

Central Africa—Next Hotspot for Carbon Trading?

Luísa Major Moreira

Tereza Garcia André

Archa Dutta

Ana Sofia Roque

Susana Pinto Coelho*

☞ Africa; Climate change; Emissions trading; Forests

Abstract

Carbon trading markets, both regulatory and voluntary, are being seen by several African nations such as Gabon, the Democratic Republic of Congo, the Republic of Congo and Angola, to take advantage of their significant forest resources, build their economic progress on sustainable and environmentally sound principles and contribute to climate change outside of their region. Yet, each African country's objectives and pace in enacting a carbon credit monitoring and marketing regulatory framework are different. This article aims to provide a comparative view of the legal regimes in force in Central African and Congo Basin neighbouring countries, headways made regarding REDD+ (Reducing Emissions from Deforestation and Forest Degradation) projects in each country and new developments to watch out for in the near future.

According to the United Nations Food and Agriculture Organisation, Africa homes 674 million hectares of carbon-absorbing land, corresponding to 22.7% of the overall area of the continent. Central Africa forests alone include the Cuvette Central Petlands and the Congo Basin—the world's second largest rainforest.

During the past decades, African Governments were not oblivious to the continent forests' potential, not only for economic growth but also as an instrument to fight climate change. In fact, since the adoption of the Kyoto Protocol in 1997, several African countries hosted projects developed under the Clean Development Mechanism, aimed at reducing emissions in developing countries against the issuance of Certified Emissions Reduction (CERs) which are then traded and used by industrialised countries to meet their emission reduction targets. Also, back in 2014, the Central African Forests Commission (COMIFAC) Convergence Plan for 2015–2025 (2nd edn)

identified priority areas to enable the relevant countries to properly manage forest areas and foster the potential thereof including, without limitation, sustainable management and development of forest resources, conservation and sustainable use of biological diversity and fight against the effects of climate change and desertification. Later, several African countries adopted the Warsaw Framework for REDD+—governing activities in the forest sector aimed at reducing emissions from deforestation and forest degradation and enhancing forest carbon stocks in developing countries—adopted at COP19 in Poland. Other than that, various carbon offsetting projects developed for the voluntary carbon markets (VMCs) have been or are in the process of being implemented throughout the continent—notably under the Verra's Verified Carbon Standard (VCS).

With global pressure to reduce and offset carbon emissions, international companies and stakeholders (in particular, from the Global North), including public and private entities, are now increasingly looking towards African forests' potential for carbon offsetting. In turn, African Governments are keen to capitalise on this trend. Throughout the continent, different countries are making some efforts aimed at hosting decarbonisation and carbon sequestration projects—notably via Nature Climate Solutions (NCS), mainly leveraged in the agriculture and forestry sectors.

However, thus far, few African countries—notably in Central Africa—have passed sophisticated climate laws and/or regulated carbon markets and/or trading. Even countries which are more advanced on this route still need to further regulate legislation recently passed and/or created or implement institutional frameworks aimed at (i) addressing climate change issues and accommodating commitments under the Nationally Determined Contributions (NDCs); (ii) reaching climate resilience and adaptation targets; and (iii) implementing carbon offsetting and trading mechanisms under the United Nations Framework Convention on Climate Change (UNFCCC). This latter topic is of particular relevance for Countries in Central Africa, due to the enormous potential of the Congo Basin rainforest as the largest carbon sink in the world. Central African countries are, however, running at different paces, as summarised below.

Gabon and DRC taking the lead

As a highly-forested and net carbon-absorbing nation, Gabon has never hidden its ambition to conquer the carbon market in view of preparing its transition from an economy reliant on extractive resources to a green one. Forest cover hovers at around 88% of Gabon, which contributes greatly to its carbon positivity.

Although Gabon continues to develop its extractive resources, both in the petroleum and mining sectors, the country remains committed to its “Green Gabon” strategy,

* Luísa Major Moreira, Trainee, Fátima Freitas & Associados; Tereza Garcia André, Senior Associate, Miranda e Associados; Archa Dutta, Consultant, Miranda & Associados; Ana Sofia Roque, Of Counsel, Fátima Freitas & Associados; Susana Pinto Coelho, Partner, Miranda & Associados.

aiming for development through sustainable practices, while maintaining a reduced ecological footprint. Indeed, in its second NDCs, Gabon committed unconditionally to remaining a carbon-neutral country up to and beyond 2050, and further reiterated its intentions to develop its carbon potential provided it has access to adequate financing. Forest management, reforestation and afforestation are expected to play a significant role on this path towards a carbon-neutral economy.

Gabon is well aware of the potential of carbon offsetting and carbon trading. On the eve of COP 27, in October 2022, Gabon announced that the UNFCCC had certified 187,104,289 tonnes of REDD+ credits in Gabon's favour for the 2010–2018 period. Further, Gabon was the first African country to be compensated for reducing its carbon emissions by the multilateral Central African Forest Initiative (CAFI), which paid out 17 million USD in 2021 to Gabon for reducing its emissions from deforestation and forest degradation (REDD+) over the 2016–2017 period.

However, given the unprecedented race for investment in African forests, Gabon is making significant efforts aimed at preparing the country's legal and institutional frameworks. Although the principles of sustainable development and environmental protection are already enshrined in namesake laws adopted on 1 August 2014, a giant leap towards sustainability was made with the enactment of the Climate Change Ordinance on 13 September 2021. This ground-breaking statute in Central Africa establishes a framework for greenhouse gas reduction and absorption measures, including carbon credits trading mechanisms. Amongst others, the Ordinance requires the Minister in charge of Climate to ensure the integral protection of carbon-rich forests of high conservation value and that the deforestation threshold for natural forests does not exceed 15,000 ha per year. The Ordinance considers forestry as one of the sectors which can have a negative impact on the climate and requires the implementation of climate change adaptation and mitigation measures in this sector, notably to reduce greenhouse gas (GhG) emissions. The establishment of a national GhG database, a GhG national quota system and a carbon offset register are among such mitigation measures under the Ordinance.

Specifically for carbon offsets, the Ordinance states that all carbon stocks generated through projects leading to GhG reduction, as duly verified by the State, are the exclusive property of the State, but can be transferred to the project parties. The State has the right to 20% of these carbon credits and can commercialise them, with the sale price to be fixed subsequently in regulations. Transfer of carbon credits abroad is subject to the approval of the Climate Change Management Authority which must ensure that the obligations under the Paris Agreement or any other international convention to which Gabon is a party are met.

Other than that, on 17 November 2022, just before COP27 ended, Gabon adopted Decree No.00291/PR/MEFMEPCPAT/MER appointing the

Gabonese Sovereign Wealth Fund (FGIS) as the entity exclusively in charge of the commercialisation of carbon credits. The FGIS has been tasked with notably negotiating and concluding the sale price of carbon credits and implementing the sales transactions. Gabon's Minister of Environment announced on 31 December 2022 that Gabon had 90 million tons of carbon credits available for commercialisation. Even at an estimated value of a modest 14 USD per ton, Gabon could be richer by 1.26 billion USD.

Carbon markets were an important theme during the Africa Climate Week held in Libreville in August 2022, ahead of COP 27, during which it was announced that the Kinguele hydro project in Gabon was the first national project to be registered under the UNFCCC. While Gabon's efforts to develop domestic carbon markets started at the time of COP26 in Glasgow, they significantly intensified around COP27, with Gabon becoming a member of the Africa Carbon Markets Initiative—which managed to raise an advance commitment of 200 million USD from corporates, and aims to create by 2030, 300 million carbon credits retired annually, revenue worth 6 billion USD and 30 million jobs.

Investments on the Gabonese forestry sector are therefore expected to rise sharply. Even Gabon's extractive sector is starting to get involved in reforestation projects. As an example, in 2022, TotalEnergies acquired a 49% stake in the forestry company Compagnie des Bois du Gabon (CBG) in view of implementing a sustainable forestry management and carbon sink model. This project is supported by an annual investment of 100 million USD per year and aims to create at least 5 million tons of carbon credits each year up until 2030.

Another country willing to take the lead is the Democratic Republic of the Congo (DRC), which is home to 60% of the Congo Basin rainforest. The DRC ratified the UNFCCC in 1997, the Kyoto Protocol in 2005, and the Paris Agreement in 2015. Under the NDCs, the country committed to a 21% reduction in emissions by 2030, with 19%. The domestic NDCs budget is estimated at 48.68 billion USD, of which 25.60 billion USD is for the implementation of pledged mitigation initiatives and 23.08 billion USD for priority adaptation actions.

At present, the existing regime governing carbon credits and trading is limited to two main statutes: Decree No.09/40 of 26 November 2009—which created a REDD structure in the country—, and Ministerial Order No.047/CAB/MIN/EDD/AAN/MML/05/2018 of 9 May 2018 on the homologation process of the REDD+ investments (REDD+ Homologation Regulations). A draft “Procedure Manual for Mandatory National Homologation of REDD+ Investments” (Manual) is also under discussion but has not yet been approved. Under these statutes, carbon stocks contained in the forests are owned by the State. Notwithstanding, the State acknowledges an exclusive ownership right over URECs (the Congolese Emission Reduction Units) to the REDD+ Investments Holder—defined as “any natural or legal

person, public or private, national or foreign, as well as any local community implementing a REDD+ investment”—following the homologation of the project. This is done by completion of a Partnership Agreement between the State and the REDD+ Investments Holder aimed at, notably: (i) determining the rights and obligations of the parties relating to the recognition of the exclusive ownership rights over URECs; and (ii) setting out the commitments for the implementation of national socio-environmental safeguards. The approval and implementation of REDD+ projects are further subjected to the general principle of Free, Prior, Informed Consent (FPIC) of local communities. For such purpose, the Manual provides for the submission of an implementation plan for public consultation to obtain FPIC prior to the commencement of the relevant activities. Preparing a Benefit-sharing Plan is also a requirement to obtain full approval of a REDD+ Investment Project. This shall encompass prior consultations with the various stakeholders, in particular with local communities and/or indigenous peoples specifying their rights, roles and benefits. This benefit-sharing shall be based on the principles of (i) performance (profit sharing focused on the distribution of revenues from the sale of URECs); (ii) equity (equitable distribution of costs and benefits of the REDD+ project amongst stakeholders who effectively contributed to the implementation of same); (iii) distribution of profits in a monetary and/or non-monetary manner; capacity to generate reinvestments; and (iv) transparency and the FPIC principle apply between the REDD+ project and stakeholders, as well as subcontractors and local communities. The registration of credits with the Registrar of Transactions on Congolese Emission Reduction is also expressly governed under the law.

Other than that, recently, the DRC also took an unconservative approach by launching auctions for new oil and gas concessions, which were also open to carbon investment firms which could bid for virgin pieces of land and commit not to develop them in any way, rather drawing revenue from their investment by selling carbon credits to entities willing to offset emissions.

Congo, running behind but moving fast

The forestry legal framework of the Republic of the Congo already provides for certain rules aimed at governing carbon credits and trading. In particular, the Forestry Code recognises the right for any individual and legal entity to generate carbon credits and market them. In general, carbon credits can be generated from both State permanent and non-permanent forests either under a risk service contract or by promoters of emission reduction projects related to deforestation and the degradation of forests, including sustainable management of forests, conservation of biodiversity and the acquisition of carbon stocks, subject, however, to an authorisation by the Minister in charge of forests. Ownership and

marketing rights shall be recognised by different holders depending on the classification of the forest where the carbon credits are generated.

In what concerns *forests belonging to the State, local communities or other public legal entities*, carbon credits generated therein belong respectively to the State, local community or other public legal entities. In case the carbon credits are generated under the scope of an emission reduction project related to deforestation and the degradation of forests, including sustainable management of forests, conservation of biodiversity and the acquisition of carbon stocks, directed by an individual or private legal entity, these are deemed co-owners of the carbon credits.

On the other hand, as regards *community forests*, carbon credits generated therein belong solely or jointly to local communities and/or indigenous peoples, depending on whether the project is executed by them or by a third party, i.e. the generated carbon credits are owned by local communities and/or indigenous peoples if the project is carried solely by them, or are jointly owned if the project is executed by a third party.

Finally, in case of *private natural forests or private plantations*, carbon credits shall belong to individuals or legal entities with private domain over the same.

The Forestry Code also sets forth that the modalities of marketing carbon credits shall be determined by means of ancillary regulations—which have not yet been enacted—and that a national body encompassing all relevant stakeholders shall be created to ensure the regulation, monitoring and control of the carbon market—the so-called Forestry Carbon Task Force—which has been recently created under Decree No.2022-1923 of 26 September 2022. Amongst others, the Forestry Carbon Task Force shall be responsible for regulating and controlling carbon markets and evaluating and homologating programs and projects in connection with carbon credits.

Specific rules for the implementation of REDD+ projects are also in place. Pursuant to Order No.113 of 8 January 2019, all individuals or legal entities, as well as local communities, may propose REDD+ projects or programs in-country which shall then create carbon credits represented by Congolese Emission Reduction Unit (URCS). The REDD+ approval process encompasses different phases. The main assessment phase begins with the submission in writing to the Minister in charge of forests of the Project or Program Description (DPP) which shall include, amongst others, the Benefit-sharing Plan, the Monitoring Plan and evidence of compliance with FPIC obligations. Finally, all REDD+ projects or programs are subject to registration. The law is not clear on the rules applicable to some though. Additional regulations in connection thereto are expected to be enacted in the near future.

Angola trying to catch up

Angola committed to the implementation of measures and programs to stabilise GHG emissions by approving the adherence to the UNFCCC in 1998, and ratifying same in 2000, and adhering to the Kyoto Protocol and to the Paris Agreement. In 2008, Angola adopted the National Strategy for the Implementation of the UNFCCC and the Kyoto Protocol—which included a set of plans, strategies and goals aimed at reducing GHG by acting on different economic, business and social sectors including, without limitation, in what concerns afforestation, deforestation, waste management, use of firewood and coal, wildfires and forest management, gas flaring, agriculture and transportation. One of the key goals set forth in this strategy was the creation of the Carbon Fund, which would be responsible for preparing the legal and institutional instruments aimed at regulating carbon credits generated under the Clean Development Mechanism (CDM) under the scope of the Kyoto Protocol and further implement actions and projects aimed at reducing GHG emissions and increase carbon sequestration capacity. This strategy also referenced the need to amend existing legal instruments and enact new laws aimed at implementing the commitments under the UNFCCC, including climate and carbon-related laws. None of these goals have been achieved within the expected timeframes though.

Following ratification of the Paris Agreement in November 2020, in May 2021, Angola submitted revised Nationally Determined Contributions (NDCs), whereby Angola committed to achieving a reduction in GHG emissions relative to a business-as-usual (BAU) emissions baseline (2015) over the period 2015–2025, comprising (i) and unconditional contribution of 14% relative to BAU (2015) in the year 2025; equivalent to an estimated mitigation level of 15,4 million tonnes of carbon dioxide equivalent (tCO₂e); and (ii) a conditional contribution of 10% relative to BAU in the year 2025; equivalent to an estimated mitigation level of 11.1 million tCO₂e. Reforestation projects have been identified as key to meeting the prospective reductions.

Angola has an estimated forest area of 66,607.38 ha, including the Maiombe woodlands, which represents a valuable opportunity for conservation and sustainable development and plays an important role in mitigating the impacts of climate change by acting as a carbon sink. Recently, the Secretary of State for Forest Resources declared the interest of the United Arab Emirates in investing in deforestation, as part of a plan that selected different countries, including Angola, to make advancements in carbon sequestration projects, and the project is estimated to be implemented in an area of 100,000 ha in three to four provinces including Cuando Cubango. However, at present, there is no domestic legislation expressly governing carbon offsetting and trading, which prevents project to be implemented on a swift and smooth manner.

The very few projects implemented and/or ongoing—notably projects related with improved cookstoves—were treated as “specific projects”, handled and/or approved on an ad hoc basis. At present, there is no clear guidance on the relevant authorities/institutional stakeholders in charge of this type of project. The Ministry of Environment is typically involved whether directly or through any of the several ministerial bodies or institutions notably (i) the National Directorate for Climate Action and Sustainable Development; (ii) the National Directorate for the Environment; and (iii) the National Commission Climate Change and Biodiversity. Other Ministries, governmental bodies and/or local authorities may also be engaged on a case-by-case basis, depending on the nature, location, scope and features of the relevant projects. Local authorities recently stated that for the existing and future carbon-related projects to be effective, and for carbon markets to operate properly, certain domestic issues must be addressed in advance notably (i) completion of forests’ and conservation areas’ certification procedures; (ii) operationalisation of the National Climate and Environmental Observatory; (iii) creation of a carbon credit certification system; (iv) development of emission reduction projects; and (v) strengthening of institutional capacities.

Significant developments are expected in the near future though. In particular, the Ministry of Environment recently announced that Angola will pass new legislation aimed at addressing climate issues, as well as carbon credits and carbon markets. There seems to be some debate on the actual path to be adopted including, without limitation, whether the appropriate route should be (i) adapt and/or amend existing legislation as required and/or appropriate; or (ii) prepare a new package of legislation expressly aimed at addressing climate and carbon-related matters on a comprehensive and structured manner. This latter option seems to be gathering domestic support though.

Mind the challenges

Despite the differences between the several Central Africa nations, notably in what concerns the legal frameworks in force, the socio-economic status, as well as the specific idiosyncrasies and cultural-related matters, similar challenges may be found when considering implementing carbon-related projects. Without prejudice to thoroughly assessing the specifics of the target country on a case-by-case basis, in order to properly frame and structure investment opportunities, amongst others, investors must be aware of the following issues.

Doubts as regards the implementation of the Paris Agreement art. 6

The Paris Agreement art.6 provides the basic guidelines for countries to set out rules to pursue voluntary cooperation aimed at reaching climate targets. In particular, art.6.2 provides for the trade of emission

reductions under bilateral and/or multilateral agreements—the so-called Internationally Transferred Mitigation Outcomes (ITMOs)—and art.6.4 provides the creation of a global carbon market overseen by a United Nations entity (Supervisory Body). Under this latter mechanism, projects shall be approved by both the host country and the Supervisory Body prior to start issuing credits (A6.4ERs) which may then be traded. Detailed rules still need to be implemented for this global market to fully operate but it is expected that the same will replace the CDM mechanism under the Kyoto Protocol.

Article 6.4 is, however, silent on whether carbon credits not authorised pursuant to the mechanism set forth therein may be issued. If such credits are issued and not properly accounted for, this could easily lead to a significant increase in greenwashing trends.

Thus far, it is unclear how Central Africa nations will address this issue and implement the Paris Agreement art.6. This will certainly be a hot topic in the near future.

African voluntary carbon markets

The potential role of voluntary carbon markets (VMCs) in Africa may be critical to enhance energy transition, accelerate decarbonisation, and monetise natural assets. Hence, defining the functioning and supervision of VMCs—both on the national and global levels—shall be key.

At COP27, the so-called Africa Carbon Markets Initiative (ACMI) was launched by the Global Energy Alliance for People and Planet (GEAPP), Sustainable Energy for All (SEforALL) and the United Nations Economic Commission for Africa (UNECA) with support from the UN Climate Change High-Level Champions—with the aim of scaling supply of and demand for African carbon credits by 2030. ACMI's ambitions include: (i) grow African credit retirements ~19-fold from 2020 to ~300 MtCO₂e per annum by 2030 and up to 1.5–2.5 GtCO₂e by 2050; (ii) create or support 30 million jobs by 2030 and more than 100 million jobs by 2050 through the carbon project development, execution, certification, and monitoring; (iii) raise the quality and integrity of African credits to mobilise up to 6 billion USD by 2030 and more than 100 billion USD per annum by 2050; and (iv) ensure equitable and transparent distribution of carbon credit revenue, with a significant portion of revenue going to local communities. ACMI published a roadmap¹ detailing the strategy and steps aimed at achieving these ambitious goals, which include supporting African Governments in drawing up VCM activation plans, setting national targets, and adapting or implementing regulations. In summary, to fully benefit from the VMCs' potential, additional efforts must be made, notably under the ACMI initiative.

VMCs is becoming a hot topic Africa wide with several Central African countries aiming at capitalising on their potential to act as significant carbon sinks and benefiting from carbon financing through market-based mechanisms, including voluntary schemes based on carbon offsets and credits. Determining how to cope with, implement, supervise and guarantee the integrity and transparency of carbon markets will be key. However, this may also be one of the most difficult tasks ahead for most African countries where most of these matters are yet rather alien or poorly regulated.

Land access, land grabbing and indigenous peoples

Land access and use are subject to different rules depending on the target country. However, in general, access to land aimed at developing investment projects is subject to strict regulations which, amongst others, aim at stressing the State ownership of land, defining the rules governing land access and protecting local communities' ancestral rights to land. In order to prevent land grabbing claims and to ensure social licence to operate, investors shall fully comply with the rules governing land access and further ensure environmental safeguards and communities protection measures.

On this topic, reference must also be made to specific rules governing indigenous peoples. First, one must stress that that some African countries do not recognise nor use the concept of indigenous peoples. This is the case of Angola, where no references to indigenous peoples may be found in the Constitution of the Republic nor on ancillary domestic statutes.

Conversely, other countries such as the DRC do recognise such a concept—notably when referring to the Mbuti, Baka and Batwa pygmy peoples—and approved specific statutes aimed at protecting indigenous peoples which shall be considered when developing projects may affect the same.

FPIC principle

Most African countries expressly enshrine the so-called FPIC principle under different domestic statutes aimed at governing amongst others (i) land access; (ii) forestry exploitation, conservation and/or management; (iii) environmental impact assessment and/or licensing; and/or (iv) other investment and/or permitting issues. Compliance with the FPIC principle by carrying out public consultation procedures in line with the specific requirements applicable under the relevant laws of the target country must be ensured, not only to enable the implementation of the relevant project but also to prevent or mitigate potential issues with local communities, which could impair the social licence to operate but also could trigger relevant reputational issues.

¹ See https://www.seforall.org/system/files/2022-11/ACMI_Roadmap_Report_Nov_16.pdf.