin, the rate of deforestation has remained fairly low over the last decades (0.09 percent between 1990 and 2000; 0.17 percent between 2000 and 2005³ in comparison with other tropical forested regions. But this trend could change for several reasons, including: (i) the food needs of the growing population in the region and internationally – currently, agriculture is the main cause of deforestation in the Congo Basin and is estimated to cause more than 70 percent of deforestation during 2000 and 2010, a percentage almost equally shared by subsistence agriculture and commercial agriculture;⁴ (ii) the remaining arable lands in the Congo Basin – few studies published over the recent years highlight the fact that the Congo Basin has consequent land suitable for the production of crops like soybean or palm oil, as well as availability for cultivation;⁵ and (iii) the economic development of the Congo Basin countries – their goal is to become emerging countries by 2020 or 2030, which will imply a change in their economy, including more focus on agriculture and better road infrastructure, which is currently an obstacle for access to land that is suitable and available for agriculture.

In this framework, the illegal conversion of forest land to agricultural activities has been estimated to represent nearly half of total tropical deforestation between 2000 and 2012.⁶ Accordingly, the process of converting forest to agricultural land must occur in the context of a very stringent and exhaustive institutional and legal framework to mitigate the risk of forest loss due to illegal forest conversion.

In order to better understand how forest conversion is shaped by existing legal and regulatory frameworks, applicable laws operating in three countries of the Congo Basin region (Cameroon, the Congo and Gabon) where forest conversion is currently under way, have been reviewed and analysed. The three countries share a high level of interest for land-based investments, and have started granting an unprecedented size of arable land in the forest, raising questions about the compatibility of large scale forest land cessions and sustainable forest management, especially in the context of the Voluntary Partnership

¹ Lawson, S. 2014. Consumer Goods and Deforestation: An Analysis of the Extent and Nature of Illegality in Forest Conversion for Agriculture and Timber Plantations. *Forest Trends Report Series*. September 2014. 158 pp. (available at http://www.forest-trends.org/documents/files/doc_4718.pdf), at p.9, quoting Honosuma, N. *et al.* 2012. An assessment of deforestation and forest degradation drivers in developing countries. *Environmental Research Letters* 7(4). 12 pp. (available at http://iopscience.iop.org/1748-9326/7/4/044009/pdf/1748-9326_7_4_044009.pdf).

² Honosuma, N. *et al.* 2012. An assessment of deforestation and forest degradation drivers in developing countries (available at http://iopscience.iop.org/1748-9326/7/4/044009/pdf/1748-9326_7_4_044009.pdf) quoted by Forest trends, Consumer Goods and Deforestation, by S. Lawson, 2014, at p. 8.

³ Tchatchou, B., Sonwa, D.J., Ifo, S. and Tiani, A.M. 2015. Deforestation and forest degradation in the Congo Basin: State of knowledge, current causes and perspectives. *Occasional Paper 144*. Bogor, Indonesia: CIFOR.

⁴ Kissinger, G., Herold, M., De Sy, V. Drivers of Deforestation and Forest Degradation: A Synthesis Report for REDD+ Policymakers. Lexeme Consulting, Vancouver Canada, August 2012.

⁵ Megevand, C. *Deforestation Trends in the Congo Basin: Reconciling Economic Growth and Forest Protection*. Washington, DC: World Bank. p. 75.

⁶ Ibid footnote 1.

Agreements (VPA) with the European Union. The Central African Republic and the Democratic Republic of the Congo were deliberately left out: conversion in the Central African Republic remains largely marginal, and though conversion for agriculture is a growing phenomenon in the Democratic Republic of the Congo, timber from forest clearance doesn't seem to be exported yet.

Through an analysis of the legal framework governing forest conversion in the Congo, Cameroon and Gabon, this paper identifies the minimum rules and mechanisms that are required for the conversion of forested land to other uses and how these are applied in the three countries: (i) National Land Use Plans (NLUP); (ii) a harmonized and clear land allocation process on forest land; (iii) the recognition of customary land tenure rights; and (iv) a framework on the relevant permits for the clearing of the forest. These constitute the minimum requirements for ensuring a coherent and exhaustive regulation of forest conversion.

1. NATIONAL LAND USE PLAN

National land allocation processes should generally be undertaken against the background of national strategic land use planning, conducted as a preliminary step by the national Government to determine the allocation of land for specific purposes. Land planning should generally be carried out on the basis of environmental features, such as soil characteristics, and should take into consideration statutory, as well as customary land and forest tenure rights. Land allocation undertaken in the context of a national strategic land use plan at national, district and local level that has considered these aspects ensures tenure certainty and contributes to the prevention of potential tenure disputes.

In particular, in relation to forest land, NLUP through forest zoning processes allows determining the authorized or prohibited use of forest lands as well as its beneficiary, whether communities, private stakeholders or the state.

In this regard, if one considers that in 2010 46 percent of the 1.6 million km² of the dense rainforest in the Congo Basin were allocated as forest concessions or designated as protected areas,⁷ it is clear that in such an important region rich in resources and traditionally inhabited by multiple ethnic groups, there is a good chance of having existing overlaps with permits other than forestry, as well as with other legitimate tenure rights.

1.1 NLUP in the Congo

In 2005, a *Schéma National d'aménagement du territoire* was issued by the Ministry for Land Management and Planning. This tool states that the destruction of forests must be avoided and regulatory tools will define precisely procedures to be followed in order to be provided with a clearing forest permit, even outside of forest areas.⁸ Even if some good indications were given with this plan, it has not been followed-up by a spatial planning.

In October 2014, a law for land-use planning and development was passed. It provides a more specific legal framework for the development of various strategic documents for land management and planning at the national, regional and local levels.⁹

Article 33 of this law provides that the State sets forth land planning strategic orientations for some parts of the territory regarding the balance between economic development, facilities, and the protection of the territory. Forests are included in these strategic orientations, but no NLUP has been developed yet. In the meantime, the overlapping of formal tenure rights such as extraction permits and informal tenure rights such as customary use rights can lead to dispute and litigation. In 2011, it has been estimated that 13 percent of protected areas were facing land use conflicts particularly due to the overlapping with mining permits.¹⁰

⁷ De Wasseige, C., de Marken, P., Bayol, N., Hiol Hiol, F., Mayaux, P., Desclée, B., Nasi, R., Billand, A., Defourny, P. and Eba'a Atyi, R. 2012. *The Forests of the Congo Basin - State of the Forest 2010*.

⁸ *Schéma National d'aménagement du territoire de la République du Congo*. p 55.

⁹ *Loi n°43-2014 du 10 Octobre 2014, d'orientation pour l'aménagement et le développement du territoire*.

¹⁰ World Resources Institute. 2012. *Atlas forestier interactif du Congo*, version 3.

1.2 NLUP in Gabon

As with the Congo, there is currently no land use plan in Gabon, but it was mentioned as a priority in Gabon's 2012 national strategic plan to become an emerging country.¹¹

Since 2012, some progress has been made towards the elaboration of an NLUP in the country. Under the authority of the National Climate Council,¹² a methodology has been defined which includes the selection of ten sectors (oil, mining, forestry, agriculture, transport infrastructure, water and energy, human habitat, conservation, defence and fisheries) after which spatial planning will be made. An Inter-ministerial Committee for the NLUP has been created and according to the National Climate Council website, a first phase for the elaboration of an NLUP is nearing its conclusion. It includes the state of geographical and legal knowledge on land and water use in Gabon.

Despite the existence of enabling legal frameworks and relevant tools in these two countries, an NLUP is still missing. As a consequence, it is **impossible to know the exact allocation of the various forest estates** in these countries.¹³

This has two major consequences: (i) permits may be issued that overlap with other existing permits as well as titles (including those of a customary nature); and (ii) authorization may be granted for purposes that contravene the laws governing the specific forest areas concerned.

The absence of an NLUP may give rise to additional confusion because land allocation may fall under the remit of a number of different ministries. In the absence of functioning mechanisms to ensure institutional coordination, these ministries may issue permits without prior inter-ministerial consultations, thus undermine the legality and governance of activities conducted upon forest estates. An NLUP provides the opportunity to demarcate responsibilities amongst government agencies.

1.3 NLUP in Cameroon

Unlike the two other countries, Cameroon has a forest zoning plan, prepared in 1995,¹⁴ which covers the forestry sector, but with very limited space dedicated to plantations (only existing plantations in 1995 were taken into account) and mining (only one potential mining site is identified, which is far from reflecting the full mining potential of the country). The forest zoning plan covers less than half of the country and focusses on the tropical forest located in the meridional part of the country. It was prepared during the structural adjustment programme, at a time when the demand for mining, plantations and large infrastructure was non-existent or very limited. The development of these "new" sectors was boosted in 2000 and major inconsistencies with the forest zoning plan were witnessed, raising the need for proper national and multi-sectoral land use planning.

¹¹ *Plan Stratégique Gabon émergent*. p 9.

¹² Council created by the President of the Republic. Its main task is the elaboration of the Climate Plan <http://www.conseilnationalclimat.ga/en/national-climate-council/about-the-national-climate-council/>

¹³ This includes public or private state estates, estates of private individuals, and permanent or non-permanent forest estates.

¹⁴ *Décret N° 95-678-PM du 18 Décembre 1995 instituant un cadre indicatif d'utilisation des terres en zone forestière méridionale*.

In 2014, land use planning was recognized as a priority for the country and a framework law was passed to govern the process.¹⁵ It aims at organizing land allocation in a sustainable development perspective, and applies to all land use and to the entire territory. It refers to key documents enabling efficient land use planning, which are still in the early stage of preparation: (i) the national plan and sustainable development of the territory at the national level; and (ii) the regional framework for planning and sustainable development at the regional level. The whole process for the technical preparation of the national and regional land use plans is still at an early stage of implementation.

It is interesting to note that the three countries went through very similar land use planning processes: the emphasis was first laid on the forestry sector, with a zoning plan prepared and adopted between the end of the 1990s and the early 2000s, as a tool to improve sustainability in the sector. The rush for arable land and mining concessions revealed the limits of this “uni-sectoral” approach, and the policy and legal risks of granting mutually exclusive commercial rights often on the same forest spaces¹⁶ – this, within a context often marked by major weaknesses in the coordination among the ministries in charge of space and resource management. As a consequence of the new trends in land demands, a process for comprehensive land use planning was designed in all the three countries, where they are still in the implementation phase.

¹⁵ *Law N° 201/008 of 6 May 2014, Land Use Orientation Law, establishing the guidelines for the planning and sustainable development of the territory to Cameroon.*

¹⁶ A study in Cameroon exposed the magnitude of the challenge: at least 50 mining permits were overlapping logging concessions, and at least 3 newly allocated land concessions were overlapping with logging concessions. In addition to that, at least 33 oil and mining permits were allocated inside of the 16 protected areas of Cameroon. Schwartz, B., Hoyle, D. and Nguiffo, S., 2012. *Emerging Trends in Land-Use Conflicts in Cameroon. Overlapping Natural Resources Permits Threaten Protected Areas and Foreign Direct Investment*, WWF-CED-RELUFA, Yaounde.

2. NEED FOR A HARMONIZED AND CLEAR LAND ALLOCATION PROCESS

In the absence of an NLUP, in order to ascertain which forest land can be used for agricultural purposes, it is necessary to refer to sector-specific laws relating to land, forestry and agriculture.

When the current forest codes were adopted by Cameroon, the Congo and Gabon,¹⁷ large-scale clearing of forest land for other uses was rare because the forest was mainly used as a source for timber and therefore the legal framework was mostly devoted to ensure sustainable harvesting. Hence, a suitable legal framework to regulate these processes did not exist, thus resulting in a number of significant lacunae.

In this regard it is important to note that if the legal pattern ensuring sustainable forest management can be framed within the forest legislation, a proper and comprehensive regulation on the conversion of forest land into another use goes beyond the scope of the forest legislation and requires the enactment of a cross-sectoral legislation. In fact, while the forest legislation should determine whether and what type of forest land can be converted to another use and the type of permit needed to clear the forest land, the law governing the allocation of land should identify the areas for agricultural activities and the agricultural law should provide for the permits to be issued for agricultural exploitation. Furthermore, environmental laws are also part of processes leading to forest conversion, specifically those governing Environmental Impact Assessments (EIA).

2.1 Identification of forest land that can be converted to another use

Cameroon, the Congo and Gabon divide their forest estates between Permanent Forest Estates (PFE) and Non-permanent Forest Estates (NPFE), in Gabon called “rural forest estates”.

PFE are generally intended to be preserved and to be made up of forestlands, in contrast with the NPFE, of which the nature of the forest is not immutable and can change under different conditions. The three countries analysed include in their PFE both protected and production forests. The NPFE in Gabon are limited to forest estates for the exclusive use of local communities, whereas in the Congo and Cameroon they are made up of protected forests that have not been classified (including in Cameroon, formally granted community forests). It is necessary to ascertain whether the PFE and the NPFE can be allocated to other non-forestry purposes.

a) From forest to agriculture - NPFEs

As previously stated, in Gabon the NPFE is limited to “rural forest estates” which includes those lands and forests that are reserved for the exclusive use of the local communities (Art. 12, Forest Code). The law expressly includes within these estates any community forests,¹⁸ small-scale logging permits¹⁹ and classified or protected forests upon the request

¹⁷ 1994 in Cameroun, 2000 in the Congo and 2001 in Gabon.

¹⁸ Article 156 *et seq.*, *Loi 16/2001 du 31 Décembre 2001 portant Code forestier en République Gabonaise*.

¹⁹ Article 95, *Loi 16/2001*, *ibid.*

of the local community.²⁰ While there is no express provision for those to be converted to a different use there is none that prevents it either, but any change of use conflicting with the stated purposes and related regulations (community forestry, small-scale logging permits and conservation) would be against the spirit of the law. Also, while the law had referred to a specific regulation to set the modalities for ensuring the exclusive use to the communities, the announced regulation was never enacted.

However, it should be noted that the clearing of non-permanent forests with an area equal to or greater than 25 hectares is subject to an EIA.²¹ This provision could be seen as an implied admission that NPFE can be converted to another use. Also based on the Environmental Protection Law, the agricultural activities that are likely to affect the fauna and the flora are submitted to a previous authorization from the Ministry of the Environment²² depending on the results of EIA. It is indeed considered that the agricultural activities covering more than 100 hectares have an impact that justifies the completion of EIAs.²³ However, it is unclear at what stage the authorization from the Ministry and the EIA are supposed to intervene and what the procedure is to change land use from forest to agriculture.

In the Congo, the NPFE can be used for various activities: (i) traditional agricultural activities; (ii) protection activities; (iii) small-scale logging activities, by means of special permits; and (iv) other activities, by means of deforestation.²⁴ The Forest Code states that, in the NPFE, the Water and Forests Administration collaborates with other ministries involved, in particular the departments responsible for agriculture, livestock and the environment, and with other stakeholders. This collaboration must be carried out in order to ensure that the forest, land productivity, and the conservation of soil, water and ecosystems, are maintained.²⁵ Upon reading the Forest Code's various provisions on the NPFE, there is no doubt that these lands can be used for purposes other than forestry activities.

In Cameroon, the NPFE comprised community forests, private forests and national forests. National forests are defined by default²⁶ as those forests falling under none of the categories defined by the forestry law, and those not covering orchards, plantations, fallows, grazing lands, etc. The 1995 guidelines for the implementation of the forestry law provides that national forests can be converted into other land uses,²⁷ but this should be consistent with the sustainable management goal provided for national forests.²⁸

²⁰ Article 212, *Loi 16/2001*, *ibid.*

²¹ Article 3, *Décret N°000539/PR/MEFEPEPN du 15 juillet 2005, réglementant les Etudes d'impact sur l'environnement.*

²² Article 77, *Loi N°7/2014, relative à la protection de l'environnement en République Gabonaise.*

²³ Article 3, *Décret N°000539/PR/MEFEPEPN du 15 juillet 2005, réglementant les Etudes d'impact sur l'environnement.*

²⁴ Article 62, *Loi ° 16-2000 du 20 novembre 2000 portant code forestier.*

²⁵ *Ibid.*

²⁶ Article 35.1, *Loi N°94/01 du 20 janvier 1994 portant régime des forêts, de la faune et de la pêche.*

²⁷ Article 25.3, *Décret n° 95/531/PM du 23 août 1995 fixant les modalités d'application du régime des forêts;* this article provides that forest products should be harvested before the project for which forest land is allocated will be developed.

²⁸ Article 35.2, *Loi N°94/01, ibid.* Article 14.1 also prohibits forest fires on forest lands, without distinction between the PFE and the NPFE.

b) From forest to agriculture – PFEs

In the Congo, land use change is not permitted in PFE until they have undergone a declassification process as the declassified forest would become part of the NPFE. Once the forest in question has been declassified to NPFE, a deforestation permit must be issued before proceeding to forest clearing. Declassification denotes the procedure by which the classified status of a forest is changed and can only occur where the intended use is for 'public utility' or in the 'national interest'.²⁹

Declassification implies that the forest in question is classified in the first place. However, in practice this is not always guaranteed. For example, no Congolese forest at present has been subject to classification in accordance with the procedure outlined by the Forest Law.³⁰ This is problematic when it comes to land-use change, which implies declassification. It may also present the risk that all forests could be considered as available for conversion.

There is a specific procedure for forest declassification in the Congo which, among other things, includes: the classification of an equivalent area of forest land in compensation for the declassified area and the opinion of an ad hoc committee. There is also an obligation to conduct studies on the forests that could be declassified; those studies should look at the foreseeable impacts of the project on the ecosystem and on the living conditions of the populations and the cost-benefit of the execution of the project in relation to the maintenance of the forest.³¹ Those studies are carried out with the participation of different stakeholders including indigenous people and local communities and local non-governmental organizations (NGOs) working in the area of development and the environment.³² The results of the studies are made public, with an opportunity for the populations impacted by the project to send some observations to the forest administration.

In the Congo, where the declassification process appears well structured, the operational procedures for the expert committee that decides on forest classification are lacking, particularly in terms of defining specific criteria for judging the validity of a forest declassification request.³³

In Gabon, the PFE is divided into two categories:

- classified forests which cover several forest uses all devoted to the protection of the forests, e.g. protected areas and national parks;³⁴ and
- registered production forests for timber harvesting which are subject to logging permits.³⁵

There are no legal or regulatory provisions outlining procedures for a change in use of registered productive state forests and the only reference made in the legal framework to

²⁹ Ex: Republic of Congo, *Arrêté n°6509 du 19 août 2009 précisant les modalités de classement et de déclassement des forêts*.

³⁰ Faure, N., Henriot, C. 2015. *The legal framework for forest conversion in the Republic of Congo*. Client Earth, June 2015. 39 pp. (available at <http://www.documents.clientearth.org/download/2866/>).

³¹ Article 24-30, *Loi n° 16-2000 du 20 novembre 2000 portant code forestier*; Article 24 and 25, *Arrêté n°6509, ibid.*

³² Article 26-29, *Arrêté n°6509, ibid.*

³³ ClientEarth. 2015. *ibid.*

³⁴ Article 8, *Loi 16/2001, ibid.*

³⁵ Article 11, *Loi 16/2001, ibid.*

classification/declassification is in relation to protected areas, and notably, national parks. However despite national parks being a sub-category of protected areas in Gabon,³⁶ the classification/declassification procedures for the two are different. Whilst the classification/declassification procedures for national parks are more stringent because they require an imperative of ‘national interest’, as well as a compensation with an area of roughly the same size and the exact same ecosystem and biodiversity,³⁷ the classification/declassification of forests and protected areas is based on a report produced by the Ministry of Forestry stating the goal, the purpose, and the user rights exercised in the concerned area. This report, after being made public at local level for enabling complaints, is transmitted to an ad hoc multi-stakeholder commission that decides by consensus. The decision is then adopted by the concerned ministry by decree.³⁸ However, none of the above-mentioned procedures for classification/declassification of forests allow for land-use change as the law still refers to classified and declassified ‘forests’. This shows that the forest destination is not questioned by the process; rather, it aims at classifying production forests or forests in the rural domain into the forests categories identified in Article 8 of the Forest Law, or vice versa.

Even without an express provision within the Gabonese legislation to ban deforestation in the PFE, you can infer that those forests cannot be converted to another use. However, like for the Congo, while it is easy to identify what constitutes the PFE once logging permits have been allocated or national parks created, for any other use of PFE, it is not easy to identify the concerned forests in the absence of a formal and comprehensive forest zoning plan.

In Cameroon, because it is provided that the PFE permanently remain forested, its conversion into agricultural land is made more difficult (but not impossible) by the laws and regulations. For a portion of the PFE to be allocated to agriculture (or to any other use implying the conversion of the forest), the 1994 Forestry Law provides for three operations: (i) the submission of an EIA for the proposed project implying forest clearance; (ii) a degazetting of the targeted forest, which is submitted to the gazetting of a forest of the same category and of an equivalent size in the same ecological zone;³⁹ and (iii) the submission of the allocation process of both land and timber rights to the appropriate procedures provided for in the relevant legislation.⁴⁰ The Law also defines the size of the total PFE: it should cover 30 percent of the national territory and represent the ecological diversity of the country,⁴¹ – this legal requirement makes it difficult for the Government to accommodate all the existing requests and allocation of forest land for non-forest uses. It is interesting to note that the draft forestry law in Cameroon is currently proposing a wording that will result in facilitating conversions of the PFE, by allowing to only replace degazetted forest “when possible”.

³⁶ Article 70, *Loi 16/2001*, *ibid.*

³⁷ Article 8, *Loi 03/2007 relative aux parcs nationaux.*

³⁸ *Décret 1032-PE-MEFEPEPN of 1 Décembre 2004, fixant les modalités de classement o déclassement des forêts et des aires protégées.*

³⁹ Article 16.1, *Law No. 94-01 of 20 January 1994 to lay down Forestry, Wildlife and Fisheries Regulations;* Articles 22-24, *Décret n° 95/531/PM du 23 août 1995 fixant les modalités d'application du régime des forêts.*

⁴⁰ *Décret n° 76-166 du 27 avril 1976 Fixant les modalités de gestion du Domaine National.*

⁴¹ Article 22, *Law No. 94-01*, *ibid.*

2.2 Allocation of land for agricultural activities

Like in many other countries, the allocation of land for agricultural activities is not based on agricultural-specific legislation nor on land allocation plans, but it is simply based on land (tenure) laws. In order to develop agricultural activities, a lease is likely to be given authorizing to occupy and exploit a portion of land. This is for instance the case in Gabon where, other than a land title, no specific agricultural permit is required to start agricultural activities.⁴²

Those land tenure laws are usually lacking some safeguards to make sure that when forest lands are part of the lease, that they have been previously mapped and identified as forests that could be converted for another use.

The size of the areas which have been given for agro-business activities over the last few years has been significant, particularly in the central Africa region. Thus, in the Congo an express occupation permit of 470 000 hectares has been given to the company Atama Plantation, which following feasibility studies, has further reduced the permit area to 180 000 hectares, suitable for the cultivation of palm oil.⁴³ Similarly in Gabon, where the main actor for agro-industrial development, Olam, has two joint venture palm projects with the Government of the Republic of Gabon: Olam Palm Gabon (also OPG); and *Société de Transformation Agricole et Développement Rural* (also SOTRADER) with their project *Gabonaise des Réalisations Agricoles et des Initiatives des Nationaux Engagés* (also GRAINE). In Gabon, out of the 209 334 hectares of land initially allocated for commercial palm oil development, 63 780 hectares were returned to the government as ‘unsuitable’ and other areas have been set aside because of social or environmental value.⁴⁴ Yet, Olam states that:

“25 735 hectares of the planted palm area were originally highly logged and degraded secondary forests”.⁴⁵

In Cameroon, even if the allocations of agricultural land in the forest are far below what was originally announced after 2010,⁴⁶ some of the current allocations are in the (designated) PFE. Biopalm received a provisional land lease of 3 300 hectares, part of which covers a logging concession with an approved management plan.⁴⁷ Herakles Farms (also SGSOC) received a provisional lease of just less than 20 000 hectares, part of which is in a designated Forest Management Unit. The decision of allocating agricultural land in the forest is assessed by a series of public administrations, without the formal participation of the Ministry of Forestry. The Ministry of Forestry is only involved when the final selection of the site is done, and is in charge of ensuring availability of land by allocating logging rights.⁴⁸

⁴² *Loi n° 022/2008 du 10 décembre 2008 portant Code agricole en République Gabonaise.*

⁴³ <http://atamaplantation.com/site/index.php?cat=7>

⁴⁴ Olam, 2012. *Response from Olam to Rainforest Foundation UK statements for report on industrial palm oil in Congo Basin*, 26 November 2012.

⁴⁵ Olam International’s response to Mighty Earth and Brainforest report, available at: <http://olamgroup.com/news/olam-internationals-response-to-mighty-earth-and-brainforest-report/#sthash.AG4faMcR.dpbs>.

⁴⁶ Nguiffo, S. and Sonkoue, 2015. *M. Agro-industrial Investments in Cameroon. Large-scale land acquisitions since 2005*, London, IIED, <http://pubs.iied.org/pdfs/17571IIED.pdf>; Levang, P. and Hoyle, D., *Oil Palm Development in Cameroon*, Yaounde, WWF-CIFOR, 2012. <http://www.cifor.org/library/3793/oil-palm-development-in-cameroon/>

⁴⁷ Nguiffo, S., 2013. *S. The Challenges of Implementing the VPA in Cameroon*, CED, Yaounde.

⁴⁸ Article 110.2, *Décret n° 95/531/PM du 23 août 1995 fixant les modalités d'application du régime des forêts.*

The allocation of land for agricultural purposes is mostly based on tenure legislation, in case legitimate tenure rights – and more specifically, those with social legitimacy, such as customary and indigenous rights, common property, overlapping and shared rights, as well as women’s rights – are not sufficiently recognized before the lease is given – this will engender some important social disruption.

3. RECOGNITION OF CUSTOMARY LAND TENURE RIGHTS OF LOCAL COMMUNITIES AND INDIGENOUS PEOPLE

In the Congo Basin countries, customary land tenure rights, other than use rights, are either not formally recognized, as in Gabon, or are conditional upon ‘certified improvement’ of the land, as in the Congo.⁴⁹ It is to be highlighted that in 2011 for the Congo, a new law was adopted establishing the protection and the promotion of indigenous people which recognizes the pre-existing customary land rights of indigenous populations even in the absence of specific land titles. However, even if this law represents a very important step towards better recognition of indigenous peoples’ land tenure rights, the implementing decrees are still lacking and this is hampering its implementation.

Despite the lack of strong regulations, Local Communities and Indigenous People (LCIP) continue de facto exercising those rights in all the Congo Basin countries, but this gives rise to **land tenure insecurity**, which potentially leads to land disputes resulting from, for e.g. the granting of permits to develop agro-business activities on land traditionally occupied and used by LCIP.

It should be noted that one of the tools that can be used by LCIP to, at least, express their views on forest conversion projects is the public enquiry and consultation processes put in place during the conduct of EIAs, when provided by legal frameworks governing forest conversion. However, if case laws are unclear or incomplete there is no clarity on how those consultations have to be run, as well as whether and how the land tenure rights of LCIP will be taken into account while planning forest conversion.

In Cameroon, despite the lack of formal recognition of customary rights, the land law grants communities with a right to be consulted in the process of land allocation for agro-industries. This consultation is mainly done through the Land Consultative Board (LCB). According to the Decree N°76/166 of 27 April 1976, laying down the procedures for management of the national domain, the Board has to examine all the requests for land concessions with the aim, among other objectives, of identifying communities’ land needs and selecting areas to be allocated to the investor. The Board is chaired by the Government District Officer, and comprises the chief and two elders of each of the villages covered by the proposed concession. No representative of the ministry in charge of forestry sits on the LCB, depriving the administration from the possibility of avoiding overlaps of proposed land concessions with the PFE in the early stages of the application. Two other weaknesses are to be mentioned here: (i) the members representing the communities are a minority of the members of the LCB; and (ii) the LCB can only provide an opinion, not a decision, and the final award can be contrary to the will of the population as represented by the Board.⁵⁰

⁴⁹ It is to be observed that following promulgation of Law 5/2011 on the promotion and protection of indigenous people rights in the Congo, the Government recognises indigenous people’s customary tenure rights. However the implementing decrees of this law are yet to be promulgated. See, Republic of Congo. 2011. On the Promotion and Protection of Indigenous Populations. *Act No. 5-2011 of 25 February 2011*. (Available at http://www.iwgia.org/images/stories/sections/regions/africa/documents/0368_congolese_legislation_on_indigenous_peoples.pdf).

⁵⁰ In the case of SGSOC, despite the concerns voiced by some communities in the land consultative board meeting, the process went ahead, resulting into conflicts between the company and the communities of Ebanga, Nguti and Sikam. See Nguiffo, S., 2013. *Dispossessed at all cost? Remarks on the Process for Allocating Land to SGSOC in the Nguti Sub-division* <http://rightsandresources.org/en/publication/dispossessed-at-all-costs/#sthash.elQyLvCK.dpbs>

Therefore, there is a limited right to consultation, but not proper Free, Prior and Informed Consent (FPIC).

To partially fill this current gap in the regulatory framework and to protect LCIPs legitimate tenure rights on the forest they depend on, several international standards have been promoting the FPIC.⁵¹ Using FPIC means that a community has the right to give or withhold its consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use.⁵² In order to avoid tenure related conflicts due to overlapping land uses, it is essential that the governments proceed to a formal recognition of all existing customary tenure rights over their territory, as well as to the introduction of an FPIC procedure in case of projects aiming at a land use change over the lands where these rights are granted.

The above sections have analysed how forest land is granted for conversion. The following section analyses the legal framework governing the clearance of forest land, following its change of use.

⁵¹ The Convention on Biological Diversity, the International Labour Organization Convention 169, the United Nations Declaration on the Rights of Indigenous Peoples, the FAO Environmental and Social Management Guidelines.

⁵² Forest Peoples Program definition. On the topic consider: FAO, 2014. *Respecting free, prior and informed consent, Practical guidance for governments, companies, NGOs, indigenous people and local communities in relation to land acquisition*; and FAO, 2016. *Free Prior and Informed Consent, An indigenous peoples' right and a good practice for local communities*.

4. LEGAL FRAMEWORK GOVERNING DEFORESTATION PERMITS

In Gabon, the forest legislation does not provide for any permit authorizing the complete clearing of forests for agricultural commodity production. All existing permits only allow for selective logging exploitation. Furthermore, according to agricultural legislation,⁵³ farming activities are not subject to any permit in Gabon. Therefore, it appears that in Gabon there is no permit to explicitly authorize the clearing of forests.⁵⁴ In the meantime, deforestation is happening in the country, as stated in a report published in December 2016, reporting that Olam ‘cleared approximately 20 000 hectares of forest across four of its Gabonese concessions in Awala and Mouila since 2012.’⁵⁵

This does create an important risk of illegality regarding the timber resulting from forest conversion because there is a lack of transparency regarding the chain of custody for this timber. Without a clear definition on the legality of conversion timber, it is almost impossible to trace the timber because there is no rule regarding the harvest, marking, transport, storage, processing and export of the timber.

Furthermore, without a specific permit for clearance it means that there is no restriction in the current forest legislation on the means used to clear the forests, and no obligation to ensure FPIC of LCIP who might be affected by the clearance planned.

The Congolese Forest Code outlines that an Environmental Impact Study must be carried out at the site prior to projects involving deforestation. The Study must include mitigation measures for large projects.⁵⁶ Moreover, even if still incomplete, Congolese legislation⁵⁷ provides some rules on the allocation of deforestation permits. The application for a deforestation permit must be accompanied by the following information: (i) the company’s articles of association; (ii) the scope of the work; (iii) a map indicating the location of the area affected or an outline of the route to be opened; (iv) the work schedule; and (v) the equipment to be used. The permit outlines the timeframe by which deforestation work must be carried out, as well as the amount of tax to be paid. The issuing of a deforestation permit is subject to the payment of this tax, named the Deforestation Tax.

It is worth pointing out a specificity of the Congolese legislation in this regard: the land concessionaire is also allowed to freely dispose of the timber.⁵⁸ This provision provides an additional incentive for investors applying for land concessions to find a location in the forest and to use the value of timber for their initial investment. A perverse effect of this provision is that it makes it easier to access logging rights as a land concessionaire, than as a

⁵³ *Loi n° 022/2008 du 10 décembre 2008 portant Code agricole en République Gabonaise* and *Loi n°23/2008 du 10 décembre 2008 portant politique du développement durable*.

⁵⁴ Sartoretto, E., Henriot, C. and Ichou, B. 2016. *Le cadre juridique de la conversion des terres forestières au Gabon*. ClientEarth, January 2016. 27 pp. (available at <http://www.documents.clientearth.org/wp-content/uploads/library/2016-01-01-le-cadre-juridique-de-la-conversion-des-terres-forestieres-au-gabon-hac-fr.pdf>).

⁵⁵ Higonnet, E., Hurowitz, G., Bellantonio, M. and Lapidus, D. 2016. *Palm’s Oil Black Box: How Singapore’s national wealth fund has fueled a secret vehicle for deforestation from Gabon to Indonesia* (available at <http://www.mightyearth.org/wp-content/uploads/2016/12/Palm-Oil-Black-Box-PrintApproval3.pdf>).

⁵⁶ Faure, N. and Henriot, C. 2015. *The risks associated with conversion timber in the Republic of Congo* (available at <http://www.documents.clientearth.org/library/download-info/the-risks-associated-with-conversion-timber-in-the-republic-of-congo/>).

⁵⁷ Article 31, *Loi ° 16-2000 du 20 novembre 2000 portant code forestier* and Article 42, *Décret N° 2002 437 du 31 décembre 2002, fixant les conditions de gestion et d’utilisation des forêts*.

⁵⁸ Article 32, *Loi ° 16-2000, ibid.*

logging concessionaire. Logging concessionaires have to go through a long allocation process, full of uncertainties associated with the public auction. They also have to prepare a forest management plan and are subjected to selective logging practices, while land concessionaires are subjected to no condition in the harvesting of timber. There is therefore a risk that some companies interested in the timber apply for a land concession and exit the country after timber harvesting is completed, without investing in the plantation. The laws and regulations in the Congo does not provide for safeguards against such a risk.

In Cameroon, the law provides for a typology of logging titles all submitted to the obligation of practicing selective logging. The logging titles in the PFE are subject to compliance with a management plan, designed as the tool guaranteeing sustainability of logging, while logging titles in the NPFE are only obliged to comply with the norms applicable to logging activities in forest areas (size of logs to be harvested, norms protecting the rivers, etc.). However, there is a provision for what is referred to as “small titles”, designed to allow for tree felling in forest areas to be converted. The most common title is the “authorization for timber recovery”, used to harvest the timber when a development project is likely to request the clearance of forest lands.⁵⁹ Two options are proposed by the legislation: (i) harvesting by the administration, owner of the timber and all forest products; and (ii) the sale of logging rights through public auction, after a proper inventory of the timber in the area.⁶⁰ The condition for the allocation of an “*authorisation de recuperation*” by the Ministry of Forestry, states there should be a valid “development project” planned in the area to be ‘clear-cut’, with all the requested permits and authorizations in place. The legality grid prepared in the framework of the Voluntary Partnership Agreement (VPA) between Cameroon and the EU contains indicators related to the authorization for timber recovery, opening the possibility for timber from these titles to be included in Forest Law Enforcement, Governance and Trade (FLEGT) processes.

In practice, most of the logging rights in areas converted for development projects in Cameroon, including for plantations, were granted as “*ventes de coupe*” (sale of standing volume of timber). This decision is justified by the fact that when the need for forest clearance is expressed, the project is already in an advanced phase of its development, and a proper process by the Ministry of Forestry would be likely to induce major delays in the availability of land and at the beginning of the project. For the Ministry to grant an authorization for timber recovery, an inventory of all the timber to be harvested should be conducted, prior to the public auction. This requires time and money, and the proposed projects are often not willing to afford it. In order not to slow down investment projects, the Ministry of Forestry seems obliged to find the fastest solutions for timber harvesting. This decision, however, raises several questions and concerns in terms of compliance with the laws and regulations: (i) “sales of standing volumes of timber” do not allow for ‘clear-cutting’, and undersized timber harvested using this title will not meet the legal criteria of the VPA; and (ii) “sales of standing volumes of timber” for forest conversions are often granted by a regional commission created within the local services of the Ministry of Forestry, where the law provides for an inter-ministerial allocation committee for sales of standing volumes of timber. The practice of using “sales of standing volumes of timber” instead of authorization of timber recovery exposes the timber to illegality in the upstream processes (allocation of logging rights), even if logging operations are conducted in full compliance with the regulations.

⁵⁹ Article 110.1, *Décret n° 95/531/PM du 23 août 1995 fixant les modalités d'application du régime des forêts*.

⁶⁰ Article 110.2, *Décret n° 95/531*, *ibid.*

Risks of illegality related to lack of law enforcement

A legal and regulatory framework cannot *per se* avoid any risk of illegality related to forest conversion. Rather, there is a consistent risk of illegality in the Congo Basin countries, linked to the lack of enforcement of existing legislation, as has been observed in the Congo by the VPA FLEGT Independent Monitor.⁶¹ In a report published in September 2014, they observed several breaches in enforcement of the legal and regulatory framework regarding three deforestation permits signed in June 2013. Amongst the breaches identified, no 'Environmental Impact Study' (EIS) was carried out, despite the Forestry Code outlining that an EIS must be undertaken at the site prior to projects involving deforestation.⁶²

Based on a very recent report published by the Independent Monitor (IM) in February 2017, it does appear that no progress has been made on the respect of the legal framework governing forest conversion in the Congo. From 2014 to 2016, the IM evaluated the enforcement of the forestry laws by the authorities on the forest clearing and the companies that hold forest clearing authorizations in some Congolese regions. The following are examples of IM observations: (i) a lack of impact studies for some projects which were granted forest clearing authorizations; (ii) forest clearing authorization issued without any collection of the related tax; (iii) a lack of payment of due cutting-down and forest clearing taxes; and (iv) timber exploitation and transformation on the basis of the expired authorizations.⁶³

⁶¹ Independent Monitor in Congo has been created in 2007; Congolese Government put in place an Independent Monitor for the implementation of the forest legislation. *Rapport N°01/CAGDF, mission du 6 au 23 avril 2014 (pp. 10 et 11).*

⁶² Article 45, *Décret N° 2002-437.*

⁶³ *Rapport N°13/CAGDF, Observation Indépendante-APV FLEGT, Mission du 03 au 17 juillet 2016 et du 24 juillet au 10 août 2016.*

CONCLUSION

The legislation on forestry and land were prepared at a time when the governments in the Congo Basin did not anticipate the current interest of investors for land concessions, especially for crops like rubber tree and palm oil growing in forest areas. The measures put in place for achieving sustainable forest management are likely to be seriously undermined by the growing demand of forest lands for non-forest uses.

It is clear that an incoherent, incomplete or non-existent legal or regulatory framework may significantly limit the governments' ability to implement long term forest management and also increase the risk of illegality of activities related to forest conversion.

In particular, the lack of an NLUP represents an important gap for these Congo Basin countries in their mechanisms for preventing forest conversion outside the boundaries established by national authorities in accordance with the relevant legal framework. In all those countries, in the absence of an NLUP, the initial selection of plantation locations is done by the investors, on purely technical and commercial grounds, without consideration for ecological constraints. This leads to the increased demand of land in the PFE, including inside or around some ecological hotspots.

Furthermore, the procedures for changing use of forest land and the grant of permits for clearing the forests undermine the capacity to mitigate risks.

In each of these countries, the processes of land-use change are too incoherent or too complex and are often not supported by strong and functional institutions.

These factors undermine good governance – whether for the forest or the agriculture sectors.

There is an urgent need for legal reforms, in order to: (i) increase forest protection, especially against the current threats and in a context characterized by the development of the VPA processes and the policies and strategies of the programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD) for the Congo Basin countries; (ii) reinforce the recognition and protection of communities' rights, with the challenge of land and resource scarcity and population growth; (iii) improve the efficiency of land and timber allocation processes by improving coherence and consistency with the highest transparency standards, as a way to avoid further destruction of the forest and suspicion on the legality of timber coming from forest conversions; and (iv) improve the decision-making process in rights allocation by providing the governments with clear tools for comparing the options offered to them on a specific portion of forest (based on financial, ecological and social merits).

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