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The legal framework for forest conversion in the Republic of Congo



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Introduction

Deforestation is one of the main causes of climate change on a global scale. Although the annual rate of deforestation declined between 1990-2000 and 2000-2010, this was mostly due to reforestation policies and new plantations. However, according to the FAO, the loss of primary forests contributing to climate change continues at an ‘alarming’ rate.¹

Deforestation is mainly associated with intensive agriculture (40%) and subsistence agriculture (33%), but also with the construction of infrastructure (10%), urban expansion (10%) and mining extraction (7%).² If we focus solely on tropical zones, we can observe that 71% of deforestation is caused by commercial agriculture. In Africa, commercial and subsistence agriculture combined represent more than two thirds of deforestation; and in this region, the impact of mining activities on deforestation is much greater than in the rest of the world.³

The Republic of Congo (hereafter ‘Congo’) is not spared from this reality as a proportion of its forest is not only used to harvest timber products, but forestlands are also converted for agro-industrial, mining or infrastructure projects. Although the rate of deforestation remains relatively low (0.08% per year)⁴, a potential increase is foreseen in the years to come due to agriculture in the regions’ forests.⁵

It is important to remember that the forest in Congo covers 65% of the country’s surface area and stretches over 22.5 million hectares, making up more than 10% of the Congo Basin’ s dense rainforest area.⁶ As such, the existing issues around forests land being allocated for other purposes, such as agricultural or mining activities are crucial. The potential impacts of these activities, as much social as environmental, are important concerns that must be taken very seriously.

This study will focus on forest conversion, which can be defined as clearing natural forests with the objective of changing the use of the land in order to make room, amongst others, for crops such as soya or palm oil, or for mining. This process is generally irreversible.

It is essential to understand the legal framework in force governing forest conversion in Congo-Brazzaville, for agricultural or mining purposes. We will focus in particular on agro-industrial and

1 From 16 to 13 million hectares per year between these two periods according to the FAO, *Evaluation des ressources forestières mondiales* (Global Forest Resources Assessments), 2010.

2 Honosuma et al., An assessment of deforestation and forest degradation drivers in developing countries, 2012, available at http://iopsience.iop.org/1748-9326/7/4/044009/pdf/1748-9326_7_4_044009.pdf ; cited by Forest trends, Consumer Goods and Deforestation, by S. Lawson, 2014.

3 Ibid.

4 REDD Readiness Preparation Proposal (RPP), Republic of Congo, 2010. See also the Central African Satellite Forest Observatory (OSFAC), *Forêts d’Afrique Centrale Evaluées par Télédétection* (FACET) (Monitoring the forests of Central Africa using remotely sensed data sets), 2010; FAO, *Evaluation des ressources forestières mondiales*, 2010.

5 World Bank, *Dynamiques de déforestation dans le bassin du Congo* (Deforestation Trends in the Congo Basin), by Carole Megevand, 2013.

6 *Considérations politiques sur l’utilisation des terres dans le Bassin du Congo* (Political considerations on land use in the Congo Basin) - COMIFAC December 2013.

mining projects, since they are large-scale projects that are likely to make up the vast majority of forest conversion in the coming years.⁷

By examining this legal framework, we hope to provide the reader with a better understanding of the various steps to follow for converting forestland for other purposes in Congo. Three main stages are considered: access to forestland (chapters 1 and 2), the land and exploitation permits to be obtained in order to implement an agricultural or mining project (chapters 3 and 4), and the legality of conversion timber (chapters 5 and 6).

Each chapter seeks to provide answers to a specific question:

- Is there a national land-use plan in Congo? (1) Here we will analyse national land distribution, a starting point for understanding what land is available for agriculture or mining.
- Which forestlands are likely to be allocated for other purposes? (2) In this section, we will look closely at which forestlands are available for conversion and examine the conditions that need to be met in order to do so.
- Which land/exploitation permits are required to implement an agricultural or mining project? (3) Once forestland is available, care must first be taken to examine how to obtain the exploitation permits required for agricultural or mining activities.
- Which permit authorises the clearing of a converted forest for other purposes? (4) The deforestation permit allows the right-holder of the forest to clear it in order to set up the agricultural or mining activities for which the exploitation permits have been allocated. We will examine how to obtain this permit.
- Can conversion timber be sold/exported? (5) It is important to consider conversion timber, particularly who owns it and whether it can be sold.
- Does the Voluntary Partnership Agreement (VPA) take into account conversion timber? (6) Finally, we will examine whether or not conversion timber is included in the VPA legality matrix.

Moreover, in a crosscutting manner, the analysis highlights the participation of local communities and indigenous people (LCIP) and the protection of their rights, throughout these stages. It is important to analyse the rights of LCIP since they are the first to be potentially affected by conversion through, for example, expropriations and the destruction of their livelihood.

⁷ The construction of infrastructure (roads and other public works) may also lead to forest conversion. We will not cover this subject in this report.

1 Is there a national land-use plan in Congo?

Firstly, it is necessary to determine the process of land allocation in the country. This will enable us to understand which type of use is intended on a particular space, paying particular attention to how land is distributed for forestry, agricultural or mining activities.

In this chapter, we will examine the importance of land-use planning in the framework of forest conversion and the current implementation of, or the lack of, a national land-use plan. We will then analyse the existing land dispute resolution mechanisms to be used in cases of a land-use overlap.

1.1 The usefulness of a national land-use plan

Any national land allocation process complies, in principle, with national strategic planning carried out by the government beforehand so as to determine the allocation of land for specific purposes at the national level. Such land planning is, generally, carried out on the basis of the soil and the environmental features.

A national land-use plan (NLUP) - developed in a participatory manner and aimed at achieving sustainability - is the ultimate land-use planning tool that makes it possible to determine the most appropriate land use practices.⁸ Planning touches upon all types of land use, in particular rural land, whilst reserving land for forestry and agricultural activities.

Planning also makes it possible to define the procedure to follow in the event of a conflict between rural land-uses and urban or industrial expansion, by indicating the priority sectors in which rural land-use has the most value. Therefore one of the key components of regional planning is zoning which designates the use permitted or prohibited on certain land.⁹

1.2 Land-use planning in Congo

1.2.1 The current lack of a national land-use plan (NLUP)

In Congo, **law n°10-2004 of 26th March 2004, establishing the general principles to be applied to the state and land regimes** (law n°10-2004)¹⁰ has a chapter dedicated to the evaluation, classification and allocation of land. This chapter indicates that the state is empowered to allocate land through census, delimitation, evaluation and land classification procedures.¹¹ Land allocation is carried out for all land throughout the national territory including rural, peri-urban and maritime land as well as subsoil, whether or not this land is subject to private appropriation.

⁸ Sidle et al., *Expérience du zonage forestier en Afrique centrale : introduction au zonage forestier et à la planification de l'affectation des terres 2010* in COMIFAC, *Les forêts du bassin du Congo, Etat des forêts 2010* (chapter 11).

⁹ For more information on land-use planning, see J.G. Sidle, *Expérience du zonage forestier en Afrique centrale*, 2010.

¹⁰ Loi n°10-2004 du 26 mars 2004, fixant les principes généraux applicables aux régimes domaniaux et fonciers. (law n°10-2004).

¹¹ Art 53, Law n°10-2004.

The law provides general guidelines on how to proceed with land-use planning. It states that land-use planning must take into account land value. It is worth noting that planning must also take into account the potential legal implications of rural land-use change, particularly following an expropriation procedure.¹²

It also states that land-use planning must take into account the general allocation of land in four main areas: urban areas (allocated for housing, commercial and industrial activities), peri-urban areas (for various crops), rural areas (divided into three categories: agricultural, forestry or mining activities) and marine or river areas.

However, neither an NLUP nor any other land-use planning document has been developed under these provisions. Nevertheless, the implementation of a “multi-resources forest inventory project for the purpose of the development of a national land-use plan”¹³ highlights the government’s will to carry out such a plan in a consistent manner and on the basis of the existing resources enhancement.

Instead of an NLUP, a National Land Development Plan¹⁴ was issued in 2005 by the Ministry for Land Management and Planning. The National Land Development Plan is the first level of spatial planning at the national level. It lays down a geographical, political and institutional assessment of Congo; it identifies main priorities in terms of infrastructure, communication and natural resources use mainly. It also provides a strategic outlook of Congo in 2025.

Regarding the use of resources, the National Land Development Plan 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.¹⁵ Additionally, guidelines are provided on the use of forest areas, amongst others.

The National Land Development Plan is therefore a strategic document providing guidance on the various sectors; however, it does not replace the NLUP which ought to consist in a much sharper land-use planning tool. The NLUP should be elaborated within a multi-stakeholder framework. The legal vacuum formed by the absence of a NLUP is also acknowledged by the new Congolese forest policy.¹⁶ On the other hand, the National Land Development Plan is ill-adapted to the national development needs, and should be updated¹⁷.

The recent framework **law n°43-2014 of 10th October 2014 for land-use planning and development** (law n°43-2014)¹⁸ provides a more specific legal framework for the development of various strategic documents for land management and planning at the national, regional and

12 Ibid.

13 This project is implemented by the National Inventory and Management of wildlife and forest resources centre (CNIAF) in collaboration with the FAO. The data collection has been completed and the project is currently analysing and processing this data.

14 *Schéma National d'aménagement du territoire de la République du Congo* (The Republic of Congo's National Land Development Plan), August 2005.

15 The Republic of Congo's National Land Development Plan, p. 55.

16 The Republic of Congo's forest policy, 2014-2025 p.14.

17 Ibid.

18 Loi n°43-2014 du 10 octobre 2014 d'orientation pour l'aménagement et le développement du territoire.

local levels. This law represents the legal basis for the development of new strategic guidelines, which should replace the existing National Land Development Plan.¹⁹

This law provides that coordination, consultation and participation are three fundamental principles of the land development and planning policy.²⁰ It requires the involvement of the main stakeholders, including civil society and development NGOs, in the elaboration of land development policies. The consultation principle aims at ensuring the harmonization of land planning operations at all levels.

This law identifies five key focus areas of the land planning policy: the unification of the territory (infrastructures), the zoning process, the urban and village structure, the priority public services, and local development. With regards to zoning, Article 12 of the law provides that different zones within Congo's territory will be identified for a better use of natural resources: land planning areas; development transboundary areas; special economic zones; industrial areas.

Moreover, Law n°43-2014 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, and must therefore, be included in a specific National Land Development Plan.²¹

The planning of natural resources exploitation areas will require taking into account the necessary protection of the environment and the needs of present and future generations. Furthermore, the use of natural resources must be carried out on the basis of specific development plans, set within a multi-stakeholder and multi-sector inclusive process.²²

This law also recalls the State's responsibility for the implementation of a land planning policy that "guarantees the concomitant development of different economic sectors while respecting all forms of land ownership".²³ It must be noted that different types of land ownership exist in Congo, from the recognition of indigenous people customary land rights to the recognition of registered land ownership (grating of land titles).²⁴

Finally, Law n°43-2014 finally foresees that strategic land development decisions are first of all contained in the national land development plan. This strategic document outlines the zoning of areas right across the national territory and is supplemented by documents such as sector specific guidelines.²⁵ Among these guidelines, the tourism and environment guidelines is of particular interest. It requires carrying out environmental impact assessments prior to launching

¹⁹ The Republic of Congo's forest policy, 2014-2025 pp. 14.-15.

²⁰ Art. 5, Law n°43-2014.

²¹ Art. 33 and 34 Law, n°43-2014.

²² Art 37, Law n°43-2014.

²³ Art 38, Law n°43-2014.

²⁴ For an analysis of the legislation on local communities and indigenous people ownership and use rights in Congo see : ClientEarth, *Droits de propriété et d'usage des CLPA*, Avril 2014 accessible at : <http://www.clientearth.org/ressources-externes/congo/Droit-de-propriete-briefing%20juridique-final-09062014.pdf>.

²⁵ Art 15, 35 and 41, Law n°43-2014. Other strategic documents include the Land planning Code, the Urban Planning Code, departmental land development plans, sector specific development plans, the city master plans and urban plans.

major infrastructure work and the installation of industrial, agricultural or commercial units. These assessments aim at monitoring the level of impact on ecosystems.

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As such, currently in Congo, there is an initial level of land planning through the 2005 National Land Development Plan. However, this does not meet the need to develop a land-use allocation document that stipulates the use of specific lands, such as forests, throughout the country. Law n°43-2014 should, when being implemented, fill the gap in the absence of NLUP. The Congolese government must, therefore, take all necessary measures in order to implement and enforce this Law, with a particular attention given to the respect of the participation and consultation principles mentioned therein. This piece of legislation is particularly important for the future of Congolese forest cover that is, as mentioned above, likely to be converted for agricultural, mining or infrastructure projects.

1.2.2 The recognition of LCIP rights in the development of the NLUP

We will pay attention here to the recognition of LCIP rights in land use planning. Our analysis below is looking at the recognition of those rights in legal provisions, as much in terms of the participation of LCIP in the land planning process as in the recognition of their ownership rights within this framework.

Regarding the participation of stakeholders in the elaboration of a land-use allocation planning document, as aforementioned, Law n°43-2014 lays down three principles, including the principle of participation. If participation of civil society and development NGOs is specifically provided, the participation of LCIP is not explicitly set forth. Nevertheless, depending on the type of planning foreseen, one can expect that LCIP could be recognised as major stakeholders whose participation is mandatory for the production of land planning documents.

One must highlight that Law n°43-2014 does only mention the need for a participative process for the production of the National Land Development Plan, without providing the terms and conditions of that participation. Other land planning documents do not mention any participation process. Consequently, the implementation of Law n°43-2014 will be of particular importance to ensure that the principle of inclusive participation in the land use allocation planning is respected in practice.

Regarding the recognition of the rights of LCIP during land classification, Law n°43-2014 prescribes that land allocation planning is carried out in respect with all forms of land ownership.²⁶ We must recall that indigenous people have a simplified access to land ownership because in the absence of a land title, indigenous people keep their pre-existing customary land

²⁶ Art 38, Law n°43-2014.

rights.²⁷ Lands customarily owned by indigenous people would, therefore, be considered as full ownership, even though they were not registered.

Furthermore, Law n°10-2004 sets a specific provision regarding the **land allocation in village areas**, which are of particular importance for LCIP. The allocation of land-use of villages for dwelling, fishing, agriculture and livestock farming, but also forestry, mining activities and reforestation falls within the competency of specific bodies set up for verifying and recognising land rights.²⁸ These ad hoc bodies for the verification and recognition of customary land rights were created by implementing decrees n°2006-255 and 2006-256.²⁹ They aim at facilitating the recognition of LCIP land rights, without covering the land use allocation of specific village areas. As regards with participation, we can underline that these ad hoc bodies enable the participation of LCIP as 'resource persons'.³⁰ Nevertheless, this participation is not mandatory.³¹

Within the ad hoc body responsible for recognising customary land rights which intervenes at the second stage of the process, only a minimal representation of LCIP is provided for, alongside the public administrations involved.³²

It is crucial that LCIP land rights are properly recognised within the land allocation process as this will ensure land tenure certainty and prevent potential land disputes. Consequently, it is important that the mechanism in place to recognise these rights is put in place prior to the planning of land-use at the national level. Nevertheless, these ad hoc bodies for the verification and recognition of customary land rights are still not operating. It is therefore the responsibility of the competent state departments, such as the land registry, to recognise the customary land rights of LCIP. This mechanism should be available and operating to allow for the development of a consistent land-use planning.

1.2.3 The existence of a mechanism for resolving land disputes

It is important to highlight the creation of an **interministerial consultation committee** in 2009 for cases where there are land-use conflicts in natural ecosystems.³³ This committee is tasked with the harmonisation of land-uses in natural ecosystems. In theory, the Congolese Prime Minister chairs this committee which is made up of several ministers including those responsible for the forest economy, the environment, mines, oil and natural gases, land management and planning, land affairs and agriculture.

27 Art 32, *Loi n°5-2011 portant promotion et protection des populations autochtones* (Law n°5-2011 on the promotion and protection of indigenous peoples' rights).

28 Art. 59, Law n°10-2004.

29 Décret n°2006-256 portant institution, attributions, composition et fonctionnement d'un organe ad hoc de constatation des droits fonciers coutumiers (Decree n°2006-256 on the institution, remit, composition and functioning of an ad hoc body for the verification of customary land rights); Décret n°2006-255 portant institution, attributions, composition et fonctionnement d'un organe ad hoc de reconnaissance des droits fonciers coutumiers (Decree n°2006-255 on the institution, remit, composition and functioning of an ad hoc body for the recognition of customary land rights).

30 This term often refers to people who have a specific knowledge; however, it is not defined in legislation.

31 Art 2, Decree n°2006-256.

32 Art 3, Decree n°2006-255.

33 Décret n°2009-304 du 31 août 2009 instituant un comité interministériel de concertation en cas d'usages superposés dans les écosystèmes naturels (Decree n°2009-304 of the 31 August 2009 establishing an interministerial consultation committee in cases where there is overlapping usage in natural ecosystems).

On one hand, it is regrettable that the functioning and remit of this committee are not outlined in decree n°2009-304, which establishes it. As regards its functioning more specifically, it is mentioned that this committee can be brought before the relevant ministerial department. As a result, this committee is a means of appeal available to ministers but not to legal entities or natural persons.

On the other hand, it should be noted that the functioning of the committee requires the Congolese Prime Minister to chair it. However, the position of Prime Minister was abolished in 2009 in order to make way for a presidential regime where the President of the Republic is both Head of State and Head of Government. As such, this decree must be updated in order to provide for a new committee chair or an alternative appropriate procedure.

In our eyes, this conflict resolution committee appears to be very useful but we believe its jurisdiction should be widened so that people who are victims of land disputes, such as LCIP, can use it as a means of redress. Furthermore, to our knowledge, this mechanism has not yet been used since its creation. Its effectiveness therefore remains to be proven.

1.3 The consequences of the absence of an NLUP

The absence of an NLUP brings about significant consequences, as exploitation permits are issued without reference to a previous planning document. We therefore observe considerable overlapping land-usage across Congolese territory, in particular with regards to mining and forestry activities.³⁴

Furthermore, the lack of an NLUP can lead to **land insecurity** and subsequently the potential emergence of land disputes.³⁵ This affects, in particular, private individuals' access to land use and ownership rights because it is difficult to know the exact distribution of the various estates (state public or private estate, estate of private individuals, permanent or non-permanent forest estate), and, as such, the possibility of registering land on these estates. Land traditionally used by communities can therefore fall into exploitation areas, and conflicts could arise.

In reference to our analysis, it appears more than necessary to develop a **multi-sector planning approach** for land allocation in order to maximise land planning and use, and to mitigate potential conflicts. This approach would require special cooperation between the ministries responsible for the sectors involved.

It is also worth noting that the forest policy recognises the need for ministerial cooperation and plans to set up systematic procedures concerning the overlapping of forest and non-forest usage, by 2025. It also envisages collaboration between different ministerial departments with the Ministry of Water and Forests to assess their respective sectoral policies in light of their

³⁴ See the Forest Atlas created in partnership with WRI and the Ministry of Forest Economy and Sustainable Development, Interactive Forest Atlas of the Congo, version 3.0. Available at: <http://www.wri.org/our-work/project/congo-basin-forests/congo#project-tabs>.

³⁵ According to the Interactive Forest Atlas of the Congo for example, approximately 4.5 million hectares of forest concessions are subject to potential conflicts over the use of land, p 45.

impact on the forest ecosystems. Finally, it envisages an analysis of all non-forestry policies (agricultural, mining, urbanisation, energy and infrastructure policies), which affect forests, and strengthened interministerial coordination.

Law n°43-2014, determining the legal framework on spatial planning in Congo should result in the elaboration of a land allocation planning document in Congo. The respect of the three principles mentioned in this Law, i.e., the coordination, participation and consultation principles should be monitored, in particular in regards with the respect of LCIP rights.

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Without an NLUP, it is necessary to study the sector-specific laws in relation to forestry, agriculture and mining in order to ascertain which forestlands can be allocated for other purposes.

In the second part of this study, we will analyse the composition of Congo's forest estate and ascertain which land in the estate can be allocated for other purposes, and under which conditions.

2 Which forestlands are likely to be allocated for other purposes?

Congolese forests (or the Congolese forest estate) are divided into the state-owned forest estate and the forest estate belonging to private bodies (see **appendix 1**).

The forest estate belonging to private bodies is located on land belonging to natural persons, or private legal entities.

In this study, we will concentrate **on the state-owned forest estate**, which is made up of the permanent forest estate (PFE) and the non-permanent forest estate (NPFE).³⁶ The PFE is intended to be preserved and to be made up of forestlands, in contrast with the non-permanent forest estate of which the nature of the forest is not immutable and can change under different conditions.

It is necessary to ascertain whether the PFE and the NPFE can be allocated to another non-forestry purpose.

³⁶ In 2011, 72% of the forest estate belonging to the state was allocated to the PFE and the remaining 28% was allocated to the NPFE. Interactive Forest Atlas of the Congo, Version 3.0, WRI.

2.1 Can the permanent forest estate be used for other purposes?

2.1.1 The composition of the permanent forest estate

The permanent forest estate includes:

- the state's private forest estate, which includes protected forests, natural conservation forests, production forests, recreational forests and experimental forests,
- forests belonging to districts or local authorities, and
- forests belonging to public persons.

It is not expressly mentioned in the forest code that PFE forests cannot be used for other purposes, however certain provisions make it very clear. It is stated that the PFE is attributed to the forest and the wildlife habitat,³⁷ which, by contrast, implies, according to us, that the PFE cannot be used for other purposes.

Finally, the PFE is classified,³⁸ however the forest code states that '*the disposal or deforestation of all or part of a classified forest is preceded by the declassification of the relevant forest concerned*'.³⁹ Conversion of the forest for other purposes would involve deforestation of said forest. As a result, **no forest of the PFE can be used for other purposes before being declassified and thus entering in the NPFE.**

2.1.2 Declassification, a requirement for land-use change

The declassification of a forest denotes the procedure (see **appendix 2**) by which a forest that is part of the PFE (classified forest) is transferred for public utility.⁴⁰ The declassified forest therefore becomes part of the NPFE.

It is important to mention that **at present no Congolese forest has been subject to classification** in accordance with the procedure outlined by the forest code. In practice, this could lead to problems when declassifying these spaces and therefore when it comes to land-use change. There is also a risk that all forests are considered as available for conversion. However, this risk is mitigated by the fact that the objective of logging has clearly been established by the existence of administrative orders identifying forest management units, as well as by the issuance of specific forest permits. The same applies for protection forests that are created by regulations, and are clearly identified. As such, it is our opinion that these areas should not be subject to land-use change without the procedure indicated in the forest code being followed (see below).

³⁷ Art 5, *Loi n°16-2000 du 20 novembre 2000 portant code forestier* (Law n°16-2000 of 20 November 2000 establishing the Forest Code - Forest Code).

³⁸ Art 7, Forest Code.

³⁹ Art 22, Forest Code.

⁴⁰ Art 2, *Arrêté n°6509 du 19 août 2009 précisant les modalités de classement et de déclassement des forêts* (Administrative order n°6509 of 19 August 2009 outlining forest classification and declassification terms).

Additionally, the Forest Atlas of Congo, hosted by the Ministry of Forest Economy and Sustainable Development (MFESD), managed by a joint team of members of the World Resources Institute (WRI) and of the MFESD, establishes a clear distinction between PFE and NPFE.⁴¹ Therefore, the MFESD is, in practice, identifying PFE and NPFE as distinct areas, allocated to different uses. It is, nevertheless, of particular importance that an official identification process is implemented in order to clarify their status. The process must take into account LCIP rights, in particular land ownership and land use rights on areas likely to be classified or declassified.

The public utility prerequisite

Before describing the various stages for obtaining forest declassification, it is important to define the notion of public utility in order to ascertain whether agricultural or mining activities could qualify as public utility projects.

Public interest or public utility,⁴² do not seem to be defined by Congolese forestry legislation. Nevertheless, some legislative provisions and Congolese public policies seem to indicate that agricultural and mining activities can be considered as falling under public utility.

According to the law n°10-2004 on domanial and land regimes, public interest is determined by an administrative authority which includes representatives from the administration, but also landowners and village authorities, with a casting vote in the rural areas.⁴³ It is regrettable, however, that no criteria for assessing public interest are set out by the law. It is essential that these criteria be developed in order to give clear guidelines in this sense.

Public utility is mentioned in the mining code, which states that mining is only possible when a specific permit has been issued following an investigation seeking to determine the public use of the activity in question.⁴⁴

Furthermore, the key sections of the Growth, Employment and Poverty Reduction' Strategy Paper (2012-2016 DSCERP) target the following three sectoral groups: agriculture and forest, oil/gas and mines, construction and tourism.⁴⁵ Among these, the agro-industrial sector is identified as being one of the target sectors, a vector for growth and for poverty reduction.⁴⁶

In reference to these various elements, agricultural and mining activities could be (and certainly already are) recognised as being of public utility and the declassification of forestlands could be envisaged with a view to implementing an agricultural or mining project.

41 Interactive Forest Atlas of Congo, Version 3.0.

42 Both notions used in the same context of public interest and 'public utility' in the Congolese legislation.

43 Art 43, Law n°10-2004.

44 Art 57, Mining Code.

45 Growth, Employment and Poverty Reduction' Strategy Paper (2012-2016 DSCERP), p.157-158.

46 DSCERP.

We will now breakdown the declassification procedure,⁴⁷ which will enable us to examine whether the rights of LCIP are taken into account in this procedure.

The declassification procedure

With regard to the declassification procedure, it is crucial to underline that no forest can be declassified without the prior classification of an equivalent size area and the prior payment of the deforestation tax. It is important to note that due to the current surface of the PFE and in those cases where the surface area of the land to be declassified is vast, it seems difficult to meet the classification requirement of an area of an equivalent size.

1st phase: initiating the declassification procedure

The declassification procedure can be initiated by the Water and Forest Administration, or by a natural person or legal entity. A request must be submitted to the departmental or local water and forest division, and then submitted to the General Directorate of Water and Forests.

This directorate then carries out a preliminary investigation on the forest in question by collecting information, namely from the applicant, on the public interest project envisaged. Based on this investigation, the directorate decides upon the admissibility of the request, within 90 days. If the information is pertinent and accurate, the 2nd phase can begin, otherwise the claim is thrown out.

2nd phase: conducting studies and increasing awareness among stakeholders

The Directorate of Water and Forests conducts studies - or has studies conducted on its behalf⁴⁸ - on the forest to be declassified which covers:

- the foreseeable impacts of the project on the ecosystem **and on the living conditions of the populations,**
- a cost-benefit study on the execution of the project in relation to the maintenance of the forest.

The legislation mentions that all stakeholders are involved in these studies, including LCIP, and NGOs and associations working in the county in question. The study report must also be adopted by all of the aforementioned stakeholders.⁴⁹

Following the adoption of the report, it is widely publicised and presented to LCIP at meetings in the villages located in and around the forest to be declassified. These meetings are also an opportunity to put forward any reservations towards the project, transcribed in the minutes signed by attendees of the meeting.⁵⁰ A period of two months is then allowed for those who wish

47 Administrative order n°6509 outlining the terms of forest classification and declassification.

48 The cost of the studies are borne by the Water and Forest Administration or the natural person or legal entity in favour of which the declassification is carried out (article 27, Forest Code).

49 Art 27 of Administrative order n°6509.

50 Art 28 of Administrative order n°6509.

to submit a non-favourable opinion, observations or actions in order to compensate the rights of LCIP that would be affected by the project.⁵¹

3rd phase: validation of the draft declassification decree

Within 90 days⁵² following the submission of the declassification project and the study report to the administrative headquarters, the Minister of Water and Forests convenes the classification committee,⁵³ which decides upon the request.

The classification committee is chaired by the Minister of Water and Forests and is made up of: regional and municipal administrative authorities, representatives from the ministries affected (water and forests, tax, agriculture and livestock, environment, scientific research, land management and planning, land register, and tourism), committee chairpersons and members from each village involved (**in each village, indigenous populations designate their own representatives in addition to the local population representatives**)⁵⁴, two local leaders of associations and NGO.

The legislation is not clear on the way in which the declassification comes into effect, following the meeting of the classification committee. However, as the classification procedure is adopted by decree, we can anticipate that, by analogy and in the spirit of the law,⁵⁵ also the declassification will follow the same procedure and, as such, is decided upon by a decree adopted by the council of ministers, based on the recommendation of the (de)classification committee.

Comments on the declassification procedure

As regards to the declassification procedure, it is worth noting that the forest code as well as administrative order n°6509 only determines the classification's committee task **during the classification procedure** but not during the declassification procedure. The text outlines that, during classification, the committee must determine the limits of the forest to be classified, observe the absence or existence of land use rights encumbering this forest, and examine the legitimacy of the claims made. If land-use rights exist, the committee must examine the possibility of maintaining them fully; otherwise, the committee ensures their consistency and can confine them to well defined forest plots.⁵⁶ The tasks of the declassification committee would also have to be outlined.

People who have rights other than land-use rights, and who have submitted a claim for these rights can request for the case to be brought before the competent district court if no amicable

51 These observations are sent in writing to the county's administrative authority within a period of 2 months following the submission date of the declassification project and the study report to the administrative headquarters, Art 29 of Administrative order n°6509.

52 Decree n°6509 (article 30) makes reference to 90 days whereas the Forest Code makes reference to 60 days.

53 It should be noted that the committee that decides upon forest classification and declassification is called the 'classification committee'.

54 Art 18 of Administrative Order n°6509.

55 Art 14, Forest Code.

56 Art 19 and 20, Forest Code.

agreement is reached. It seems essential that the recognition of the rights of LCIP also feature in the declassification procedure and that third-party claims are treated the same.

Furthermore, it is stated that the minutes of the (de)classification meeting will be drafted and signed by the representatives of all of the stakeholders. These minutes must highlight opinion against forest classification. We believe that the publication of these minutes should be made obligatory so as to ensure a transparent procedure but also given the importance of the committee's recommendation.⁵⁷

Finally, in order to ensure legal certainty and consistency across the declassification decisions given, it is essential to have common criteria upon which the committee should base itself in order to make its decision.

2.1.3 The involvement of LCIP in the declassification procedure

LCIP are involved in several stages of the procedure. First of all, impact studies on the forest to be declassified aim, among other things, to demonstrate the impacts of declassification on LCIP. They therefore take into account the potential consequences of declassification on LCIP.

Furthermore, LCIP are involved when the studies are conducted and when they are adopted. Nevertheless, there is no procedure that seeks to establish the terms of LCIP involvement; and yet, we believe this is essential to ensure the effective participation in the declassification process.

On the other hand, the land-use rights and land rights of LCIP, which could be expropriated following declassification, are not sufficiently recognised. Indeed, we believe that simply mentioning the reservations of LCIP in the meeting minutes is insufficient since it seems that answers to these reservations are not being provided.

Finally, LCIP are offered the possibility of submitting any non-favourable opinions, observations or actions to be taken with a view to compensating the rights of LCIP but no procedure is in place for when such claims are received. As such, there are strong doubts as to whether they are taken into account.

With regard to the identification of the use rights of LCIP, we can point out that the forest code provides that such rights are recognised on a general level.⁵⁸ This recognition can be in the form of classification decrees and within forest concession management plans. In practice, Congolese forests have not been subject to declassification in good and due form, since no classification decree currently exists. As such, the recognition of the use rights of LCIP can be

⁵⁷ It is important to highlight that the declassification decree is nevertheless subject to the committee's favourable opinion when it seeks to create a classified forest for the benefit of a municipality or local authority or exchange plots in the interest of the national forest in question, art 29 of the Forest Code. In the preliminary draft bill establishing the forest regulation, the declassification committee's favourable opinion is mentioned as the only condition of all declassification decrees (article 52).

⁵⁸ Art 40 to 42, Forest Code.

affected, it is solely upon the concession holder, during the drafting of the management plan, to recognise these rights, in accordance with a procedure that is not outlined in the legislation.

We observe that the recognition of LCIP's land rights are not yet provided for by law in the classification or declassification procedure.

2.2 Can the non-permanent forest estate be allocated for other purposes?

2.2.1 Composition of the non-permanent forest estate

The NPFE is defined in the forest code in opposition to the permanent forest estate. It is made up of protected forests that have not been classified.

The NPFE is part of the state's public property, that is to say property that is allocated for the public's direct use.⁵⁹ This property can be managed by the state directly or by rights-holders, with a permit, lease or allocation.⁶⁰ The state public domain can be used or occupied but cannot be appropriated.⁶¹

The NFPE forests can be used for various activities:

- traditional agricultural activities
- protection activities
- small-scale logging activities, by means of special permits
- other activities, by means of deforestation.⁶²

The forest code states that, in the NFPE, 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 ecosystems, soil and water are maintained.

Upon reading the forest code's various provisions on the NFPE, **there is no doubt that these lands can be used for purposes other than forestry activities.**

2.2.2 Recognition of the rights of LCIP in the NPFE

We believe it is important to highlight that the forest code provides for the recognition of land use rights in the NPFE and the PFE.

59 Article 13, Forest Code; article 25, Law n°10-2004.

60 Article 49, Law n°9-2004 of 26 March 2004 establishing the state domain code.

61 Art 51-53, Law n°9-2004.

62 Article 62, Forest Code.

In the NPFE, it is indicated that local populations of foreign or Congolese nationality enjoy use rights (e.g. harvest of timber products, hunting, fishing etc.). It states that it is the responsibility of the Ministry of Water and Forests to regulate, by decree, the exercise of these rights. It can limit their knowledge and set the conditions of location, time, quantity or method of implementation.⁶³

This recognition of use rights seems essential due to their probable, at least partial disappearance during deforestation operations. Under these circumstances, compensation rights should be provided for.

*

With regard to forestlands, we can conclude that only land belonging to the NPFE can be used for other purposes. As a result, the development of an agricultural or mining project on the PFE and the related felling of timber on such land should bear a strong suspicion of illegality.

It is appropriate to define the land and exploitation permits required for developing an agricultural or mining project. Several permits will be necessary for the development of such projects: an agricultural/mining permit, possibly a land permit, and a deforestation permit. It should be noted that, upon analysis of the legislation, it is not clear in what order these permits should be obtained. In practice (Atama Plantations case), it would seem that the land/exploitation permits were obtained before the deforestation permit. We will now look at the procedures to follow in order to obtain these permits.

3 What land/exploitation permits are required to implement an agricultural or mining project?

As mentioned above, according to the forest legislation, the PFE should not be used for other purposes whereas the NPFE is likely to be.

It is now necessary to examine the sectoral agricultural and mining laws in order to determine the agricultural and mining permit allocation procedure. We will first look at the coherence between the sectoral laws and the forest code with regard to the possibility of using some forestlands (only those that have been declassified and under the conditions seen in the previous chapter) to carry out agricultural and mining activities.

3.1 For agricultural projects

The system regulating access to land for the implementation of an agricultural project is established mainly by Law n°10-2004 that lays out the general principles applicable to the state

63 Art. 40, Forest Code.

land regimes and law n°25-2008 establishing the agro-land regime⁶⁴ (hereafter referred to as the 'agro-land law'). It is worth noting that there is no agricultural code in Congo.

Article 4 of the agro-land law stipulates that the state owns land on the country estate, except when said land is registered by an occupier of the rural estate.⁶⁵ Furthermore, this law states that agricultural lands are made up of 1st category land (land for subsistence farming, fallow land, grazing land and paths) and 2nd category land (land intended for intensive farming of food crops or farming or livestock cooperatives; land for commercial or industrial use of perennial crop plantations).⁶⁶ This law clearly makes the distinction between the agricultural land and land reserved specifically for forestry or mining activities (3rd category land).

As such, the law establishing the agro-land regime seems to be compatible with the forest law and does not allow the conversion of any forestland for agricultural uses, without this land having undergone a change in category beforehand.

3.1.2 Express occupation permit

Provisions of the agro-land law outline the attribution of rural land, including agricultural land.

According to the agro-land law, rural land is attributed, depending on the case, by means of allocation, an exploitation permit or provisional permission to occupy, whilst taking into account, in principle, land planning documents (as we saw earlier, these documents are currently incomplete).⁶⁷ Allocation involves making land available for a public service, and therefore does not apply for agriculture. As regards the exploitation permit, it would seem that the decree specifying the conditions and terms of access to this permit do not exist.⁶⁸ As such, it appears that the only procedure enabling access to land that is currently part of state public property (this includes forest land for conversion) seems to be the acquisition of an **express occupation permit**.⁶⁹

The **procedure for obtaining an express occupation permit** is outlined in decree n°2005-515 laying down the terms of occupation of public property.⁷⁰

A file contains certain elements, including a plan of the scheduled developments, a list of the activities envisaged, the amount of investments and a production schedule. This is then submitted to the prefect (representative of the state in a local area) or to the mayor depending on the location of the land in question. The file is sent to the Directorate General for Taxation and then to the Finance Ministry. If the minister approves, a decree is issued by the Council of

64 Loi n°10-2004 fixant les principes généraux applicables aux régimes domaniaux et fonciers et la Loi n°25-2008 portant régime agro-foncier.

65 This possibility implies the construction of buildings, housing estates or land improvement that constitute a permanent development. Art 4, Law n°25-2008.

66 Art 8 and 9, Law n°25-2008.

67 Art 11, Law n°25-2008; Article 2, *Décret n°2005-515 fixant les modalités d'occupation du domaine public* (Decree n°2005-515 laying down the terms of occupation of the public property).

68 Based on our current research.

69 Art 2, Decree n°2005-515 laying down the terms of occupation of public property.

70 Ibid, Art 15 to 30.

Ministers. Otherwise, the request is refused and the decision cannot be appealed. In theory, the express occupation permit should not, in principle, exceed twenty years.

As regards, **occupation or exploitation of the rural domain for commercial or agro-industrial reasons**, the agro-land law outlines that concession holders must first obtain **permission from the Minister of Agriculture**. The law stipulates that the conditions of establishing and issuing the above-mentioned permits will be detailed in a decree.⁷¹ However, it would seem that this decree was never issued. There is no procedure determining the issuing procedure of this permit.⁷² Given the absence of regulatory text, it would therefore appear that concession holders must obtain, in all cases, an express occupation permit. The practice also seems to be moving in this direction as illustrated by the case of the Atama Plantation Company. This company was granted with an express occupation permit delivered through a Decree⁷³ to carry out an agro-industrial palm oil plantation project, without a special prior authorisation of the Minister in charge of Agriculture.

Thus, it seems that agricultural activities on forestlands require this express occupation permit to be obtained at which point the state allows the private right holder to use public property.⁷⁴ It is worth pointing out that this permit does not relate to use of state public property and therefore can only relate to the NPFE.

Comments on the issuing of the express occupation permit

The role of the different ministries in the issuing of permits is not clear. As regards the issuing of the express occupation permit for public property in particular, it seems inappropriate for it to be the responsibility of the **Ministry of Finances** to examine the file and to present it to the Council of Ministers, this area being, in theory, governed by the Ministry of Land Affairs.

On the other hand, it would seem that in practice the **Ministry of Land Affairs and the Ministry of Agriculture** had greater involvement than the Ministry of Finance as regards the allocation of agricultural permits. In the case of the allocation of the Atama Plantations project for example, an agreement authorising the occupation of a land reserve belonging to the state was signed between the initiator of the agricultural project and the Ministries of Agriculture, Livestock, Land Affairs, and Public Property. In this particular case, this agreement⁷⁵ has been approved by a presidential decree issued by the Council of Ministers,⁷⁶ upon the report of the Minister of Land Affairs. This demonstrates the lack of clarity in the authorities that should be involved in this process.

71 Art 25, Law n°25-2008.

72 This was subject to research at the Ministry of Land, as well as the official journal.

73 Décret 2011-552 du 17 août 2011 portant autorisation expresse d'occuper une réserve foncière de l'Etat dans les départements de la Cuvette et de la Sangha (Decree 2011-552 of 17 August 2011 regarding the express occupation permit of a State land reserve in the departments of la Cuvette and Sangha).

74 Art 15, Decree 2005-515 laying down the terms of occupation of public property.

75 There is no reference in the legislation to the obligation to sign an agreement with the developer in order to obtain an express occupation permit, since this permit is decided upon by a decree issued by the Council of Ministers.

76 Decree n°2011-552 of 17th August 2011 establishing express permission to occupy a state land reserve in the counties of la Cuvette and la Sangha.

Furthermore, if the requested land is located on the NPFE, it would seem justified for the Ministry of Forests to be involved in the occupation permit procedure.

3.1.3 The rights of LCIP in the farmlands allocation procedure

The agro-land law provides for the recognition of pre-existing customary land rights in compliance with the provisions of the code on state-owned land.⁷⁷

However, the agro-land law contains very unfavourable provisions for customary landowners. Indeed, article 21 stipulates that *'Without prejudice to existing regulations, the land of customary owners can be allocated in the form of provisional concessions by a joint decree from the Minister of Land Affairs and the Minister of Agriculture following the removal of customary rights.'*

It is not specified what is to be understood by 'liquidation of customary rights' and no compensation system is mentioned. It therefore seems that the rights of LCIP can be threatened by the allocation of agricultural land to farmers.

Finally, LCIP do not seem to be involved in decision-making when express occupation permits are granted.

3.2 For mining projects

According to law n°4-2005 establishing the Mining Code,⁷⁸ all mineral substances in the soil and subsoil in Congo belong to the State and constitute the national mining heritage.⁷⁹

In order to respect the legal consistency with the forest code, one could deduce that mining activities cannot be carried out in the PFE, unless a prior request to declassify the forest in question has been made. It seems that this is not the case. In this respect, it is necessary to point out that according to the Forest Atlas produced by WRI, 4.5 million hectares of forest concessions (i.e. 13% of their total surface area) and 86,773 hectares of conserved surface area (i.e. more than 20% of protected areas) are subject to potential conflicts over the use of land with mining permits. As such, in practice, mining concessions are in fact in the PFE.

Mining operations require, as with agricultural activities, a specific exploitation permit.

3.2.1 Mining permits allocation procedure

Several types of permits exist for mining activities and are issued by different bodies, including for example:

⁷⁷ Art. 23, Law n°25-2008 establishing the agro-land regime.

⁷⁸ Loi n°4-2005 portant Code minier (Mining Code).

⁷⁹ Art. 11, Mining Code.

- Prospecting licence: issued by order of the Minister responsible for mines
- Mining exploration permits: issued by decree issued by the Council of Ministers upon the report of the Minister responsible for mines
- Small-scale mining permit: issued upon the decision of the central administrative mining authority
- Industrial prospecting licence: issued by order of the Minister responsible for mines
- Exploration permits: granted by decree issued by the Council of Ministers on the recommendation of the Minister responsible for mines and following a public interest inquiry

The mining code stipulates that any mining activities must be the subject of a **signed agreement between the concession holder and the state**, specifying the party's rights and obligations pertaining to the investments to be made. All beneficiaries of this agreement must comply with a certain number of obligations outlined in the mining code, including:⁸⁰

- the exercise of mining rights in compliance with the interests of the landowners
- the production of an environmental impact assessment
- an environmental land-use plan specifying the measures to be taken to mitigate pollution
- a soil remediation plan

As such, the mining code contains some environmental measures to ensure the minimisation of the impacts of mining activities on the environment.

We must add that the mining code contains a chapter on the relations between mining operators and landowners.⁸¹ It is thus established that easements of occupation and rights of way give rise to a right to be compensated on the basis of the damages suffered. This right is open to landowners and land right holders including operators.⁸²

As regards to the clearing of the land to be used for mining activities, the mining code stipulates that within their mining perimeter, the beneficiaries of mining permits may be permitted to clear the trees, shrubs and other obstacles on the land.⁸³

Decree 2007-274 establishing the conditions for exploration, research and mining⁸⁴ activities stipulates, regarding the execution of research and mining activities, that the holder of a mining permit can be authorised, by way of a decree from the Minister responsible for mines, to fell the timber required for his/her work, in compliance with the provisions of the forest code.⁸⁵ Said decree will define the zones within the perimeter where the applicant is permitted to fell and use the timber.⁸⁶

80 Art 101, Mining code.

81 Art 102 to 117, Mining code.

82 Art 113, Mining code.

83 Art 109, 1) of the Mining code.

84 Décret 2007-274 du 21 mai 2007 fixant les conditions de prospection, de recherche et d'exploitation.

85 Art 75, Decree 2007-274.

86 Art 78, Decree 2007-274.

As a result, it appears, according to the legislation, that the holder of a mining permit must obtain a deforestation permit in accordance with the forest legislation and comply with the other obligations imposed by the forest code, and particularly any existing obligations pertaining to reforestation of the forest.⁸⁷

3.2.2 The rights of LCIP in the mining permits allocation procedure

The mining code contains an entire chapter on the relations between mining operators and landowners.⁸⁸ As regards customary land rights, it stipulates that on the land where these rights are exercised, occupation can only take place once these rights have been registered or systematically recorded by the administration.⁸⁹ The formula used in the mining legislation is open to interpretation as regards the existence, or lack thereof, of an obligation to recognise customary land rights before the implementation of mining activities on the land in question.

It is necessary to point out that law n°5-2011 establishing the protection and promotion of indigenous populations⁹⁰ provides the recognition of the pre-existing customary land rights of indigenous populations, even in the absence of land titles.⁹¹ As such, it is crucial that the provisions of the mining code are corrected in order to enforce indigenous people's rights, as recognised by Law n°5-2011.

The mining code also stipulates that compensation rules must be complied with when land is occupied, to the benefit of the owner and right holders, on the basis of the damage suffered.⁹² This is particularly true if expropriation is required; in this case, the expropriation law outlines the procedure to be followed.⁹³

As regards the right to information or the participation of LCIP in decision-making over the implementation of a mining project, in principle, only the environmental and social impact study provides for this.⁹⁴

Finally, no reference is made in the mining code to the use rights of LCIP living on or using land on which mining activities are carried out.

We will now analyse the requirements for deforestation, placing emphasis on how to obtain a deforestation permit, which is a necessary procedure for implementing an agro-industrial or mining project.

87 Decree 2007-274.

88 Art 102 to 117, Mining code.

89 Art 102 paragraph 2, Mining code.

90 Loi n°5-2011 portant protection et promotion des populations autochtone (Law n°5-2011).

91 Art. 32, Law n°5-2011.

92 Art 113 and 114, Mining code.

93 Loi n°11-2004 du 26 mars 2004 portant procédure d'expropriation pour cause d'utilité publique (Law n°11-2004 of 26 march 2004 regulating the expropriation for public purpose procedure).

94 Art 31 and following, *Décret n°2009-415 du 20 novembre 2009 sur les études d'impact environnemental et social* (Decree n°2009-415 of 20 november 2009 on environmental and social impact assessments).

4 Which permit authorises the clearing of a forest converted to other purposes?

4.1 Obtaining a deforestation permit

The procedure for obtaining a permit to clear the forest is outlined below. A diagram in **appendix 3** of the study also outlines the main steps of this procedure.

4.1.1 Deforestation conditions

The forest code provides for the deforestation of forests that have already been declassified (or that have remained non-classified). The forest code defines deforestation as being the clearing or intended dieback of trees or other forest plants in order to reassign use of the land, **regardless of the means used.**⁹⁵

According to the definition of deforestation, clearing or dieback of trees can be achieved through any means. The lack of control in terms of the deforestation method may lead to developers of agricultural, mining and other projects to use methods that do not respect the environment or the rights of communities. This implies that deforestation can be carried out, for example, by burning the forest in question, which goes against many principles promised by the government, and in particular the REDD+ process which is currently being implemented in Congo.

All companies, other than logging companies, wishing to access a forest to carry out agricultural or mining activities must first obtain a deforestation permit from the Ministry responsible for Water and Forests.⁹⁶

Deforestation is therefore subject to several **conditions**⁹⁷ :

- The plot of land in question must first be declassified, in accordance with the procedure intended for this purpose⁹⁸
- A deforestation permit must be obtained (see appendix 3)
- A deforestation tax must be paid
- An environmental impact assessment must be carried out and mitigation measures implemented.

As a reminder, **declassification** can only be decided on if the project is in the public interest. It also requires an equivalent area to be classified; a study to be carried out on the impact on the ecosystems and the living conditions of the local populations, and a cost-benefit study on the project.

⁹⁵ Art 31, Forest Code.

⁹⁶ Art 31, Forest Code.

⁹⁷ Art 41 to 45, Decree n° 2002-437 of 31 December 2002 establishing forest use and management conditions (decree n°2002-437).

⁹⁸ See section 2.1.2 of this document for details on the declassification procedure.

4.1.2 Requesting a deforestation permit

As regards the **deforestation permit application**, it must be submitted by the company in question to the Departmental Division of Water and Forest (DDWF) in the region affected by the project.

This request must consist of the following:⁹⁹

- the company's articles of association
- the scope of the work,
- a 1/50000 map indicating the location of the area in question or the outline of the route to be opened,
- work schedule
- the equipment used for the work

It is worth noting that a permit does not accompany this application from the competent ministry authorising the work to be carried out, or a permit to occupy the land intended for deforestation.

Within a maximum of two months, the DDWF issues a report on the constitution and the condition of the forest in question as well as the regulatory provisions that govern it. This report is then sent to the chairman of the Water and Forests Division along with the application.

It is then the responsibility of the Minister of Water and Forest to issue the deforestation permit. It is worth noting, however, that for agricultural plantations of less than five hectares, the local Head of the Water and Forest Division issues the deforestation permit.

The permit outlines the schedule to which deforestation must be carried out, as well as the amount of tax to be paid. Any industrial plantations or other types of plantations bigger than one hectare, as well as any mining projects, are subject to the **deforestation tax**.

The forest code also lays down that companies involved in any projects that lead to deforestation must **first conduct an impact study**. The procedure for the required impact study is regulated by law n°003/91 on the protection of the environment and by decree n°2009-415 establishing the scope, content, as well as the procedures of the study and the environmental and social impact notice.¹⁰⁰ It is not clear in the deforestation permit procedure which body will examine this impact study, or at which stage of the procedure this will occur.

Comments on the deforestation permit request

It is important to highlight that the legislation contains **no criteria for assessing or evaluating** the company or project in question in order to judge the validity of the deforestation permit. As such, the issuance of the deforestation permit is at the Minister of Water and Forest's discretion.

⁹⁹ Art 42, Decree n° 2002-437.

¹⁰⁰ Loi n°003/91 sur la protection de l'environnement and décret n°2009-415 fixant le champ d'application, le contenu et les procédures de l'étude et de la notice d'impact environnemental et social.

In order to avoid arbitrary decisions and to guarantee the validity of the request, it would be essential to ensure that there is coordination between the ministries involved in this application. As such, the deforestation permit should only be granted if all the competent bodies involved have accepted the project, particularly the ministries responsible for water and forests and the ministry responsible for allocating agricultural and mining projects.

The fact that the Minister of Water and Forests authorises deforestation without any safeguards or specific criteria does not help to guarantee transparency.

4.2 Deforestation by rural populations and deforestation in classified forests

It is important to highlight that decree n° 2002-437¹⁰¹ stipulates that rural populations are permitted to carry out deforestation in protected forests for agricultural needs but specifies that this deforestation must not lead to the destruction of natural resources required for sustainable agriculture.

Furthermore, in classified forests, deforestation can be authorised for plantation planting and livestock farming needs. In such cases, deforestation is carried out in areas indicated on the management plan, whilst complying with the obligation of maintaining the land for sustainable agriculture.

4.3 The rights of LCIP in the framework of the deforestation permit

The deforestation permit procedure makes no mention of the recognition or protection of the rights of LCIP. However, it should be pointed out that the forest code¹⁰² stipulates that in protected forests (NPFE), local populations of Congolese or foreign nationality subject to the regulations outlined in this article, enjoy use rights permitting them to:

- harvest timber products required for building and maintaining their dwellings as well as deadwood and plants that constitute important cultural, food or medicinal resources,
- hunt, fish and harvest products within the limits of the law,
- establish crops or beehives and to graze their livestock or harvest fodder.

Following the clearing of the forest, these use rights will be impractical. It would therefore be worth considering possibilities so that these use rights can be recognised and respected or, where applicable, a compensation system be implemented.

The only information/participation of LCIP recommended by law takes place during the environmental impact assessment. In this respect, it is important to highlight that the Congolese Independent Observer (OI-FLEG) reported the non-compliance with basic conditions for the

101 Art 41, Decree n° 2002-437.

102 Art 40 and s, Forest Code.

issuance of deforestation permits due to Atama plantations' failure to provide an environmental impact assessment to the independent observer.¹⁰³

5 Can conversion timber be sold/exported?

Clearing forests for the purpose of implementing agricultural or mining projects also raises the issue of the use and sale of conversion timber from these forests.

5.1 Timber ownership

In the case of natural forests, the forest code stipulates that products resulting from deforestation can be recovered by the company which has carried out this deforestation.¹⁰⁴ In cases where the products are abandoned, they can be sold for the benefit of the state.

Interestingly, the forest code also stipulates that the Ministry of Water and Forests can allow donations of timber for the benefit of the local community. However, this possibility is reserved for cases where timber has been cleared in enclosed areas or where no buyers come forward and it therefore seems to be the last possible option.

For cases where deforestation has taken place in a planted forest, the products resulting from this deforestation will be returned to the owner of the planted forest, which can be a different entity from the company that carried out the deforestation.

5.2 The use and sale of acquired timber

It is not clear, from the current legislation, what rights the developer of the agricultural or mining project hold with regard to the use of timber acquired in this way, particularly with reference to the possibility of processing, selling or exporting this timber.

The Forest Code's chapter on the sale of forest products highlights that the sale of timber and other forest product is liberalised.¹⁰⁵ There is no explicit provision in the Forest Code and its implementing texts regarding the sale of conversion timber.

As regards the **sale of timber in the country**, the forest code outlines that the farming of forest products from the forest estate for commercial reasons can either be done by public subcontracting by the government or by the exploitation permit holders. However, upon analysis of the types of forest logging permits, none of them correspond to deforestation. Indeed, neither the industrial processing agreements (CTI) and the management and processing agreements

¹⁰³ Report N°016/REM/CAGDF/FM Independent Observation-FLEG, mission report, November 2012.

¹⁰⁴ Art 32, Forest Code.

¹⁰⁵ Art. 80, Forest Code.

(CAT), nor the timber licences are applicable in cases of deforestation. In fact, these permits meet sustainable forest management objectives, objectives that are incompatible with the full or partial clearing of forest land. Moreover, these permits can only be obtained in the PFE.

The only permits granted in the NPFE are special permits, which make it possible to harvest small quantities of timber for commercial purposes. These permits are only available to natural persons of Congolese nationality, as well as Congolese NGOs and associations. As such, their aim does not seem to be compatible with the objective of deforestation, which is to set up agricultural or mining projects.

Concerning **timber exportation**, the implementing decree establishing the conditions for the management and use of forests outlines that, in order to be a timber exporter or to export timber products derived from such timber, legal entities or natural persons with the exception of logging companies, must first obtain **approval from the Ministry of Trade**, following recommendation from the Ministry of Forest Economy.¹⁰⁶ This provision indicates that timber exporter status is not exclusively reserved to logging companies, agricultural or mining operators could therefore request this status.

Furthermore, it states that exports should mainly concern finished or semi-finished products.¹⁰⁷ Regarding high-quality timber, Article 180 of the Forest Code allows operators to export up to 15% of logs on the basis of ministerial authorisation.¹⁰⁸ Consequently, timber from deforestation must mainly be processed prior to being exported.

Moreover, Decree n° 2002-437 on the conditions of use and management of forests outlines that setting up a timber processing industry that is not integrated into forestry practice will require prior approval from the Ministry of Forest Economy.¹⁰⁹ The applicant undertakes to comply with the forest legislation and regulations as well as the employment legislation and regulations.¹¹⁰

Finally, prior to any sale, forest taxes must be paid, among which is the deforestation tax. In order to export forest products resulting from deforestation an export tax must also be paid.

As such, it seems clear that **no specific marketing rule refers to deforestation permits** in the legislation. According to the spirit of the forest code (and particularly the deregulation of the sale of timber), it seems that nothing would prevent the sale of conversion timber. However, it must be noted that no procedure has been put in place to manage the sale of such timber. One of the reasons that could justify a vague legal framework on deforestation, including the sale of timber produced from deforestation, is the absence, during the drafting of the forest code in 2000, of intensive deforestation linked to the reassignment of forest land for other purposes. Moreover,

106 Art 127, Decree n° 2002-437.

107 Art 48, Forest Code; Art. 129, Decree n° 2002-437. On the hand, it seems that only the genetic material and some auxiliary products can be exported in their raw form, following approval from the Ministry of Forest Economy.

108 Law n°14-2009 amending some provisions of Law n°16-2000.

109 Art 114, Decree n°2002-437.

110 Art 115, Decree n°2002-437.

the fact that deforestation permits are not expressly mentioned does not imply that they are not affected by the common rules relating to the processing industry.

It is important to highlight that the lack of clarity in the current forest legislation as regards the sale and export of conversion timber seems to have been partially taken into consideration in the new draft forest code. In its most recent version, the new code states that *“when products resulting from deforestation belong to a company which is not a logging company, their introduction to the national or international market, the conditions for the removal of timber and the payment of the various taxes are done in compliance with the provision of this law”*.¹¹¹

6 Does the VPA include conversion timber?

We believe it is important to determine whether the VPA's legality matrices take timber resulting from deforestation permits into account and, prior to this, to analyse whether the VPA includes, in its definition of legality, all aspects relating to the allocation of land particularly as regards conversion timber.

6.1 The land allocation procedure in the framework of the VPA

During the VPA negotiations in Congo,¹¹² conversion timber was not a major topic of concern because the development of major projects, agro-industrial projects in particular, had not yet led to the deforestation of vast areas of forest.

The definition of legality given in the VPA, in the two legality matrices, covers a certain amount of principles such as, for example, the fact that the company must own legal rights of access to forestry resources in its operation area.¹¹³ Nevertheless, for conversion timber, it is essential to cover all aspects pertaining to the allocation of land-use. This ranges from the possibility of assigning land for other purposes to the procedure for converting forestland and the right to use land for agricultural or mining activities. Finally, it also includes compliance with the rights of third parties on the land in question if that land is already in use or occupied.

It is worth noting that the legality matrix for timber produced in forest plantations states that, in addition to the company obtaining an exploitation permit, the procedure for granting a land title must be followed. The same applies for compliance with the forest plantation classification procedure, which is also part of the definition of legality for this type of timber.¹¹⁴

¹¹¹ Art 158 last version of the new draft Forest Code.

¹¹² Negotiations began in June 2008 and the VPA was signed in May 2010. The VPA entered into force in March 2013, editor's note.

¹¹³ Annex II Legality matrix for timber produced in natural forests, principle 2, VPA.

¹¹⁴ Annex II Legality matrix for timber produced in forest plantations, principle 2, criteria 2.1 (The title deed relating to the land on which the plantations have been set up has been properly granted by the competent authorities) and criteria 2.2 (Forest plantations have been classified in accordance with legal and regulatory provisions with respect to forestry), VPA.

However, these two aspects are not taken into account in the legality matrix for timber produced in natural forests. The credibility and coherence of the VPA would benefit from explicitly including the compliance of the land allocation procedure in this matrix before the granting of exploitation permits, as well as compliance with land rights. This position is supported by specific references in the VPA with regard to the compliance with harvesting rights and land rights.

Annex VII in particular considers that the definition of legality must be unambiguous, objectively verifiable and applicable, and must include the laws governing certain areas, including:

- *Harvesting rights, defined as the allocation of legal rights for harvesting timber in areas legally designated for this purpose*
- *Compliance, where applicable, with land rights or use rights on the land and resources of other parties likely to be affected by timber harvesting rights.*

It is clear that, in accordance with the spirit of the VPA's text, timber legality must take into account all the legislations in force that regulate the access and sale of timber, at all levels. The inclusion of land ownership rights, as well as compliance with the land allocation procedure would therefore be justified in the legality matrix. This would moreover strengthen the coherence of the concerted approach to land planning, particularly in a context where overlapping land uses remain poorly managed and verified.

6.2 Deforestation permits in the framework of the VPA

The VPA states that the legality matrix for timber produced in natural forests includes timber produced in any logging operations, including timber harvested with a deforestation permit for the completion of development projects relating to the construction of social and economic infrastructures.

Furthermore, the legality assurance system expressly states that it **applies to all national sources of timber** and that, as such, all commercialised timber in Congo is taken into account by the legality assurance system.¹¹⁵

One last reference is made to deforestation permits in Appendix X pertaining to information made available to the public. It indicates that information on the annual production of timber logged under a deforestation permit will be published.

This information would lead us to believe that legality matrices take deforestation permits into account, whereas, in reality, they only cover:

In the legality matrix for timber produced in natural forests:

¹¹⁵ Appendix III Legality Verification System Chapter 2, APV.

- the management and processing agreement (CAT)
- the industrial processing agreement (CTI)
- special permits (SP)

In the legality matrix for timber produced in forest plantations:

- plantation timber harvesting permits

As we have seen, none of these permits seems to be able to be used for the sale of conversion timber. As such, **the various aspects of legality affecting deforestation permits are not covered by the VPA.** We believe that it is essential to incorporate deforestation permits in the legality matrix so that the legality assurance of this timber can be carried out based on accurate indicators and verifiers.

In conclusion, we believe that it is essential to modify the legality matrices so that they include timber resulting from a change in forestland use. We would also emphasise the various legality criteria that must be included in the definition of conversion timber legality such as land allocation and compliance with various procedures in order to be able to convert forestlands for other purposes.

Conclusion

Based on our analysis, several essential points must be highlighted regarding the current legal framework for forest conversion in Congo.

First of all, the **lack of a national land-use plan** (NLUP) in Congo, despite the existence of a National Land Development Plan, makes it impossible to know the exact distribution of land use across the country. This leads to exploitation permits being granted without reference to detailed previous planning documents. This can also lead to overlapping land use, as well as land insecurity and the emergence of land disputes. For forest conversion, this aspect is particularly important given the considerable impact that mobilising land will have on the environment and populations.

In a second phase, based on forest legislation, we have determined that only forests on the non-permanent forest estate (NPFE) and declassified forests that were previously on the permanent forest estates (PFE) can be subject to **land-use change, and thus conversion**. In order to do this, the planned mining or agricultural project must be declared as being of public interest by the administrative entity in question. A certain number of shortcomings in the declassification procedure became apparent. The procedure did not provide clear modalities regarding the involvement of LCIP; the land rights and use rights of LCIP are not sufficiently recognised during this procedure; and the operational procedures of the committee deciding on forest classification are lacking, particularly in terms of defining specific criteria for judging the validity of forest declassification.

Once it had been established which forestlands may be available for conversion, we focused on the analysis of the **agricultural and mining permits** that have to be obtained for these types of operations. **Agricultural exploitation** is subject to an express permit to occupy the public domain, issued upon the recommendation of the Minister of Finance. The procedure for obtaining this permit revealed several problems, in particular the lack of clarity in terms of the role of other ministries involved in this procedure. In the specific case of agro-industrial exploitation, the legislation states that, in principle, permission must be obtained from the Ministry of Agriculture. However, no procedure for issuing this permit exists in the current legislation.

Concerning **mining**, many permits or permissions can be issued for carrying out exploration, research or exploitation activities. It is worth noting that all mining activities must be the subject of a signed agreement between the concession holder and the state. Through this agreement, the operator undertakes to conduct an environmental impact assessment and to comply with the rights and interests of the owners of the land in question. The mining code must however be aligned with Law n°5-2011 on the promotion and protection of indigenous people. Furthermore, it should not only take into account ownership rights but also the use rights of LCIP and provide for their compensation when carrying out mining activities.

In addition to obtaining an agricultural or mining permit, the operator must also comply with certain conditions before proceeding to the deforestation of the forest in question. First, the operator has to obtain a **deforestation permit**, issued by the Minister of Water and Forests. Upon analysis of the legislation, it is not clear when the permit must be obtained. We also believe that the permit procedure lacks specific criteria for assessing the project. Moreover, it seems that the role of other ministries involved in the conversion project is not provided at this stage, which is, according to us, lacking. Deforestation also requires a **deforestation tax to be paid and a social and environmental impact assessment to be conducted**. It is not clear in the procedure how land ownership rights and land use rights of LCIP affected by conversion will be taken into account.

Once deforestation is carried out, timber can be recovered by the company that has carried out this deforestation, or by the owner of the forest in the case of forest plantations. The current legislation does not explicitly lay down rules for the **sale of conversion timber**. Based on our analysis, in principle, nothing prevents the sale of this timber, in compliance with the provision of the forest code. However, there is a legal loophole in this area since the procedure for the sale of this timber does not seem to be sufficiently detailed.

Finally, we were able to see that the **Voluntary Partnership Agreement (VPA)** does not lay down specific regulations for checking the legality of conversion timber, although, in principle all national sources of timber should be covered by the legality and traceability principles. As such, we believe that it is essential that the legality matrix be modified in order to incorporate the legality of timber resulting from a change in forestland use. To this effect, it is important that the rules framing the land allocation procedure for conversion are reflected in the updated matrix.

We have observed that right throughout these procedures, from their involvement in land planning to the allocation of exploitation permits, the **rights of LCIP are insufficiently taken into account**. It seems clear that when the rights of LCIP are mentioned, the modalities of their involvement are often lacking. We have observed the need to harmonise sector specific legislations in view of Law n°5-2011 on indigenous people.

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Further reading

In French:

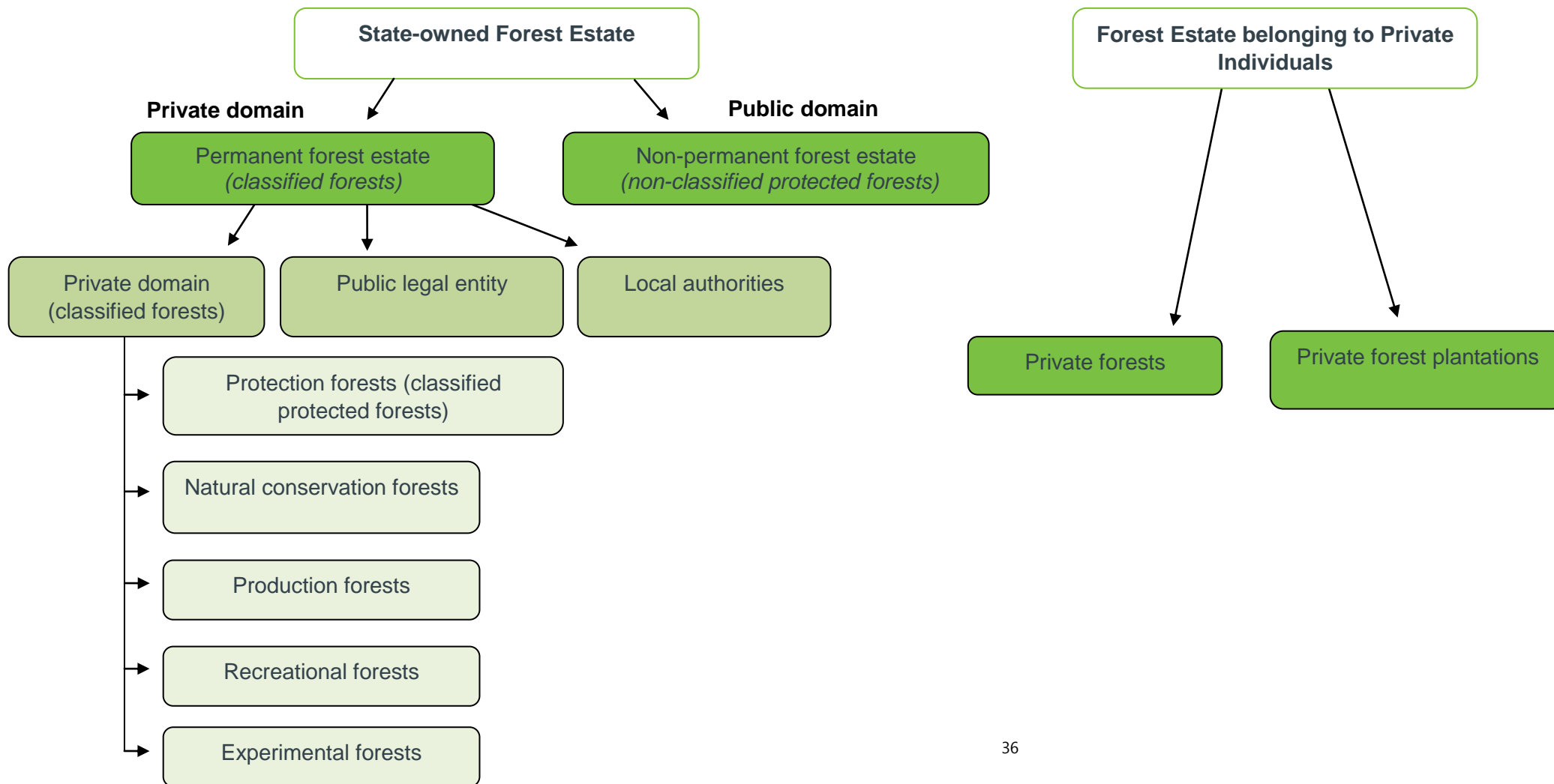
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In English:

- Sam Lawson et al., *Consumer Goods and Deforestation*, par, Forest trends report series, September 2014, available at http://www.forest-trends.org/documents/files/doc_4718.pdf
- Daphne Hewitt, *Potential Legality Issues from forest conversion timber*, Forest trends report series, November 2013, available at http://www.forest-trends.org/documents/files/doc_4137.pdf

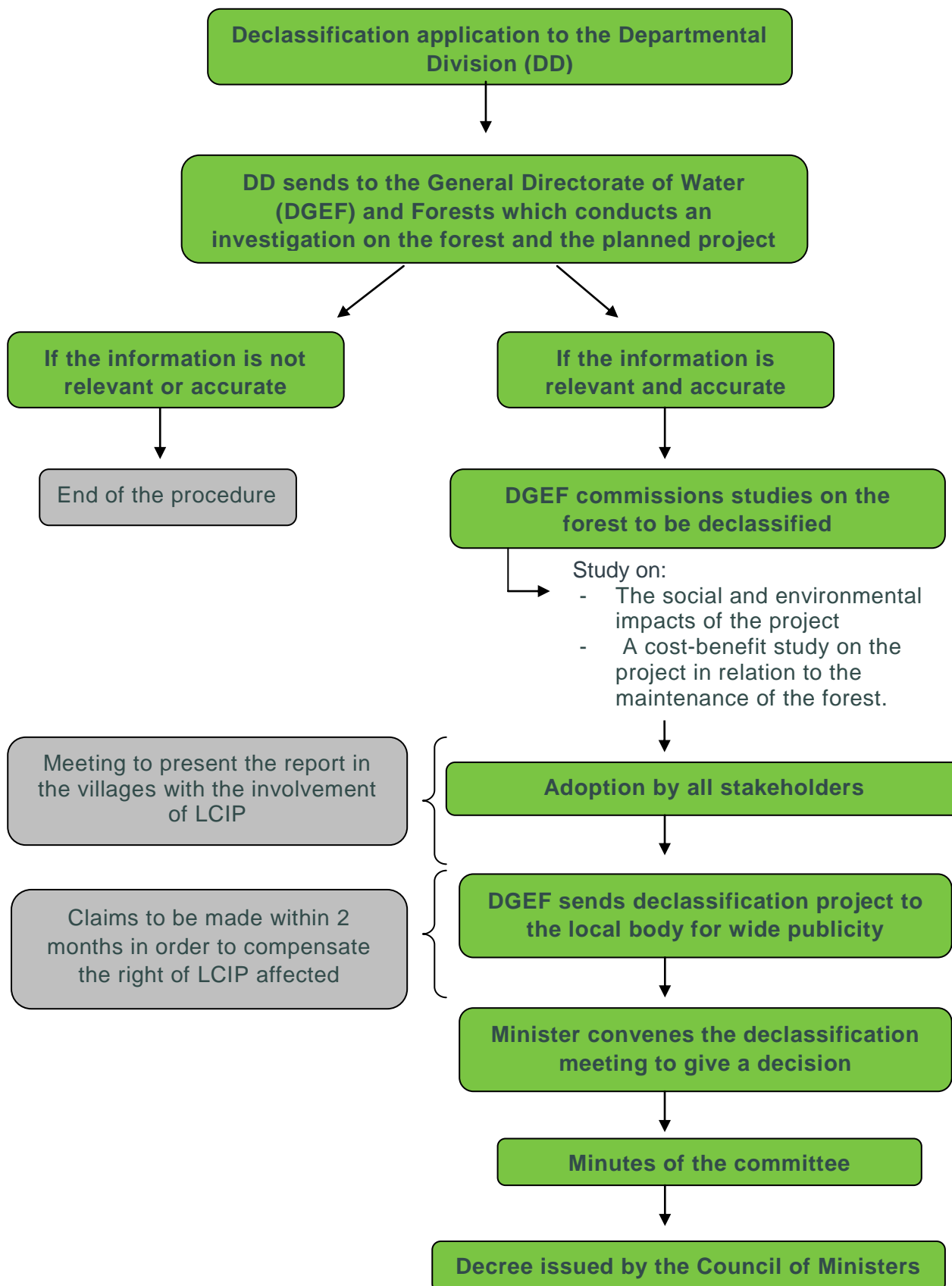
Appendix 1: Diagram of the national forest estate

Art 3 to 8, 13 and 33, Forest Code 2000



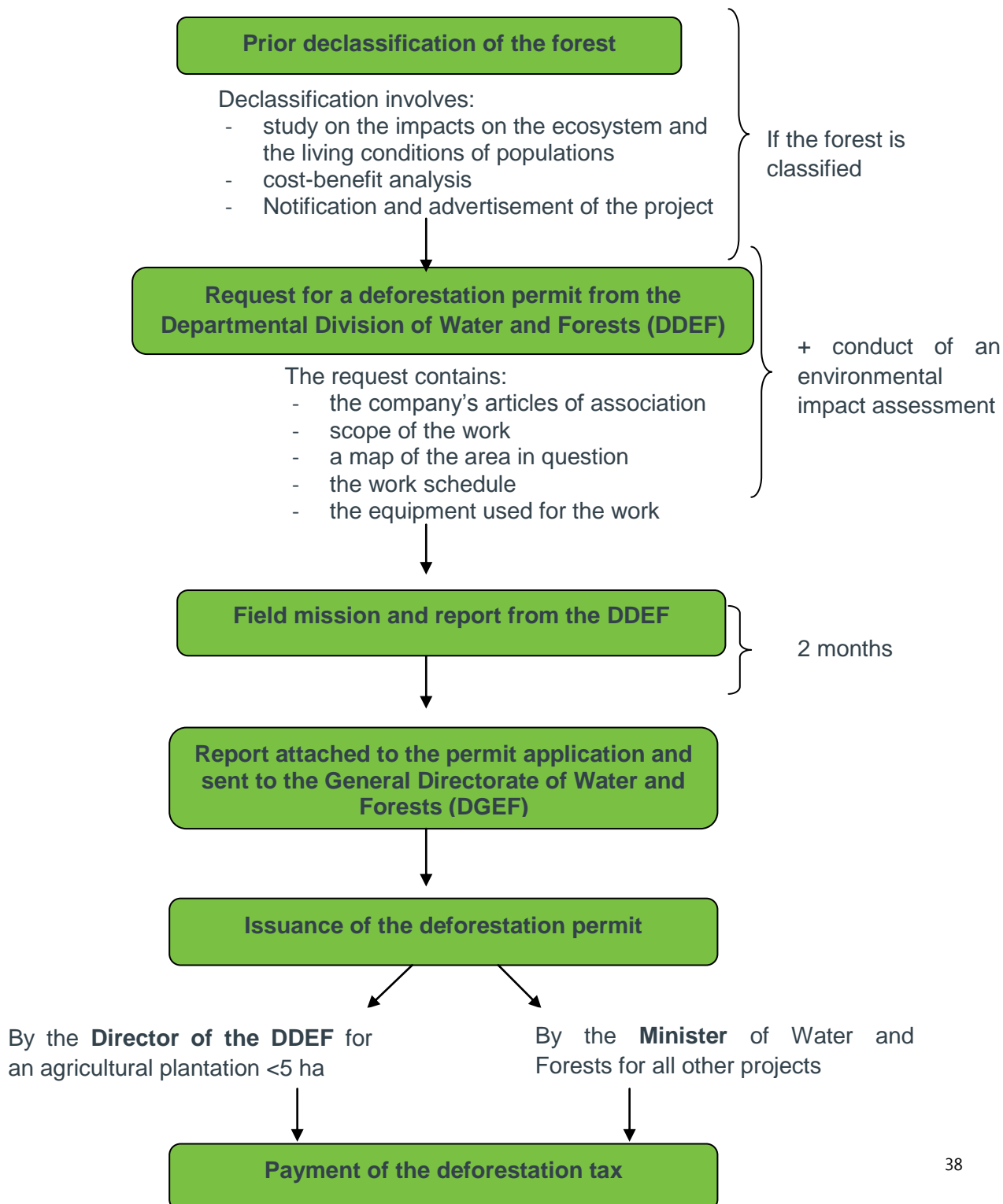
Appendix 2: Diagram outlining the declassification procedure

Art 24 to 30, Forest Code 2000 and Art 22 to 32, Administrative order n°6509 outlining the terms of forest classification and declassification



Appendix 3: Diagram outlining the procedure for obtaining a deforestation permit

Art 31 to 33, forest code 2000 and Art 41 to 45 Decree n° 2002-437 establishing forest use and management conditions



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