



3.5 Land tenure and FLEGT-REDD+ synergies, Republic of the Congo

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Introduction

Rural communities' land tenure rights in the Republic of the Congo (ROC) remain woefully insecure. Most of the land in the country is owned by the state and managed either directly or through long-lease concession contracts to resource extraction companies. Some legal provisions offer communities the possibility of private ownership and use rights, but in practice these options remain limited.

The relatively recent development of international forest governance initiatives in ROC, however, offers the potential to improve communities' access to tenure. The 2010 FLEGT Voluntary Partnership Agreement (VPA) between ROC and the European Union will likely affect the protection of land rights through its legality monitoring activities. The Reducing Emissions from Deforestation and Forest Degradation (REDD+) process, introduced in 2011, aims to reduce the drivers of deforestation, including the need to clarify land-use rights.



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REDD+ and FLEGT's mutual interest in tenure issues creates a number of potential synergies. This article examines these possibilities. It offers specific insights as to how REDD+ and VPA have addressed the issue of land tenure so far, what challenges have arisen and how coordination between the two initiatives can be strengthened.

Land tenure in ROC

Land tenure has been described as "the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land."¹ Land is understood in this definition as including other natural resources, such as water and trees. Land tenure can therefore be individual or collective; it may be statutory (enshrined in state law) or customary (as exercised according to customs and practice).

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The concept of tenure covers a broad spectrum of legal rights, often referred to as a “bundle of rights.” On one end of the spectrum is ownership, which confers the permanent right to use the land or resources by the right-holder, including among others the right to lease, sell or transfer the land. At the other end of the spectrum are use rights, which permit the use of the land and resources within limited terms of time or scope. Use rights are susceptible to restriction or termination by the owner of the land.

In ROC, communities’ ability to own land is limited. From the independence of the country in 1960 until the 1991 Sovereign National Conference, all land in ROC belonged to the state; the concept of private land ownership was abolished altogether. Since 1991, private land ownership has been re-established, though this was not given legal effect until the passage of a new set of land laws in 2004.

In general, the legal framework for the land sector is riddled with gaps and inconsistencies that leave communities’ tenure rights highly vulnerable to interference by the state and third parties (Table 1). Land tenure is sorely in need of comprehensive reform, particularly as pressure for land increases.

Table 1. Main tenure rights and associated challenges, ROC

Legal provision	Challenges
General provisions on land tenure	
Land ownership	
<p><i>Law 10-2004</i> on land domain regimes; <i>Decree 2006-255</i> and <i>2006-256</i> creating ad hoc bodies to recognize customary rights. These laws have several provisions related to land tenure:</p> <ul style="list-style-type: none"> ▪ all land property must be registered to be recognized as an ownership right — on registration, a title is delivered; ▪ land titles can be individual or collective; and ▪ customary property rights can be registered as ownership rights. Two decrees have set out the terms for new local bodies to identify and recognize these rights.² 	<p>In practice, access to property is limited because of costly and burdensome procedures, as well as a lack of information about the right to property and the registration process.</p> <p>Customary ownership rights over the land can be registered only if the land has been developed (<i>mise en valeur</i>) and communities can show proof of 30 years of development.³ These requirements are often difficult to meet in practice.</p> <p>The local bodies in charge of registering customary land rights are still not in place in a number of departments in ROC.</p> <p>The state retains the right at any time to cancel customary rights that are not registered and attribute the land to concessions.⁴</p> <p>There is little by way of consultation or participatory mechanisms in the process of registering a customary title, creating a risk that individuals or groups will claim title at the expense of other users of the land.</p> <p>The 10-2004 Law was passed after the current 2000 Forest Code and its provisions have not yet been incorporated in the code. There are, however, ways to address this through the ongoing Forest Code review process.</p>

Table 1, continued

Legal provision	Challenges
Land and resource use rights	
<p><i>Law 16-2000</i> (Forest Code), articles 40-42; and <i>Arrêté 5053</i> defining national directives for the sustainable management of forest concessions, articles 18-20:</p> <ul style="list-style-type: none"> ▪ use rights may be recognized on state-owned land, within forest classification decrees or within the forest management plans that the concessionaire must develop for each concession area; ▪ these use rights are limited to non-commercial uses and to a set of specific activities, mainly the collection of non-timber forest products, hunting, fishing and agriculture; ▪ in each concession, a Community Development Area is created to contribute to the economic development of local communities; and ▪ In the Community Development Area, the rights given to communities are established on the basis of socio-economic studies and enshrined in the management plan. 	<p>There is no legal obligation for the government or concessionaires to recognize use rights. Even where they do so, no formal procedure exists for this recognition.</p> <p>The government retains the right to restrict use rights by enacting secondary legislation (<i>textes réglementaires</i>) through the Ministry of Forests.⁵</p> <p>Use rights are restricted to non-commercial uses within a set of specified activities, significantly limiting communities' right to do what they want with the land.</p> <p>There is no requirement for the participation of local communities in the identification of use rights or the creation of Community Development Areas (e.g., through community mapping).</p> <p>The concept of "community" is not defined in the provisions that grant use rights and Community Development Areas, nor anywhere else in the law. The failure to differentiate among local communities creates a risk that some local land users could be excluded from rights and benefits by other local land users.</p> <p>The recognition of Community Development Areas takes place on an ad hoc basis, concession by concession, and only at the time the management plan is developed, which can occur up to three years after the concession is allocated. This leads to delays in the protection of communities' rights.</p> <p>Community Development Areas can be recognized only within logging concessions, leaving out many communities who live outside these concessions.</p> <p>Use rights and Community Development Areas are recognized only for the duration of the concession contract (between 15 and 25 years, although 25-year contracts are renewable indefinitely).</p>

Table 1, continued

Legal provision	Challenges
Specific provisions for indigenous people's tenure	
Ownership and access to land and natural resources	
<p><i>Law 5-2011</i> on the rights of indigenous peoples, articles 31-42:</p> <ul style="list-style-type: none"> ▪ Indigenous people have individual and collective rights to property over land and natural resources they have occupied or used customarily. These rights cannot be taken away by the state.⁶ ▪ The state is mandated to facilitate the delimitation of their customary territories.⁷ ▪ Customary land tenure does not need to be registered to be recognized by the state. 	<p>Implementing decrees have not been passed for this law, meaning there is no institutional framework to support the recognition and enforcement of these rights.</p> <p>The state has not actually performed any of the activities to facilitate the identification of customary territory.</p> <p>As with the general customary rights provisions in the 2004 land law, this law was passed after the Forest Code and therefore its provisions are not yet incorporated in it. It is crucial to ensure that this is addressed in the ongoing Forest Code review process.</p> <p>This law applies only to the 1.2% of the Congolese population defined as indigenous.⁸ Other forest-dependent communities, such as local communities other than indigenous peoples, cannot benefit from this protection.</p>

Do the FLEGT VPA and REDD+ processes address land rights?

ROC's VPA, which was signed in 2010 and ratified in 2013, offers some opportunities to protect forest communities' tenure rights. First, it sets out a definition for legal timber, using a set of Principles, Criteria, Indicators and Verifiers constructed from existing Congolese legislation. Moreover, it implements monitoring systems to ensure that the law is being respected. It also recommends areas for legal reform and establishes its own public consultation procedures for these reforms.

The REDD+ process is much less well established in ROC. Thus far, its primary steps have been the conclusion of a Readiness Preparation Proposal (R-PP) in 2011 (RDC 2011). This outlines the main strategic, technical and financial steps to prepare ROC to implement the REDD+ process. The R-PP specifically identifies insecure tenure as one of the problems it aims to tackle, proposing to respond with the development of a national land-use plan and an expansion of protected areas within the country.⁹ ROC initiated its first REDD+ project in May 2012, from a logging company hoping to receive credits for standing forest within its concession.¹⁰

What synergies could FLEGT and REDD+ develop?

REDD+ and FLEGT share a mutual concern for land tenure that could lead to synergies. The R-PP proclaims its intention to build on the work of FLEGT, describing the two schemes as "complementary mechanisms" with a shared interest in strengthened forest governance, and proposing ROC as a model for other countries on how to integrate the

two effectively.¹¹ The FLEGT VPA in ROC has already developed mechanisms for governance monitoring, legal reform and public participation that REDD+ could usefully build on. REDD+, for its part, offers a cross-sectoral approach and additional funding that could be used to strengthen these mechanisms and broaden their impact.

A cross-sectoral vision

The influence of the VPA is limited by its focus on the timber industry. It cannot address the land rights of people who are threatened by quickly expanding forest land uses such as industrial agriculture and mining. REDD+, as the R-PP points out, has the advantage of encouraging a cross-sectoral vision; it takes into account all land-use sectors that drive deforestation.

By building on VPA structures, REDD+ could be an opportunity to expand the VPA's gains beyond the timber sector.¹² For example, the R-PP identifies forest management plans as an effective means of curbing deforestation. The incorporation of forest management plans in the VPA's legality definition has already helped ensure that they are developed for all timber-producing forests; REDD+ could potentially mandate them for other sectors of land use as well. This would enable more communities to have use rights and Community Development Areas (*Séries de Développement Communautaires*) enshrined in a management plan, and would require more companies to conduct preliminary socio-economic mapping that could identify these pre-existing rights. Although these options for protecting community land uses offer only a partial solution to the land tenure problem, they would nonetheless be an important step toward further recognition of land ownership rights.

Better-coordinated institutions

Since 2012, the VPA has been within the mandate of the Forestry and Sustainable Development Ministry, whereas REDD+ is the responsibility of the Environment and Tourism Ministry. The fact that the VPA and REDD+ fall within different ministries can make it difficult to coordinate activities. Conversely, however, this could provide an opportunity to address the lack of coordination between different ministries, which is itself one of the reasons behind the failure to provide comprehensive protection for community tenure.

The R-PP creates various bodies that involve cross-ministerial cooperation. One example is the Public Authority Platform of the National REDD+ Committee, which includes the ministries for forests, environment, agriculture, mines, hydrocarbons and land.¹³ The R-PP also proposes national land-use planning to incorporate the full range of sectors.¹⁴ These kinds of REDD+ platforms and projects could be a way to build much-needed links between different ministries, and to tackle land-rights issues at the national level.

Mapping pre-existing land rights

The VPA requires timber producers to show that they have legal rights to the timber and land in question and that communities in the area have been informed of their legal rights, such as use rights within the concession area.¹⁵ This should encourage companies to map pre-existing land rights before they commence logging operations. Mapping under

the VPA would benefit only those people who live within forestry concessions, however, and would not lead to a national-scale understanding of land use.

REDD+, on the other hand, offers several opportunities to conduct comprehensive mapping. First, the R-PP proposes to develop a national land-use plan to “respect all rights and prevent user conflicts.” This would involve mapping what those uses are.¹⁶ Second, the R-PP calls for the implementation of a Social and Environmental Strategic Assessment, to be based in part on the Principles and Criteria of the VPA; this could enable the VPA’s land rights obligations to be reinforced at a national, cross-sector scale.¹⁷ In clarifying land rights, both initiatives should build on the VPA’s public consultation approach in order to support genuinely participatory mapping exercises. This is the only way to ensure that the customary land uses of communities are accurately identified.

Developing a national land-use plan

Clarification of customary rights under a REDD+ national land-use plan could also help ensure that community uses are recognized and promoted by the VPA’s legality verification system, rather than being minimized as “illegal” uses. Principle 3 of the VPA legality definition requires concessionaires to show they have respected the rights, customs and practices of local and indigenous populations in accordance with national legislation and regulations and international conventions. Often, these practices have not been clearly defined by law, and concessionaires may permit local communities to continue using certain areas that the forest company does not need. There is a danger that the VPA might encourage concessionaires to adopt a more legalistic approach, thus pushing out informal land uses that formerly supported communities. This risk may be increased by the promise of REDD+ credits, which could motivate companies to evict communities from non-productive areas of their concession in an attempt to claim credits for the trees there.



A comprehensive national land-use plan, as suggested by REDD+, could help to clarify and protect community use from these kinds of actions. REDD+ could provide funding and institutional support to the development of a national land-use plan, which would be difficult for the Congolese government to implement on its own. It is essential that such a land-use plan be developed in a participatory manner. The outcomes of these efforts would have significant economic importance. This could lead to co-optation of the process by business interests or more powerful ethnic groups at the expense of communities who are less able to participate. To date, REDD+ processes in ROC have a poor record of consulting communities.¹⁸ The risk that community land use would be sidelined by a REDD-backed land-use plan is heightened by the R-PP’s tendency to portray these uses as drivers of deforestation.¹⁹ It is important that REDD+ build on the VPA’s established public consultation mechanisms to ensure that a national land-use plan reflects the full range of community interests.

Monitoring and enforcement of land rights

REDD+ and the VPA share an interest in monitoring the enforcement of existing land rights. The VPA sets up a Legality Assurance System (LAS) to ensure that its legality definition is followed, including its indicators on respect for local customary rights. REDD+ requires the establishment of a national Safeguard Information System (SIS) to ensure that implementation meets certain social safeguards, one of which is respect for the rights of local and indigenous peoples.²⁰ The R-PP states that monitoring of REDD+ governance should place particular emphasis on reinforcing the framework already set in place by the VPA, and offers to provide additional financial, operational and technical support.²¹ Building ROC's national SIS on the VPA's LAS could be an opportunity to strengthen funding for the LAS and expand its reach to non-forestry sectors.

This opportunity has not yet been realized. REDD+ implementers in ROC have focused on developing a national measurement, reporting and verification (MRV) system, rather than building a well-designed overarching SIS. The MRV system focuses entirely on measuring carbon; it does not include land rights as a component. Moreover, it was constructed as a system fully separate from the Congolese LAS; instead, it was built according to general criteria provided by the World Bank that are not specific to ROC and do not make any link to the LAS. VPA and REDD+ implementers have the opportunity to adjust this approach by integrating common components of their own monitoring systems, in particular the LAS and SIS.

Land law reform

One of the VPA's strengths is the broad participatory process it built regarding the content of domestic laws. Annex IX of the VPA sets out various proposed reforms with positive potential for community land rights, in particular, the revision of the forest code, regulations on the assignment of state plantations to third parties, and the creation of community-managed forests. However, partly because of its focus on the forestry sector, the VPA falls short of calling on the Land Ministry for broader-reaching reform to existing land laws.

By contrast, the R-PP sees such reform as a key objective, calling for cross-sector initiatives such as "land tenure reform and development of a land-use plan."²² It does not go much further than general proclamations, however. It does not call for any specific new laws, identify the relevant government ministries, or create the consultation bodies to develop them — nor has it allocated any funding for these activities. The VPA, meanwhile, has devoted much more time and financial resources to developing the institutional framework to actually carry out a legal reform process. This would provide an interesting opportunity for synergy. The VPA states that its list of suggested reforms is not exhaustive.²³ REDD+ could direct funding to realize its proposed tenure reforms through the VPA's established mechanisms for government engagement and public consultation; for example, building on the working groups who have been revising the forest code and discussing community forest management.

Strengthening tenure within community-managed forests

The R-PP's plan to expand protected areas presents a risk for community access to land, since in the past the creation of protected areas often involved the relocation of local populations. On the other hand, the R-PP also states that REDD+ protected areas should promote a new conservation approach that pursues co-management and co-benefits for local populations.²⁴ REDD+ projects in general require secure long-term tenure rights, so as to better monitor and encourage the preservation of carbon stocks.²⁵ This could be an opportunity to strengthen the tenure rights offered by community-managed forests in ROC, including Community Development Areas, which the R-PP mentions as potential models for REDD+ projects.²⁶ This could involve adjusting the legal framework for Community Development Areas to grant longer-term, directly enforceable tenure rights to communities and thus make them eligible for REDD+. Such adjustments could be considered in the VPA-backed discussions on new community forest management laws, and in the current process of review of the Forest Code.

Conclusion

Both the VPA and REDD+ have structural features that could complement each other so as to address the significant gaps in tenure protection for Congolese communities. The VPA, as the more established of the two initiatives, has instituted governance monitoring and legal reform processes that could usefully be incorporated by REDD+. It has also developed public participation mechanisms that could help ensure that REDD+'s proposed land-use planning does not further disenfranchise communities. If REDD+ successfully builds on these VPA mechanisms, it could in turn provide them with much-needed additional funding. It could also broaden them to include other land-use sectors. This would promote increased collaboration between government ministries, thus reducing the inconsistencies and lack of oversight in current tenure arrangements. In practice, very little has been done on the ground to pursue these synergies. REDD+ has mainly concentrated on building carbon-focused MRV systems and developing its own communications strategy. REDD+ and FLEGT VPA implementers should pay greater attention to the synergies identified above as they continue to develop their own mechanisms, so as to enhance their ability to tackle crucial land-rights issues in ROC.

Endnotes

1. This definition is proposed by the FAO in *Land tenure and rural development*, Rome 2002.
2. See *Décret No. 2006-255 du 28 juin 2006 portant institution, attributions, compositions et fonctionnement d'un organe ad hoc de reconnaissance des droits fonciers coutumiers*; *Décret No. 2006-256 du 28 juin 2006 portant institution, attributions, compositions et fonctionnement d'un organe ad hoc de constatation des droits fonciers coutumiers*.
3. See *Décret no. 2006-255 portant institution, attributions, composition et fonctionnement d'un organe ad hoc de reconnaissance des droits fonciers coutumiers*, article 7.
4. See notably *Loi 25-2008 du 22 septembre 2008 portant régime agro-foncier*, article 21.
5. See *Loi No. 16-2000 portant code forestier*, articles 40 and 41.
6. See *Loi No. 5-2011 portant promotion et protection des droits des populations autochtone*.

7. See *Loi No. 5-2011 portant promotion et protection des droits des populations autochtones*, article 32.
8. Source: *Centre National de la Statistique et des Etudes Economiques*, « *Volume, Répartition Spatiale et Structure par Sexe et Age des Populations Autochtones au Congo* » (March 2011).
9. See RDC 2011, p. 69.
10. See <http://olamonline.com/olam-internationals-subsiary-cib-and-republic-of-congo-announce-a-pioneering-redd-initiative-to-realise-value-from-standing-forests>.
11. See RDC 2011, pp. 72–74.
12. *Ibid.*, pp. 72–74.
13. *Ibid.*, p. 22.
14. *Ibid.*, p. 69.
15. See EU-ROC VPA, Principles 2 and 3.
16. See RDC 2011, p. 49.
17. *Ibid.*, pp. 99–104.
18. See *Plateforme Congolaise pour la Gestion durable des forêts, Note de contribution de la société civile par rapport à la préparation du R-PP en République du Congo*, 10 June 2010.
19. See RDC 2011, pp. 49–57.
20. See FCCC/CP/2010/7/Add.1, Appendix 1, paragraph 2e.
21. See RDC 2011, p. 140.
22. *Ibid.*, p. 49.
23. See VPA, Annex IX.
24. See RDC 2011, p. 46.
25. See, for example, Cotula and Myers 2009.
26. See RDC 2011, p. 75.

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