

Executive Summary

Introduction

Democratic Republic of Congo (DRC) is one of the world's largest countries, has great natural resource wealth, yet is one of the world's poorest countries. Forests cover about sixty percent of the country (or about 134 million hectares). Together with forests in neighboring countries, they form the Central African Rain Forest, the second largest tropical forest in the world after the Amazon.

The matters raised in the Request for Inspection relate to the closed, broad-leaved rainforest in DRC, which is estimated to cover 86 million hectares. These forest lands are the home and source of livelihood and cultural identity of many people, including large numbers of Pygmy peoples who have depended on the forests for millennia. The forests are also, in many other ways, an invaluable resource.

The present Report presents the findings of the Inspection Panel in response to a Request for Inspection of two Bank-financed operations involving DRC forests and forest concessions. The claims in the Request, Bank Management Response, and the findings of the Panel, are summarized below.

The Request

On November 19, 2005, the Inspection Panel received a Request for Inspection (hereinafter "the Request") from the Organisations Autochtones Pygmées et Accompagnant les Autochtones Pygmées en République Démocratique du Congo (Indigenous Pygmy Organizations and Pygmy Support Organizations in DRC). The Requesters submitted the Request on their own behalf and on behalf of affected local communities living in DRC. Representatives of local communities of several provinces in DRC signed the Request.

On January 13, 2006, Management submitted its Response to the Request for Inspection. The Board approved the Panel's recommendation to conduct an investigation into the matters alleged in the Request for Inspection on February 28, 2006.

The Bank-Financed Projects/Operations

The Request relates to two Bank-financed operations: the Emergency Economic and Social Reunification Support Project ("EESRSP" or "the Project") and the Transitional Support for Economic Recovery Grant Operation ("TSERO") development policy loan.

The EESRSP is aimed at supporting implementation of economic reforms in DRC, and has five components. The Request focuses on Component 2 which, *inter alia*, has the objective of helping to restore effective institutions in the forestry sector in DRC provinces, improve local governance over natural resources, bring the new DRC Forest Code into practice, and address the problem of illegal logging. This Component

originally set out two priorities: (1) to prepare a forest zoning plan with a focus on the most forested provinces, in particular Equateur and Orientale; and (2) to “[l]ay the ground for implementation of the new law’s forest concession system - with a focus on converting old forest contracts into the new concession regime.”

The subsequent TSERO is a budget support operation, disbursed in a single-tranche with a medium-term policy framework. It is defined by the Bank as Development Policy Lending (DPL). It constitutes the third operation to support the economic recovery of DRC.

One of the TSERO’s objectives is to improve governance in the natural resources sector. Two of its nine Board approved conditions relate to forests. These are: (1) initiation of the legal review of forest concessions, through various steps; and (2) extension of a 2002 Moratorium on new logging concessions until “*new auction procedures are adopted; legal review of existing procedures is completed; and a 3 year plan for future concessions is adopted based on a participatory process.*” The TSERO also sets forth several indicators of progress, including: completion of the legal (concession) review in accordance with specified procedures; continued compliance with the 2002 Moratorium; recruitment of an independent observer to assist in monitoring and other activities; enactment of key implementation decrees under the 2002 Forest Code; and continued implementation of fiscal reforms.

The Claims of Requesters

The Requesters claim that they have been harmed and will be harmed by the forest sector reform activities supported by the EESRSP and the TSERO. The Requesters fear that the design and implementation of a new commercial forest concession system may cause irreversible harm to the forests where they live and on which they depend for their subsistence. They contend that these developments are taking place without giving them information, consulting with them, or providing them with an opportunity to participate.

The Requesters are also concerned about negative effects of a forest zoning plan, which they believe is being prepared with IDA support without consultation or consideration of interests of indigenous peoples.

The Requesters claim that implementation of the EESRSP will lead to violations of their rights to occupy their ancestral lands, manage their forests and resources according to traditional knowledge and practices, and protect their cultural and spiritual values. They claim this would then lead to the loss of their living environment and their means of subsistence and force change in their way of life, causing serious social conflict. They claim that they were not consulted and are concerned that the zoning of the forests could occur without consideration of the indigenous peoples’ interests.

The Requesters assert that their grievances result from the Bank’s failure adequately to address and implement applicable safeguards and from the World Bank’s “*hastily adopt[ing] a Congolese Forest Code*” without the participation of civil society or the

indigenous communities. In particular, they claim that the Bank failed to comply with its policies and procedures regarding environmental assessment (“EA”), indigenous people, and forests. The Request also raises issues of compliance with Bank policies and procedures relating to cultural resources, involuntary resettlement and supervision. The Requesters further claim that the Bank’s use of certain lending instruments (an Emergency Recovery Loan for the EESRSP and a Development Policy Loan for the TSERO), led to the circumvention of its safeguard policies.

Response from Bank Management

Management claims that it has made every effort to apply Bank policies and procedures and that the Requesters’ rights or interests have not been and will not be directly and adversely affected by a failure of the Bank to implement its policies and procedures.

With regard to the EESRSP, however, Management recognizes that it was not in full compliance with OP 4.01 on Environmental Assessment and acknowledges that OP 4.20 on Indigenous Peoples should have been triggered during project preparation once the zoning element was included in the Project, even if it was dropped from the Project before implementation.

Management believes that the Bank’s forest work in DRC since 2002 has enhanced public participation and allowed for dialogue with local NGOs. The Response notes that the Bank helped organize the first multi-stakeholder forest forum in DRC in November 2004. With regard to outreach to Pygmy people, Management acknowledges that a more proactive outreach might have enabled the Bank to establish more direct lines of communication with indigenous Pygmy leaders and communities.

Management indicates that it plans to undertake the following: consider activities to strengthen institutions and provide an overall framework for other Bank-supported forest activities in DRC; establish a proactive forest information and outreach program as well as more direct lines of communications with indigenous communities, including Pygmies, to make certain that in future Bank operations they receive social and economic benefits that are culturally appropriate; and ensure that future Bank lending in the forest sector and other initiatives such as the zoning plan include measures that strengthen the legal and customary rights and preserve the cultural heritage of indigenous communities, including the Pygmies.

The Investigation Report and Applicable Policies and Procedures

This Report concludes the Panel’s investigation into the matters alleged in the Request for Inspection. Panel Chairperson Edith Brown Weiss and Panel Member Werner Kiene led the investigation. Three internationally recognized experts/advisers on social and indigenous people’s issues and on forestry and environmental issues assisted the Panel in its investigation.

In its investigation, the Panel reviewed relevant Bank documents and other materials from the Requesters, Bank staff, the Government of DRC, nongovernmental organizations, local communities, concessionaires, and other sources, including scholarly literature. The Panel interviewed Bank staff, both in Washington, D.C. and in Kinshasa. It also met with the Independent Observer, various nongovernmental organizations, experts, and other private parties. The Panel visited DRC and areas affected by the Bank's EESRSP and TSERO in January 2006 and in January/February, 2007. The Panel team traveled to Equateur and Orientale Provinces, including Kisangani and nearby areas, Mbandaka, Bikoro, Ingende, Bafawsende and other areas. During the visits, the Panel met with the Requesters and locally affected people, Bank staff, national and provincial authorities, the Technical Working Group and the Independent Observer, nongovernmental organizations, representatives of the forest industry association and concessionaires, local and international technical experts, and other concerned people. The Panel is grateful to all those who have assisted in the investigation.

Bank Operational Policies and Procedures Applicable to the Project

With respect to this Project, the Panel assessed whether the Bank complied with the following applicable operational policies and procedures:

OP/BP 4.01	Environmental Assessment
OP 4.12	Involuntary Resettlement
OD 4.15	Poverty Reduction
OD 4.20	Indigenous People
OP/BP 4.36	Forests
OP/BP 8.50	EmergencyRecovery Assistance
OP/BP 8.60	Development Policy Lending
OPN 11.03	Cultural Property
OP/BP 13.05	Project Supervision
World Bank Policy on Disclosure of Information	

Forests and Sustainable Development in DRC

It is difficult to fully comprehend the present situation of the country, the people and the forest. DRC is emerging from a decade of war and civil disturbance. The conflict was dispersed, multi-sided and chaotic, often taking place in forested areas. It left nearly 4 million people dead and millions more displaced from their homes.

There are to date very few usable roads in DRC, and the population has very little or no access to modern facilities for health, education or governance. The rural population of some 40 million people has developed a great reliance on traditional and subsistence uses of the forest for survival, particularly during and after the civil conflict of the last decade.

The Pygmy people have inhabited DRC forests for millennia. Their way of life, culture, and strong attachment to these forests and the forest world, and the threats they face from

logging and exploitation of the forests by others, are described in detail in this Report and its Annex (Ethnography of the Pygmy Peoples).

Forest Concessions

DRC has a history of granting concessions to special interests for exploitation of natural resources. Timber has been no exception. The country has used forest concessions to tap forest resources for export markets and to extract needed revenues for national and provincial governments.

Most concession logging activities originally took place along the country's rivers, while remote forests were largely left untouched. In the recent years of conflict many of the deeper forest areas became part of the war theater and commercial forest activities in some areas came to a complete standstill.

During the final years of the conflict, however, huge tracts of high-quality forest land were allocated to parties with various economic and political interests. When the international community returned to DRC in 2001, there were many concession agreements, under various names, that had allegedly been granted on paper by various previous governments. According to the Bank, a good number of these agreements were speculative.

Bank Management states in its Response that it advised the Government on measures aimed at returning forest concessions to the State that had expired or were illegally held. Management notes that in 2002 (prior to the EESRSP) the Government cancelled 163 concessions, which Management claims reduced the total area under concessions from 45 million hectares to 20 million hectares. **The Panel notes the importance of the Bank's intervention, before the start of the EESRSP, to advise the Government to cancel concessions that were illegal or had expired. This was consistent with the Bank's Forest Policy.**

However, the Panel also observes that the cancellations do not mean that that the full reduction of some 25 million hectares contained forest cover. The Panel was informed, during its investigation, that substantial areas in these concessions were not covered by forests, but had been previously logged and/or were agricultural lands, swamp lands and even villages. Moreover, a substantial portion of the concession areas cancelled in 2002 that did have forest cover appears to have re-emerged as concession areas under consideration for validation in the concession conversion process supported by the EESRSP.

During its investigation, the Panel was told by many sources that new entities and operations may enter DRC forests in the post-conflict environment with an interest in large-scale logging and associated activities that, people fear, will be unsustainable and will fail to take into account the rights and interests of local people living in or near the forests, including the Pygmy peoples.

The Panel observes that one can expect strong pressures for industrial logging, because the resource is enormous and the profit potential great. **In this light, many people, including some who are critical of World Bank actions, indicated to the Panel their hope that the World Bank will stay engaged in the sector to support and help ensure that critical social and environmental needs are protected, while supporting needed economic development and progress in the country.**

Bank Engagement and Focus

The large-scale and non-transparent licensing of forest concessions in the final years of the conflict, alarmed both DRC leadership and its development partners, and was a major factor leading to the involvement of the World Bank in this sector.

Within the context of plans for post-conflict rehabilitation and development, the Bank focused attention on the forests, with particular emphasis on generating higher tax revenues through a substantial increase in the level of concessional logging. Early Bank documents highlighted the gap between actual levels and much higher potential levels of timber production, and the very high tax revenues that could be generated *“if all the concessions in the DRC were granted in conditions of the open market.”* The documents also highlighted other benefits that would arise at substantially higher levels of concession logging, and stated that *“DRC is to become the premier producer of wood in Africa.”*

A key indicator of success of the EESRSP forest element of Component 2 in the original Project documents was the number of concessions that would be transparently approved. Management acknowledged in its Response that this was not an appropriate indicator and would be removed. Nevertheless, the presence of this indicator in the Project documents reinforces the view that the mindset at Project design was to provide support for increased industrial logging as a means to increase tax and revenue generation and support local employment.

The Panel notes that there is wide agreement that industrial logging in DRC has profound social and environmental impacts. There is also widespread awareness that DRC lacks basic institutional, technical and field capacity to address social, environmental and other issues relating to logging in its forests. A 2007 Report on Forests in Post-Conflict DRC, in which several Bank staff participated, notes that *“Industrial timber production has a poor track record in Africa. Over the past 60 years, there is little evidence that it has lifted rural populations out of poverty or contributed in other meaningful and sustainable ways to local and national development.”*

The Project documents presented to the Board upon approval of the EESRSP contain virtually no information or analysis on critical social and environmental issues and risks that would inevitably arise in connection with a Bank project involved with tropical forest concession operations, especially one which was built on analysis that foresaw the value and need to increase industrial logging concession operations.

The Panel finds that the Bank's early interest in the potential tax and revenue-generating value of increased industrial logging led to a focus on developing a Project that would facilitate increased levels of industrial forest exploitation. The Panel finds that there was inadequate consideration of the many important socio-economic and environmental issues of forest use, embedded within Bank safeguard policies, and that this distorted the actual economic value of the country's forests. This, in turn, contributed to problems of Bank compliance with its social and environmental policies at the stage of Project design and appraisal.

The Legal Framework and Institutional Capacity

The EESRSP in Component 2 and the TSERO sought to support implementation of the legal framework in DRC relating to forests, including the 2002 Forest Code and the 2002 Decree creating a Moratorium on the awarding of new forest concessions. The Panel notes that developing a good quality legal framework is a high priority and is consistent with Bank policy. **Much still needs to be done as of the date of the Panel's Report to develop the regulations implementing the Forest Code.**

The Panel also notes, however, DRC lacks capacity to implement the legal framework, including its provisions designed to benefit local communities. During its investigation, the Panel saw little evidence of enhanced government capacity to enforce the law and respond to social and environmental issues posed by logging. **The Panel is concerned about the Project's potential impact in supporting actions to validate long-term concession contracts when the capacity to ensure sustainable forest concession operations does not exist.** The Panel also notes that the lack of capacity is likely to jeopardize the collection and distribution of hoped-for revenues from logging.

Social Compliance: The Pygmy People and Other Groups

Indigenous Peoples

A major claim of the Requesters is that, despite the presence of indigenous Pygmy people in the Project implementation area, the Bank did not apply OD 4.20 on Indigenous Peoples. The Requesters indicate that the Indigenous Peoples' existence, survival, cultural identity, and traditional knowledge are intimately linked to the forests. They assert that the Bank prepared terms of reference ("TORs") for a pilot zoning plan covering the axis Maringa-Lopori-Wamba, which recognized the presence of Pygmies' indigenous communities in these forests, yet ignored OD 4.20 on Indigenous Peoples.

In its Response, Management explains that the design of the Project as reviewed at concept stage did not reveal the existence of Indigenous Pygmy communities in Project-affected areas. Thus OD 4.20 was not triggered. However, Management states, in its Response to the Request for Inspection that *"in view of the likelihood that Pygmies would be present in whatever tract of forest in Equateur was selected for the pilot, OD 4.20 should have been triggered."*

OD 4.20 on Indigenous Peoples requires the Bank to ensure that indigenous people “do not suffer adverse effects during the development process, particularly from Bank-financed projects, and that they receive culturally compatible social and economic benefits.” The policy requires the Bank, in the early phases of Project preparation, to identify whether indigenous peoples are present in an area affected by a proposed project.

While no reliable census data are available, the Panel’s expert estimates that DRC is home to between 250,000 and 600,000 Pygmy people. The Panel’s expert notes that the size of the Pygmy population may be larger than claimed because of discrimination against Pygmies. The distribution of the Pygmies is described in detail in the Panel’s Report. In addition, the map produced by Management in its Response to the Request (January 2006) shows that Pygmies are dispersed over wide areas of the country, even though this map under-represents the presence of Pygmies. On the other hand, the map indicates that the concentration of Pygmy people is highest in areas where forests have been thus far least exploited, but where an increasing number of concessions have been granted.

The Project documents presented to the Board for approval of the EESRSP do not mention the Pygmy Peoples, or assess potential issues or risks to them posed by Project activities, even though the presence of Pygmy peoples in the forest areas of DRC was well known and documented. **The Panel finds that Management did not carry out appropriate screening as required in the early stage of the Project to determine the possible presence of indigenous peoples. Management failed to identify the existence of Pygmy communities in areas affected by the Project. This does not comply with OD 4.20.** This failure was detrimental to the interests of the Indigenous Peoples, and to ensuring that they and other vulnerable people would not be harmed by but rather would benefit from actions affecting the forests and forest concessions.

Even by the time of Management Response to the Request for Inspection, some Pygmy groups affected by the Project had not identified. Moreover, only limited attention was given to the fact that, as a consequence of conflict and economic breakdown, the current rural population of about 40 million people relies heavily on the forest for subsistence.

The Panel reviewed whether Pygmy People qualified as indigenous people under OD 4.20. **The Panel observes that most of the Pygmy people satisfy the criteria, with the possible exception of the language criterion.** They have a close attachment to their ancestral lands and the forest resources. They identify themselves as a distinct group or groups and follow their own long-established customs and social patterns, and have continued for centuries to follow primarily a subsistence-based way of life that is adapted to and relates to the forests around them. While speaking languages similar to those of their neighboring Bantu-or Sudanic-speaking agricultural peoples, they use different intonation in their speech, by which they are easily identified as Pygmies in a local context. **The Panel observes that Pygmies in DRC should be considered as Indigenous People under OD 4.20.**

Where the presence of indigenous people is confirmed, OD 4.20 requires a number of actions. It provides for development of a culturally appropriate Indigenous Peoples Development Plan (IPDP) “*based on full consideration of the options preferred by the indigenous people affected by the project.*” Any project “*that affects indigenous peoples and their rights to natural and economic resources*” is expected to include components or provisions that incorporate such a plan, and studies “*should make all efforts to anticipate adverse trends likely to be induced by the project and develop the means to avoid or mitigate harm*” (emphasis in original).

The Panel finds that the Bank’s failure to trigger OD 4.20 for the EESRSP’s Component 2 and to prepare an IPDP does not comply with OD 4.20 on Indigenous Peoples. As a result, potentially critical interests and needs of the indigenous Pygmy people in relation to these Project activities have been left unaddressed.

A policy-consistent IPDP would have provided the framework for improved baseline data on the Pygmy people in the DRC. It would have identified the needs of the people in terms of their livelihoods and culture and would have provided a strategy for effective local participation. It would have assessed the legal framework in relation to potential vulnerabilities and issues of importance to the Pygmy people. **The absence of an IPDP appears to have been a major contributing factor to problems that arose in the early efforts to initiate a Pilot Forest Zoning Plan (PFZP) and in the implementation of the concession review process.**

The Panel notes that it was only after this Request for Inspection that the Bank paid more attention to the plight of the Pygmy people and the many others dependent upon the forests. To its credit, Bank Management is now devoting attention to the livelihood and cultural problems faced by people living in the forest or dependent upon it.

Cultural Property

The Requesters claim that if the forest concession allocations and pilot zoning are carried out without consulting the indigenous people or taking their interests into account, it would “*result in (...) the violation of their cultural and spiritual values.*” In Response, Management states that “*The pilot zoning plan does not threaten physical cultural property (...) indigenous and other forest dwelling peoples would have been consulted had the zoning proceeded.*”

Bank Policy OPN 11.03 on Management of Cultural Property in Bank-Financed Projects adopts the United Nations definition of “cultural property”, and states that it includes “*sites having archaeological (prehistoric), paleontological, historical, religious, and unique natural values*” The policy further provides that the Bank “*will assist in the protection and enhancement of cultural properties encountered in Bank-financed projects, rather than leaving that protection to chance.*”

The forest to the Pygmy people is not merely the place where they obtain material benefits. Forest plants and animals are useful both in direct and indirect ways, for material as well as spiritual purposes. The forest provides the people with the basis of their cultural identity. Certain areas are of particular cultural and spiritual significance. The Panel notes that under OP 11.03, the Bank is required to “*assist in the protection and enhancement of cultural properties.*”

The Panel finds, however, that Project documents at design and appraisal did not identify the cultural property and spiritual value of forest areas to the Pygmy peoples or the appropriate measures to avoid impacts to areas that might fall within the definition of cultural property under Bank policy. This did not comply with OP 11.03 on Cultural Property. For reasons outlined in the present Report, it was foreseeable that the zoning proposal and the concession conversion process could potentially harm these areas, even if such harm was not intended.

The Panel considers that it is not sufficient under the relevant policies to defer consideration of these issues and impacts, and consultations with local indigenous people more generally, to later stages of Project implementation, e.g., at such time that the zoning proposal is implemented, and/or after the conversion of concessions during the development of concession management plans. **While consultation and appropriate action at these later stages would still be important, a safeguard postponed in the design and appraisal stages may become a safeguard denied.**

Poverty Reduction

The Requesters claim that the Project would not alleviate the poverty of the people of DRC. Instead, they claim that the Project’s “*negative impacts would further impoverish the poorest and most marginalized segments of the Congolese population and jeopardize all prospects for sustainable development.*”

In its Response, Management indicates that the impacts of forest reform on poverty alleviation will be brought about through innovations such as (1) economic benefits from logging concessions and (2) community forest programs. Management notes that the Bank is conducting a Poverty and Social Impact Analysis (PSIA) “*on the impact of forest reforms on poverty alleviation (forest revenue shares to local entities, cahiers des charges, community forests)*” and that fieldwork and local consultation are being carried out in partnerships with local NGOs.

OD 4.15 on Poverty Reduction states that sustainable poverty reduction is the Bank’s overarching objective, and summarizes Bank procedures and guidelines for operational work on poverty reduction.

Management states that institutional reforms through the Project will contribute to poverty reduction and rural development. The Panel observes, however, that there have often been cases where local people have not really benefited from logging industries, except for a short term benefit limited to a small number of people. Instead, as seen in the

case of Cameroon (described in the Report), local people, in particular Pygmy peoples, are suffering from increased poverty. **As noted previously, the 2007 Report on Forests in Post- Conflict DRC also comments that industrial logging has a poor track record in Africa, and that there is little evidence that it has lifted people out of poverty.**

In addition, during its field visit the Panel heard from local people that the promised sharing of the revenue of timber production with local communities in DRC has not been done. This likely is linked to the continuing lack of capacity to enforce the legal framework. **Unless strong measures are taken to ensure that the benefits reach local people, the concession system will not make the expected contribution to poverty alleviation of the local people.**

The Panel also observes that the economic value from timber production is only a minor part of the total economic value produced from the forest. The market value of timber production, both formal and informal, is estimated at US\$160 million per annum, whereas the total economic value of the resources used by local people, such as firewood, bushmeat, forest fruit, honey, plant medicines and other non-timber forest products, amounts to over US\$ 2 billion per annum.

The Panel notes that if access to these non-timber resources were to be considerably restricted by timber operations, there would be no way of compensating for the loss. The Panel's expert further notes that forest-living people want an ample subsistence base, which can also provide means of fulfilling their social and cultural needs, rather than short-term economic benefits from industrial logging and related activities, which may risk their subsistence base in the longer term.

The Panel observes that the establishment of "community forests" could have significant positive impacts, if they are designed to take into account the needs of the local people and to incorporate lessons learned from problems in other settings (e.g., Cameroon). Local people expressed fear that community forests would be available only on relatively small land areas left over from large-scale concession operations.

The Panel finds that there is a possibility that the Project, in its present form, may not contribute significantly to alleviating poverty of the forest people, because of the risks mentioned above, and may instead contribute to adverse impacts on poverty to the extent that logging practices are unsustainable. The Panel is especially concerned in this regard about the delay in developing implementing regulations concerning customary forest rights, including for "community forests," and in supporting small-scale forest-based enterprise.

Environmental Compliance

Environmental Assessment

Under OP 4.01 the Bank requires environmental assessments of projects proposed for Bank financing *"to help ensure that they are environmentally sound and sustainable."*

The Policy provides that the EA is a process “*whose breadth, depth and type of analysis depend upon the nature, scale and potential environmental impact of the proposed project.*” A proposed project is classified as Category A “*if it is likely to have significant adverse environmental impacts that are sensitive, diverse or unprecedented.*”

The Requesters claim that the EESRSP was erroneously classified as Category B under OP 4.01 on EA. Because of the sensitive impacts of the policies to be implemented under the Project and the existence of indigenous communities, the Requesters contend that the Project (Component 2) should have been classified as Category A. They note that a zoning plan would have significant environmental and social impacts.

Management asserts that the EESRSP was correctly classified as Category B. Management notes that “[*t*]echnical assistance operations for institutional strengthening are usually classified as Category C. Where such operations result in designs or plans that when implemented may have potential impacts, they may be given a classification higher than C, normally Category B.” According to Management, the preparation of a PFZP and the existence of indigenous communities do not *per se* require a Project to be placed in Category A.

The Panel notes that a “Category B” EA originally was prepared under the Project. Documents presented to the Board at the time of Project approval state that the Project is classified as Category B “*because no activity funded under the Project is expected to have a significant negative environmental or social impact.*”

This “Category B” EA, however, covered the road-construction elements contained in Component 3 of the Project. When the Project team later upgraded this EA to Category A, it still applied only to Component 3. **Under the Project, there was no EA analysis ever completed (whether of Category A, B or C) of the pilot zoning and logging concession elements contained in Component 2 of the Project. The Panel finds that the failure to prepare an environmental assessment for Component 2 of the Project does not comply with OP 4.01**

The Panel considered what type of EA analysis should have been prepared under Bank Policy for each of these two elements in Component 2 of the EESRSP: the pilot zoning element and the logging concession element.

(i) Assessment of the Zoning Element.

The Panel notes that at the time the EA was completed, the zoning element was an integral part of Component 2 of the Project. **The Panel considers that forest land use planning should have been anticipated to have a potentially fundamental impact on land, forests, and people.** Such a process involves, among other things, the physical allocation of forest areas for different purposes. The potential impacts could be diverse and sensitive, meaning, again according to OP 4.01, that they may be irreversible and raise issues covered by OP 4.04 *Natural Habitats* and OP 4.10 *Indigenous People*.

The extent and nature of these impacts would likely depend to a very large degree on how the land use planning was done - - which is one of the reasons that a proper environmental assessment and analysis is so important. In addition, the basic concept of a “pilot” approach suggests setting the foundation, principles and methodologies for an even broader scale initiative on land use planning throughout the DRC.

The Panel finds that the potential impacts of land use planning in DRC should have been analyzed as part of a “Category A” EA. The failure to develop an environmental (and social) assessment which addressed these issues, at the time when the forest zoning plan was part of the Project, does not comply with OP 4.01. Dropping the zoning element from the Project has had important consequences, as detailed in the Panel’s report. While Requesters expressed concerns about the zoning process, they also have strongly indicated that an appropriate land use planning process is needed to ensure that their rights and interests in the forest are recognized and protected.

(ii) The Logging-Concession Review Process

As noted above, Component 2 of the EESRSP also included a process to review the validity of logging contracts in the DRC, and convert old forest contracts, covering millions of hectares, into the new concession regime.

A Ministerial Decree in October 2005 established the process to review forest concessions. As described in detail in the Report, the process, consists of several steps that will eventually lead to recommendations on whether or not individual logging concession arrangements should be validated as legal and converted into 25 year titles to engage in industrial logging. After the concession review process has been completed, the Moratorium can be lifted and new concessions allocated. The Panel notes that all parties to the forest concession review process associate the Bank intimately with it.

The Panel finds that it should have been clear at Project design that the Project’s involvement in the review of logging concessions carried very significant environmental and social implications. The existing logging concessions cover vast stretches of forest, including many areas that are home to the Pygmy peoples. **The forests also have world-class biodiversity value and include large areas of habitat of endangered species of fauna, such as the bonobo. The Panel finds that the failure to prepare an EA for this Component does not comply with OP 4.01.**

The Panel notes, in this regard, a distinction suggested by Management between the direct environmental impacts of an “investment” activity versus the presumably more indirect impacts of a “technical assistance” or “policy and institutional reform” activity. **The Panel observes that the financing of policy and institutional reforms in a sensitive sector like the forests of DRC, and related advice and technical assistance, can lead to highly significant environmental and social impacts, even if it does not involve direct financing of the mechanical and organizational tools for industrial logging.**

For such activities, an EA promotes informed decision-making based on consultation with affected people, consideration of potential impacts and alternatives to address the difficult problems in relation to the areas under forest concessions, and an examination of strategic parameters and elements of an overall policy reform. The failure to carry out this analysis may mean that even the best-intentioned “reform” initiatives can fall out of line with Bank social and environmental policy objectives, and even lay the basis for significant harms.

If the Bank had done an EA, it would have identified relevant DRC obligations under at least two international environmental agreements: the Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Convention) and the Convention on the International Trade in Endangered Species of Flora and Fauna (CITES). DRC is party to both. Five DRC natural sites are included on the World Heritage List, all on the Endangered List. One of the large sites appears to be adjacent to two forest concession areas subject to review in the conversion process and close to other areas under review. The World Heritage site is also recognized as a protected area under national law. EA 4.01 provides that the Environmental Assessment needs to take into account the country’s “*obligations, pertaining to the project activities, under relevant international environmental treaties and agreements*” and states that “*the Bank does not finance project activities that would contravene such country obligations, as identified in an EA.*”

The Panel finds that a “Category A” EA would have been the appropriate, policy-consistent tool to assess these issues and to comply with OP 4.01. Even if the project were classified as Category B, OP 4.01 requires an environmental (and social) assessment for the forest related activities.

(iii) Delay in Release of the EA.

With respect to the concerns raised by Requesters about the delay in releasing the EA, the Panel notes the difficulties of working in an emergency and post-conflict environment. In this regard, the Panel notes Management’s statement “*OP 4.01 thus provides some latitude for completion and disclosure of the safeguards instruments required for a project prepared under OP 8.50 and has been interpreted in this case to allow for EA preparation during its implementation. This is typically a period of between 6 and 12 months after project effectiveness. According to the legal agreement the EA and ESMF were to be completed 12 months after the date of effectiveness.*” In the present case, however, the preparation and public distribution of the EA was finalized more than 24 months after the effectiveness of the Project, and the EA ultimately prepared did not address the forest-related elements in Component 2, as described above. **The Panel finds that this does not comply with OP 4.01.**

Forest Policy

The Requesters assert that Bank activities pertaining to the forestry sector in DRC do not comply with Bank OP 4.36 on Forests. They claim that the activities are being implemented without adequate consultation and do not respond to indigenous peoples' concerns or to the requirements for sustainable management. They fear that the EESRSP will lead to the revival of the logging industry without mechanisms for effective control or transparency, and that the Bank supports the idea that "*development will come from industrial logging.*" The Requesters note that, according to the Bank's own estimates, the policies supported by the Bank will ensure 60 million hectares, or three-quarters of the tropical forests, in DRC are available for timber production. The Requesters claim that if zoning of the forests were to be completed and new concessions allocated without consulting affected people and incorporating their interests, it would violate various of their rights.

Management considers the Pilot Forest Zoning Plan component to be an important element of its strategy. However, Management underscores that the PFZP was dropped from the EESRSP in July 2005. Concerning the Forest Code, Management asserts that it introduced innovations such as: traditional users' rights, including those of indigenous peoples; contributions to rural development; enhancement of the rights of local communities; and transparent allocation of future logging rights. Management is mainly concerned with the Government's capacity to develop and enforce the implementing regulations and states that many of these regulations are still lacking.

The 2002 Operational Policy on Forests (OP 4.36) states that the "*Bank does not finance projects that, in its opinion, would involve significant conversion or degradation of critical forest areas or related critical natural habitats.*" The term "*critical natural habitats*" includes existing protected areas and areas initially recognized as protected by traditional local communities (e.g., sacred groves).

Large scale, generalized maps indicate that existing forest harvesting concessions do not overlap with existing national protected areas, although. As noted above, one of the World Heritage Sites appears to be adjacent to two concession areas and close to others. In addition, **the Panel heard numerous statements by indigenous communities that existing operating concessions were felling trees and building roads in sacred groves (local community recognized protected areas).** From the Panel's observations of operating concessions, it appears that they may often not respect local community sacred groves.

Given the focus of the Project to improve institutional and policy capacity, the Bank could consider that it is not financing a Project that involves significant conversion of critical forest areas or natural habitats and that it is thus in compliance with OP 4.36. The Panel agrees that this view has merit to date, but notes that there are important factors that could affect and alter this assessment with respect to the outcome of this Project, even in the short run. Project design put a strong focus on harvesting and the revenue it generates. The question of whether and how the Project

might contribute to impacts on critical forest areas will depend, *inter alia*, on how the concession review process is implemented and the eventual related questions of land use and zoning.

Natural Habitats Policy

The Natural Habitats Policy (OP 4.04) of 2001 contains requirements similar to OP 4.36 on Forests, including a provision that the Bank “*does not support projects that, in the Bank’s opinion, involve the significant conversion or degradation of critical natural habitats.*” For reasons similar to those described above, the Panel notes that the Bank may have judged that it is not financing such a Project in the present case, but there are some potential considerations to the contrary, and much will depend on how key elements of the Project are implemented in the future.

OP 4.04 also provides that the Bank does not support projects involving significant conversion of natural habitats (as distinguished from critical natural habitats) unless a comprehensive analysis demonstrates that the overall benefits from the project substantially outweigh the environmental costs. **The Panel notes that no such comprehensive analysis has been completed even though (as noted above) the Project had the potential to affect how logging operations take place in areas of very significant natural habitat. The potential risks in the Project are not addressed.**

The Natural Habitat policy also provides that the Bank expects the borrower to “*take into account the views, roles, and rights of groups (...) affected by Bank-financed projects involving natural habitats, and to involve such people in planning, designing, implementing, monitoring and evaluating such projects.*” **Until the time of the Request, however, the Panel found very little evidence of attempts to take into account or involve the local communities likely to be affected by the Project. This does not comply with OP 4.04.**

Development Policy Loans and Forest Components

The EESRSP was a traditional project loan. However, the subsequent TSERO is a Development Policy Loan (DPL), a component of which relates to the forest issues at the core of Component 2 of the EESRSP. Since the TSERO is a DPL, it is not subject to safeguard policies in the same way as investment projects. DPLs are “*rapidly disbursing policy-based financing*” instruments to support “*a country’s economic and sectoral policies and institutions.*” Financing is usually done in a single-tranche disbursement. The TSERO loan was disbursed in a single-tranche of \$90 million on December 29, 2005. Policy-based lending comprised about 30 percent of the Bank’s lending for FY 03-FY06.

OP/BP 8.60 on Development Policy Lending, enacted in August 2004, replaced OD 8.60 on Adjustment Lending. OP 8.60 requires the Bank to determine “*whether specific country policies supported by the operation are likely to cause significant effects on the country’s environment, forests, and other natural resources.*” If the determination is

made that there may be a significant impact, country level diagnostic work, particularly Country Environmental Assessments (CEAs) and Strategic Environmental Assessments (SEAs) are indicated as appropriate analytical instruments for assessing the effects of DPLs on the environment. OP 8.60 also contains guidance regarding the social impact of DPLs.

The Panel notes that the Bank determined that the TSERO is not likely to cause significant adverse environmental effects. **The Program Document of the TSERO initially relied on the analysis under EESRSP in making that determination, but the EA for EESRSP was not available until February 2006, after the determination had to be made, and even then the EA did not address the forest-related activities under the Project, i.e. Component 2.**

Prior to the Board's discussion of the TSERO on December 8, 2005, Management issued a corrigendum on December 7, 2005 to revise statements in the Program Document on environmental impacts of the forest and mining sector measures. The corrected statement includes Bank staff's determination that the measures under TSERO are not likely to cause significant effects on the country's environment, forests and other natural resources, or on poor people and vulnerable groups (including indigenous people). The statement also indicates that the assessment is consistent with a "*series of analyses and consultations held within the context of the preparation of a forest sector review.*" At that time, neither a formal Country Environmental Assessment (CEA) nor a Sector Environmental Assessment (SEA) had been prepared.

The main argument for "no significant effects" of the operation is that the TSERO required as conditions an extension of the Moratorium on new concessions and a legal review of the existing concessions. However, the Panel notes that forest concessions as practiced in DRC may be detrimental to indigenous people, to other local communities, and to sensitive forest environments. Moreover, the Panel finds that the system for determining whether there will be significant effects on the environment and natural resources is flawed. Little time is available for the initial assessment, and it would be difficult to reverse an initial assessment that there are no significant effects. The CEA and SEA for assessing effects may not have been completed, as in the case of the TSERO in DRC.

The TSERO is not subject to safeguard policies because it is a DPL instrument. However it was concerned with related actions that were being funded by the EESRSP which was subject to those policies. Furthermore, given significant social or environmental impacts in the DPL, analysis and assessment in the Program Document is required. OP 8.60 emphasizes the need to consider "the borrower's systems for reducing such adverse effects." The Panel observes that a fair description of that would have concluded that the systems were non-existent or extremely debilitated and ineffective. That might have led to some difficult discussions in the approval process. **The Panel finds that the Bank's determination that there were no significant environmental or social effects of the forest Component of the TSERO is not consistent with the objective of Bank**

policies, especially when the Component essentially carries forward Component 2 of the earlier investment project, which was subject to the full Bank safeguard policies.

The Panel acknowledges that analysis of environmental and social effects could have taken time, but the assessment could have proceeded in tandem with any critical actions. The Panel does not agree that systematic assessment would have caused delays that, in turn, would have caused greater social and environmental harm in the field.

The chaotic situation in the DRC forest sector merited and still merits the Bank's committed engagement. The Panel also recognizes that the DPL can be attractive because it engages the Finance Ministry. **In light of the issues raised above, however, the Panel notes that it is questionable whether the choice of a DPL under its present guidelines was the right instrument for achieving the agreed-upon goals of reforming this sector with its many social and environmental complexities.**

To better understand the choice of this instrument for the forest Component of the TSERO, the Panel reviewed past practice with DPLs. The Panel notes that there appears to be a trend in the Bank that DPLs are very frequently determined to have no significant environmental and social impacts. Various Bank documents argue that their effects, if any, on the environment will be "*felt only indirectly*." The best practice guidance describing incorporation of environmental concerns into development policy lending reaches the same conclusion on the basis that the majority of DPLs are solely focused on areas such as the public sector, financial, health, and education sectors, which are not directly linked to the environment. This trend is evident in the 27 DPLs which include forest sector reform, most of which have been in Africa. This is rather surprising because the forest sector has long been identified as one of the most likely sectors to cause environmental impact, and the need for careful analysis in such sectors appears to be well understood.

The Panel notes that up-front and accurate assessment of environmental and social impacts is important for DPLs, as DPLs are usually single-tranche operations and any meaningful supervision for such DPLs takes place in the preparation phase for future DPLs, if any. Only with an accurate and clear assessment of environmental impact, could Management include an environmental conditionality among the limited number of conditions for a single-tranche DPL. **The Panel finds that there are potential risks of including components such as forests in DPLs, which lack safeguards. The Panel notes that formerly such forest components were generally handled as projects, subject to safeguard policies. The Panel observes that the use of DPLs for other natural resource components could raise similar issue.**

The Panel recognizes that the DPL is an instrument that can engage high-level attention of the Finance or other influential Ministry, which in the specific country context can be important. The Panel finds that in using a DPL, it is critical that the process for assessing whether there are significant environmental and social effects be rigorous and thorough and that there be a willingness to undertake the prudent

assessments in order to avoid subsequent unforeseen impacts and unwelcome developments.

Project Implementation

During Project implementation, important issues have arisen relating to, *inter alia*, the Moratorium, the concession conversion process under the EESRSP, the decision to drop the pilot zoning component from the Project, and related issues of Project supervision.

Post-Moratorium Concessions and “Swaps”

During its investigation, the Panel heard repeatedly that the 2002 Moratorium on the allocation of new forest concessions has been “bypassed” on a large scale. Reportedly, new concessions were granted by certain Government authorities and “swaps” took place in which logging companies exchanged forest areas that they deemed unproductive or that had been already logged for new, higher quality forest areas.

The 2007 report *Forests in Post-Conflict DRC*, referred to earlier, confirms these problems. It indicates that 32 contracts covering 4.6 million hectares were reported to have been awarded in 2003, and similar transactions took place in 2004 and 2005. Furthermore, some of the contracts cancelled in 2002 were rehabilitated in 2004. These transactions affect an estimated 15 million hectares and involve areas where Pygmies and other vulnerable peoples live. Reportedly a third of the contracts are inside areas identified as priority landscapes for conservation. The Panel observes that Bank Management in its Implementation Completion and Results Report on the TSERO to the Bank’s Board of Executive Directors, dated May 1, 2007, characterizes these developments as follows: “Between 2002 and 2005, this moratorium has been largely respected, although some violations are reported.”

The Panel recognizes the difficulties of working in a post-conflict environment. The Bank, in Aide-Memoires through July 2005, recognized that there were **new contracts for concessions in violation of the Moratorium, many of which were “swaps” of old contracts for new ones**, and indicated that it did not believe the contracts conformed to the new Forest Code. It requested the Government to take certain steps to address the problem. **The Panel finds that the Bank’s recognition of this problem and its response in the Aide-Memoires through July 2005 were consistent with Bank policy on supervision. However, the Panel also finds that Management apparently did not make timely follow up efforts at a sufficiently high level to ensure necessary action in response to its findings. The Panel also notes that none of the supervision documents after July 2005 refer to the “swaps” or potential violations of the Moratorium.**

As described above, the Bank played a central role in initiating the current concession review process, and is directly involved in supporting and supervising its implementation. The post-Moratorium swaps and allocations of new concessions raise significant concerns about the entire concession conversion process.

The Concession Conversion Process

Presidential Decree 50/116 of October 24, 2005 sets forth the process and the criteria for the legal review by which former logging titles are to be converted into forest concessions, valid for 25 years. Those who hold old forest concession titles must apply for conversion to the Ministry in charge of Forests. A new Inter-Ministerial Commission will review the applications. There are 156 concessions covering about 20 million hectares under consideration in this process.

The conversion process takes place in several stages. Initially, a Technical Working Group, assisted by an Independent Observer, conducts a technical review and verification of information relating to each concession, including whether it meets the legal criteria. These criteria include whether the current title is legally valid, whether forest taxes have been paid in full, and whether a sawmill exists in the concession area. The report of the Technical Working Group, with findings as to which titles satisfy the criteria, and the interim report of the Independent Observer are sent to the Inter-Ministerial Commission. The Inter-Ministerial Commission then is to recommend whether or not individual logging concession arrangements should be validated as legal and converted into long-term 25 year titles to engage in industrial logging. These recommendations go to the Minister in charge of Forests for formalization, and then transmission to the applicants.

If a concession is converted, the concessionaire has four years to prepare a forest management plan. However, it can continue logging operations during this period. All concessions that apply for conversion can continue operations until they are cancelled. The Moratorium on new concessions is to be lifted by Presidential Decree after the publication of the results of the concession conversion process, including the cancellation of non-converted concessions, the adoption of auction procedures, and adoption of a three year plan for future concessions developed through a participatory process.

While the Technical Working Group has reportedly completed its review and recommendations, the Inter-Ministerial Commission has not become operational. As of August 2007, a new Decree specifying the names of the current members of the Commission still needs to be approved.

The Panel notes the potential importance of the concession conversion process. It appreciates the role of the Technical Working Group and the assessments provided by the Independent Observer of problems that have occurred during this process. **The Panel recognizes the Bank's efforts to establish the role for such an Observer, which the Panel finds is consistent with Bank policy. The Panel also finds, however, that the concession conversion process set forth in the October 2005 Presidential decree has been beset by considerable and significant problems.** These are noted below. Some of these shortcomings may be due to an overly optimistic Project design that did not properly assess the risks inherent in the chosen approach. Others may be partly attributed to weakness in the supervision process which, of course, was severely influenced by the post conflict situation and the difficulties of dealing with the Borrower's institutions in a fragile political environment.

(i) Treatment of Existing Concessions

The first stage of the concession conversion process is to assess and check the validity of the existing logging contracts. During this stage, it could be envisioned that contracts that on their face do not comply with the criteria could be screened out of the process and not validated.

As described above, many large concessions were either allocated or swapped for after the 2002 Moratorium. Such post-Moratorium concessions, involving millions of hectares of DRC forests, are listed among the concessions being considered for approval in the concession conversion process. **The Panel has been informed that an initial screening-out of such concessions that would appear to be invalid on their face will not, however, be done. If this continues to be so, it means that despite the review and recommendation of the Technical Working Group, the Inter-Ministerial Commission might decide to recommend such concessions for approval.**

(ii) Time Constraints

The conversion process follows a rather short time frame, which does not leave much time for field verifications and consultation. **Experts involved in the technical report indicated that they were not given nearly enough time for these activities.**

One of the criteria for validation, for example, is that the concession company has been “*respecting the limits of the concession.*” This is difficult to determine in a few months for 156 concessions in the vast area of DRC, with the considerable transport and information gathering difficulties.

One of the objectives of the EESRSP was that through the concession conversion process, adjustments would be made as appropriate to concession boundaries. These adjustments could be of great importance to local and indigenous peoples living in or near concession areas, as well as for biodiversity and environmental conservation. Consultations with them will be difficult in the compressed time period allowed.

The Panel notes that there are villages and camps, roads, fields, fallow lands found in many of the concession areas under legal review. However, in most of these concessions, neither the mapping of customary use of forests nor the compensation for the loss of such rights has been made. In some concessions, the usage rights of Indigenous People are not recognized at all, and they are obliged to pay 25-50% of the products to the Bantu farmers and concession owners as “entry fee” to the forest.

During its field investigation, the Panel heard about social conflicts regarding the logging concessions. For example, Pygmy people at one village told the Panel about conflicts with the logging company and with the Bantu (Baoto) farmers. They complained that consultation about the logging concessions and negotiations of the ‘*cahier de charge*’

(social contracts with communities) were made only between the logging company and Bantu farmers.

The Batwa people from another village and its neighboring areas also reported to the Panel that the logging company had been cutting their important medicinal and caterpillar-bearing trees, destroying their fields of crops and sacred sites, building roads penetrating their settlements and field sites, without any consultation or compensation.

The Panel is concerned that such claims and conflicts could not be properly assessed during the short time given for field verification, and reflected in the Report submitted for review by the Inter-Ministerial Commission.

(iii) Race to Extract and Swap for Higher Value Forest Areas

The Panel further notes that the initiation of this process may have inadvertently created incentives for actions that increased potential impacts in the forests in some areas. In particular, the process may have created an incentive for the “swaps” by companies of “unproductive” or already logged area in exchange for higher quality forest areas, noted above, so that these could be considered for conversion to legal titles in the review process. There is also substantial anecdotal information to suggest that the process has contributed to accelerated logging within some existing concessions, in advance of determinations as to their legality.

Announcing a future deadline after which some claimants will no longer be able to exploit the resource encourages a race by those who may not be able to log in the future to exploit as much as possible before the deadline, although the lack of adequate transport capacity for the logs allegedly limits this. The Panel observes that it is important to address this problem, and that there is a risk of irreversible damage to the forests and the local communities which depend on the forests.

(iv) Lack of Meaningful Participation by Pygmy Peoples and Local Communities

The Panel examined the extent to which locally-affected people have been involved in this conversion process. The Inter-Ministerial Commission includes two permanent representatives of national nongovernmental organizations (NGOs). The October 2005 Decree setting forth the composition of the Inter-Ministerial commission did not refer explicitly to indigenous peoples representation. **After the November 2006 Decree, the Commission will now include a local representative of indigenous people for each concession under review, if the concession is in proximity to indigenous people. The Panel also understands that under new draft legislation a permanent representative and alternate representative of indigenous peoples’ organizations may be included in the Commission.** The Panel heard testimony that these measures are important symbolically as recognition of the status and rights of these people in such a process. **The Panel commends the Bank for its efforts to encourage participation of indigenous people in the process and notes that this is consistent with Bank policy.**

The Panel also notes, however, that there are significant issues and problems regarding how to choose a local representative from indigenous people who have been living in a number of scattered groups without much contact with one another and with little experience with a political system of representation. A recent progress report by the Independent Observer describes current difficulties in regard to the process of selecting such representatives, including inadequate funding.

The Panel is also concerned that these approaches may produce consultation processes that are inconsistent with basic Bank policy objectives and requirements described in other sections of this report. The Panel is especially concerned that those who are selected may find themselves in a very weak situation in the Commission meeting. The Panel understands that the local representatives will not have access to the Technical Working Group Report and to the concession file under review until their arrival in Kinshasa the previous day, or even the same day, and will be expected to participate in the consideration and review of a rather technical file with other powerful permanent Commission members, who are familiar with the process and may also have had additional opportunities to become familiar with the file. **Unless these concerns are addressed, the Panel is concerned that the inclusion of a local indigenous representative may legitimize a process under which the more powerful members of the commission would take decisions that could run contrary to the interests of locally-affected people.** There is the potential that individual representatives in turn could be blamed by their own communities for participating in such a process. **In light of these problems, the addition of a permanent representative and an alternate representative of indigenous peoples to the Inter-Ministerial Commission could be regarded as particularly positive.**

The Panel also heard concerns expressed regarding the extent to which this decision-making process will operate transparently. The Panel was informed that the Report prepared by the Technical Working Group and the Report of the Independent Observer will not be made public before the Commission's recommendations are made. It is not clear whether the information and minutes of the meeting will be made publicly available at a later time.

(v) Asymmetrical Rights to Contest Concession Decisions

The Panel notes that the October 2005 Decree reserves a right to logging companies to contest the decisions notified by the Minister in charge of forests. **It is not apparent, however, that communities have parallel means of recourse to contest decisions.** The conversion process outlined in the October 2005 Presidential decree does not have an explicit provision to enjoin logging operations of cancelled contracts during an appeal. Civil society has expressed concerns that cancelled logging operations might continue while appeals are pending, which could be a long time.

(vi) Additional Observations

While the legal review and conversion processes may be flawed and involve various problems, the Panel finds that it contains elements that are important in Bank policies. The process involves elements of information disclosure, consultation, implementation of a political system of representation, and may stimulate activities of participatory mapping, sensitization and capacity building of the indigenous people.

The Panel wishes to underline the extraordinarily high stakes involved in the forest concession conversion process, and in ensuring that the relevant legal requirements and criteria are properly applied to concessions under consideration - - including those granted (or “swapped”) after the Moratorium on new concessions in May 2002. The Bank has been a very active proponent of and advisor on this legal conversion process, and will thus face close scrutiny with respect to how the process unfolds and the final results. Its supervision and follow-up to any problems that arise in this process is of great significance to its work in the DRC forest sector and to compliance with Bank policies.

The Panel also wishes to note the extremely difficult institutional setting in which the process takes place. The Panel has been repeatedly informed that there is weak capacity at the national level to implement the reforms and that at the provincial and local levels, the institutional capacity is either minimal or non-existent. The Panel heard testimony and saw visual evidence that those with responsibilities for implementing and enforcing regulatory measures on logging lack the resources and capacity to do so effectively. **The Panel notes the critical importance of building capacity within the vast tropical forest area to monitor and implement forest reform measures.**

In addition, the Panel notes that while some concessions are said to be in the hands of companies known for following laws in other countries, other companies may be different. The Panel has received disturbing reports and information about abuses committed against local communities and forests in certain concession areas.

Zoning and Land Use

As previously described, the proposed forest zoning plan (referred to as the PFZP in Management Response) was an important initial element of the EESRSP. Many of its elements met the highest technical standards. However the PFZP became a major issue in the Request because the Requesters claimed that it did not sufficiently include the stakeholders (notably the Pygmies) for whom the results of zoning decisions were extremely important.

Management dropped the pilot zoning component from the Project around the time that these concerns were being raised. Although the rationale for this decision was not fully transparent at the time, the Panel observes that the proposed pilot zoning did not yet comply with applicable Bank policies, namely, OP 4.01 on environmental assessment and OP 4.20 on indigenous peoples.

Dropping the pilot zoning element instead of bringing it into compliance with Bank policies and procedures delayed the gathering of important information, and may not have furthered the objectives of the Bank's overall strategy in the DRC forest sector. The zoning proposal originally included in the Project, as approved by the Board, envisioned addressing land tenure rights of stakeholders.

The Panel notes that, in this context, the forest concession conversion process serves as *de facto* zoning under which the legal and economic interests of the logging companies will be considered for long-term recognition, while consideration and recognition of the land tenure and livelihood rights of the people living in the forests or dependent upon them will be delayed.

The Requesters worry about the fate of their forest. They state that *“we fear, therefore, that the moratorium will be lifted once this conversion operation has been completed, and result, in the short term, in the granting of new forest concessions, even though the zoning plan would not yet have been prepared.”*

The Panel found during its investigation that participatory mapping of the indigenous Pygmy peoples customary forest uses has already been attempted in some areas of Oriental and Equateur Provinces with support of NGOs. The Panel notes the recommendation in the Forests in Post-Conflict DRC report that local communities' uses be mapped and their rights secured. Many people during the Panel's investigation highlighted the importance of participatory measures to ensure that their rights and interests are properly identified and addressed.

Implementation Decrees under the Forest Code

EESRSP Project documents indicate that the timely adoption of decrees to implement the Forest Code was an important element of the Bank's strategy to address forest-sector reform. This same element was included as one of five indicators of success for the TSERO.

Some thirty implementation decrees are to be issued in due course. Most of the Decrees adopted to date relate to forest concessions. The Panel was informed that as of the date of this Report, implementing decrees on the issue of community forests, sustainable management plans, as well as many other key decrees have not yet been adopted.

Various reasons have been cited for this delay, including that the decree on community forests requires innovation, studies and other preparatory work. **The Panel recognizes that basic legal and administrative steps may take longer than usual in the context of difficulties facing the DRC. However, the delay in preparing the decrees on community rights has given the impression that Bank support has been biased toward institutional reforms for reopening logging operations in DRC, while lacking a holistic vision.**

The Panel has been informed that two draft decrees related to community forests were prepared in March 2007, and that they are now being revised. Concerns have been expressed that the limit on the total area available for each community forest is very restrictive and that the decrees do not appropriately reflect the structures and interest of communities on the ground. The Panel underscores the provisions for involving affected local communities and indigenous peoples in OD 4.20 and other Bank policies in this process.

The Panel learned during its investigation that the Bank and others are interested in developing new approaches and mechanisms to promote conservation and sustainable use of the forest areas in DRC. The Panel also notes recent efforts by Management to recognize the needs and interests of local communities. **The Panel recognizes the important recent Bank effort to provide for monitoring of illegal logging, and the DRC's decision to have a well-known international NGO study how to provide an independent monitoring capability for illegal logging.** These efforts are consistent with Bank policy.

Concluding Observations

The Panel recognizes that the tropical forests in the DRC are a critical resource for the country. They are both a source of revenue and a home and source of livelihood for the many indigenous and other local people who inhabit the forests. The people in DRC have a critical interest in ensuring that all citizens benefit from the forests.. The forests in DRC are also an invaluable resource for their biodiversity and potential contribution to mitigating climate change.

In its investigation, the Panel noted that when the Bank initially became engaged in the DRC and decided to support work in the forest sector, it provided estimates of export revenue from logging concession that turned out to be much too high. This had a significant effect, for it encouraged a focus on reform of the forest concession system at the expense of pursuing sustainable use of forests, the potential for community forests, and conservation. For the most part, foreign companies or local companies controlled by foreigners have been the beneficiaries of this focus. Those whose concessions are confirmed in the concession review process will be the beneficiaries of the new 25 year leases.

The Panel found that the Bank underestimated the social and environmental implications of the forest-related components of the EESRSP, and failed to meet core Bank safeguard policy requirements relating to indigenous peoples and environmental assessment, among others. The Panel was particularly concerned that the Project documents presented at the time of Board approval failed even to identify the existence of the Pygmy peoples in the forests of the DRC where logging concessions and (originally) land use planning - - influenced or supported by the Project - - would be considered for approval. This led to a series of significant shortcomings in Project design that may yet contribute to serious harms to these people and the forests in which they live. The Panel also noted a

significant failure in assessing and planning to prevent or mitigate potential impacts on the rich and unique biodiversity present in DRC forests.

The Panel is concerned that the benefits from the industrial harvesting of trees, which is at the core of the policy and administrative reform, are not going to the people living in and around the forest. The Panel found evidence that the promised benefits to the communities from the concessions, such as schools, clinics, and other facilities, have not materialized. This is not consistent with the objective of the Bank's policy of poverty reduction.

The forests are an enormously important and valuable resource for the Congolese people. The Panel notes that there is a real danger that the highest quality forests will be depleted and valuable fauna exhausted with little benefit to local populations, or even to the general population in the country. People may lose access to forests and their products, on which they depend. This issue affects not only those living today, but the welfare of future generations. In this connection, **the Panel notes the potential importance of developing a more balanced approach by emphasizing appropriate models of community forests as well as other actions to support community participation, land tenure and use rights in the forests and by linking to the recently proposed Bank administered fund to pilot instruments for reducing carbon emissions from deforestation and forest degradation.**

The Panel observes that the Bank dropped its initial component on land use zoning in favor of a priority to concession reform and thereafter possible development of land use zoning. The Panel finds that as a result of the forest concession reform effort, which results in 25 year titles to extract timber, the Bank will in fact have supported de facto land use zoning. Any zoning that takes place thereafter will be against the backdrop of the confirmed concession titles, which may severely limit application of models for alternative uses of DRC forests.

The Panel also expresses its concern about the instruments of a Moratorium on new concessions combined with a reform process for confirming or canceling concessions to take place at a future unspecified date. **In the absence of institutional capacity to implement and enforce a Moratorium or to ensure prompt review of the concessions, there is the danger that some of those exploiting the forests will expand their concessions, swap some areas for others with higher value forests, or obtain new concessions and harvest as rapidly as possible.** This is particularly troublesome, where the existing legal and institutional structure did not provide an effective way to hold title to tropical forest areas for conservation purposes.

The Panel understands that the Bank has been intent on avoiding the holding of concessions for purposes of speculation. Consistently with the existing Decrees, the Bank has therefore insisted that the holder of a concession must demonstrate harvesting, as by the presence of a sawmill, and the payment of taxes on harvested logs. Bank staff have stressed that if a party wanted to conserve forests, it could return its concession to the Government and have the Government allocate it for that purpose. But that assumes that

the Government would be willing to do so and has the capacity to enforce its protected areas, both of which are questionable. **The Panel observes the potential importance of encouraging the Borrower to explore conservation concessions or comparable instruments consistent with the new Forest Code.**

The Panel notes that the forest concession reform process has many positive elements, which have been identified earlier: the gathering and disclosure of information on the forest and the concessions, the initiation of consultation with local communities about their forests and their initial rudimentary participation in the allocation process, and the anticipated stimulation of participatory mapping, sensitization and capacity building of indigenous peoples and their communities.

The Panel also notes its concern, though, that in the end it may be difficult to cancel effectively some of the concessions that the Technical Working Group, assisted by the Independent Observer, might recommend in its Report to the Inter-Ministerial Commission as not qualifying for confirmation. Those who extract the resources have very substantial resources to try to contest decisions not in their favor, while the country is still struggling to build its institutional capacity to implement and enforce its laws, regulations, and policies. The Panel notes the potential importance of the Bank's role in helping build the country's institutional capacity in the forest sector.

The Panel observes that Bank staff have attached high importance to getting the appropriate legal framework in place for forests and have contributed significantly to this process. **The Panel recognizes the importance of a solid legal framework and the difficulty of developing and establishing it. But an almost overwhelming problem in the forest sector in DRC is the lack of institutional capacity to implement and enforce the laws and regulations, especially at the provincial and local levels. Until this is developed, the legal framework, although an essential step, cannot be relied upon to ensure sustainable development in the forest sector or to ensure that the people benefit from the forests.**

The Panel also notes its concern that Development Policy Lending is being used for supporting activities which in earlier times have been financed as projects. This effectively bypasses the environmental and social safeguard policies that apply to projects. The Panel understands that Development Policy Lending may sometimes be the preferred instrument. However, since DPLs are usually disbursed in a single tranche, it is difficult to ensure that attention is paid to environmental and social issues. Moreover, in the case of DRC and increasingly most other DPLs in Africa with forest components, the Bank determines that there are no significant environmental and social effects, or alternatively that any effects would be positive. The Panel is concerned that these determinations are cursory with little time available to assess the proposed endeavor and with an implicit assumption that technical assistance programs affect only the targeted government program. **Activities such as support for a forest concession program have very broad and very significant social and environmental effects in the country that cannot be ignored and need to be assessed.**

The Panel found that the various parties with whom it spoke, including the Requesters and other donors, believed it important, if not essential, that the Bank continue to be involved in the forest sector in the DRC. Many view the Bank as a powerful institution in this context. **The Panel recognizes that it is important for the Bank to remain engaged in the forest sector in DRC. It is also essential that the Bank comply with its social and environmental safeguard policies, as well as its other policies, to ensure that the forests benefit the people in DRC and that they be available for both present and future generations.**