Legal Aspects in the Implementation of CDM Afforestation and Reforestation Projects: The Argentinean Experience

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Executive Summary

In Argentina, CDM projects need to address local requirements in addition to the procedures set out by its Designated National Authority (DNA) known as the Argentine Clean Development Mechanism Entity or Oficina Argentina para Mecanismo de Desarrollo Limpio (OAMDL), a unit specially created by the Environment Secretariat which is directly subordinate to the office of the Secretary for Environment and Sustainable Development. Compliance with all legal requirements is a basic consideration for project approval. The DNA invites other agencies with powers over sector-specific areas to join the DNA’s Advisory Board. Prior to project approval, CDM project submissions are required to be sent to the respective provinces where the project is to be executed for a 10 day comment period.

CDM is not expected to be a major driver behind afforestation and reforestation projects. Financial costs of CDM AR are seen as a serious barrier to many potential project proponents, particularly for small-scale initiatives. Major multinational forestry companies have not shown a major interest in the carbon market, focusing their investment either on timber or pulp. However, there is considerable interest in certain provinces in the potential for CDM to leverage projects with additional environmental benefits, such as the prevention of erosion or watershed protection. In addition, marginal agricultural land could become more attractive if one includes the value of certified emission reductions (CERs). There may also be a niche in the future for small community or NGO-led projects in the forestry field where such initiatives may produce tangible co-benefits, such as biodiversity conservation or diversification of production. In addition, forestry policy tends to favour projects involving native species or with substantial social or environmental co-benefits. Objective barriers to entry will, however, need to be addressed.

Previous experience with AR projects have highlighted the need for meaningful stakeholder involvement at an early stage and improving general awareness among the population as to the strengths and weaknesses of CDM. It has also revealed the difficulties that projects involving native and often slow growing species face, i.e., the low rate of return on investment for a long cycle (50 plus years) project.

The Forestry Promotion Law (Law 25.080, 1999) encourages forestry investment through subsidies and guaranteed long-term fiscal stability. Environmental impact assessment (EIA) and socio-economic impact assessment (SIA) are required to receive these incentives. If the project is not contemplated under the forestry promotion regime, EIA will depend very much upon the exact situation in each provincial jurisdiction.

To counter the risk that a project receiving benefits under the Forestry Promotion Law may be considered non-additional under CDM rules, any benefits paid to forestry projects designed with the sole or complementary purpose of acting as carbon sinks must be reimbursed to the State from the proceeds of future sales of carbon credits. Nevertheless, since Law 25.080 is probably the key driver behind most future forestry investments, there should be a greater contemplation of CDM in this regime, beyond the brief reference to the reimbursement of any subsidies received. Its framework for broader, environmental policy-related objectives for forestry projects will also be useful in determining whether a project meets the country’s sustainable development aims.

The right to a CER is not currently defined under Argentine Law. Nothing in the law impedes defining a CER by contract between parties as a personal obligation, rather than a real right, which would require an amendment to the Civil Code. A CER can be considered either as a civil or industrial “fruit” generated by a certain thing or good to which it is attached as an accessory. In the case of a landfill gas or energy project, the investment and technology required to capture the carbon would imply an industrial fruit, whereas in the case of a forestry investment, CERs would appear to fit into the definition of a civil fruit, in similar fashion to share dividends in a company. As a personal obligation, however, it would not be possible to register the CER as a charge on land. As a real right, a CER would be registrable as a charge on land and in effect “dismember” the right to generate CERs from another party.
The Civil Code provisions are broad enough to offer sufficient legal tools for an effective CDM contract to be drawn up to guarantee the rights and obligations of the various parties to a CDM project. The Law on Surface Rights for Forestry Development (Law 25.509), a recent amendment to the Civil Code, may provide the vehicle for separating the ownership of the land from the ownership of the forest and its fruits, such as CERs. For the benefit of small-scale forestry projects, there may be a case for using the fiduciary structure contemplated under Law 24.441, where the project proponents might involve a number of smallholders who would pool their resources and set up a Forest Trust to administer the project and market the CERs, on behalf of the group. This particular structure would have an additional advantage in that it is already in widespread use for forestry investments.

Although there are theoretical grounds for sustaining the view that the State, as a Party to the Protocol, holds title to the benefits derived from the generation of CERs, this position will effectively eliminate any incentive that the private sector may have in developing CDM projects. The ultimate decision will very much depend on political factors, rather than strong legal reasoning.

There are also strong grounds for avoiding the temptation to introduce strict legal definitions of CERs, at least in substantive bodies of law such as the Civil or Commercial Code. It would not seem advisable to attempt to “freeze a legal definition in time” which may not reflect future legal requirements. There would also appear to be merit in retaining the flexibility to use whichever of the existing contractual vehicles are available at present. In all cases, the legal architecture will require careful consideration of the tax implications of the sale of CERs.

No legally mandated criteria have been established regarding the relationship between a CDM project and the country’s sustainable development aims. Presentations will therefore be dealt with on a case by case basis with an emphasis on compliance with all legal requirements. Reference to Forest Stewardship Council Principles and Guidelines may in some cases be a valid alternative for assessing whether a particular project is compatible with sustainable development. There are also other technical guidelines being developed locally which may assist officials in determining whether a project meets sustainability criteria.

While no explicit provisions are made in the law for public participation, the requirement for public participation should be considered an indispensable condition for approval. The requirement for public comment may require future regulatory fine tuning to avoid unnecessary duplication of procedures in the process of complying with permitting and EIA procedures at the relevant provincial offices (whether under either of the forest promotion regimes or as independent CDM investments).

While comments and opinions made by the public are not legally binding, relevant authorities are required to publicly state and give reasons for the dismissal or rejection of such contrary opinions as may be expressed by members of the public. In the case of CDM projects, it is likely that any public controversy regarding a particular project will be a deciding factor in the ultimate decision.

In theory, approval by the DNA of a CDM AR project activity could be revoked for non-compliance with any conditions on which such approval had been made contingent. Self interest on the part of the project developer would, however, act to ensure a reasonable level of (at least) formal compliance with the law. Moreover, the legal procedure involved in revoking a decision granting approval for a CDM AR project would discourage a project developer from pursuing the project, if he/she was at all in doubt that this remedy could be invoked.

There is an underlying concern that the existence of guidelines as regards species, land classification and other technical issues that are too strictly worded may end up ruling out the viability of certain projects because of failing the test of additionality. While there is a case for not legislating and running the risk of setting a legal baseline which could in fact pre-empt or kill off any opportunities for developing CDM projects, some degree of clarification may be necessary, as regards minimum standards for eligibility, so as to dispel the considerable degree of uncertainty that currently exists for forestry projects. Beyond the
field of legislators and parliamentarians, there is a considerable degree of intellectual debate concerning ownership of CERs and who the beneficiaries should be.

There is a strong need for COFEMA (the Federal Council for the Environment) to become committed to the climate change agenda in general and CDM in particular. For instance, COFEMA should recommend that all AR projects seeking to qualify for CDM status should implement an EIA, including public participation, even if the existing arrangements in a particular province do not currently require an EIA. In addition, while there is fluid communication and a positive relationship between government agencies in the specific areas of climate change and the CDM, there is a lot to be gained in improving inter-agency coordination within the Federal Administration in setting and implementing environmental policies. It is also the ideal forum in which to define guidelines as regards regional and provincial priorities for CDM projects and criteria as to what kind of projects will contribute to the country’s sustainable development.
Acronyms and Abbreviations

AFIP  Administración Federal de Ingresos Públicos/Federal Income Administration
AND  Autoridad Nacional Designada/Designated National Authority (DNA) – for Kyoto Protocol and CDM
APN  Administración de Parques Nacionales/National (Federal) Parks Administration
BID  Banco Interamericano de Desarrollo/Inter-American Development Bank
BM  Banco Mundial/World Bank
B.O.  Boletín Oficial/Official Bulletin
CIADI  Convenio Internacional para el Arbitraje de Disputas por Inversiones/ICSID International Convention on the Settlement of Investment Disputes
CIEFAP  Centro de Investigación y Extensión Forestal Andino Patagónico/Centre for Research and Extension for Andean and Patagonian Forests, Esquel, Chubut, Argentina
COFEMA  Consejo Federal del Medio Ambiente/Federal Council for the Environment
C.C.  Código Civil/Civil Code
DB  Dirección de Bosques de la SAyDS/Native Forests Protection Department of the Environment Secretariat
Dec.  Decreto/Decree (regulatory instruments established by the President of the Nation in accordance with constitutional powers to operationalize legislation enacted by Congress)
DEM  Departamento Ejecutivo Municipal/Municipal Executive
DF  Dirección de Forestación/Federal Department of Afforestation (entrusted to apply Law 25.080) subordinate to the Ministry of Economy
EIA  Estudio de Impacto Ambiental/Environmental Impact Assessment
FIP  Formulario de Información de Proyecto/OAMDL Project Notice Form
GEI  Gases de Efecto Invernadero/Greenhouse gases (GHG)
LGA  Ley General del Ambiente (Nº 25.675)/General Framework Law for the Environment
LIEY  Laboratorio de Investigaciones Ecológicas de las Yungas/The Tucumán University Yungas Ecology Research Laboratory
LISEA  Laboratorio de Investigaciones Ecológicas de Argentina/La Plata University Laboratory for Ecological Research
IFONA  Instituto Forestal Nacional/National Forestry Institute
INTA  Instituto Nacional de Tecnología Agropecuaria/National Institute of Agricultural Technology
IVA  Impuesto al Valor Agregado/Value Added Tax (VAT)
MDL  Mecanismo de Desarrollo Limpio/Clean Development Mechanism (CDM)
MEc  Ministerio de Economía/Federal Ministry of Economy
OAMDL  Oficina Argentina para Mecanismo de Desarrollo Limpio/Argentine Clean Development Mechanism Entity
ONG  Organización No Gubernamental/Non-governmental organization (NGO)
PEP  Poder Ejecutivo Provincial/Provincial Executive
PK  Protocolo de Kyoto/Kyoto Protocol (KP)
PIN  Nota de Idea de Proyecto MDL/CDM Project Idea Note (PIN) – to be submitted for OAMDL approval
PPMM  Presupuestos Mínimos/“Minimum Standards”
PROSOBO  Programa Social de Bosques/Social Forestry Programme and Sustainable Development
Res.  Resolución/(Public Authority) Resolution
SAyDS  Secretaría de Ambiente y Desarrollo Sustentable/Secretary for Environment
SAGPyA  Secretaría de Agricultura, Ganadería, Pesca y Alimentos/Federal Agriculture, Livestock, Fisheries and Food Secretariat
UCC  Unidad de Cambio Climático/Federal Climate Change Office of the Environment Secretariat
Responses to Questionnaire

A. General Questions

1. Administrative and regulatory set-up

   a. Which government institutions are responsible for:
      
      i. forestry;
      
      ii. land; and
      
      iii. the environment?

      Which law(s) is/are the source(s) of the mandates of these institutions? Are these institutions national or local institutions? In the case of local institutions, please indicate which local level (e.g., state, provincial or district) they refer to and describe their relationship with related national institutions (i.e., institutions with related or similar mandates).

1. Administrative and regulatory set-up

Argentina is a Federal country with a Constitutional arrangement whereby power is divided between the Federal State, the Provinces, and, more recently the City of Buenos Aires after amendments to the Constitution in 1994, granting autonomy to the capital on a footing similar to that of the rest of the Provinces.

Under the Constitution of Argentina, the Federal State holds all powers expressly delegated by the Provinces to the Nation, with the Provinces retaining all other faculties and attributions. In this regard Federal Powers constitute an exception to the general rule of provincial jurisdiction. In accordance with these provisions, all substantive legislation regarding civil, commercial, criminal, mining and social security legislation has been vested in the National or Federal Congress, whilst all procedural aspects related to implementation, conflict resolution and judicial organization remain with the provinces. Provinces are also responsible for primary education and for guaranteeing municipal autonomy within their respective jurisdictions.

Although the “division of powers” between both state levels appears to be relatively straightforward, there are some areas where the demarcation of powers is not always so straightforward and where a substantial level of overlap may occur. In areas such as promoting social and economic development, or empowering indigenous communities for example, both the Federal state and the Provinces are entitled to act concurrently. As regards environmental policy, given the horizontal nature of much legislation designed with environmental objectives in mind, there is always a potential for jurisdictional conflicts.

Under the terms of article 124 of the Constitution, amended in 1994, ownership of all natural resources lies with the Provinces. The right to exercise authority and, in principle, to regulate the use of natural resources is a direct consequence of provincial ownership and constitutes the basis for most laws and delegated legislation pertaining to forestry, water use, mineral rights and issues such as land use and planning regulations.1

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1 Article 124 of the Constitution states that “Provinces hold eminent domain over the natural resources existing within provincial territories” (Corresponde a las Provincias el dominio originario de los recursos naturales existentes en su territorio...). The term “Dominio originario” may be assimilated to the concept of eminent domain as understood in its public law interpretation, thereby granting the provinces the right to legislate and regulate over natural resources within provincial territory, whether such resources are actually owned or not by the province. Under the doctrine of eminent domain, ultimate “ownership” of assets lies with the state as a consequence of sovereignty over its territory. Argentine Civil and Administrative Law, like other countries with legal systems modelled upon continental and Roman law, distinguish between public ownership or “dominus”, as public dominium and private dominium. Where the State (whether Federal Provincial or Municipal) holds land or other things in a public capacity, i.e. for the public interest, the legal relationship is that of public dominium. In this case, assets are subject to public law and may not be sold, encumbered or leased as in private ownership. Where the state holds things as private dominium, the legal relationship follows the general rules of property law, i.e.: the property may be sold, encumbered or be subject to acquisitive prescription. (See articles 2506, 2340, 2341 and 2342 of the Civil Code, and Catalano, Codigo Minero Comentado, art 7º, pp. 56 to 72.) An example of this latter is the case of fiscal lands owned by the provinces and subject to forestry law.
Notwithstanding the provisions of article 124, the 1994 Constitution establishes a specific rule for environmental policy-making in article 41, providing the Federal State with the power to establish minimum or threshold requirements for environmental protection applicable throughout the country. Provinces may establish complementary laws and regulations to the federal “minimum standards”, either by setting more stringent requirements, or by establishing regulations in areas where the Federal State has not established such environmental thresholds. In view of the provisions of the Constitution, primary responsibility for regulation of forestry, land related issues and the environment lies with the provinces, subject to any minimum standards that the Nation may enact, although economic promotion and active policies aimed at developing these sectors may be shared to a certain extent between both levels of government, in accordance with the rules outlined above.

In the case of forestry regulations, a province is entitled to establish “complementary” regulations, setting additional requirements for AR projects, EIA procedures or matters such as public participation. In view of this relationship between the federal and provincial levels of government, CDM projects will need to address local requirements in addition to the procedures set out by the DNA. In practice, meeting provincial environmental requirements will be a key part of evaluating a particular project’s contribution to the sustainable development of Argentina, and it is foreseeable that the Federal Environmental Council (COFEMA) will be the natural forum for drawing up these criteria for consideration by the DNA when approving CDM projects. Alternatively, the DNA may wish to establish a consultation mechanism with the relevant province involved in an AR project to ascertain whether the project is consistent with local requirements, beyond mere compliance with local administrative regulations and permits. In 2000, COFEMA passed a resolution requiring provinces to set up liaison offices with the DNA for the purposes of coordinating and streamlining provincial involvement with climate change activities and projects.2

In principle all land use regulations, rules on forestry, and environmental management are the direct responsibility of the Provinces. The National Government, in accordance with the provisions of the Federal Constitution, retains the capacity to establish minimum environmental standards, establish the framework for economic and development promotion, and the responsibility for ensuring that international law is domestically implemented and complied with.3

a. i. Forestry

As described above, responsibility for direct administration of forestry related issues lies with the respective provincial authorities. The structure of these authorities varies from province to province in accordance with local public law. Responsibility for forestry is sometimes entrusted to an Environment and Natural Resources Ministry or Secretariat, while in other provinces public management may lie with a government entity entrusted with economy or production (See Appendix 1 for some examples of provincial organization charts, identifying the relevant departments responsible for forestry).

At the federal level, responsibility for forestry is shared between the Secretary for Environment and Sustainable Development (SAyDS), the Secretary of Agriculture, and the Tourism Secretariat with responsibility for the National Parks Administration. The former is entrusted with regulating and establishing national policies for natural forests and coordinating provincial actions, whilst the Secretariat for Agriculture is in charge of setting policy for commercial forestry involving non-native or exotic species

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2 COFEMA Resolution 31/00 calls for the establishment of liaison offices between the DNA and provincial environmental authorities.
3 The constitutional arrangements of Argentina have created a shared and complementary set of roles for legislating and enforcing environmental laws. The Federal Environmental Authorities, in addition to setting the thresholds applicable to all provinces, are also responsible for implementing multilateral environmental agreements (MEAs) throughout the country. Different offices within the Environment Secretariat act as focal points for the various international conventions and treaties to which Argentina is party and liaise with the respective provincial authorities. In practice, where Argentina has signed up to an agreement under international law, the provisions of these treaties become in fact “minimum standards”; given the powers of the Federal Government to negotiate with the international community in representation of the Union.
and managing the national forestry promotion schemes.4 (See Appendix 1 for a description of the structure of the Federal Environment and Agriculture Secretariats.) The National Parks Administration is entrusted with managing protected areas subject to federal management.

The most recent amendment to the Ministries Law assigns the following duties to the Environment Secretariat, the Agriculture Secretariat, and the National Parks Administration:

**Federal Environment and Sustainable Development Secretariat (SAyDS)**

In accordance with Executive Decrees 487/04 and 295/03, the Secretariat has a wide range of goals and objectives, some of which are of relevance to climate change policy and forest management. Some of the outstanding goals are:

- Assist the Minister of Health and Environment in all matters pertaining to environmental protection and preservation, implementing sustainable development, the rational use and conservation of natural renewable and non-renewable resources with a view to achieving a healthy and balanced environment in accordance with the terms of article 41 of the Federal Constitution;

- Participate in and constitute the Federal Environment Council or Consejo Federal de Medio Ambiente (COFEMA) supplying it with the necessary means for its adequate management;

- Carry out surveys of natural resources and participate in the conservation, recovery, protection and sustainable use of all natural resources, both renewable and non-renewable;

- Prepare and intervene in legislative proposals regarding environmental quality, conservation and use of natural resources, sustainable development, land use and planning requirements and environmental quality;

- Establish guidelines for land use planning and planning of different aspects relative to the national environmental management and its impact on the quality of life; and

- Intervene in the application of international agreements within the field of the Secretariat’s attributions.

**Federal Agriculture, Livestock, Fisheries and Food Secretariat (SAGPyA)**

Executive Decree 67/03 also sets out a broad range of duties and functions for the Federal Agriculture Secretariat. Among those with most relevance to forestry and land use are the following:

- Prepare and implement plans, programmes and policies with regard to production, marketing, technology, quality and sanitary programmes in the field of agriculture…forestry, agribusiness in coordination with the interests of the provinces and different sectors;

- Promote the use and conservation of natural resources destined for agricultural production, horticulture, livestock...forestry and fisheries, with a view to enhancing the productive capital of the Nation and the economic development of these sectors;

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4 It should be stated that in addition to this separation between the Environment and Agriculture Departments, responsibility for the National (Federal) Parks System lies with an independent agency, the National Parks Administration (Administracion de Parques Nacionales –APN) created by Law 12.103 and amended by Law 22.351, under the aegis of the Tourism Secretariat. Prior to 1999, APN was subordinate to the Environment Secretariat. This administrative arrangement has been severely criticized by many in the environmental community due to the fragmentation that this introduces into establishing a national strategy for conservation. Ironically, the Environment Secretariat is the focal point for the Biodiversity Convention, yet notwithstanding the efforts made to coordinate policy, the Environment Secretariat has no real say in decisions pertaining to federal protected areas.
Coordinate actions with the different regions of the country, with a view to decentralizing actions in different parts of the country, in addition to integrating the different productive sectors;

Intervene in the evaluation of all factors affecting the development of agricultural and forestry development, both within and beyond the country, with a view to proposing global measures or sector specific measures and policies to foster these activities; and

Intervene in the implementation of policies aimed at promoting, developing and financing agricultural, livestock and forestry activities with a view to ensuring their sustainability.

The Department of Afforestation, within the Agriculture, Livestock, Fisheries and Food Secretariat, has direct responsibility for forestry and the application of Forestry Promotion Law 25.080.  

Finally the National Parks Administration (Administración de Parques Nacionales – APN) has a number of key roles to play in the enforcement of policies regarding natural resource conservation, even when it is not very likely that a CDM project will be designed for implementation within the jurisdiction of a national park.

In addition to the legislation already described, there are other important legal instruments with relevance to Forestry. These are:

**Law 13.273**
This law, approved in 1948, sets out the general framework for protecting the forest resources of the country, in addition to promoting commercial forestry. This legislation is still in force, although its provisions should be interpreted in light of the subsequent Constitutional amendment and the restatement and strengthening of provincial autonomy. Like many other national laws related to natural resources management or other areas corresponding to provincial powers, Law 13.273 set up a broad framework for forest management to which provinces could adhere. In the particular case of Law 13.273, most provinces have formally adopted or “adhered to” the text of the national law, among other reasons, in order to benefit from forestry promotion schemes run by the Federal Government.

**Law 25.080**
Law 25.080 was passed for the purpose of creating an incentive regime for all new forestry activities and the expansion of existing plantations. This law also contemplates the promotion of forestry related industry and sawmills, on condition that all projects benefiting from the regime contribute to enhance the supply of timber and other forest products. In addition to providing incentives for productive investment, however, the law also sets a framework for broader, environmental policy-related objectives for forestry projects. Article 4 defines plantation forests, for the purposes of the law, as plantations of native or exotic species with commercial value as timber, ecologically adapted to lands, which by reason of its natural characteristics are suitable for forestation and afforestation and which, at the time of the entry into force of

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5 Ministerial Resolutions 22/01 (Ministry of Economy) and 152/00 (SAGPyA).
6 Prior to the 1990s the National Forestry Institute (IFONA), established in 1973, was entrusted with administering the commercial forestry promotion programmes and afforestation subsidies to which legal entities and individuals were entitled to apply for planting and other forestry operations. IFONA was dissolved in 1991, in the process of extensive state reform, economic deregulation and privatization. It should be remembered that although Argentina is a Federal State, in practical terms much of its economic development and decision making has historically been centrally run. The 1949 Constitution, for example, virtually nationalized many natural resources, including oil and gas deposits. Subsequent legislation in the field of energy, petroleum or forest promotion, tended to maintain a highly centralized structure. Only after the Constitutional Reform of 1994 and the simultaneous enactment of legislation has this imbalance been redressed with a return to a federal system where the provinces effectively exercise power over natural resources. There are many examples of this process of devolution: Law 24.145 deregulated the oil and gas industry and stated the principle of provincial ownership over hydrocarbons.
7 Article 1 of Law 25.080.
This law, do not have any tree cover, as defined by local authorities. A degraded forest, subject to a management plan aimed at improving the forest’s environmental quality may be eligible for benefits under the terms of the law. Article 5 furthermore states as a general rule that all forestry activities must be carried out in accordance with sustainable development criteria for natural resources management, and ensure that maximum protection is granted to the forest.

This legislation was approved in January 1999 and set up a framework for promoting forestry investment by means of the following basic instruments:

1. A system of subsidies, payable over a ten year period for planting and developing forests, and;  
2. Fiscal stability for a period which may vary between 30 and 50 years depending upon the nature of the project, type of species to be planted, climate and local conditions.

Law 25.080 establishes that provinces must formally adhere and subscribe to the promotion regime by sanctioning concurring legislation and agreeing to abide by the “tax freeze commitment”. Provinces must also invite their respective municipalities to join the promotion scheme and provide for a similar freeze of local levies, as contemplated for by national and provincial fiscal regulations. The law also allows for additional support or incentives to be provided by provincial authorities, on condition that they do not contradict the overall national scheme. Finally, the forestry promotion scheme makes no distinction between foreign or national investments, on condition that an individual or corporate legal entity benefiting from the scheme establishes its domicile in Argentina, under national regulations.

**Law 24.857**

This legislation, sanctioned shortly before Law 25.080, also establishes a fiscal stability incentive for all activities related to forestry as defined under Law 13.273. Activities such as sustainable forest management of natural forests aimed at enhancing productivity while maintaining and/or improving the long-term health of the forest or maintaining or improving biodiversity are eligible for tax stability.

The difference between both regimes (Laws 25.080 and 24.857) lies in that one refers to native species and natural forests (Law 24.857), while the other is limited to “implanted” commercial forestry (Law 25.080).
25.080). From the perspective of carbon sequestration, Law 24.857 is probably of less interest than Law 25.080, given the current definitions of native forest management under the CDM. Furthermore, this legislation has had little practical impact to date as regards projects designed to benefit from its provisions.  

**Decree 1332/2002 (Social Forestry Programme – Programa Social de Bosques (PROSOBO))**

This Decree sets out the framework for a general scheme aimed at promoting afforestation and reforestation with native species. The Programme was developed in 2002 in the wake of the massive social crisis, which affected Argentina after the debt default in 2001, and collapse of the De la Rua Administration amidst civil unrest in most major cities in Argentina. Its aims are twofold:

- **Creation of employment in depressed regional economies, as a means of deterring the process of rural migration to large cities; and**

- **Promotion of sustainable management of natural forests, in addition to the increase of the total area under forest cover.**

Some of PROSOBO’s activities include natural forest restoration, development of regional nurseries for both exotic and native species, planting of forest curtains and windbreaks, forest and bush fire management, maintenance of urban and peri-urban forests and parks. The definition of beneficiaries under PROSOBO is much broader than that contemplated under Law 25.080 which relates almost exclusively to commercial plantations. PROSOBO may provide assistance to Municipalities where socially disadvantaged populations may reside, as well as to religious or community groups, indigenous communities, business associations, trade unions or cooperatives.

For the purposes of this assessment, PROSOBO, although a highly commendable initiative with important ancillary social and sustainability benefits, does not have the same level of importance as the Forestry Promotion Act already described. While it is technically feasible for a PROSOBO programme to qualify for a CDM afforestation or reforestation project, the objective barriers to entry make this scenario highly unlikely.

**a. ii. Land**

**Responsibility for land use and planning issues**

In this regard an important distinction should be made in accordance with the constitutional provisions described above. All issues pertaining to substantive legal provisions, such as property rights, easements and servitudes under private law, mortgages, and contract law in general lie within the powers of the National Congress to establish all Civil, Criminal and Commercial legislation.

The provinces, by virtue of Article 124 of the Constitution, retain the right to regulate the rational use of natural resources in the public interest. Most provinces have sanctioned legal codes regulating agrarian

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14 Telephone interview with Environment Secretariat staff at the Native Forests Department.
15 Environment Secretariat (SAyDS) sources have estimated that 200,000 jobs could be created with forestry and forestry related activities, as well as planting some 5 million hectares with native species, “Primer Inventario Nacional de Bosques Nativos”, SAyDS, Direccion de Bosques, Buenos Aires, 2002.
16 One of the most important barriers to entry is the high up-front costs of validation, certification, etc. Large scale forestation with strong financial backing may be in a position to bear these costs, whereas a project carried out by a local government with social purposes may not be in a position to do this. An exception to this may be the World Bank’s BioCarbon Fund or Community Development Carbon Fund (CDCF), but it may be too early to ascertain whether this will be the case. PCF up-front costs, for example, are in the area of US $150,000 to 180,000. This is way beyond the possibilities for all but major forestry institutions. Another barrier to entry, again for small plantations is the market uncertainty. Once the Kyoto Protocol enters into force, and a market with clear price signals emerges, there is expected to be a greater interest in AR projects.
17 Article 75, Federal Constitution.
law, which may cover a range of issues from pesticide use, permits requirement for certain activities, forestry regulations and laws on hydrological resources.

The Province of Santa Fe, for example, has a specific law on Forest Conservation (Law 11.121), sanctioned in 1993 with the following aims, in addition to those contemplated under the provisions of Law 25.080:

- Protect naturally forested areas and maintain and sustainably manage modified forested areas;
- Create botanical parks and forests with native or exotic species from outside the region, for educational or experimental purposes, or for the purposes of technology transfer;
- Promote local community involvement in forest management;
- Induce the creation of nurseries for the production of forestry species and for the establishment of afforestation programmes within the Province;
- Assist in the preparation of fiscal lands for forestry purposes;
- Establish forestry promotion programmes, with a view to providing technical and financial assistance to forestry projects;
- Create incentives for forestry projects aimed at protecting watersheds, highway windbreaks, soil, river and lake shore protection, flood control, species and habitat protection where considered necessary, etc.;
- Protect permanent forests, including parks and provincial or municipal reserves or forests sheltering species worthy of conservation; and
- Assist in the plantation of native species for experimental purposes on adaptation to ecosystems.

As a rule, this example of provincial legislation is common to many other jurisdictions and provides a framework for forestry investment and the promotion of sustainable management on private lands.

Notwithstanding the general provisions regarding Constitutional powers to legislate on natural resources as stated above, the Federal Congress enacted Law 25.675 as a General or Framework Environment Law. Article 9 of this Law establishes that Land Use Planning (Ordenamiento Territorial) constitutes one of several key instruments for managing the environment. Given the fact that the General Environment Law is a "minimum requirements" or environmental threshold law enacted pursuant to the provisions of article 41 of the Constitution, the basic conditions for land use and planning policy have in fact become a common national environmental standard or requirement for all provinces. The wording of article 9 is very broad and as it stands presently is more of a general statement of policy which does not translate into concrete obligations for the respective provincial administrations, other than to begin to develop land use plans as part of environmental policy making. In the event that a national minimum standards law is enacted with detailed requirements for such land use plans, provinces would then be required to prepare provincial plans in accordance with the national minimum standards.

Historically, land use concerns have tended to be viewed from an urban perspective, with little attention paid to the need for integrated urban and rural planning, taking into account issues related to agroecological management, conservation and hydrological resources. In this sense, the Land-Use Planning Law has, to date, been virtually limited to the urban environment and has mostly been concerned with zoning issues, densities and permitted uses. Furthermore, where land use and planning laws do exist, enforcement has tended to be lax, in part because the issue itself has not in the past been perceived to be of importance for policy makers.

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19 Many sources have indicated the importance of establishing minimum standards legislation for land use planning, but none have so far reached advanced debate in Congress. (Personal communication with congressional representatives and staff, NGO leaders and SAyDS staff.)
In view of the enhanced awareness regarding the importance of land use and planning as an instrument for setting environmental and sustainable development policy, it is highly conceivable that future legislation will however begin to introduce concrete and enforceable obligations upon the provinces, with regard to the setting up of land use plans with direct effect on various economic activities, including forestry.20

a. iii. The environment

Responsibility for Environmental Management
In accordance with the Argentinean Constitution, direct responsibility for environmental management lies with the respective provincial authorities, with the exception of the Federal State’s powers to set minimum standards, as already described above. The Federal Government is also entrusted with coordinating national environmental policy-making with the provinces and the City of Buenos Aires, as well as inter-agency actions, within the national government. In addition to the provisions of article 41 of the Constitution, and the various provisions under existing Ministerial Laws, the General Environmental Law sets up a Federal Environmental System for the purposes of coordinating environmental policy and sustainable development decisions between the different levels of government.21

The General Environment Law also formalized the status of the Federal Environment Council (COFEMA) as an inter-state or inter-federal agency with a legal mandate to ensure debate and coordination between the various provincial environmental agencies and with the federal environmental authorities. COFEMA, originally created by an inter-provincial agreement in 1990, has, under the recent organizational structure for environmental management in Argentina, pursuant to the 1994 Constitution, acquired a good measure of political importance as a key policy-making forum.22

COFEMA, however, does not have concrete enforcement powers and must rely on implementation by the respective provincial administrations or the Federal Secretariat in areas under Federal Jurisdiction. As proof of the enhanced legal status held by COFEMA after the General Environment Law, nearly all subsequent “minimum standards” legislation enacted by Congress, have assigned concrete duties to COFEMA in enacting delegated legislation, and in the regulatory implementation of national laws.23

The National Executive is entrusted with the duty of proposing resolutions or recommendations to the provinces for the purposes of ensuring implementation and compliance with minimum standards requirements throughout the country, in addition to enforcement of complementary legislation and related regulations.24

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20 This conclusion is based upon personal (off-record) communications and interviews with a number of public representatives, including decision makers in the Environment Secretariat and legislators from both chambers of the Federal Congress. This consensus is also very strong among the NGO and academic community, including highly regarded organizations, such as Fundacion Vida Silvestre Argentina (FVSA), Fundacion Ciudad, Asociacion Interamericana de Ingenieria Sanitaria (AIDIS) and Fundacion Ambiente y Recursos Naturales (FARN). See, for example, FARN-IUCN, “Presupuestos Mínimos de Protección Ambiental: Recomendaciones para su Reglamentación”, Buenos Aires, 2003.

21 Article 23, Law 25.675.

22 Articles 23 and 24 of Law 25.675 make explicit reference to the duties of COFEMA. Article 25 formally ratifies the creation of COFEMA by incorporating the Original Terms of Agreement as an Annex to the text of the legislation.

23 One of the weaknesses of Inter-State or Inter-Federal bodies such as COFEMA is the fact that they lack a budget and strong administrative support. Although the Federal Secretariat currently acts as an administrative secretariat for COFEMA, it does not have its own funding or budgetary arrangements. In view of the fact that it has been entrusted with many concrete tasks in drafting and agreeing upon secondary regulations needed to make minimum standards laws operational, this lack of institutional strength may prove to be a serious weakness for environmental management in the future. Furthermore, the lack of coordination between sector specific agencies (e.g. Agriculture and Environment, or Public Works and Environment) is an administrative phenomenon which occurs at both the federal and provincial levels of government. Improving horizontal coordination between areas within the public sector is a major challenge for environmental policy in the future.

24 Article 24, Law 25.675.
To date, the following pieces of environmental framework legislation have been sanctioned, in addition to the General Environmental Law already mentioned:

- Law 25.612 on Industrial and Services Activities Waste;
- Law 26.670 on the Management and Elimination of PCBs;
- Law 25.688 on Environmental Management of Waters;
- Law 25.831 on Free Access to Environmental Information; and
- Law 25.916 on Domestic Waste Management.

Finally, and in view of the fact that Argentina is a Party to numerous international environmental agreements, the liaison between these agreements and the various provincial agencies and offices is performed by the Federal Environmental Secretariat, via the respective departments that act as “focal points” for these international regimes. The Federal Secretariat must also interact fluidly with the corresponding offices within the Foreign Ministry, which are entrusted with negotiating and representing the interests and positions of the country at all international fora.  

b. Is there a central permitting system for afforestation and reforestation (AR) projects? Otherwise, how would an AR project implementer go about obtaining the necessary permits?

The organizational structure of Argentina as a Federal State described above, lays out the general interactions between provincial governments and the national government. The permitting system under which a forestry investment or related project is carried out would to a great extent determine the precise administrative “critical path” to be followed to obtain government approval. The project developer would be required to abide by all relevant provincial legislation applicable to the project’s jurisdiction. In some provinces, for example, an EIA and a forest management plan are required to be submitted to the relevant authorities, pursuant to either environmental or forestry related provincial laws. In other cases, unless the project is seeking the benefits derived from a specific forestry promotion regime, no formal permitting will be required, insofar as the land owner holds property rights and is entitled to carry out whatever economic activity he or she deems most convenient.

Notwithstanding the applicability of EIA regulations to forestry projects in accordance with provincial regulations, provinces also retain the right to regulate and establish requirements for sale of forest products, transportation of timber or payment of fees for cutting or thinning of forests. As regards forestry products and timber, for example, Law 13.273 contains a detailed set of requirements for transportation and necessary accompanying documents (article 14), forest extraction permits for fiscal lands (article 29), payment for extraction upon the basis of species, quality and final use of products (article 30), limited permits for extraction and collection of fruits and forestry products (article 31).

In practical terms, the most important forestry promotion legislation is Law 25.080 described above and its various implementing regulations. The structure that Law 25.080 has adopted for the purposes of promoting forestry investment requires a certain amount of decentralization between the Federal Department of Forestry (Agriculture, Livestock, Fisheries and Food Secretariat) and the various provincial and even local government agencies entrusted with forestry management. This decentralization of the permitting process also applies to the submission and approval of Environment Impact Assessment (EIAs) required by the regime.

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25 COFEMA also plays a role in “grounding” international legal provisions and ensuring that consensus is achieved in implementing international rules domestically, or in taking commonly agreed upon positions to international negotiations.

26 Legal transportation of forest products entails obtaining a specific document (Guia Forestal) specifying the origin of the species, quantity and compliance with relevant applicable permits. In theory, this documentation allows for a comprehensive control of the sale and marketing of forest products, along similar lines as most other natural resources, such as livestock, minerals, etc.

27 Article 6 of Law 25.080 requires that each Province designate a specific Forestry Authority for the purposes of managing approval of projects as a condition for provincial admission to the investment regime, under the terms of article 23 of the Law and of its Regulatory Decree 133/99. This office must coordinate with municipal governments and other government agencies.
Regulatory Executive Decree 133/99 was passed for the purposes of implementing Law 25.080. The Decree mandates, in its article 23, that the responsibility to evaluate and verify all forestry management plans, land tenure documents, approval and certification of small-scale investments,28 carried out under the Forest Promotion Regime, are delegated to the relevant provincial authorities, as are the duties to subsequently monitor and supervise these small-scale forestry investment projects.

Article 5 of Law 25.080 states that all Provinces that adhere and commit to the investment promotion regime shall coordinate all necessary administrative requirements relative to EIA for small-scale projects and investments with the Federal Agriculture, Livestock, Fisheries and Food Secretariat.

As described above, participating Provinces must formally state their adherence to the regime and designate an office to act as “Focal Point” and liaise with SAGPyA and municipal governments. This office will act as the enforcement authority for the Forestry Promotion Regime in each province and act as a clearing house for projects, in addition to performing inspection and monitoring of projects submitted for approval. This authority is also entrusted with ensuring that municipal and other local governments abide by the investment promotion regime and coordinate work with the provincial and national governments.29

Federal Agriculture, Livestock, Fisheries and Food Secretariat Resolution 22/01 establishes the guidelines for decentralization by vesting in the provincial authorities all document reception, preliminary reviews, site visits, inspections and certification of declared forestry work where necessary. Inspection reports are to be forwarded to the Federal Authority.

c. Is there a designated national authority (DNA) in the host country? Is the DNA part of any of the institutions described above, or any other institution? What is the scope of the powers of the DNA (e.g. Is it empowered to look into the terms of the contractual arrangements between or among the project participants and other contracts relating to the project, such as contracts with other occupants of the land?)

Argentina has a Designated National Authority (DNA) in accordance with the Kyoto Protocol. The DNA is known as the Argentine Clean Development Mechanism Entity or OAMDL, for its Spanish acronym.30 OAMDL operates as a unit specially created by the Environment Secretariat and is directly subordinate to the office of the Secretary for Environment and Sustainable Development, as set up by Secretariat Resolution 168/01.31 Subsequent regulations and more specifically, SAyDS Resolution 845/04 establish the guidelines for project evaluation as follows:

- Project evaluation is to be carried out by public or non-profit organizations with sufficient knowledge and technical background to perform assessments of greenhouse gas reduction or sequestration projects.32
- Resolution 169/01 also lays out the detailed procedures for submission of proposals and outline drafts for CDM projects.

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28 These refer to projects under 100 hectares in size.
29 Article 6 of Law 25.080. The decentralization process envisaged by the Forestry Investment Regime is currently being implemented by means of specific covenants between the Federal and Provincial Forestry Authorities. (Telephone communication with Marcela Coppola, attorney with the Forestry Department of the Federal Agriculture, Livestock, Fisheries and Food Secretariat, Ministry of Economy).
30 Organismo Argentino para el Mecanismo de Desarrollo Limpio (OAMDL). Its predecessor was created by Decrees 822/98 and 849/99 and was known as the Argentine Office for Joint Implementation, in consonance with the pilot phase of activities implemented jointly, then in progress. The current denomination for the DNA is more appropriate to the current status of CDM in the context of the Kyoto Protocol.
31 Technically, Resolution 168/01 was written into law by the then Secretariat for Sustainable Development and Environmental Policy. Subsequently the denomination and reporting lines for the Environment Secretariat changed; however, no modifications were made as regards the mission and functions of the OAMDL, until Resolution 56/03 which created the Climate Change Unit, reporting directly to the Secretariat.
32 In theory, the independent evaluator carries out a desk review which is then submitted for the DNA for consideration. The independent entity’s judgement is not binding on the DNA, but there would clearly have to be very strong grounds for overriding a negative report on the project, and normal administrative law procedures would apply to such a decision (challenge in court from a third party, for example). In practice this
OAMDL is run by an Executive Committee, chaired by the Environment Secretary and a Permanent Secretariat with the following duties:

- Establishment or modification of existing or new guidelines for project evaluation;
- Drafting of modalities and procedures for project identification and submission of proposals;
- Outline of procedures for project approval;
- Development and promotion of activities aimed at “marketing” CDM projects nationally and internationally;
- Oversight and the design of monitoring plans and other project evaluation activities; and
- Identification of potential sources for financing CDM projects.

The Designated National Authority is assisted by an advisory board, made up of various sector-specific committees or working groups focusing on particular kinds of CDM projects. In particular the Designated National Authority has formalized invitations to other areas of the Federal Government to appoint representatives to the advisory board. These areas include the Energy, Transport, Industry and Agriculture Secretariats, International Trade from the Foreign Ministry, Secretariat for Science and Technology, and the Ministry of Education. This structure of the DNA attempts to develop a horizontal approach to climate change project approval by involving other agencies with powers over sector-specific areas.

In 2001, standard procedures for evaluating projects submitted for OAMDL approval were drawn up and a format for presentation was introduced in 2002. This format follows the Project Design Document (PDD) adopted by the Marrakech Accords in addition to other requirements such as the World Bank’s PCF, or the Dutch Senter Programme. Project proponents are required to submit the following documents, broadly in line with Kyoto Protocol requirements:

- Project description and summary;
- Baseline determination methodologies;
- Project lifecycle and crediting periods;
- Emissions reductions and environmental impacts;
- Sources of funding and a declaration to the effect that no ODA is being used in the project;
- Stakeholders’ comments; and
- Monitoring plans.

system has not been sufficiently well tested to date. In the wake of recent regulatory amendments introduced by Resolution 845/04, it is expected that a full list of independent non-profit, academic or research institutions will register as independent evaluators. However, many have criticised the system for virtually duplicating the same mechanism as required by the CDM (validation). Given the fact that the proponent has to pay a fee for the services of the independent evaluator, this again pushes the up-front costs of project development and paperwork. Furthermore, there is also the delicate issue of a project being locally approved and then rejected by the Executive Board. What value would the local evaluation have in this context, if it will be disregarded by the EB? This has been one of the “Off Record” arguments for changing the system for a letter of no objection, avoiding any formal government statement on the project itself. In addition to this, participants seeking external finance are not prepared to go through a local approval procedure with costs and time attached if this same procedure must be replicated before the CDM. The recent amendments to the system have tended to integrate the formal evaluation procedure with the more informal and simplified procedure established with the “prior consultation mechanism” process. This would have the advantage in not committing the DNA or any public agency to a formal review system along the lines of the CDM and facing the ensuing risk of granting approval to a proposal that might be rejected by the CDM.

In practice most of the OAMDL procedures and guidelines follow Kyoto Protocol and Executive Board procedures and documents to the letter. While the presentation follows the format of a Project Design Document (PDD), there is a section on compliance with all local regulations.

These working groups have been functioning more or less continuously since 2002 and deal with the following category of projects: Energy and Industry, Agriculture, Land Use and Forestry, Waste and Transport. These working groups all include members from the private sector, research institutions such as INTA (Agricultural Technology Research Institute), NGO representatives, academics and other public sector organizations. (Personal communications with Hernan Carlino and Nazareno Castillo, former and current administrative coordinators of the OAMDL).

Environment Secretariat Resolution 372/03.

Environment Secretariat Resolution 345/02.
In addition to these requirements in line with CDM procedures in general, the OAMDL may request and review any other information that may be pertinent for project approval.\(^\text{37}\)

A recent regulation has been introduced for the purposes of streamlining the process of evaluating and obtaining approval from the Argentine Government for CDM projects and avoiding project proponents incurring excessive up-front administrative charges and costs. Environment Secretariat Resolution 239/04 establishes a “prior consultation” mechanism for submitting an outline of the proposed project for consultation with the OAMDL.

In its informal structure, this “prior consultation” mechanism allows for a certain amount of interaction and discussion between project proponents, developers and public authorities. This instance may also provide the pertinent forum for evaluating the contractual relationship between the parties as regards sale of CERs, financing arrangements, and sharing of benefits between project participants. To date, the OAMDL has probably paid more attention to public law issues regarding permits, EIA and complying with CDM formalities, than the private law agreements between the parties. In view of the increasing interest in defining the right to CERs and once CDM projects become more commonplace, there are bound to be more precise definitions regarding contractual arrangements, legal nature of CERs, and their consideration under Argentine law.\(^\text{38}\)

The Outline of the proposed project may, upon approval of the Office, be then formally resubmitted as a Project Idea Note (PIN) for the consideration of the Secretary. If approved, the proposal may receive the formal letter of non-objection in accordance with CDM requirements.\(^\text{39}\) There is a potential amount of overlap between the formal regime for evaluating CDM projects established under Resolution 169/01, and the more informal prior consultation mechanism created by Resolution 239/04. As more projects are submitted for scrutiny and approval by OAMDL, it is expected that these approval procedures will achieve a greater degree of harmonization in the future.\(^\text{40}\)

d. If there is no DNA, are there plans to establish a DNA in the next 12 months?

Not applicable.

e. How would you describe the relationship of the DNA with the institutions described in 1.a, as well as other agencies charged with the regulation of a CDM AR project?

Argentina’s DNA, the OAMDL, has developed a proactive strategy towards CDM projects with a relatively fluid relationship with sector specific agencies in other ministries (Transport, Agriculture and Livestock, Energy and Waste Management). OAMDL has set up an inter-institutional Advisory Commission for the purposes of ensuring that all relevant government agencies with potential interest in CDM projects participate on this Advisory Board.

\(^\text{37}\) Environment Secretariat Resolution 345/02, follows the format adopted by the CDM for submitting PDDs. Sections C and D refer to detailed information on the project’s development and implementation that give strong grounds for the DNA to review contractual relationships between the project participants.

\(^\text{38}\) Interviews with OAMDL officials have indicated the existence of contacts between the World Bank’s PCF and the OAMDL with a view to pursuing these aspects of CDM project development, and strengthening the capacities of DNA staff in the workings of CDM contracts.

\(^\text{39}\) Published in the Official Bulletin, 24/03/04.

\(^\text{40}\) Telephone communication with Monica Casanovas, OAMDL, Secretary for Environment and Sustainable Development. The SAYDS has reviewed the structure for project approval given the potential ambiguities in the two co-existing approaches currently in place, resulting in the enactment of SAYDS Resolution 845/04. The reason for introducing a simplified procedure was to avoid unnecessary bureaucracy and paperwork for a mechanism which is already perceived to be complex and is surrounded with uncertainty. Any additional administrative requirements pose the risk of a strong disincentive for project development.
The Argentinean Experience

Notwithstanding the fluid communication and positive relationship between government agencies in the specific areas of climate change and CDM, there is a lot to be gained in improving inter-agency coordination within the Federal Administration in setting and implementing environmental policies.

In addition to the coordination within the national administrative framework, COFEMA, the Federal Environmental Council is the inter-jurisdictional forum entrusted with coordination and defining environmental policy among and between the Provinces and the Federal Administration. Recent legislation on minimum standards has reinforced COFEMA’s legal standing and it is to be hoped that Climate Change and CDM will be seriously addressed in the near future. COFEMA is also the ideal forum in which to define guidelines as regards regional and provincial priorities for CDM projects and criteria as to what kind of projects will contribute to the country’s sustainable development.

2. Overview of the forestry sector

a. How is the term “forest land” defined in the country of study?

For the last 50 years, the term “forest land” has been defined in terms of what it is not.

Article 1 of Law 13273 states that “forest land shall be such land that due to natural conditions, situation, structure, climate, topography, quality and economic convenience is not suitable for agriculture or pasture and is therefore apt for forestry purposes. In addition to this, forest land will also include land considered necessary for the purposes of this legislation”. Forestry land is therefore land not suitable for agriculture or livestock, thus reflecting the scant importance that forestry had for the Argentine economy many years ago, in comparison with other land-use activities.

The law defines “forest” as any wood formation, natural or artificial which, by means of its contents or functions, shall be declared by the pertinent provincial regulations to be subject to the terms of the law.

Forests are classified under article 5 of the law into the following categories:

- Protective forests, with a purpose of protecting coasts, irrigation canals, watersheds, windbreaks, wildlife refuges, etc., as well as protecting against soil erosion;
- Permanent forests, which must be preserved with a view to maintaining national provincial or municipal parks or reserves, preserving species considered valuable or public forests and forests for the purposes of enhancing landscape beauty. Trees at the sidelines of roads are also considered under this category;
- Experimental forests, the purpose of which is to carry out research on native species or native and exotic species as regards adaptation to climate and soil conditions;
- Special forests and woods are those forests of private property created with a view to protecting or enhancing agriculture or other farming activities; and
- Productive forests, briefly defined as such artificial or natural forests capable of producing timber or other subproducts of economic value on a periodic basis.

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41 In theory, all categories of forest could be eligible for AR projects, although permanent forests would be hard to disqualify as these would imply a likely degree of natural forest management. Forestation of roads could conceivably qualify and there might be a role for local governments and even NGOs in this field.
42 Article 6, Law 13.273. Article 15 of the Law also states that afforestation and reforestation work in protected forests may be carried out by the State with the consent of the landowner or directly by the landowner under the supervision of the State. Should circumstances so require, the State may expropriate this land in the public interest.
44 Article 8, Law 13.273.
45 Article 9, Law 13.273.
Provincial legislation provides various examples of more sophisticated definitions of forests and forest lands, although all tend to consider forestry land in terms of those productive activities for which the land is not suitable.

For example, the Province of Misiones defines “forest land” in Law 854, article 2, paragraph c) as: “All lands within provincial jurisdiction which by virtue of their alternative uses show a clear soil aptitude for forestry use...”

The province of Chubut, for example, takes a similar position regarding the definition of forest lands, including a mix of biological and economic criteria. Decree 904/91 defines “forest” in accordance with article 102 of the Provincial Constitution as:

“All mass of trees growing in a natural state and with sufficient density so as to form a continuous unit associated with the seedlings of the species therein including all bushes, plants, flora and fauna in a single permanent biotic association by means of natural dispersion and capable of producing timber on an industrial basis.”

“Forestry Zone: a region characterized by the presence of a plant association as described above occupying no less than 50 percent of the land surface. Excluded from these definitions are zones with formations of ñire, laurel, and other similar low lying vegetation...Land considered not suitable for agriculture or livestock breeding shall also be considered apt for forestry purposes.” 47

b. In general terms, how are forest land, forest-related activities and forest products regulated in the country of study (e.g., Is there a separate law governing the sector, or are forestry provisions found in a more general law, such as an environment or natural resources code?)? How does this system compare with the way the sector is regulated in other countries in the region?

Under the provisions of article 124 of Argentina’s federal Constitution, ownership of natural resources lies with the provinces, and, subject to “minimum standards” requirements, the right to regulate and control the use of natural resources lies also with the Provinces. Each piece of provincial legislation will deal with natural resources and forests in accordance with the legal framework in force. Some Provinces, such as Jujuy, went down the path of attempting to develop a comprehensive Natural Resources Code, similar to the Colombian Natural Resources Code first enacted during the seventies.48

Today most provinces have enacted different kinds of framework environmental legislation dealing with general environmental policy aspects and individual natural resources on a chapter by chapter basis. By and large most provinces in Argentina have adhered to the National Forest Law 13.273, thereby setting up a general framework as regards classification of forests and measures of protection which is common to all jurisdictions. More recent provincial legislation has tended to go into greater detail with regard to forest management, zoning requirements and enforcement of management plans.49 Some of the recent legislation also deals with forest conservation in far greater depth than the more extractive-oriented legislation of previous decades.50

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47 The exclusion of these species is due to the parkland ecosystem which characterizes these trees in mountain foothills. Through the CDM, there might in fact be more forestry land than previously considered, given that the forest gains an economic value and thus more “apt” in comparison with other uses, as marginal agricultural land could become more attractive if one includes the values of CERs.
49 For example, Tierra del Fuego, Provincial Law 597 on Forestry Land Zoning.
50 In Chubut Province, for example, Law 3944 deals with forest promotion. In Misiones, Law 3058 aims at protection of implanted and native forests, and requires an EIA for all forestry activities (Resolution 228/00).
c. If the majority of forest land is owned by the government (national or local), does the law allow afforestation or reforestation projects to be undertaken by private persons, including individuals, corporations and communities on government-owned forest land? What would the terms of such an arrangement be?

Although there is a fair amount of land still under public administration, most forest land and commercial forestry activities in Argentina are carried out on privately owned lands.51

Regarding forestry on public lands, the National Forest Law 13723 establishes the following guidelines:

- Article 22 states that forests and forestry lands as specified in article 1 of the Law and which belong to the private domain of the state are inalienable (may not be sold, or in any other way forfeited), except such lands as may be deemed necessary to be destined for colonization or new settlement developments as stated by law.52 In such a case there must be a clear social interest and proper technical evaluations must be carried out prior to any decision in this regard. The law in this sense reflects the priorities which were paramount in a developing country half a century ago.

- Article 24 states that productive forests and forestry lands of the Nation and adhered provinces and municipalities that have adhered to the law are subject to the terms of the forestry law. Commercial use of these forests will depend upon their classification.

Provincial legislation follows a similar pattern:

Misiones, for example, states in Law 854 that forests and forest lands that make up the private domain of the Provincial State may not be sold or subject to prescription in any way and are subject to the following regime:

- Direct Provincial administration;
- By concession to private parties, prior to an open and public bidding process;
- By direct award to mixed economy companies (private and State participation), as long as the State holds a majority shareholding; and
- By administration to be carried out under the auspices of decentralized public entities created by the Province.

In Tierra del Fuego, Law 313 allows for fiscal land to be awarded to private parties by a public bidding process, direct award subject to approval of management projects and programmes, giving priority to projects already under way, or regularization of existing land occupation.

51 The proportions of public land assigned to commercial forestry vis-à-vis privately owned commercial forests vary from province to province. On average around 80% of the country’s forests are privately owned. In Misiones Province, for example, 84% of forested land is privately owned (SAyDS, SAGPyA and FAO, “Estudio de Tendencias y Perspectivas del Sector Forestal en America Latina 2020: Informe Nacional Argentina”, Buenos Aires, 2004). Some forest projects designed to be carried out on public lands, involving native forest exploitation have encountered very serious opposition from both NGOs and public sector officials, due to strong doubts regarding sustainability. In order to prevent such an intangible risk in a long-term investment project, developers prefer to seek rights to land on a private sector basis, thus avoiding such uncertainties. A case in point is the Lenga Patagonia project developed in the early nineties by Trillium Corporation. The project, involving the exploitation of native lenga (Nothofagus antarctica) is currently inactive because of strong local opposition.

52 A distinction should be made between public ownership depending upon the use or purpose to which the property is put. If the property serves a public purpose, it is deemed to be within the public domain and may therefore not be sold or forfeited in any way. If the property serves no public interest, it is considered to be in the private domain of the state and may therefore be transferred, sold or auctioned, as if it were property subject to general principles of civil law. This has been the case of sales of fiscal lands for agricultural colonization purposes. In practice most provinces have in fact subjected fiscal lands to rural colonization programmes, thus making these lands subject to the exception stated above.
d. In an AR project, how are benefits (such as harvesting, recreational or hunting rights) required by law to be shared with other parties who are not project participants.

There is no distinction between CDM and any other forestry-related project in this regard; hence general principles of civil law and pertinent local regulations will apply. The right to the harvest of any crop is recognised under the Civil Code as the concept of a “fruit”.53

As regards hunting rights, article 34 of Forestry Law 13.273 states that “[h]unting and fishing on fiscal forests shall only be permitted in accordance with regulations, with prior authorization and during the established seasons or times of year...” It is conceivable that hunting rights could be set up as a servitude for the access to land for the purposes of hunting, in accordance with article 2972 of the Civil Code.54

d. i. With the landowner (if the landowner is not the one implementing the AR project).

For a complete review of the different conceivable hypotheses in this regard see below. A recent amendment to the Civil Code provides for a specific dismemberment of property rights in the case of forestry projects submitted in accordance with the Law on Forestry Promotion.

Under the terms of Law 25.509, a new and specific property right has been created over a land surface dedicated to forestry investment. Under the provisions of this property right, the holder of the “surface rights” acquires a real (registrable right in land) property right to the surface and everything planted thereupon for a period of up to a maximum of 50 years, after which the right becomes extinguished by virtue of the terms established in the law (jure et de iure).55 This property right in fact grants or creates a specific property right to everything planted upon the land, as long as the project has been executed in accordance with the forestry investment law. The right to the forest plantation and to benefit from its fruits may be transmitted to third parties like any other real property.

Under these arrangements the owner of the subjacent property may not hinder the surface owner’s enjoyment of the surface property, nor burden such dismembered ownership in any way by constituting additional rights or encumbrances over that surface property.

The legislator’s aim in creating this new property right has been one related to economic development policy. Many potential forestry investments are deterred or barred from obtaining long-term finance, due to the limitations on collateral, unless they actually own the land. By creating a specific registrable right over the surface property and the plantations thereby established, it is possible for a forester to constitute a mortgage over the surface property (in fact the plantation), without requiring full ownership of the underlying land rights. The entire process, in theory, should be conducive to long-term joint ventures between landowners and forestry developers, without undue asset immobilization by landowners or excessively onerous requirements for investors in forestry.56

53 The concept of fruits (ius fruendi) is covered in the Civil Code, articles 2422 to 2444. The Civil Code also contemplates definition of fruits in the context of long-term lease contracts (arrendamientos) in article 1505 and 1506 of the Civil Code. A distinction should be made between the right to perceive and appropriate the fruits of a property from the real property right to usufruct. The former is set up by contract between the parties whereas the right to usufruct constitutes a charge on land and is therefore registered as a title to enjoy one of the attributions of the property. Usufruct is in fact a dismemberment of one of the attributions of property, the right to enjoy its fruits. Some of the consequences of this distinction are subtle, yet nevertheless important. For example, in the case of a rural lease (arrendamiento) the fruits or produce of the land pertain to the lessee, however, the lessor or landowner may recover any unpaid rent for the lease from the fruits of the land, whereas under usufruct, the right to dispose of the produce lies entirely with the beneficiary of the usufruct.

54 Article 2972 describes the personal servitude as a right set up in favour of a certain person regardless of the possession of real property and which becomes extinguished with the person in whose favour the right was constituted, such as the person’s death. Velez Sarsfield, the author of the Civil Code gives the example of a hunting servitude as an instance of such a personal servitude. In the footnote to this article, Velez makes a distinction between typical servitudes, as those involving two properties or tenements, fully subject to the “numerus clausus” rule of property law explained in p. 21, and atypical personal servitudes which have more in common with contract law than real property law.

55 Article 6 of the law is strict in the term for which this right may be constituted. Any different term agreed upon by the parties will be deemed invalid and an unwritten clause without legal effect.

56 The right to own and exploit the forest would implicitly signify the transfer of the right to enjoy the benefits of any “service” provided by the
d. ii. With other persons occupying or using the land.

In the event that a person or legal entity other than the owner should hold a legal right to be upon the land, such occupancy should be subject to the terms of the existing contracts and agreements. With regard to third parties without a legal right to occupy the land, due attention should be paid to the Civil Code or the specific provisions of the Forestry Law.

Article 33 of Law 13723 states that no person may occupy fiscal forests, nor graze animals on forest lands, without permission from the competent forestry authority. Intruders may be evicted with prior notice and, if required, with the assistance of public force. Simple occupancy of forest lands will not be sufficient cause or give rise to any preferences in the right to a concession, although the general rules of prescription may apply.

d. iii. With users or occupants of adjacent parcels of land.

As stated before, the general rule is that adjacent landowners will not hold any special rights over a forestry property. Any actions on neighbouring land, whether forestry-related or otherwise may be contested in court in the event that they may represent a threat or hindrance to the normal use of property. In addition to the remedies that have been mentioned before, Article 2618 of the Civil Code establishes a general rule regarding the obligation to use and enjoy property in a reasonable manner and without causing excessive inconvenience to neighbouring properties. The grounds for this general obligation to cause no harm to others (sic utere tuo alter non laedas) were included in the 1968 amendment to the Civil Code with a view to introducing a limitation to the absolute definition of property law as conceived in the nineteenth century. The concept of an “excess to the normal tolerance between neighbours” is the source of legal responsibility and bears a strong similarity to the concept of nuisance in common law and “voisinage” in modern civil law systems. Under this provision, judges have wide-ranging powers to assess damages against a party in breach of article 2618, order the ceasing of harmful activities, or any other remedy that may be required. The law and jurisprudence also state clearly that possession of a legally valid administrative permit does not provide an excuse for causing harm or inconvenience to neighbours or third parties.57

Are existing laws sufficient to protect the interests of these other parties?

Technically the law is sufficiently clear so as to protect the rights of the various parties involved in any dispute. Rapid civil remedies exist and in theory provide the means for judicial relief to any threat to a legally guaranteed right. These remedies are the Civil Code real actions or “Actiones in rem” whereby a landowner or holder of a property right may resort to legally characterized actions in defence of these rights, such as a real or “confessory” action to defend a servitude or easement to which the holder of the easement is entitled over a third party’s property, or the negatory action to declare that no easement rights have been constituted or exist over a forestry property.58

In addition to these remedies, civil law and local procedural law allow for rapid and expedited remedies for all impairment or hindrance to a property right or any of its attributions. Interdicts may be filed to prevent a neighbour carrying out work which might threaten property or the construction of a new building forest such as carbon reduction. As a personal opinion, the fact that the law only creates this property right for 50 years may raise an awkward question regarding what happens to the carbon sequestered in the plantation after the 50 years. This is an ongoing debate in most private conservation circles with the issue of short-term agreements or easements.

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57 This article of the Civil Code is one of the most commonly invoked in environmental litigation, particularly in the context of industrial torts and land use planning violations that cause nuisance to neighbouring properties. Hypothetically, it could be used to stop a neighbouring property from using fire as an agricultural practice due to the risk that this might present to a forest plantation.

58 Argentine Civil Code, articles 2795 to 2800. The terms “easement” and “servitude” have been used indistinctly for the purposes of clarification, given the broadly similar nature of these institutions under common and civil law systems. In reality the technical term under civil law is that of servitude.
which may affect existing property rights. Possessory actions may be filed in the event of unlawful occupation or hindrance to the exercise of a property right.

Finally it should be stated that illegal occupation of a property (squatting) constitutes the crime of property usurpation under the Penal Code and may give rise to criminal prosecution.

Notwithstanding the existence of these legal remedies, it should be stressed that the formal court system tends to be slow and bureaucratic and may not always provide full protection, particularly in the case of land occupations with a criminal or political intent.59

e. Based on official records, are there major plans to host afforestation and reforestation projects in the country in the next 12 months?

No. From various interviews and conversations with forestry-related officials and private sector representatives, none of the forestry projects being undertaken by major corporations are as yet related to CDM.60 Most forestry companies are playing “wait and see” as regards Kyoto ratification and until clear market rules exist for CERs.

However, there is some considerable degree of interest in certain provinces in the potential for CDM as a way of leveraging projects with additional environmental benefits, such as the prevention of erosion or watershed protection. In 2003, Neuquén and Rio Negro provinces signed agreements related to the creation of a Patagonian Forest Council (Corporacion Forestal Provincial – CORFOPA) for the purposes of pursuing CDM opportunities in the field of forestry investments in the region. The proposal also contemplated setting up a regional mechanism for banking CERs and developing a regional forestry plan for the Patagonian provinces.61

As regards forestry projects in general, a recent study on the status of the forestry sector in Argentina, prepared by FAO, SAyDS and SAGPyA, identified various areas of potential growth of forestry in certain areas of Argentina, driven by future demand forecasts. The provinces of Corrientes, Misiones and Entre Rios revealed the greatest potential for future forestry development, although a positive perspective is also given for the development of sustainable forestry projects through management of native forests in the Chaco region.62

59 While land conflicts in Argentina are relatively circumscribed to certain areas where fiscal lands have been distributed relatively recently under various colonization schemes, or where there has been a tradition of informal occupancy, either by local families practicing subsistence farming or indigenous communities, with claims to traditional ownership, the recent experience of neighbouring countries such as Brazil and Paraguay should be borne in mind by forestry project developers. Due diligence in ascertaining the existence of potential land conflicts should be an important part of any CDM investment.

60 Most forestry projects were shelved after the 2001 financial crisis. It is only at present that there is beginning to be a renewed interest in forestry investments and projects. CDM may become an additional plus, with the Kyoto Protocol’s entry into force. However, if forestry takes off because of the purely economic benefits, it may be hard to show additionality, at least for projects with an underlying commercial rationale.


3. Overview of land-related legislation

a. In rough terms and only to the extent they pertain to lands that, based on their legal classification, are permitted to have afforestation and reforestation projects:

i. Please describe the system of land ownership and the rights that attach to land ownership (e.g., right to exclude others from entering the land, right to sell the fruits of the land, including CERs, and rights of succession to land), including the system of respecting pre-existing rights over the land (e.g., rights of indigenous peoples, rights of long-time occupants that could ripen into ownership).

Land ownership in Argentina follows broadly similar rules as those which apply in most other Latin American countries, with a legal system based upon Roman and continental civil law. The Constitution recognises the right to possess and enjoy private property, in accordance with the terms of such laws as may regulate the exercise of individual rights.63

Private property is inviolate, unless subject to expropriation or compulsory purchase in which case, a specific law is required and compensation to the person deprived of property must first be paid. Property Law in Argentina follows the general rule of civil law systems in adopting a “numerus clausus” system whereby the only legal rights to immovable or “real” property are those recognised explicitly by law. Real property rights must therefore be typified in the Civil Code and no rights in land may be created by bilateral contract unless such a right conforms to a recognised legal category under the law.64

Article 2503 of the Civil Code establishes several categories of real property of which the following are of most interest to CDM and forestry projects:

Dominium or ownership. This concept corresponds to ownership in fee simple under common law. In principle ownership implies the full enjoyment of property unencumbered by dismemberments or restrictions.

Condominium or joint ownership. Basically the concept of ownership is the same as in full dominium, except for the fact that the attributions are shared. Either or any of the co-owners have the right to a division of the property and petition to such effect.

Usufruct. The right to usufruct implies a dismemberment of the attributions of property by separating the power to perceive and enjoy the fruits of a property from the “bare ownership”. Usufruct in fact allows for a separation of the right to enjoy the benefits from the right to property. This real right is useful in permitting productive use to be made of a property by granting the rights to enjoy the products and fruits, without requiring full ownership.

Surface right to forestry plantations. This is a specific right created under Law 25.509, for the reasons that have been described above. In many ways it is very similar to the right of usufruct, in that there

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63 Article 17 of the Federal Constitution guarantees all inhabitants the right to private property. Article 14 states most of the basic individual rights to be enjoyed by the inhabitants of the country, such as the right to hold property. The final paragraph of this article states that the exercise of such a right must be in accordance with the regulations that pertain to its exercise. This is the basis of the concept of “Police Power” upon which most regulatory powers are based.

64 Article 2502 of the Civil Code establishes the general numerus clausus rule restricting real property rights only to such types as are described and characterized by law. Any right not fitting into a real property right definition may, however, be valid as a personal right. The category of right as a closed category applies to real property law. For this to occur, a definition of a CER would have to be included as an amendment to the Civil Code. This has not yet happened and is highly unlikely in the immediate future. Nothing however impedes defining a CER by contract between parties as a personal obligation. The difference is that in this last case it will not be possible to register the CER as a charge on land such as is the case with an easement or servitude. Constituting property as a real right rather than a personal right would among other things, result in its being registrable as a charge on land and in effect “dismember” the right to generate CERs from another party, e.g. a landowner would assign his right to generate CERs to the project developer.
is a dismemberment of property between the owner and the person entitled to enjoy and benefit from the fruits of the property. For this right to exist a forestry project must be approved in accordance with the terms of Law 25.580. In this sense, the surface right to a plantation is more specific than the general terms of usufruct, and certain provisions are more favourable to the forestry developer than the general rule of usufruct, such as the 50 year duration for the right to a plantation.65

The laws of inheritance in Argentina follow similar principles as those that exist in other civil law systems, whereby succession to property by a deceased person is transmitted mortis causa to all legally entitled heirs in equal share. Under the laws of succession a person may discretionally dispose of property up to one fifth of the total inheritable assets without hindrance. Any disposal of inheritance in excess of this legitimate inheritance share, may be contested by the heirs and in consequence be reduced or modified by judicial ruling.

Ownership may also be acquired by long-term prescription (usufructio). This institution may be of considerable interest to forestry project developers, in the event that the land upon which a project is to be executed may harbour long-term occupants. This is a case which, while not widespread, does exist in certain regions of Argentina. Any person peacefully and uncontestedly occupying land for an uninterrupted period of time (ten or twenty years, depending on the existence of good faith and sufficient title) may seek judicial recognition of this uninterrupted land tenure. These provisions of the Civil Code have been often used in cases where a landowner has died, heirs have not come forward, the State has not exercised its claim to take up vacant inheritances under the doctrine of eminent domain, and existing tenants have continued in possession of the property and exercised rights of possession, such as making payment of taxes or dues related to the property.66

As regards indigenous communities, Argentina formally recognised the pre-existence of its native communities in the constitutional amendment of 1994, although legislation dealing with the protection of native communities has been on the statute books for considerably longer.67 The powers to regulate indigenous rights issues and questions such as community land ownership are jointly shared by the Federal Government and the Provinces. Argentina is also a signatory to the ILO Convention 169, which guarantees indigenous communities the right to participate in the management of natural resources that exist upon native land. Most provinces with substantial indigenous communities have also enacted legislation complementary to the international agreements (ILO Conventions) to which Argentina is a party.68

Law 23.302 was enacted during the 80s and contemplated explicit recognition of indigenous communities and their legal representation by means of specific community institutions.69 Subsequent national and provincial legislation provided for adjudication of land to local communities in sufficient amount to meet local community farming, forestry, mining, industry or craftsmanship needs, in accordance with the particular situation of each community.70

65 Usufruct may be constituted for the lifetime of the beneficiary. However, in the case of corporate entities, usufruct may last no longer than 20 years (Article 2920, Civil Code).
66 The Civil Code contemplates two hypotheses. A ten year prescription period for cases where a person has acquired a property in good faith and with sufficient title (Article 3999), and a twenty year prescription period where uninterrupted possession can be shown, regardless of the existence of good faith or sufficient title (Article 4015). In the first case, a person purchasing land and failing to record the transaction in the land registry could seek to perfect his or her title by means of short-term prescription. The second case is more likely where long-term occupancy exists on rural lands which have been inactive from an economic perspective. A forestry project could well encounter such a scenario in certain areas of the country, with uncertain records of title or land registries.
67 Article 75, paragraph 17 of the Federal Constitution formally recognises the pre-existence of native ethnic groups and their rights to partake in the management of natural resources and cultural identity. The difference between the creation of a new “right” and the recognition of pre-existing indigenous communities’ rights to land is somewhat subtle, even when the practical outcome is very similar. By recognising the pre-existence of indigenous rights, fiscal land is vested in communities in possession of land, as if they had held the land originally. In a sense the recognition has retroactive effects by validating ancestral occupancy, as opposed to a judicial decision with effects for the future as of the moment of recognition.
68 These ILO Conventions were ratified by Law 24.701.
69 Article 2, Law 23.302.
ii. Short of ownership over land on which CDM AR projects can be implemented, what other rights can be granted over such land (e.g., in the case of government-owned land, licenses, concessions, and in the case of privately-owned lands, servitudes, leases)?

Please describe each right briefly (e.g., duration of the right, entitlements and obligations that come with the right, fees, if any, paid for the enjoyment of the right, documentation of the right). Which of these rights can co-exist with other land-based rights (e.g., license with an easement)?

We have already mentioned the real surface property right as a specific property right linked to a forestry project benefiting from the Forestry Investment Law. This system has a number of advantages in that it allows for a developer to enter into negotiations with a landowner whereby the landowner does not need to make an outright sale of his/her property, and the developer obtains sufficient certainty in his/her proper surface entitlement to seek out long-term finance. A holder of forestry surface rights may mortgage or offer the right as collateral to secure a loan agreement, for example.71 As stated before, the right to land surface for forestry purposes lapses after 50 years, but may be renewed for a subsequent period. As all real property, the right to land surface for forestry is registrable and may be validly enforceable against all parties (erga omnes) from the date of registration as legal title to the plantation.

Finally, as regards public land and forestry laws, it should be remembered that most provinces hold title to fiscal land within provincial jurisdictions as property within the private domain of each provincial state. In most cases the responsibility for the distribution and award of these public lands lies with local land authorities. As we have seen before, under the terms of the Forestry Law (Law 13.273), land may be given in concession to private operators for forestry use. In the past, land colonization was a key area in many provincial administrations, in view of the sparse population in many parts of the country, and also because of the large areas of public land available for these schemes. At present the opportunities for this kind of land colonization are considerably smaller than in the past.

In order to benefit from the terms of Law 25.080 on Forest Investment, when public lands are involved, the competent public officials require legal proof of land tenure. One of the requirements of article 2 of the regulatory decree 133/99 (Law 25.080) is that all beneficiaries must show evidence of ownership or rightful possession, such as title deeds to property and land affected by the investment, authorization and power of attorney supplied by the rightful landowner, long-term lease contract, notarized copy of a purchase and sale agreement, or an authentic permit for the occupation of fiscal properties pursuant to a land concession related to fiscal lands.72
Does this system of rights described above accurately represent what exists on the ground, or are certain forms of entitlement not given legal recognition?

Generally speaking, the system of property law as applied to land described above represents an accurate portrayal of most legal relationships between landowners, occupants or farming leases. In addition to the general description of private law institutions, attention should be paid to the various provincial regimes aimed at developing agricultural ownership through land colonization schemes. These schemes are practically non-existent in the traditional farming heartland provinces of the Pampa region, but are a reality in the more remote regions or younger provinces where such colonization schemes have been a way for the provincial administrations to distribute fiscal land to small farmers.

It should also be stated that in some of the provinces where agriculture or forestry has not been highly developed in the past, title to land in property registries is often precarious. This circumstance has led to some serious, though focalized cases of conflict between traditional occupiers of land and large agricultural corporations with recently purchased land title. Given these circumstances and the existing CDM requirements as regards local community rights, it is highly unlikely that a forestry project under CDM would be developed in areas subject to this kind of legal risk. Proper due diligence should uncover these potential issues at the initial stages of any forestry investment.

iii. If there is a gap in the law, how could this complicate CDM AR projects in the country of study?

Please see answer to previous question. In the event of uncertainty to land title, or potential conflict with traditional occupiers unable to demonstrate formal title to land, it is highly unlikely that a CDM project would prosper.

b. Will land need to be reclassified and land use plans need to be changed in order to accommodate CDM AR projects?

As stated previously, land use and development planning are considered key instruments in sustainable development. This is evident from the emphasis that the General Environment Law places upon Land Use Planning as one of the key “threshold” instruments for a national environmental policy. However, as this discussion tends to show, formal land use plans are not yet strong instruments for environmental policy in Argentina. Up until the present, land classifications have been mainly a guide for technical decisions regarding soil conditions and agronomic aptitude for forestry development, as opposed to a formal land use scheme with concrete legal consequences for landowners.

In the future, and in the event that a major public policy decision is taken as regards the key importance of a federal land use policy for promoting sustainable development, based upon the “minimum standards” requirement in article 41 of the Federal Constitution, there will probably be a strong need for the adoption of land use plans that contemplate forestry and the potential of land for implementing CDM projects.

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73 During the early nineties, most property registries in the more developed provinces underwent programmes aimed at overhauling all the manual registrations of title and cadastre identification with computerized systems. In part these initiatives were aimed at organizing such registries with a view to improving land tax collection. These programmes however have not always been carried through in some of the more remote provinces. Land ownership according to property registries is therefore not always reliable.

74 The high prices of soy have led to expansion of agricultural frontiers in marginal areas, including Yungas cloud forest, Chaco parkland and Santiago del Estero scrub and dryland forests. In many cases traditional occupiers of historically low value marginal lands have been displaced by conversion to modern agriculture. Absence of formal title on behalf of families who have occupied land for generations has been one of the main causes of this rural conflict with modern agribusiness.

75 Law 25.675.

76 The National Institute of Agrarian Technology, INTA, has developed an extensive soil atlas for the purposes of agricultural extension and research work. INTA studies regarding soil aptitude are used by the Forestry Authorities when evaluating AR projects (Telephone communication with Forestry officials at SAGPyA).
However, until such policies become explicit, business decisions as regards the aptitude of land for forestry projects will be taken on the basis of merely technical classifications with little or no weight from a public policy perspective.

4. **Review of carbon sequestration projects in the country (or in a country in the same region applying a similar legal system)**

   a. Please describe past (if any) and present carbon sequestration projects in the country (or in the region applying a similar legal system, in case there were no such project in the country of study), including which stakeholders participated in their development and implementation. Please focus on AIJ or PCF projects, if there are any in the country of study. If the projects are too numerous to describe, please select those that are, in your best judgment, most relevant to this study.

   For the purposes of describing the status of carbon sequestration projects in Argentina, it is worth looking at some of those presented under AIJ, as well as a brief review of forestry projects currently submitted for evaluation. In this latter case there are to date no projects up and running, and most are in the preliminary stages of assessment. A full and exhaustive review of all forestry related carbon projects is impossible at this stage, whereby a selection of those bearing most relevance to the overall project have been selected.

   In the province of Neuquen in Northern Patagonia, there is a fair degree of experience and knowledge regarding the development of carbon related projects. During 1998 and 1999 the German Institute for Environment and Development (IUE) in conjunction with CIEFAP, the Patagonia Forestry Extension and Research Centre, offered agreements to private forestry companies in Neuquen, Rio Negro and Chubut for the purposes of developing the carbon potential of plantations. The agreements provided for an assignment of the rights to trade the carbon derived from forests at a value of between 60 and 100 US dollars per hectare, without prejudice to the right to the timber or actual ownership of the land. By the terms of this agreement IUE purchased the sole and exclusive right to generate and benefit from CERs, if any, derived from the forest lands. IUE assumed all the transaction costs of project registration, validation and verification, before the AIJ and, in the future potentially before CDM.

   About six of these agreements were concluded, involving private and public sector producers in all three Patagonian provinces mentioned and with different project profiles. In some cases, the projects involved exotic forest plantations (Pinus Ponderosa), while in others native forest management and plantation with native species (Araucaria Pehuenia) was preferred, although the size of native forests was considerably smaller than those involving commercial forest species.

**The Prima Klima Project**

In 1999, Prima Klima, a German NGO obtained provincial approval for a forestry project in the province of Chubut, involving the protection of native forests, recovery of degraded land and the sustainable management of the Fontana and La Plata lake basins in the Andean foothills of Patagonia. The project was

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77 But with some explicit obligation to maintain minimum levels of carbon stock.

78 Chidiak, Martina, Moreya, Alejandra and Greco, Carlos, “Captura de Carbono y Desarrollo Forestal Sustentable en la Patagonia Argentina: Desafíos y Sinergias”, CEPAL, Universidad de San Andres, CENIT, Buenos Aires, 2003, p. 51. Personal communication with Martina Chidiak. One of the companies involved in these agreements was CORFONE a company owned by the Province of Neuquen. The price paid for the right to receive CERs, if any, is relatively low if translated into values per ton of C, taking into account the entire project cycle. According to CIEFAP estimates, IUE would be paying around 0.12–0.20 US$ per ton of CO2 equivalent, well below current price estimates. However, the low value paid for the carbon potential reflects the uncertainty in the market and the risks involved in developing a project. The up-front payment, while low in comparison to the potential value derived from the generation of CERs, represents a tangible immediate benefit for a landowner who still retains the right to the land and all the other resource based-benefits.

79 Procedures exist in Argentina for the purposes of screening the introduction of exotic species and ascertaining their potential effects upon local ecosystems. Federal Environment Secretariat Resolution 376/97 requires an EIA for the introduction of exotic species. The regulation is very...
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a joint effort by Prima Klima, Fundacion Bosques de Patagonia, a local NGO and CIEFAP, a local forestry research and agricultural extension center. The project involved sustainable management of native ñire and lenga forests on a surface of around 120,000 hectares, with the potential to capture some 64,000 to 116,000 tons of carbon per year over a 50 year period. As already described, the Prima Klima project ran into serious NGO and local community opposition which finally led to loss of funding.80 Although the project is still active, current reports would indicate that it has in practice been abandoned.

The Rio Bermejo Carbon Sequestration Project81
This project is a sustainable management and forest protection programme located in degraded mountainous forest and neighbouring agricultural lands in north western Argentina. The project will combine tree plantations on agricultural lands, enrichment planting and sustainable management of degraded forests subject to past logging, and forest preservation to increase carbon sequestration. The major goals of the project are to sequester carbon to help reduce greenhouse gas emissions, to protect biodiversity, and to offer sustainable economic alternatives to the local communities.

The participants of the project involve three organizations from Argentina, Fundacion ProYungas, a research and conservation NGO active in the Yungas biome, The Tucumán University Yungas Ecology Research Laboratory (Laboratorio de Investigaciones Ecológicas de las Yungas – LIEY), the La Plata University Laboratory for Ecological Research (Laboratorio de Investigaciones Ecológicas de Argentina – LISEA), and TROPI-CO2, Inc., a US institution involved in project development, administration, financing, technical assistance, monitoring and verification.

The project involves approximately 70,000ha of forest and degraded land and it is estimated that the project will constitute a reduction of 4,345,500Mg C in GHG emissions over a 30-year period. The project involves on-the-ground research to be carried out by the two university research institutes mentioned, aimed at calculating aboveground biomass for the ten most common tree species and the related soil carbon cycle dynamics.

It is estimated that all external verification of carbon sequestration will be conducted by SmartWood, Inc., a US-based FSC certification entity. The project aims at a conservative calculation of both baseline data and sequestration rates, and as an added insurance against unforeseen eventualities such as fire or depredation, no carbon credits will be claimed during the first year. The project also aims at donating the forest area to the National Parks system or a suitable NGO, so as to ensure sustainable management of the forest once the project is completed. A trust fund should be set up to cover all future operational expenses of the reserve.

general however and although in theory should be complied with by all forest developers seeking to introduce new exotic species, is usually not given consideration by the Forestry Authorities. When seeking approval for a forestry project under the provisions of Law 25.080, SAGPyA Resolution 22/01 provides for broad discretion for the authority evaluating a project to request additional technical information on such issues as the potential impacts or risks in the introduction of exotic species. According to information provided by SAGPyA officials, there have been several instances where this has occurred with the introduction of Asian teak into Argentina, and studies or technical opinions have been requested from institutions such as the National Agricultural Technology Institute (INTA) or relevant universities, in addition to studies carried out by the project proponents. In this regard, there is potential for enhancing the interaction between the agriculture, forestry and environmental officials at the federal level for the purposes of improving coordination in this approval procedure.

80 Opinions differ considerably regarding the merits of the Prima Klima-CIEFAP Project. By and large, opposition to the project arose from Greenpeace, due to its well documented and critical position to carbon sinks in developing countries as opposed to emissions reductions in developed countries (see www.greenpeace.org.ar) and other local groups who expressed concerns over the poor communication surrounding the project’s aims with local stakeholders. Other criticisms have been levelled at CIEFAP for confusing the role of promoting agricultural and forestry extension with that of project developer. See Chidiak, Martina, Moreyra, Alejandra and Greco, Carlos, “Captura de Carbono y Desarrollo Forestal Sustentable en la Patagonia Argentina: Desafíos y Sinergias”, CEPAL, Universidad de San Andres, CENIT, Buenos Aires, 2003.

81 For a description of the Project, see http://unfccc.int/program/coop/aij/aijact01/Argusa-01-01.html
In addition to capturing GHG emissions, the project will help protect the threatened Yungas ecosystem and restore vital habitat for endangered species such as jaguar, tapirs, and primates. The local community of Los Toldos in Salta will also play an important role in the management of the project. A major effort will be made to increase the productivity of the pastures and agricultural lands used by the community in order to reduce the currently strong pressures on existing forest for conversion to agriculture and thus support the local economy.82

The project is an extremely ambitious attempt at achieving carbon sequestration benefits in addition to collateral social and environmental benefits. Although the Argentine Government granted approval and a letter of consent to the project in September 2000, funding for the entire proposal has not been secured to date, in part due to uncertainty of afforestation and reforestation projects from a carbon revenue perspective – i.e. because the project would not be eligible under the current CDM rules.83

Current Afforestation and Reforestation Projects
There are a number of ongoing projects related to carbon sequestration, although not all of them are in the process of submitting a proposal to the OAMDL, or are directly related to the sale of CERs. The projects described below are a sample of what different stakeholders in the academic, applied research, NGO and private sectors are aiming to achieve for CDM activities.84

- CIEFAP,85 for example, is currently undertaking a research project aimed at identifying the full potential for CDM forestry projects in Patagonia, as a means of enhancing the regional possibilities for forestry on degraded ranching land.86
- Two pine and bamboo forestry projects submitted by an NGO, Fundacion Crecer Juntos, are currently under evaluation by the Forestry Working Group at OAMDL. These are supposed to be unilateral projects, one of which is being executed in accordance with the terms of Forestry Promotion Law 25.080. To date no decision has been made on the eligibility of either of the projects.
- A forestry project in the province of San Luis, submitted by Emprendimientos Forestales La Carolina. The project involves afforestation with commercial value species on 4,500ha of former grazing land near La Carolina. The project is a unilateral investment of around US $ 5 million and a project cycle of 30 years. The project also aims at maximizing co-benefits, such as watershed protection, prevention of soil erosion and social benefits by improving and diversifying the local economy.
- An NGO-run project aimed at carrying out native species plantations in the province of Santiago del Estero. The project involves afforestation over some 3,000ha spread over 10 municipalities in the Province and also aims to strengthen local capabilities with forestry and nursery skills in the production of slow growing native species.87

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82 Deforestation due to encroachment of agricultural frontiers is a very real threat to many valuable ecosystems in the region. (See WWF, Forest Conversion Initiative, info.conversion@wwf.ch). The Rio Bermejo proposal is also expected to have a number of positive non-greenhouse gas environmental impacts. The forest protection and reforestation activities associated with the project will assist in protecting the biodiversity of the region. There are two national parks (Baritú and Calilegua) which contain tropical montane forest in the adjacent region. If present land use practices continue these protected areas could easily become islands in a landscape dominated by agriculture and degraded forest.
83 Conceivably, the project could benefit from the incentives regimes described above. However the rate of return on the project was deemed to be too low, even with the planting incentives.
84 Information obtained from OAMDL (see oamdl@medioambiente.gov.ar) and personal communications with public officials and various climate change stakeholders.
85 Centro de Investigación y Extensión Forestal Andino Patagónico (Centre for Research and Extension for Andean and Patagonian Forests), Esquel, Chubut, Argentina.
86 This project is currently being executed by CIEFAP, INTA, the National Institute of Agricultural Technology and the Chubut Department of Forests, with German (GTZ) funding.
87 The project has been conceived by Fundacion del Sur and Grupo Ambiental para el Desarrollo and is scheduled to receive ODA funding from Italy. This may present some difficulties from the perspective of CDM project eligibility.
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- A unilateral project aimed at developing 2,700ha of afforestation with exotic species in the Parana Delta region, under the Forestry Promotion Regime (Law 25.080). The project has been conceived by private developers with a view to also obtaining benefits from the forest’s non-timber resource, such as nut and honey production. The project also aims at obtaining FSC certification for its operations.

b. What are the most important lessons that can be learned, if any, from these carbon sequestration projects, which can be applied to CDM AR projects, especially as they relate to the issues set out in this list?

In many ways it is premature to establish a pattern for the outcomes of afforestation and reforestation projects in Argentina. The initial experiences under AIJ are illustrative of the difficulties facing any project proponent. The Prima Klima project illustrates the need for good communication and networking with local communities in order to dispel suspicions and fears regarding foreign initiative and more particularly those funded by developed countries. Most of the people interviewed in connection with this project revealed the lack of clear information regarding the project. In such a climate of uncertainty, NGO and media pressure probably killed the project even before it was permitted to reach the stage of an objective and impartial evaluation. A clear lesson to be learned from this case is the need for meaningful stakeholder involvement at an early stage and improving general awareness among the population as to the strengths and weaknesses of CDM.

In the case of Rio Bermejo, the main difficulties lie in securing adequate finance for a costly, though well conceived project. Apart from the difficulties with AIJ and the uncertainties for any US-based partner, given the current climate change policies of the Bush Administration and the future of the Kyoto Protocol, the project probably reveals a lot about the difficulties that any forest management project involving native and often slow-growing species face. The rate of return on investment for a long cycle (50 plus years) project is just too low for most initiatives aimed at enhancing the Internal Rate of Return (IRR) for a commercially viable forestry project with additional environmental benefits.

As regards the more recent projects submitted or under discussion among forestry companies in Argentina, it is too early to draw meaningful conclusions at this stage. Clearly, the “long cycle” issue may present an obstacle for most investors, particularly as regards slow-growth native species, except for corporations with deep pockets and a fair degree of philanthropy or social responsibility as a driver. In addition to this, the costs of setting up and validating a sequestration project may be considered to be a major source of discouragement to most small or medium sized companies.

c. If no carbon sequestration projects have been implemented in the country, which countries’ experience could the country of study benefit from the most?

Carbon sequestration is an area where there are fewer projects available for comparison than emissions reductions projects. It is highly probable that the comparative experiences which will be most taken into account in Argentina will be projects submitted to the PCF and, more significantly as regards sequestration and additional biodiversity related benefits, projects submitted for eligibility to the World Bank’s BioCarbon Fund. The neighbouring country with a clear and proactive policy as regards forestry investment and carbon sequestration projects is probably Bolivia. Costa Rica is also an example as regards proactive forestry and climate change public policies.

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88 The existing costs for validations and approval as established by the PCF, for example, are an obvious barrier to any small project developer.
89 Bolivia has adopted an active forestry development policy involving promotion of native forest management, as well as commercial plantations. During the nineties, Bolivia enacted wide-ranging environmental legislation (Law 1333) and various sector specific regulations aimed at
d. In your opinion and based on your research, what types of projects will be implemented under the CDM? Are unilateral CDM projects planned?

There is a considerable amount of interest in Argentina regarding CDM projects, notwithstanding the uncertainty regarding Russian ratification of the Kyoto Protocol. However, given the current status of CDM projects in Argentina and the major introduction of combined-cycle gas technology in the energy sector during the early 90s privatization and deregulation, it is highly probable that most CDM projects will be initially concentrated in the waste management and landfill gas sectors. In the event that CDM proves to be a viable alternative in improving the rate of return on investment in these areas, it is probable that carbon sequestration projects mainly in the forestry field will once again attract the interest of investors, possibly even within the first commitment period.90

Finally, as regards the possibility of developing unilateral CDM projects, much will depend upon the macroeconomic conditions in which business decisions in general are taken. There is no shortage of access to capital within Argentina. However the economic situation and financial uncertainty may well prove to be a negative condition to the development of CDM projects, unless the project can ensure that the future flow of CERs will be easily marketable. If conditions are favourable, it is likely that unilateral forestry projects will be developed, probably with commercial timber purposes as an initial objective, but with CDM sink potential built into the financial and technical design.

e. Which stakeholders (e.g., government, private sector, communities, NGOs) will have an active role in the planning, design and implementation of CDM projects (both unilateral and bilateral)?

One of the purposes of the OAMDL is to attract investments in CDM. Therefore, there is a clear role for the DNA as a promotion agency for unilateral projects. Apart from being a regulator and promoter, the government may also be a project proponent. A local government or Province could, for instance, push for a CDM project for social or additional environmental benefits.

CDM projects will be successful in Argentina if the private sector gets proactively involved in:

- The design and implementation of projects intended to improve the rate of return of new and innovative investments in the fields of alternative energies, clean technologies or A and R projects.

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90 There is no clear source for these assumptions. However, based upon interviews with various market players and analysts, the general consensus is that landfill gas projects will be the “ripest fruit on the tree” as regards projects, followed later on by forestry projects. (Interviews with O. Girardin of Fundacion Barioloche and Horacio Ethcegoyhen of Ecossecurities (Brazil), Ltda.)
Implementation of CDM projects with the sole purpose of obtaining CERs. In this case, the principal driver underlying business decisions will be corporate image or social responsibility, prestige or public relations instead of the mere rate of return.

There may be a niche in the future for small community or NGO-led projects in the forestry field where such initiatives may produce tangible co-benefits, such as watershed protection, biodiversity conservation or diversification of production, as is contemplated under the provisions of the BioCarbon Fund.

B. The CDM Project Cycle

5. CDM AR project design and formulation

a. What substantive standards (e.g., species of trees to be used, types of land on which projects can be implemented), if any, are used for AR project activities:
   i. as required by law?
   ii. used in practice although not required by law (e.g., in development agency funded projects)?

There are no substantive requirements regarding the use of species, mandated by law for afforestation and reforestation projects. Each project would be assessed on its merits and would need to demonstrate technical feasibility in accordance with land conditions, adaptation of species to climate, etc. Given the federal structure of Argentina, considerable weight would be given to policies or programmes in place in each provincial jurisdiction.

From a technical standpoint, there is a considerable amount of literature, soil atlas classification criteria, and studies by research institutions and public agencies which would be highly recommendable references when submitting proposals for a CDM AR project.91 There is an underlying concern that the existence of guidelines on species, land classification and other technical issues that are too strict may end up ruling out the viability of certain projects because of failing the test of additionality.

An example of this would be the case of a land use plan with strict criteria and soil classifications having binding effects on a landowner’s actions and decisions, as opposed to land classification which would only have weight as regards management decisions, from a strictly technical point of view. A land classified as apt for forestry use, would in effect be setting the legal baseline against which environmental additionality would be measured, given the fact that the land would be practically useless for other purposes. More flexible guidelines would therefore help to promote afforestation and reforestation on marginal or degraded lands, where additionality would be much easier to demonstrate.92

b. Under existing laws, what kind of study, at the minimum, must a proponent of an AR project undertake? Do the requirements for such study provide guidelines for an environmental impact analysis? A socio-economic impact analysis?

This question merits an answer considering two separate government levels, provincial and federal, and in turn, at the federal government level, depending on whether the perspective is purely a forestry or CDM sequestration oriented.

91 There are many examples of such technical documents: See “Atlas de Suelos de la Republica Argentina”, UNDP, SAGyP and INTA, 1990. Also Giunta, Ricardo, Edaphic Forestry Catalog (Nomenclador Edáfico Forestal), SAGPyA. More recent work has been done for both the Environmental and Forestry Authorities, such as the National Report on Argentina’s forests, prepared by Braier, Gustavo, (FAO, SAGPyA and SayDS, Buenos Aires, 2004).

92 Personal interview with Hector Ginzo, CDM and forestry expert, currently with the Foreign Ministry.
As stated before, the basic rule under the constitutional arrangements in Argentina are that regulation, and hence permitting and approval procedures, are provincial. Most Provinces have regulations and requirements in place as regards evaluating the environmental consequences of a forestry project, either as a technically-based procedure prior to administrative approval, or as an instance within the decision making procedure, including stakeholder participation. Under the terms of the General Environment Law 25.675, it should be remembered that EIA and public participation procedures for projects with a “significant” environmental impact are compulsory “threshold” standards throughout Argentina. Although the exact definition regarding the kind of projects subject to EIA and the extent to which forestry projects must conform is not yet clear and vary in accordance with provincial legislation, it is to be expected that COFEMA will elaborate on these issues in the near future.

In the context of CDM, compliance with all legal requirements is a basic consideration for project approval, following standard CDM procedures. The DNA will therefore be committed to ensuring that a given project complies with all applicable local legislation.

From a forestry perspective, the Forest Promotion Regime (Law 25.080) specifically requires an EIA and SIA to be submitted for approval to be given. In view of the decentralized system adopted by the Agriculture Secretariat, these assessments will therefore be approved by the competent provincial authorities, insofar as the respective province has stated its adherence to the Forestry Promotion Regime.

c. If there are guidelines:

i. Are the guidelines for an environmental impact analysis different from those that are required by law for an environmental impact assessment?

ii. Are the guidelines for a socio-economic impact analysis different from those that are required by law for a socio-economic impact assessment?

There is no difference between the guidelines for environmental impact analysis and those for environmental impact assessment, nor for socio-economic impact analysis and socio-economic impact assessment.

Guidelines may vary from Province to Province. However, Forestry Promotion Law 25.080 establishes in article 5 that all forestry or forestry and industrial projects wishing to benefit from the tax stability regime must include an environmental impact assessment and ensure that all adequate measures are taken to give maximum protection to the forest. The law also states that these measures will be evaluated by the Environment Secretariat, so as to ensure that sustainable development practices are followed. In this sense the text of Law 25.080 sets a useful precedent in mandating inter-agency collaboration, given that the enforcement authority is the Federal Secretary for Agriculture, Livestock, Fisheries and Food.

Article 5 of the Regulations for Law 25.080 states the details and contents of an environmental and social impact assessment. These assessments are obligatory for all projects over 100ha and must include the following items:

- Executive summary of findings;
- Legislation, institutional background and EIA antecedents in the Province;
- Baseline description of regional natural resources, prior to the project;
- Characterization of positive and negative impacts in the area of influence;
- Alternatives to mitigate, manage or control negative impacts; and
- Proposed monitoring and control programme and management measures.

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93 Decree 133/99, article 5.
94 Most CDM AR projects are expected to be of this size.
In accordance with the decentralized federal system for managing the forestry promotion regime, the EIA must be approved by the provincial authorities. Local guidelines may also be prepared by the provincial authorities as regards mitigating measures. When an EIA for a project does not receive express approval within 60 days of submission, it will be deemed to have met the standards without further requirements.

Regulatory Decree 133/99 sets out additional requirements for the EIA and Social Sustainability Evaluation in article 24. In order to be eligible for the benefits of the regime, projects must present studies showing the environmental and social sustainability of the project, in addition to technical feasibility and economic viability. The wording of the decree with respect to social sustainability is particularly sparse, with a simple statement to the effect that in the event of the project having a negative impact, especially as regards indigenous communities, “special attention must be paid to corrective measures, so as to neutralize or render a positive impact”.

In essence, social aspects are a section of the EIA itself and not an independent assessment. The legislation of the province of Salta makes an explicit reference to SIA, but this is an exception to the general rule.

It should be stated that no explicit provisions are made in the law for public participation. Given the decentralized nature of the Forest Promotion Regime, it should be understood, consistently with Argentine constitutional and administrative law, that such requirements will be implemented at the provincial level in accordance with most other procedural requirements. In this regard, and as stated elsewhere, the requirement for public participation should be considered a “minimum standard”, pursuant to the provisions of the General Framework Environment Law and therefore a sine qua non condition for approval, notwithstanding the absence of specific requirements for public participation in some provincial legislation.

Law 25.675, the General Framework Environment Law, establishes in article 19 that “Every person has the right to be consulted and to give opinions in administrative procedures of a general incidence...related to the protection and preservation of the environment...”. Article 20 requires that relevant authorities should institutionalize consultation procedures or public hearings as obligatory instances prior to the permitting or authorization of activities with significant or potentially negative effects on the environment. Finally, article 21 contains a general requirement that public participation must be mainly assured in environment impact assessment procedures and during the preparation of land use plans and programmes.

The requirement for public participation in decision making is a cornerstone of environmental policy in light of the new institutional arrangements set up after the 1994 Constitutional amendment. Given this, and the additional fact that stakeholder involvement is a necessary condition for CDM project approval, there is a clear legal obligation to ensure adequate and meaningful public participation in all CDM approval procedures.

In the context of the forestry promotion scheme, the regulatory decree allows for small projects (under 100ha) to be exempt from EIA requirements, unless otherwise treated under local law, or for regional assessments to be carried out by universities, public research institutions or outreach organizations such as INTA (Instituto Nacional de Tecnologia Agropecuaria), as and when required by local regulations. The terms of the law, in fact, allow for a fair degree of discretion in the case of small-scale projects, so as to ease the burden and cost to small developers.96

95 Under these minimum standards requirements established by the General Framework Law on the Environment, objections raised during a public hearing or other similar public participation mechanism law are not binding on the public authorities. However, there is an obligation to state the reasons for ignoring or failing to take into account any objections raised by the public (Article 20, final paragraph). In other words, there is an onus on the decision maker to ground any decision taken in the context of contrary views.

96 As stated before, there is a clear need for introducing more interagency cooperation to ensure that EIA requirements set up for forestry projects also meet the concerns and requirements of CDM project approval and vice versa. There is also a strong practical incentive in reducing unnecessary duplication of permitting requirements, and thus increasing the already high up-front costs of setting up a CDM project.
d. If there are no guidelines, what default technical guidelines could the project participants follow which, in your opinion, would be acceptable to the host country?

Guidelines for EIA are widespread in Argentina and most provinces already have a sophisticated system in place with instructive manuals for preparing assessments, checklists, etc. In the event that a provincial regulation is silent on a particular technical area, the proponent could resort to accepted industry practices, or preferably any acceptable multilateral agency criteria, such as those used by the World Bank, Inter-American Development Bank or special entities such as the PCF or BioCarbon Fund.

Guidelines on Social Impact Assessment are not as widespread in Argentina, at least at the administrative level as a tool for project approval. There is a fair amount of methodological experience among public sector decision makers, but most of it is related to urban and service oriented projects. In this case, proponents would be required to submit a methodology, based upon relevant comparative practices, such as those employed by the EU for performing SIAs. Some provinces have taken a lead in developing criteria for social impact analysis or assessment and, in these cases, guidelines are easier for project proponents.97

e. How is the term “significant impact” defined by the host country’s law? Is this the criterion that triggers the need for an environmental and/or socio-economic impact assessment, or does some other criterion trigger this requirement? Is there a list of projects that require an environmental and/or socio-economic impact assessment? If there is such a list, are afforestation and/or reforestation projects included in such list?

The term “significant impact” has led to considerable conflict in the interpretation of EIA legislation. In some cases, the dispute has led to litigation and even strong pressures to modify the text of the Law.98 The methodology for screening a project varies from Province to Province. In some cases, there is a system based upon a double “checklist”, along lines similar to that adopted in EU Directive 337/85, with a list of major projects requiring a compulsory EIA, and another list of projects where the EIA will be subject to regulatory conditions contingent on size, location, technologies, etc.

In other Provinces, an attempt to replace the discretion in the former “double list” system has been made by introducing a points system with objective parameters. Under this regime, a formula automatically screens a project based upon supposedly “objective” criteria, such as size, location, number of employees, energy consumption, etc. The second system tends to work reasonably well for industrial facilities, but may not be the best alternative for evaluating issues such as biodiversity or soil erosion, which are typical in forestry projects.99

EIA for forestry projects is therefore considered differently according to the regulations in force in each province. A few examples of provincial EIA regimes illustrate the variations in the approach to EIA requirements.

In the case of Santa Cruz, Law 2658 sets out the framework for EIA and defines environmental impact as “Any net positive or negative change in the environment as a direct or indirect consequence of anthropogenic actions which may produce alterations liable to affect the health and welfare of present and future generations, the productive capacity of natural resources, and essential ecological processes.”100

97 Province of Salta, General Environment Law 7070 and Regulatory Decree 3097/00. Chapter VI contemplates Environmental and Social Impact Assessment as an instrument for environmental management and decision making. Public participation is contemplated throughout the process.

98 In the City of Buenos Aires, this discussion led to the amendment of Law 123 on EIA with a view to eliminating the “grey” areas where interpretation of the magnitude of an impact proved to be highly controversial. Although the issues in an urban district such as Buenos Aires are not applicable to this study, the problems arising from the definitions of “significant” or “relevant” impact are very similar.

99 Cordoba Province General Environment Law 7343 is a good example of the double list or “double annex” system. Buenos Aires Province Law 11.459 on industrial facilities EIA is a good example of the latter.

100 Article 2.
Articles 3 and 7 of the Law describe activities subject to EIA and provincial review in extremely broad terms which will require regulatory fine tuning in the future.\textsuperscript{101}

In the case of the province of Salta, EIA is regulated under Law 7070 and its regulatory Decree 3097/00. Annex I to the regulations contains a list of activities subject to EIA, among which the following are of clear relevance to AR projects: protected forest reserves, agroforestry programmes, economic utilization of timber, wood or forestry products, deforestation for agricultural expansion and forestry.

The province of Santa Fe has legislation in place for both forestry protection and EIA. Law 11.121 is a wide ranging law dealing with forestry promotion and environmental protection, including community participation in forestry related activities.\textsuperscript{102} More recently, Law 11.717 set out the general framework for EIA and environmental management in the Province. Decree 101/03 set out the guidelines for carrying out the assessment of projects subject to EIA requirements. Annex 2 lists various categories of projects related to forestry, such as native forest management, forestry, reforestation, timber extraction and other related forestry activities.

In the case of Neuquen, Environmental Protection Law 1875, with its various amendments and regulatory decrees, establishes the framework for EIA for projects carried out within the Province’s jurisdiction. Article 7 of the Law establishes a broad definition of human induced activities requiring EIA. Regulatory Decree 2656/99 provides detailed guidelines for EIA, depending on the category and type of project. Annex 4 of this decree requires an environmental report for removal of natural vegetation if under 5 hectares, and reintroduction of native species, as required by the provincial authorities. Annex 5 of the same decree requires a full EIA, prior to commercial development of native forests and plantations of artificial forests, and changes of use in natural protected areas. Removal of natural vegetation in areas over 5 hectares is also subject to a full EIA.

The province of Buenos Aires has established guidelines for EIA in its framework legislation on environmental protection (Law 11.723). Annex 2 to the law establishes that forestry projects and forest management will be subject to EIA and permitting requirements as established by the Provincial Authorities.\textsuperscript{103}

As described above, however, it should be remembered that the Forest Promotion Law (25.080) requires an EIA in all cases, except for small sized projects, i.e., those under 100ha. Implicitly, the law has established a threshold for “significant impact” projects, based upon the size of the forestry plantation. The regulations enacted pursuant to the law, however, have left the provinces to decide the details of implementation of EIA for projects under 100ha in each case, by allowing for the involvement of academic and official research institutes in the development of studies on a regional basis, or in relation to land use plans.\textsuperscript{104}

\textsuperscript{101} Article 3 refers to activities with the potential to “significantly” affect natural resources or the environment. Article 7 furthermore states that “…The following activities will be considered capable of modifying the environment of the Province; a) ...That directly or indirectly contaminate soil, water air, flora or fauna or other natural or artificial components of the environment...” The list continues with other activities which may affect watercourses, topography, generate waste, etc. Forestry is not specifically considered, although future regulation will no doubt define under which circumstances forestry may affect natural resources significantly.

\textsuperscript{102} Articles 12 and 13 of the Law require that a permit be issued by the Natural Resources Secretariat for all work involving deforestation. A study must be prepared with professional support indicating the management requirements for forestry work with a duty to carry out reforestation with relevantly apt species.

\textsuperscript{103} The legislation was enacted in 1995, but to date implementing legislation has not yet been enacted. Until detailed regulations are in force, the EIA requirements are not yet operational.

\textsuperscript{104} Article 5, Regulatory Decree 133/99. The regulation has deliberately left it up to each province to decide how this EIA for small sized plantations will be carried out. The reference to regional land use plans reflects a forward-thinking legislative and environmental policy agenda, allowing for an overall EIA to be carried out when small projects are involved. This may be of particular use, when there are a multitude of small-scale projects under development, where each one individually considered is under the threshold of the legal requirement, yet in conjunction, significant and cumulative environmental impacts may occur at the landscape scale.
In conclusion, it is safe to state that, as a general rule, EIA will always be a requirement for forestry projects, when the developer is seeking the benefits of the forestry promotion scheme. Even when the forest promotion scheme was created by a national regime, the federal government has delegated implementation to the respective provinces. If the project is not contemplated under the forestry promotion regime, EIA will depend very much upon the exact situation in each provincial jurisdiction.105

f. Which government institution approves the environmental impact assessment? The socio-economic assessment? The mitigation plan to address projected negative impacts?

As stated in the previous response, each Province has its own EIA regime and the conditions and requirements will vary from one jurisdiction to another. Even in the case of a Federal regime, such as that established under the Forestry Promotion Law, the actual task of processing and approving the EIA will fall to the provincial authorities, given that the system is run on a decentralized basis.

g. What types of AR projects are recognized by the host country’s law (e.g., agroforestry, monocultural or mixed industrial plantations, forest landscape restoration projects, for instance, on degraded or protected lands, community forest projects, other AR projects with focus on timber production, biomass energy, watershed management etc.)?

At present, there are no clear cut restrictions with respect to the modality or design of an afforestation or reforestation project. As may be seen from the projects submitted to the OAMDL for consideration, the species and design may vary from one case to another. From informal conversations with officials at the Environment Secretariat it is to be imagined that forestry policy will tend to favour projects involving native species or with substantial co-benefits, either from a social or environmental perspective, such as those contemplated under PROSOBO, the Social Forests Programme.106

Article 4 of Decree 133/99, pursuant to the Forestry Promotion Law, states that when forestry projects involve afforestation in native forest areas, provincial authorities may recommend their approval only if it is possible to furnish proof of the sustainability of the project as regards the natural resources involved, maintenance of biodiversity, and an increase in the social benefits derived from the project.

There has been a recent interest in developing forestry projects as part of biomass-energy programmes aimed at replacing fossil fuels. There is however no clear public policy in this regard, at least in relation to forestry.107

h. Are these AR project types treated differently under the law, e.g., in terms of incentives, requirements? Do the regulations make certain project categories easier/more difficult, cheaper/more expensive to implement?

The main differentiation between forestry projects lies in the surface area destined for plantations. In general, most legislation addresses this issue by treating small projects differently from large investments.

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105 Given the existence of EIA as a “minimum standard” for environmental management, it is hard to conceive of a province not addressing the issue of establishing when a forestry project is subject to EIA or not, regardless of the status of the project vis-à-vis Law 25.080 on forestry promotion. Again, it is quite conceivable and would even be worthy of a COFEMA recommendation, that all AR projects seeking to qualify for CDM status should implement an EIA, including public participation, even if the existing arrangements in a particular province do not currently require an EIA.

106 Created by Decree 1332/02, the programme aims at providing social benefits in addition to reforestation with native species. The programme was not specifically designed to attract CDM projects.

107 Interview with Martina Chidiak, researcher at ECLAC.
In the case of the Forestry Investment Law, for example, a distinction is made between plantations in accordance with size. Plantations under 100 ha are considered small investments and exempt from the terms of the law with regard to a strict EIA and may benefit from a simplified regime or by studies to be carried out by official research institutions (Law 25.080, article 5).

Concerning financial benefits, the Forestry Promotion Law states in Title V that forest projects are entitled to benefit from non-reimbursable economic support (subsidy) for afforestation or reforestation work on a diminishing sliding scale, in accordance with the increase in size of the investment, as long as the total area of the project is under 500 ha. Thus a project up to 300 ha in size is entitled to up to 80% of the costs of implantation, and from 301–500 ha, up to 20% of planting costs. The sizes of the aforementioned projects eligible for support increase in the case of Patagonian provinces from 300 to 500 and 500 to 700, respectively.

The issue of these benefits has been raised given the potential risk of a project becoming disqualified from CDM on the grounds of not meeting the test of additionality. In order to counter such a risk, Regulatory Decree 133/99 establishes in article 19 that any benefits paid under Law 25.080 to forestry projects designed with the sole or complementary purpose of acting as carbon sinks, are to be reimbursed to the State from the proceeds of future sales of carbon credits in accordance with the schedule to be established by the regulatory authorities. It is very much an open-ended question whether this provision in the regulations is sufficient to address the concerns regarding additionality. The intention of Kyoto and the Marrakech Accords was to avoid the flow of “double benefits” from Annex 1 countries to host countries, in cases where a project is already tapping into “soft” developed country funding in the form of ODA. To what extent this excludes benefits where these are part of the Host Country regulatory framework and therefore do not involve ODA from an Annex 1 country is a moot question. In the case of the Forestry Promotion system, the duty to reimburse any benefits received appears a reasonable way of avoiding any risk to the project from the perspective of lack of additionality.

6. Negotiations of the CDM AR contract

a. Is the right to a CER defined in national law? If so, please describe how it is defined and how the law seeks to protect the right (E.g., under which type of property, if any, does the right to a CER fall? What form of registration within the country is required, if any, to protect the right (e.g., annotation on the title to the land, recording in a special registry)?)

The right to a CER is not currently defined under Argentinean Law. Project proponents and developers must therefore resort to the range of contractual and real property options existing under the Civil Law system when putting together the legal structure of a CDM project. In some cases, recent legislative amendments have modified the Civil Code so as to accommodate innovative legal vehicles for the purposes of stimulating investments in agriculture, real estate and forestry.

Two examples of these instruments are:

- The Law on Fiduciary Trusts (Law 24.441) which provides for a transfer of assets or property to be administrated in trust by a trustee on behalf of a beneficiary, thereby allowing for funds or assets to be destined for a specific purpose such as a forestry investment, to a separate legal entity from the parties setting up the structure (trustor). This vehicle has been the favourite for some of the most recent forestry investments, and has the advantage that the assets assigned to the trust for a specific purpose are sheltered from the assets and liabilities of either the trustees or the beneficiaries. The Fiduciary Trust may also provide a useful vehicle for structuring a CDM project.

- The Law on Surface Rights for Forestry (Law 25.509) which provides for a specific immovable property right to be set up separately from the ownership of the underlying land. This new right
in property is a dismemberment of the traditional concept of ownership as understood in Roman law (*ius utendi, fruendi et abutendi*), whereby the landowner cedes the right to the surface of the property to a third party, to be specifically destined for forestry use, in accordance with the terms of the Forestry Promotion Law 25.080. The surface rights thus established, are registrable and tied to the land and as such may be used as collateral in obtaining financing for forestry investments.

It is likely that both these legal instruments will prove useful in designing the most appropriate legal structure for CDM projects.

**b. If the right is not defined by law:**

i. Are there plans to define the right through legislation in the near future (i.e., in the next 12 months)?

As stated elsewhere, and as far as is possible to ascertain, there are no plans to introduce specific legislation in order to define CERs.\(^{108}\) Notwithstanding this, it is worth drawing attention to the wider context in which the discussion regarding rights to CERs and ownership of carbon benefits is taking place. The Kyoto Protocol, if ratified, is in effect creating a valuable and innovative commodity, while contributing to reduce GHG impact on the global climate. Up until now, the general approach has been to assume that, in absence of a specific definition of a CER under domestic law, general legal principles will apply whereby the ownership of CERs will accrue to the project participants or purchasers, in accordance with the manner in which the project is structured.

There is also a sector of opinion that espouses the notion that CERs are the outcome of a deliberate global policy aimed at reducing the impact of GHGs, sanctioned by international agreement whereby parties to the Protocol undertake to reduce or mitigate anthropogenic activities with effects on climate change. As a consequence of this framework, individual countries are in effect managing a natural resource, and therefore there is argument in favour of each state, as a party to the Protocol, holding title to the benefits derived from the generation of CERs.\(^{109}\) Outside the context of CDM, for example, New Zealand has expressed that the rights to certain carbon sequestration activities will lie with the State. Similar announcements have been made by China in the context of the CDM.\(^{110}\)

In the case of Argentina, there are theoretical grounds for sustaining this point of view, based upon Article 124 of the Federal Constitution and the general rule of provincial ownership over natural resources, as discussed above. The right to a CER is not currently defined under Argentine Law. Project proponents and developers must therefore resort to the range of contractual and real property options existing under the Civil Law system when putting together the legal structure of a CDM project. In some cases, recent legislative amendments have modified the Civil Code so as to accommodate innovative legal vehicles for the purposes of stimulating investments in agriculture, real estate and forestry.

In practical terms, however, this position taken to the extreme of considering any climate benefits or environmental services provided by a project as the property of the provincial government, will effectively eliminate any incentive that the private sector may have in developing CDM projects.\(^{111}\)

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108 Personal communication with Senate Environment Committee staff.
110 Id.
111 This is as yet very much a theoretical discussion in Argentina. Officials at the OAMDL and SAyDS are aware of the potential “deal breaker” status of any initiative aimed at nationalizing or “provincializing” the right to CERs. The final decision will very much depend upon political factors, rather than any strong legal reasoning.
ii. Based on existing property and contractual law, what would be the best way to characterize the right? Is there only one way, or are there several possibilities?

There are several ways of approaching the issue of defining the right to CERs by using existing legal arrangements. The most appropriate definition should reflect the profile and nature of the activities undertaken and interests of the participants, as well as the financial structuring required by the project itself.

The Argentine Civil Code was initially drafted in the second half of the nineteenth century and amended at various times over the years, including the recent inclusion of the real surface right to a forestry plantation as already described. Although the Civil Code does not define CERs, its provisions are broad enough to offer sufficient legal tools for an effective CDM contract to be drawn up to guarantee the rights and obligations of the various parties to a CDM project.

Article 2311 defines “things” as material objects capable of having value. Energy and other natural forces susceptible to appropriation are assimilated to the concept of a thing. Article 2312 adds that immaterial objects capable of having value, together with material things are collectively considered as goods and make up a person’s patrimony. Subsequent articles distinguish between movable and immovable things, including in this last category such legal instruments as may represent or establish rights over immovables (immovables by virtue of representation, e.g. a title deed to land).

The Civil Code defines fruits, products and accessories in subsequent provisions, pursuant to this broad classification. Article 2329 defines fruits and organic produce as an accessory part of a thing, making a distinction between “fruits” and “products” based upon the ability of the principal to generate such fruits on a regular footing without diminishing its nature. A forest or vineyard will therefore provide fruits on a regular basis without diminishing or altering its original condition, whereas a quarry or mine will yield its produce only after substantial transformation and loss of productive ability. Article 2330 contemplates a further distinction between the “natural fruits” described and the “civil fruits” derived from the use and enjoyment of a thing. Examples of civil fruits are the interest earned on money, or the so called “industrial fruits” obtained from the transformation of things by virtue of human capital or labour.

Given these definitions established in the Civil Code, there is no legal obstacle to considering a CER either as a civil or industrial “fruit” generated by a certain thing or good to which it is attached as an accessory. The Civil Code, as most other continental law systems, also contemplates the right to assign credit and obligations under the general law of obligations. Therefore there is no obstacle to a project participant, for example a landowner, or plantation surface right beneficiary, assigning his or her right to CERs produced by the project to a third party, such as the project investor or purchaser of the CERs, under an emissions reduction purchase agreement (ERPA).

The generation of a CER is in essence an intellectual and industrial effort in the pooling of human and financial resources, technology transfer and know-how which results in the creation of a new and intangible “good” with value on the global market. The good created by a CDM project is basically a small

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112 The courts have construed this definition very broadly, so as to include immaterial things in addition to energy, such as airwaves, internet, TV signals, etc. (Santos Cifuentes, “Codigo Civil comentado y anotado”, La Ley, Buenos Aires, 2004, T. III, p. 155).
113 Civil Code, Article 2319. Water and any other fluids which are separated from the soil are considered movables.
114 Further defined in articles 2424, 2425 and 2426.
115 The distinction between civil and industrial fruits is mostly academic in this context. Much will probably depend upon the relative importance of the investment and outlay required to generate the CERs, vis-à-vis the financial and legal engineering necessary to their successful marketing. In the case of a landfill gas or energy project, the investment and technology required to capture the carbon, would imply an industrial fruit, whereas in the case of a forestry investment, CERs would appear to fit into the definition of a civil fruit, in a similar fashion to share dividends in a company.
but identifiable contribution to the mitigation of a global problem, climate change, which has been granted recognition by two treaties: UNFCCC and the Kyoto Protocol. This virtual creation of value is also granted protection under the Civil Code by means of article 2567 which states that a person acquires ownership of a new object created or transformed or specified from the things of another with the intention of appropriation. This transformation of an object extends to the generation of a “new” good, such as the generation of a CER with tangible market value. The Civil Code thus grants protection to the creation of wealth through some measure of human endeavour, as would be the case in a typical CDM project.116

The Civil Code also establishes general rules on ownership and the ability to trade, commerce or dispose of different personal obligations or real property rights. The overall principle is that all things are “within commerce”, unless their sale or assignment is expressly forbidden by law, or is subject to a public authorization.117 Articles 2339 to 2350 deal with the distinction between goods belonging within the “public domain” and the “private domain” of the state, and such goods as may appropriated by private individuals. Goods within the public domain are considered “beyond commerce” and therefore may not be the object of contracts of sale, purchase or any other legal nature. As stated before, the general rule is that of freedom of contract and the ability to establish obligations over goods or things, unless specifically banned. Goods within the public domain, and therefore “beyond commerce” are expressly listed in Article 2340.118 In the event that the State were to decide upon the inclusion of a new category of goods within the public domain, such as the inclusion of all rights to carbon or other intangible environmental services, this would require an amendment to the Civil Code with explicit inclusion within Article 2340. However, for the purposes of CDM, the overall civil law rules described above provide a broad and sufficiently solid platform upon which to build the legal structure for any given project.

The law concerning contracts in Argentina, therefore, offers a number of alternatives to define the rights and obligations of the parties to a CDM project. The precise structure would depend to a considerable extent upon the characteristics of the project, nature of the proponent, willingness of the proponent to invest, whether the project is unilaterally developed and implemented, or dependent upon an Annex 1 country investment or participation. There is clearly no “one size fits all” and future business practice, CDM Executive Board decisions and the market will no doubt define the preferred legal vehicles for developing projects.

In the cases of landfill gas projects currently being developed in Argentina, there are basically two alternatives being developed, depending upon the willingness of the Annex 1 country participant to get involved in the project.

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116 In a sense, this general protection that civil law grants to human efforts and industry when creating or transforming an object into another is the basis of numerous specific legal protection regimes, such as intellectual property, author’s rights, industrial patents, etc. This provision is also a valid argument against attempts on behalf of the state to “nationalize” any right to climate change or environmental benefits derived from CERs, given the need for strong participant involvement in the “transformation” or creation of the CER, by virtue of the project’s investment. This transformation will effectively provide grounds to strengthen the argument in favour of the project participant’s right to CERs.

117 Article 2336. Paragraph 1 states that the sale, assignment or trade of a thing which is expressly forbidden by law is absolutely inalienable and therefore outside the realm of commerce. Article 2338 contemplates the case of relative inalienability, in cases where an administrative authorization is required. An example of this is where the State grants a concession or disposes of land within its private domain, and such transactions are therefore subject to administrative law requirements. (Santos Cifuentes, “Codigo Civil comentado y anotado”, La Ley, Buenos Aires, 2004, T. III, p. 171).

118 Article 2340 includes the territorial sea, inner waters, rivers that flow and may serve the general interest, underground waters, with the exception of the right to a reasonable use by landowners (subject to administrative authorization), beaches and river shores, streets, roads and any other public works that serve the common interest, official public documents and ruins and archaeological sites of scientific interest. In all cases, private individuals and legal entities have the right of use and enjoyment of goods within the public domain, subject to administrative requirements and regulations (Article 2341). The purpose of goods within the “public domain” of the state is to serve and satisfy a public or collective interest.
In one case, the investor may take an active interest in the design and operation of the project, thereby setting up a special purpose company, alone or in partnership with a local participant, for the purpose of selling carbon credits. This kind of structure may provide better protection to the investor’s interests, than a simple purchase agreement tied to the financing. It is likely to be a frequent legal format, where the project envisages additional incomes to the sale of CERs, such as energy generation or, in the case of forestry projects, sale of timber or other forest projects. As a shareholder in the venture, the participant would stand to benefit from the project as a whole, as opposed to simply obtaining the income from the sale of CERs. The disadvantage to this kind of structure is the need for direct involvement in project management.

In another case, the Annex 1 country participant would enter into a contractual arrangement for the purchase of CERs as and when they are generated. This is basically the model used by the PCF, whereby the Fund commits to acquire by means of an ERPA a given amount of CERs over time. Payment is made up front (at a considerably discounted price), thereby providing the project developer with the necessary financing to set up and operate the project.

In the case of a forestry project, the Law on Surface Rights for Forestry Development (Law 25.509), described above, may provide the vehicle for separating the ownership of the land, from the ownership of the forest and its fruits, of which the CERs would constitute a clear example. By constituting a registrable right to the forest, the investor (and therefore owner of the CERs) would be acquiring a long-term right with potentially stronger legal protection than a contract. The rights over the forest plantation would also give right to the accessory “fruits” such as the carbon credits generated by the project.\(^{119}\)

c. In the absence of a clear legal definition of the right to a CER, can the concept be defined sufficiently between parties to a project through their contractual agreement?

Clearly the ultimate answer will be provided when a concrete case is taken before a court of law for scrutiny. However, as a matter of personal opinion, it would appear that the existing provisions of the Civil and Commercial Code regarding contracts should provide (at least in theory) sufficient protection to all parties involved. Although legal security has been and is an issue in Latin America and Argentina, criticism of the legal system and the judiciary tend to relate to more structural faults of a socio-political nature, such as corruption, poorly equipped courts, dossier overload, etc. These weaknesses are however common to the entire system and do not relate specifically to the issues of contract law as applicable to CDM projects.

d. Would defining the right to a CER by contract still be an available option even if the right were sufficiently defined by law?

See above. Much would depend upon the nature of the right to a CER created under such a hypothetical law. If legislation were to create a property right, or an interest in land, this would become mandatory in accordance with the civil law doctrine of real property law as in the public interest and therefore unalterable by the will of individual parties, as opposed to the rule of freedom of contract in contract law.

Defining a right to CERs as real property or a property right may appear to be an attractive option in theory, but it should be remembered that real property law defines the relationship between a person or legal entity and a registrable asset such as land. While this may be reasonable in the case of an AR project where either the land or the plantation are closely associated with the “fruit” thereby generated (CERs), it

\(^{119}\) Article 2424 describes natural fruits as those spontaneously produced by nature, while industrial fruits are created by human labour or cultivation of the land. Civil fruits include the income or rent obtained from the thing. A CER would in all probability be considered in part an industrial fruit (depending on the type of CDM project), given the need for forestry work, and in part a civil fruit, considered from the perspective of the income produced by its sale. The definition of a CER as a fruit following the right to the plantation would have to be drawn up by contract and would be considered an accessory to the plantation. CERs themselves would not be registrable.
may not always be an adequate and flexible solution for CERs generated by other kinds of project. Therefore, clear definition of a CER in any contract between the project participants will always be necessary.

e. Does the country’s law on contracts set the venue and jurisdiction for dispute settlement? Can this requirement be waived?

The general rule of contract law in Argentina states that the will of the parties to an agreement must reign supreme unless there are reasons of public order that may override or condition the general principle of contractual freedom. This principle also applies to dispute resolution conditions, election of venue and applicable jurisdiction.

A distinction should however be made between contracts between private parties and contracts involving a private party and a public entity in exercise of a public power.

Private party agreements are subject to the principle of freedom of contract and therefore it is possible to make a choice of applicable law and venue for conflict resolution. It is common practice in private law to agree upon a particular forum or method of conflict resolution, thereby renouncing any of the default principles established in civil law or civil procedure law.120

In the case of a CDM contract, such as an agreement between a local participant and an Annex 1 corporation wishing to fund project investment in exchange for the right to CERs, the parties could agree upon any eligible forum, whether in or beyond Argentina’s jurisdiction. The parties could also conceivably agree upon a widely used method of conflict resolution other than domestic or foreign court litigation, such as national or international arbitration.121

In theory arbitration has a drawback in that the enforcement of a ruling may require subsequent access to a court of law in order to secure compliance, with the ensuing opportunity for delay on behalf of a party seeking to procrastinate. In practice, parties to a CDM agreement will probably make use of built-in compliance warranties, insurance policies or other similar remedies so as to avoid resorting to dispute settlement mechanisms. In this sense, the slow and cumbersome workings of the court system will probably act as a strong deterrent to a party resorting to a court.

In the case of an agreement involving a private party and a public entity, such as a project between the Nation or a Province, a state owned company or municipality, public law provisions may inhibit the respective public sector participant from agreeing upon a forum of law beyond the “natural jurisdiction” of the courts to which the particular public entity is subject. In such cases, change of venue and jurisdiction may not be a real possibility.122 Finally it should be remembered that Argentina is a Party to ICSID, the International Convention on the Settlement of Investment Disputes, an arbitration mechanism set up under the auspices of the World Bank. Participants investing in CDM projects in Argentina would be entitled to a degree of protection from arbitrary government decisions.123

120 Unless otherwise agreed, the jurisdiction and competent court will be either that of the domicile of the parties or the place where a contractual obligation must be fulfilled. Given the difficulties in a federal country where the parties’ obligations may involve more than one provincial jurisdiction, in practice most parties will establish a single court of jurisdiction for conflict resolution. In both national and international transactions it is possible to establish a forum and applicable law, even when this may be outside Argentina.

121 While substantive legislation is a prerogative of the Federal Congress, the powers to establish Procedural Law are retained by the Provinces. Nearly all provincial Civil and Commercial Procedure Codes allow for parties to opt for mediation or arbitration as alternative dispute settlement mechanisms. There are various arbitration procedures open to parties in Argentina, such as those established by the Buenos Aires Stock Exchange Court of Arbitration or the Cereals Exchange. International Chamber of Commerce (ICC) rules are also widely used in commercial law disputes, in place of lengthy local court proceedings.

122 It is impossible to contemplate all the possible alternatives or scenarios which may arise in this context. Public Law provisions vary from Province to Province. In some cases disputes will be heard before a civil or commercial court, while in others, a contentious administrative law court may be competent.

123 Foreign investors in Argentina have resorted extensively to ICSID arbitration in the wake of the devaluation following the abandonment of the
f. Under the law, is there any class of persons who are recognized as requiring the special protection of the law when entering into contracts (e.g., indigenous peoples, unorganized communities)? What special protection does the law grant this class of persons (e.g., higher burden of proof in demonstrating that the party entered into the agreement voluntarily, entitlement to special assistance from the DNA in the negotiation of CDM AR contracts)?

Although the legal framework establishes certain restrictions upon the ability of some parties to bind themselves under the law, there are no specific provisions for applying these in the context of CDM approval. Notwithstanding the lack of specific and binding provisions as regards local community or indigenous rights, it is highly probable that the DNA would take reasonable steps to ascertain that a project proposal involving disadvantaged groups had obtained a degree of informed consent prior to approval.

7. National Approval

a. Under present laws, are there special requirements that CDM AR project participants need to comply with to become CDM AR project participants (apart from the general capacity to enter into contracts, e.g., financial capacity, track record in the implementation of CDM AR projects, proven commitment to environmental protection)?

A CDM project proponent must comply with all formalities as required in OAMDL regulations. OAMDL regulations reflect CDM Executive Board PDD requirements. Most of the legal formalities pertain to details of company or institutional registration with administrative authorities, balance sheets, list of company or association officials, powers of attorney to represent the respective entity before environmental and other public authorities, etc. As regards the project itself, CDM proponents are required to demonstrate the technical feasibility and availability of financing (whether external or local, depending upon the participation of an Annex 1 country organization or if a unilateral project).

Given the fact that few CDM projects are up and running in the developing world, it is hard to envisage a requirement that a project developer prove past experience in CDM projects.

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124 The Civil Code establishes as a matter of general principle that minors be represented by their legal guardian or tutor, as is also the case for individuals deprived of the capacity to make decisions such as individuals declared insane. In cases of mental incapacity a court-appointed curator will act in the best interests of the person incapable of comprehending his or her actions.

125 The obvious forum to agree upon these guidelines would be the Federal Environment Council (COFEMA). COFEMA would issue a resolution, which would then be included in the OAMDL’s guidelines for project development. This is a further strong argument in favour of increasing coordination between the federal government and the provinces.

126 Sanctioned recently in November 2004, Resolution 825/04 (SAyDS) repeals several rules in the CDM project approval cycle, and attempts to clarify the somewhat confusing CDM approval cycle as stated in previous regulations.

127 Annex 1, Resolution 169/01, Section 8, follows the general scheme for presentation before the CDM Executive Board. Evaluating institutions are required to look into additionality, economic aspects, and the technical feasibility of the project proposal.

128 CEAMSE (Coordination Ecologica Metropolitana Sociedad del Estado), a public sector company involved in waste management and landfill operations in the metropolitan area of Buenos Aires, in a recent call for proposals to install methane recovery and combustion in its operations inserted a condition in the terms of reference and bidding documents requiring demonstrable experience in similar CDM landfill gas projects. The condition was rejected by many potential project proponents as being restrictive in view of the reduced number of companies able to meet the condition. (Personal communication with CEAMSE staff). Also see www.ceamse.gov.ar
b. What legally mandated criteria are used for determining whether a CDM AR project assists in achieving sustainable development?

To date, no legally mandated criteria have been established regarding the relationship between a CDM project and the country’s sustainable development aims. Presentations will therefore be dealt with on a case-by-case basis with an emphasis on compliance with all legal requirements. As stated elsewhere in this report, a clearer definition of what constitute the provincial and regional priorities as regards sustainable development would be highly advantageous and should be considered a priority by the Federal Environment Council (COFEMA).

c. Is there a legally specified mechanism for determining that a CDM AR project assists the host Party in achieving sustainable development (e.g., sustainable development indicators, if any, for CDM projects, and for CDM AR projects in particular)? If so, please describe this process. Who is authorized to issue this certification? Can this certification be issued even in light of objection from other agencies and from stakeholders?

There are currently no specific detailed criteria that bind the DNA when evaluating a project, other than following the procedure for evaluation as established in SAyDS Resolution 825/04. The ultimate decision will lie with the Secretary for the Environment who, in theory, has a fair degree of discretion in making a final decision regarding any project. In practice, the procedure designed by the OAMDL for project evaluation will very probably determine the grounds for the Secretary’s approval, and it is hard to imagine a decision being taken in the presence of a negative report by the various instances and organizations involved in reviewing a project on its technical and economic merits.\(^{129}\)

d. If there are no substantive and procedural guidelines on determining that a CDM AR project assists in achieving sustainable development, in your opinion and based on your knowledge of the related law and policy in the country of study, what basis would the DNA use to determine that this requirement has been met? For instance, are there voluntary criteria that have been used in past (not necessarily CDM) projects (e.g., donor-funded afforestation and reforestation projects?) which could be acceptable to the DNA?

The procedure for obtaining project approval involves several steps, as has already been described. Furthermore, there is a fair degree of participation in the technical evaluation groups working with OAMDL. While many of the individuals involved in these groups come from business or academic constituencies, they are open to any interested party wishing to apply.

Within the OAMDL, and more specifically within the forestry sector working group, there is substantial familiarity with the existing criteria and standards for sustainable forest management. Reference to FSC Principles and Guidelines may in some cases be a valid alternative for assessing whether a particular project is compatible with sustainable development.

There are also other technical guidelines which may assist officials in determining whether a project meets sustainability criteria. The National Standards Body of Argentina (IRAM) has opened a working group mirroring the International Standards Organization (ISO) working groups on forestry and on climate change baseline monitoring.\(^{130}\)

\(^{129}\) Under Administrative Law principles, a decision or administrative act made by a competent authority must be grounded in fact and based upon such legal powers as granted to the authority. A decision made without sufficient factual basis, such as approval of a project in absence of a technical report supporting the evaluation would be open to challenge from interested parties. The decision would be even more open to a legal challenge should the public official entrusted with approval of a project ignore or not take into account a negative technical report. While it is technically possible for the Secretary to grant approval against the technical opinion of staff assigned to evaluate the project, the onus would be upon the decision maker to state reasons of public policy of sufficient weight to override any technical objections raised.

\(^{130}\) ISO Technical Report 14.061 has been conceived as a guide to assist forest managers in implementing 14.001 EMS for sustainable forest
Government policy documents will also probably be considered when evaluating a forestry project. The Environment Secretariat has set up a Model Forests Programme aimed at developing native forests under sustainable management as part of the International Network on Model Forests. The Programme has established a Strategic Action Plan for the period 2003 to 2005 with the following goals:

- Promote sustainable development in the framework of an integrated management of natural forest resources;
- Development of methods, procedures and innovative management of forest ecosystems; and
- Promotion of strategic planning and public participation in forest management.

Environment Secretariat Resolution 444/03 created the Model Forest Programme aimed at building capacities at the forest planning and management stage and developing criteria, indicators and standards for forest management in the context of the International and Regional Networks on Model Forests. In addition to these objectives, the Programme aims to strengthen ties to the various international conventions dealing with sustainable development and forestry and building skills in management by developing criteria and indicators for forest management. The Department of Forests at the Federal Environment Secretariat has developed a Guide for the presentation of proposals to the Model Forest Programme. Although this is not a binding document for the DNA, it is highly probable that these criteria will be taken into account when judging a CDM proposal.

Finally, and as stated elsewhere, all evaluations regarding the conformity of a given project to the goals of sustainable development will need to take into account the law and policy applicable to forestry and sustainable development in the respective provinces where the CDM project is to be carried out. The recently sanctioned Resolution SAyDS 825/04 has addressed the issue of more formal provincial participation in the approval cycle, by specifically providing for all CDM project submissions to be sent to the respective provinces where the project is to be implemented for a 10-day period for comment, prior to project approval.

8. Project Validation

a. Under existing law, how is the requirement for public comment under the Kyoto Protocol likely to be complied with in the host country?

The requirement for public comment is an issue which may require future regulatory fine-tuning so as to avoid unnecessary duplication of procedures, for instance, with the EIA. Currently the OAMDL is placing Project Descriptions on the Internet for the purposes of ensuring public access to information, in accordance with the requirements of Law 25.831 on Public Access to Environmental Information. The technical report draws extensively from existing ongoing international processes such as the Intergovernmental Panel on Forests (IPF) or the Intergovernmental Forum on Forests (IFF). Various other processes around the world will assist in evaluating the sustainability of forestry projects, such as the Pan European or Helsinki Process, the Montreal Process related to temperate forests, or the Central American or Lepaterique initiative for tropical forests. In neighbouring countries there are also similar initiatives aimed at developing standards for forest management, based upon ISO or other criteria, such as the 5 principles and 18 criteria developed as CERFLOR by the Brazilian Standards Association (ABNT).
procedural requirements set out in the regulatory framework for submitting projects to the OAMDL, also contain references to public participation as required by the Kyoto Protocol.\textsuperscript{137}

In addition to the Law on Public Access to Environmental Information, the General Environmental Law (Law 25.675) mandates access to environmental information for the public at large and interested parties, as well as compulsory EIA procedures for projects with a potentially significant negative impact on the environment. This threshold law also establishes the right of the public to be consulted and to make comments in all administrative procedures related to preservation or protection of the environment. This general right is given further strength by the law with a requirement for instituting formal consultation proceedings or public hearings for activities that may significantly affect the environment. While comments and opinions made by the public are not legally binding, relevant authorities are required to publicly state and give reasons for the dismissal or rejection of such contrary opinions as may be expressed by members of the public.\textsuperscript{138}

Most provinces already have EIA laws in place with mandatory public participation procedures for most development projects including forestry investments. Given the structure underlying the forestry investment regime, whereby the Federal Forestry Authorities have delegated approval and evaluation of projects to the Provinces, local EIA regimes will apply to the permitting procedure, including public participation.\textsuperscript{139}

In the event that an AR project is not prepared under the terms of either of the forestry investment promotion regimes (Laws 24.857 or 25.080), the respective provincial regulations for issuing the approval will still apply per se, although not as a decentralized function of the federal authorities.\textsuperscript{140}

In all likelihood, an AR project proponent will carry out the permitting and EIA procedures at the relevant provincial offices (whether under either of the forest promotion regimes or as independent CDM investments) and include any public comments made, or minutes taken during a public hearing pursuant to provincial regulations, with the formal submission to OAMDL. This would be the “common-sense”

\textsuperscript{137} Section C.4 of Environment Secretariat Resolution 345/02, following the outline established by the Kyoto Protocol for project submissions (PDD), requires the inclusion of comments by interested parties as well as a description of the process used to involve stakeholders. This requirement coincides with the wording of Appendix B of the Annex on the PDD, which requires the PDD to include a description of all stakeholder comments, including a brief description of the process, a summary of the comments received, and a report on how due account was taken of any comments received. This wording is extremely open and provides great leeway in the manner in which stakeholder consultation may be carried out in each country. So far the process in Argentina is not specifically established other than the provisions of Resolution 345/02 described above.

\textsuperscript{138} Article 19 of Law 25.675 states that “Every person has the right to be consulted and to make representations in all administrative procedures related to the preservation and protection of the environment, where these be of general or particular incidence...” (Author’s translation). Article 20 furthermore states that: “Authorities must institutionalize proceedings to ensure public consultation or hearing as compulsory instances for authorizing activities that may generate significant and negative effects on the environment...” Finally, Article 21 establishes that “... Public participation must be ensured mainly in procedures related to environmental impact assessment and land use planning programmes, particularly during the planning stage and at the evaluation of results...”

\textsuperscript{139} EIA and the need for including public participation is a threshold or “minimum standard” environmental requirement as mandated under Article 41 of the Federal Constitution. These requirements are therefore compulsory throughout Argentina, regardless of the existence and structure of provincial legislation. In the event that a province should fail to have an EIA regime in place for forestry projects (This is an unlikely scenario, given that most provinces with forestry potential already have sophisticated EIA regimes calling for public participation in place), an ad hoc procedure would be needed in order to meet the CDM requirements.

\textsuperscript{140} For example, Neuquen Province requires an EIA for natural forest management and development projects, implanted forest development and introduction of exotic species (Annex V, Executive Decree 2656/99, and Law 1875, as amended by Law 2267). In the case of Salta Province, Regulatory Decree 3097/00, Annex I to Law 7070 on Environmental Protection requires EIA for the following projects: land use plans and subdivisions, agroforestry projects, economic development of timber, forests or forest products, silviculture and productive forest plantations.
solution, avoiding unnecessary duplication of both public sector and private developer efforts, with the organization of two separate and practically parallel instances for public participation.

Clearly there is a task here for COFEMA, the Federal Environmental Council, in agreeing upon harmonized procedures whereby the provincial EIA process and ensuing public participation may be better linked to the CDM approval process.

b. What weight would stakeholder opinion have on the issuance of permits?

As stated above, under the system for EIA and public participation established in the General Environment Law, and in the various relevant provincial regimes, stakeholder comments are not binding upon public authorities, although there may be a legal obligation for the authorities to give reasons and grounds for rejecting any objections that may be raised by the public during the public participation process.

Although there is little legal precedent regarding judicial action against administrative decisions disregarding public comments in the context of the EIA process, it is clear that stakeholder interests will be of crucial importance to the entire permitting process, from a political perspective.141 Argentina has a vigorous free press, and while journalism is not usually well informed about environmental issues, the media exerts enormous influence over public opinion and hence over public decision making. In the case of CDM projects, it is very likely that any public controversy regarding a particular project, whether raised by the press, grass roots groups, or NGOs, will be a deciding factor in the ultimate decision. It is hard to envisage the DNA or any other public agency using its discretionary powers to issue an approval for a controversial project against public opinion.142

9. Project Monitoring

a. In monitoring a CDM AR project, can project participants use monitoring processes put in place for other purposes (e.g., EIA law, forestry laws, CBD) as a guide?

Yes. In fact most provincial regulations provide for periodically updated reports to be filed for monitoring purposes, pursuant to EIA or other permitting regimes. The Forestry Investment Promotion Regime requires that all projects submitted for the purposes of obtaining the legal benefits of the scheme, provide a schedule of activities and investments for the project.143 The Regulations mandate that any modifications or amendments made to the project up until the 31st December of each calendar year must be notified to the relevant national or provincial authorities where these duties have been decentralized, on or before March 31 of the subsequent year.144

However, the Investment Promotion Regime establishes that this legal requirement must be complied with by means of affidavits to be filed by the various beneficiaries of the Law. If no changes have been

141 Most jurisprudence involving the EIA process has riginated in citizen groups challenging a public decision to approve a project without an EIA, as opposed to challenging the failure to include the public’s comments or opposition to a particular project. See Fundación Ambiente y Recursos Naturales (FARN), “1st. International Conference on Environmental Compliance and Enforcement in Latin America”, May 28 and 29, 2004 Buenos Aires, Argentina.

142 A particular case in point is the Prima Klima forestry project developed under AIJ rules in the Province of Chubut during 1999, to which we have already referred. The Project, developed by a German NGO, Prima Klima, in conjunction with CIEFAP, a local forestry extension and research institute and the Fundación Bosques de Patagonia (Patagonian Forests Foundation), ran into strong NGO and particularly Greenpeace opposition. Various opposition groups sought a court injunction to halt the project, and while the case was eventually dismissed upon appeal to the Supreme Court of Chubut Province, Prima Klima ultimately withdrew funding for the Project. (See Chidiak, Martina, Moreyra, Alejandra and Greco, Carlos, “Captura de Carbono y Desarrollo Forestal Sustentable en la Patagonia Argentina: Sinergias y Desarrollo”, CEPAL, Universidad de San Andres and CENIT, Buenos Aires, 2003, p. 69.)

143 Decree 133/99, Article 24.

144 Decree 133/99, Article 2, paragraph c).
made to the project, or if these have not been made evident to the respective authorities by the project’s beneficiaries, it is deemed that the project’s details and particulars remain unchanged.

Similar monitoring and reporting requirements are mandatory for beneficiaries, from a tax and customs perspective, given the benefits of fiscal stability that the law provides to forestry investors. In this case, due to the fact that non-compliance with the regime may result in a net reduction in tax collection, supervision and control is probably more effective than that required for reporting on environmental or land use conditions.\(^{145}\)

Environmental monitoring is therefore very much a process that depends upon the good management and honesty of the beneficiaries to the system. Given the poor enforcement of most natural resource protection laws, monitoring requirements may not always be strictly observed, or may not reflect actual management on the ground.

However, in view of the fact that CDM projects will be subject to periodic third party evaluation, it is logical to foresee that monitoring requirements will tend to be designed so as to be consistent with generally accepted international best practices, regardless of local regulatory requirements. It is probable that CDM AR projects will design and include management plans that meet provincial forestry regulations where required, in addition to conformity with other relevant guidelines, such as industry best management practices. In all cases, however, the key driver behind correct monitoring will be the need to observe CDM requirements rather than the strict compliance with local legal requirements.\(^{146}\)

b. What happens if monitoring indicates that there has been a violation of national law governing the project? How would that affect the project’s implementation? Can the certification that a project assists in achieving sustainable development be subsequently withdrawn?

This is an area in which the legal framework remains unclear. The Forestry Investment regime (Law 25.080) provides for a number of sanctions for non-compliance with the law’s provisions which escalate in relation to the severity of the offence. Similar provisions related to sanctions for non-compliance with forestry laws, including monitoring, are present in most provincial forestry or environmental regulations. These sanctions however, only cover the forestry project itself and do not explicitly extend to loss of CDM approval status.\(^{147}\)

Chapter V of Law 25.080, for example, deals with violations of the provisions of the law and provides for cumulative sanctions to be applied to the forestry investor, ranging from the total or partial loss of benefits granted under the tax stability regime, reimbursement plus interest of such payments received for plantation work, reimbursements of all national or provincial taxes which would have been payable had the project not benefited from the regime, and fines not in excess of 30% of the valuation of all investments declared under the forestry promotion regime.

In all cases however, sanctions must be imposed by means of a reasoned decision based upon sound evidence, issued by the relevant Authority, in this case the Agriculture, Livestock, Fisheries and Food Secretariat. This decision is initially open to an administrative appeal, and if unsuccessful, a judicial appeal may be filed in due course with the Federal Court System.

\(^{145}\) Joint Federal Income Administration (AFIP) General Resolution 157/01 and Agriculture, Livestock, Fisheries and Food Secretariat Resolution 10/01 require a certified public accountant to verify and vouch for valued added tax (VAT) reimbursements that can be authorized under the terms of the Forestry Investment Law.

\(^{146}\) A number of private sector forestry companies have begun implementing ISO 14.001 management standards to their forestry operations. In other cases, projects seeking Forest Stewardship Council (FSC) certification will develop monitoring plans in accordance with the management plans drawn up to meet FSC certification criteria. IRAM, the National Standards Body of Argentina, has recently set up a Working Group on Forest Management, for the purposes of implementing ISO TR 14.061 (Information to Assist Forestry organizations in the Use of Environmental Management System Standards ISO 14.001 and ISO 14.004).

\(^{147}\) Resolution 169/01(repealed) and the recently sanctioned Resolution 825/04 set out the procedure for obtaining DNA approval. Nothing in the
Law 13.723 (Consolidated Text in accordance with Decree 710/95) also establishes a penalties system in Chapter VIII. Among others, article 45 considers, *inter alia*, the following as infringements against the forestry law:

- Violation of an approved management plan;
- Failure to comply with instructions given by a relevant forestry authority pursuant to existing regulations or laws; and
- Providing false data or information in mandatory reports to competent forestry authorities.

Fines may be imposed in addition to the filing of criminal actions and, where pertinent, civil suits for damage to property. Forest products may also be confiscated. Finally, Article 50 states that, where a violation of forest law has been committed by agents or legal representatives of a corporate entity, civil liability may also extend to that corporate entity.

In theory, a decision by the Federal Environment Secretary stating the country’s approval of an AR project, could be revoked for non-compliance of any conditions to which such approval had been made contingent, such as a failure to meet legal requirements for either of the above mentioned laws, or, in fact for non-compliance with any other pertinent provincial regulation.

However, there are two reasons why this scenario is unlikely. The first reason is practical and relates to the way a CDM project developer would attempt to meet the monitoring requirements for certification of CERs. It is highly unlikely that a monitoring plan designed to satisfy an operational entity would fail to address legal and regulatory compliance as a routine item in a forestry operation’s management plan. Self interest would therefore act to ensure a reasonable level of (at least) formal compliance with the law. In this case, it would be highly unlikely that the formal approval of the CDM project be directly revoked, without prior warning or notification of such non-compliance to be corrected.¹⁴⁸

¹⁴⁸ It is hard to envisage a case of gross regulatory violation going undetected by an Operational Entity performing verification, short of open collusion with the project developer. This possibility is extremely unlikely, given the level of public scrutiny that such a violation might attract.
The second reason is also practical in nature and lies with the legal procedure involved in revoking a decision granting approval for a CDM AR project, particularly given the fact that the requirements and conditions for such a revocation are not yet formally written into the international or national regulations. A decision to revoke project approval would therefore be subject to appeal under administrative law and, upon exhaustion of all possible administrative remedies, open the way for a judicial challenge. Such a situation would therefore become a legal quagmire and in all probability discourage the developer from pursuing the project, even when no actual revocation might have occurred.

C. Conclusions and Recommendations

1. Will the introduction of CDM AR projects in the host country significantly alter the afforestation and reforestation objectives of the country, as stated in law, and the nature of afforestation and reforestation projects that are currently being implemented in the country of study (as registered with the pertinent national/local agency), if any?

It is still very premature to venture a valid prediction as to the effects that CDM will have on the forestry sector in Argentina. Although there is widespread interest in the mechanism, and the existing legal structure contemplates and attempts to assist the possibility of projects obtaining value for carbon sequestration services, by eliminating the potential barriers to demonstrating additionality, CDM will probably not be a major driver behind afforestation and reforestation projects.149

The Forestry Industry on the whole remains sceptical as regards the carbon market, notwithstanding the interest expressed by some groups and the outline projects submitted to date. This concern is two-fold and relates to both the domestic and international settings.

At a domestic level, the financial crisis of 2001 and subsequent economic turmoil created a high degree of uncertainty in the markets. Banking restrictions originally aimed at preventing a currency crisis have led to serious difficulties in obtaining financing for investment projects in general. Given the fact that forestry projects, even for short cycle plantations, do not have a positive cash flow until several years after start up, financial costs constitute a serious barrier for many potential project proponents, particularly for small-scale initiatives.150 Major multinational forestry companies with access to international financial markets do not have the difficulties of local companies, but to date have not shown a major interest in the carbon market, given the fact that the focus of the investment is either on timber or pulp.

At the international level, the delay in ratification of the Kyoto Protocol has led most players in the forestry sector to postpone decisions until rules for CDM, and particularly carbon sequestration become clear. In addition to this, until COP 9 the uncertainty regarding the temporary nature of forestry CERs or the requirement for insurance had lessened the appeal of forestry, in favour of more straightforward emission reduction projects, such as landfill gas or energy projects.

Notwithstanding this, there is an underlying optimism among experts that forestry, together with landfill gas, represent the most viable areas for developing CDM projects in the future.151

149 Article 19 of Regulatory Decree 133/99 specifically provides that in the event of Forestry Projects seeking the benefits of fiscal stability under Law 25.080, and conceived with the sole purpose of providing carbon sinks in accordance with UNFCCC, the National Executive must draw up specific rules aimed at harmonizing the CDM and forestry promotion regimes in such a way that any non-reimbursable funding obtained for plantation purposes be converted to credits, refundable upon sale of carbon benefits. As stated by agriculture officials, this wording was included in the regulations so as to address possible disqualification of forestry projects on the grounds of having received ODA funding or benefits. A Forestry Project would therefore have to forfeit the planting subsidies and reimburse any money received, once the project derives income from the sale of CERs (personal communication with Horacio Etchegoyhen, Ecosecurities Ltd, representative in Argentina).

150 Argentina does not have a highly developed capital market for ventures such as forestry, even when the legal structure for developing investment trusts has been created, with a view to developing long-term investment products, as an alternative to financing agricultural development, such as vineyards or forestry projects (Law 24.441 on Trusts and Law 24.083 on Investment Funds).

151 Interview with Osvaldo Girardin, climate change expert with Fundacion Bariloche.
2. **In case there is as yet no clear legal definition of the right to a CER in the country of study, if participants to different CDM AR projects use varying contractual characterizations of that right within the same country, will this situation result in any particular legal and related difficulties in the host country?**

In principle, the lack of characterization of a CER under domestic law should not pose any kind of difficulty for the parties to a CDM project. As far as available existing information goes, there are no immediate legislative proposals to introduce definitions or more precise legal regulations regarding the nature of CERs or particular modalities for CER transactions.152

Existing contract law establishes the overall principle of the supremacy of the will of the parties to an agreement, in the context of individual freedom, as long as that will does not contravene the public interest or the continental law concept of “Ordre publice.” In other words, the will of the parties to a contract will normally reign supreme, and should provide strong enough grounds to sustain any claim or resolve conflicts deriving from a CDM related contract in an Argentine court of law.

There are also strong grounds for avoiding the temptation to introduce strict legal definitions of CERs, at least in substantive bodies of law such as the Civil or Commercial Code. Given the fact that the carbon market is a rapidly evolving area, with continuous changes in definitions in accordance with the development of international negotiations, it would not seem advisable to attempt to “freeze a legal definition in time” which may not reflect future legal requirements. Furthermore, in view of the different alternatives available for setting up the legal structure of a CDM project, there would appear to be merit in retaining the flexibility to use whichever of the existing contractual means are available at present.

Based upon the existing CDM projects being developed in Argentina, the legal structure will vary in accordance with the role of the proponent, as an investor or a project developer. Where the proponent is an investor, there may be a case for setting up a special purpose company as a separate entity from the actual developer, with the sole purpose of marketing CERs. In other cases, the project developer will enter into a long-term sale contract for all future CERs generated along similar lines as the PCF’s Emissions Reductions Purchase Agreement (ERPA). In this case there would be no need for a separate legal entity.153

In other cases, particularly for the benefit of small-scale forestry projects, there may be a case for using the fiduciary structure contemplated under Law 24.441, where the project proponents might involve a number of smallholders who would pool their resources and set up a Forest Trust to administer the project and market the CERs, on behalf of the group. This particular structure would have an additional advantage in that it is already in widespread use for forestry investments.

In all cases, however, the legal architecture will require careful consideration of the tax implications of the sale of CERs. In the field of tax law, there may be a case for regulatory fine-tuning, taking into account the particular nature of the sale of CERs as a virtual export of an “environmental service”. Given the detailed nature of tax law in general, most regulatory amendments may be carried out by the tax administration and would not require parliamentary approval.

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152 Consultations with Federal Senate Environmental Committee staff.
153 These hypotheses are based upon interviews with different parties involved in developing CDM projects in Argentina, mainly in the landfill gas and industrial fuel conversion fields.
3. Based on the issues that were revealed by the analysis you have undertaken, how would you describe the nature of the legal issues identified? Are they avoidable or unavoidable? (For instance, could land tenure issues be resolved simply by choosing a different project site, or are the problems so prevalent that they would emerge, regardless of the project’s location?) Are policies and legal provisions on CDM AR projects clear enough to prevent most disputes from arising in the future?

The nature of the legal issues involved in developing a successful CDM project in the field of afforestation or reforestation are by and large common to any new institutional regime. In the case of climate change and considering the uncertainties which characterize the international carbon market, this scenario is highly predictable and the difficulties understandable. In all likelihood, the first successful projects will take up a considerable amount of legal time and effort in two key areas of any new field: regulatory due diligence and the drafting and negotiation of all necessary contracts between the parties to a CDM project.

In the absence of clearly defined regulatory provisions, the freedom of the parties to enter into contractual arrangements regarding rights and obligations under a CDM project will be the deciding issue in any potential conflicts which may arise in the future. Detailed and painstaking writing of contracts is therefore a key stage in the successful outcome of any CDM project. An area of regulatory uncertainty in this regard will no doubt be that of taxation and fiscal liability. From a fiscal perspective the sale of CERs will constitute an export of “environmental” services and therefore should not be subject to value added tax (VAT). Given the novel nature of CDM, tax authorities may need to amend the VAT regulations so as to contemplate the sale of an intangible service such as a CER.

In addition to these concerns, it should also be mentioned that scrutiny of offshore corporations seeking to establish operations in Argentina, either as branches of Annex 1 companies, or as independent entities controlled by the parent company, has been increased as a consequence of concerted government attempts to crack down on money laundering operations. The repatriation of profits has also been subject to increased controls in light of a stricter regulatory environment for investment and financial operations.154

Finally, as regards issues surrounding uncertainty of land title, it should be borne in mind that Land Registries in Argentina will vary from one jurisdiction to another and any anomalies or conflicts with local land occupants or tenants should become apparent early on in the design of a CDM project, while performing the regulatory due diligence. Any conflicts which appear to be insurmountable will therefore be virtual deal-breakers and force a relocation or abandonment of the project. It is highly improbable that a CDM project will be executed in provinces or regions of Argentina where land title is unclear, even in the event that soil or ecological conditions should prove to be excellent.

4. How would you characterize the level of compliance and enforcement with the legal standards and regulations you have described above? Do you think the CDM AR framework can and will act as a trigger for improved compliance and enforcement for these standards and regulations?

Enforcement is definitely the weak link in the entire legal and institutional framework for environmental protection, not only in Argentina, but throughout most of the region as well. The reasons for poor enforcement are complex, and go beyond the possibilities of an in-depth discussion in this paper.

The tendency to “over-regulate” in Argentina is aggravat by the nature of a federal system which tends to lead to legal overlap with environmental concerns being addressed by both national, provincial, and in

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154 These policies have been dictated in part by anti-terrorist legislation enacted as a consequence of 9/11, in part by attempts to control money laundering from drugs and other illicit operations, and in part as a consequence of the widespread capital flight which led up to the December 2001 financial meltdown.
some cases municipal regulations. Sustaining three separate levels of public administration increases the fiscal burden on the private sector, in addition to the administrative paperwork required in order to meet all pertinent formal requirements such as filing of affidavits and reports.155

In addition to the structure of the legal system, the key reason for poor enforcement probably lies in the steady decline over many years in the quantity and quality of public sector staff and personnel in charge of environmental management, coupled with budgetary constraints.156 The capacity and skills to supervise and ensure compliance with forestry programmes requires a blend of modern technology and physical presence on the ground, which is usually lacking in the public sector.157 Statistics and data therefore rely almost exclusively on the information provided by the very parties that the State is supposed to control and supervise. By and large, inspections by environmental authorities are only triggered when a third party reports overt or flagrant violations to the law.

In view of these inherent weaknesses, the incentive to ignore or evade regulations that are often perceived as superfluous or unnecessarily bureaucratic is therefore often strong. However, given the fact that validation of CDM projects and certification of emissions reductions or carbon sequestration is entirely dependent upon third party and independent verification, it is a good guess that lack of strong public sector enforcement will not affect the quality and performance of CDM projects. On the contrary, the verification and auditing system that is being set up to ensure the credibility of CDM, should act as an incentive to the rest of the forestry sector, much in the same manner as meeting ISO 14.001 EMS standards has tended to improve business management in other industrial sectors during recent years.

5. What recommendations for adjustments in legislation, if any, can you make, to address the issues set out above? In your best judgment, how likely is it that these adjustments will be made? Is it possible to estimate how long these adjustments would take, and how much they would cost? Please relate your response to any major legal reforms relating to forestry, land or the environment currently taking place in the county of study/region.

These are some preliminary suggestions as regards legislative adjustment. Based on interviews and informal conversations with public officials, some of the laws discussed below are in the process of revision and as such are subject to review and re-assessment.

In the first place, and in view of the fact that Law 25.080 is probably the key driver behind most future forestry investments, there should be a greater contemplation of CDM in this regime, beyond the brief reference to the reimbursement of any subsidies received for forestation purposes in article 19 of Decree 133/99.

Congress has sanctioned several minimum standards or environmental threshold laws (presupuestos minimos). To date no bills have been debated in connection with climate change or CDM. Clearly there is a case for not legislating and running the risk of setting a legal baseline which could in fact obstruct or kill off any opportunities for developing CDM projects. However, some degree of clarification may be necessary, for example, in respect to minimum standards for eligibility, so as to diminish the considerable degree of uncertainty that currently exists regarding forestry projects. Beyond the field of legislators and parliamentarians, and as previously discussed, there is a considerable degree of debate concerning ownership of CERs and who the beneficiaries should be.

155 The goal of the Forestry Investment Promotion Regime (Law 25.080) was to limit and “freeze” the total government tax take from forestry investments and therefore provide a certain degree of predictability to business decisions. (See Braier, Gustavo, “Estudio de Tendencias y Perspectivas del Sector Forestal en America Latina al año 2020”, SAyDS, SAGPyA, FAO, 2004, www.medioambiente.gov.ar).

156 Although structural reform during the 90s was supposed to increase public sector efficiency, in practice reforms were limited to deregulation and privatization of public services and publicly-owned enterprises, without any meaningful attempts to create a modern, highly professional and effective civil service.

157 The First Inventory of Native Forests using satellite images was drawn up as recently as 2002. To be used as an effective enforcement tool, the images should be updated on a frequent basis, so as to contrast and compare with affidavits filed by individual forest companies (see Braier, Gustavo, op. cit. p.28.)
There is one tendency that would favour “nationalizing” the right to CERs by virtue of the environmental service to mankind that sequestration performs. Another tendency favours leaving the issue to be resolved under existing contract law. Notwithstanding the conceptual arguments on both sides, nationalization of CERs does not seem to be a viable option, in view of the practical difficulties that this would entail for project developers.158

The regulatory status of the sale of CERs vis-à-vis the taxation status of the transaction may require further clarification. If considered an export of an environmental service the sale of CERs should not, in principle, be subject to Value Added Tax (VAT). In this case, however, all work and investments carried out with a view to making the project effective, would be paying VAT. The VAT system essentially works on a credit and debit account whereby the tax is effectively paid upon the difference between goods and services sold downstream and goods and services purchased upstream. The chain of value finalizes at the frontier and therefore VAT on exports does not allow for a recovery, unless explicitly recognised as a tax credit that may be offset against other fiscal obligations. In this regard it is well worth taking a more detailed look at the possible tax implications of CDM projects, so as to be as neutral as possible.

Given the federal nature of environmental policy in Argentina under the new constitutional arrangements, there is a strong need for COFEMA to become committed to the climate change agenda in general and CDM in particular. In view of the fact that all projects must demonstrate their contribution to sustainable development, and any such decision is contingent upon provincial goodwill, it is essential that these guidelines be developed with the consensus of all provinces and the DNA. A scenario where a project participant must sacrifice common sense on the altar of provincial autonomies by replicating similar permitting procedures at two separate levels of government is a nightmare and will probably discourage most projects from going beyond the feasibility stage.

Finally, there is a potential need to address the current administrative structure designed for DNA approval. A system was established in 2001, whereby government approval for a project was subject to a detailed administrative procedure, based upon the CDM Executive Board format. This scheme involves independent third party technical review by public and NGO research institutions, in a similar manner as conceived by the Kyoto Protocol for validation by Operational Entities. 159 More recently, SAyDS has developed a simplified procedure whereby a letter of approval may be obtained from the Secretary, after prior consultation. The coexistence of these two alternative administrative procedures has the potential to introduce some confusion into the approval process.

However, the recently enacted Resolution 825/04 attempts to clarify the current status quo for project approval, with a more clearly described “prior consultation” procedure leading to a non-binding letter of non-objection, and the more formal approval procedure, involving external evaluation and an explicit period of public comment with publication of prospective projects on the OAMDL website.

The procedure designed in 2001 replicates the CDM procedure, thereby requiring a project proponent to carry out the entire process of validation twice, once before the local authorities, and after that, formally before the Executive Board. This may lead to an unnecessary duplication of costs in a field where the high up-front expenditures are a very effective barrier to entry for many potential project developers and proponents. In this regard, the recent regulations establishing a streamlined and simplified procedure for obtaining a letter of approval from the local authorities appear to be well inspired and should be followed up with a substantial reform of the existing procedures.

158 Given the fact that Russian ratification has triggered the Kyoto Protocol’s entry into force, it is probable that legislative scrutiny of CDM will increase in the aftermath of COP 10, held in Buenos Aires.

159 As far as it has been possible to ascertain, this procedure has not in fact been used to date.
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Appendices

Appendix I: Government agencies responsible for forestry and the environment – organizational charts

Appendix II: Legislative digest

Appendix III: Approval mechanism for CDM projects
Appendix I

Charts

A National level

1. General organizational chart
2. Sustainable Development and Environment Secretariat (Secretaría de Ambiente y Desarrollo Sustentable – SAyDS)
3. Department of Forestry (Dirección de Forestación)
4. DNA: Argentine Office for the Clean Development Mechanism (OAMDL)
5. Native Forests Department (Dirección de Bosques Nativos)

B Provincial Level

1. Province of Santa Cruz
2. Province of Neuquén

C ProSoBo: Institutional diagram
A National level

Chart 1: General Chart. Executive agencies related to forestry and CDM affairs.
Chart 2: Sustainable Development & Environment Secretariat (Secretaría de Ambiente y Desarrollo Sustentable).
Chart 3: Department of Forestry (Dirección de Forestación, SAGPyA).¹

Chart 4: DNA.

¹ Departments in several government agencies are charged with protecting the environment and must formulate policies for the environment. Recently, many projects and policies have been designed by the Secretariat for Sustainable Development and the Environment and the Secretariat for Agriculture, Livestock, Fisheries and Food or other public bodies with related duties. The Undersecretariat for Agriculture, Livestock, Fisheries and Food is in charge of the sustainable use of natural resources, although this is also part of the economic objectives of forestry.
Chart 5: Native Forest Department (Environmental & Sustainable Development Secretariat - SAyDS)

Policy Level

Sustainable Development & Environment Secretariat -SAyDS-

Under Secretariat of Natural Resources

National Department of Natural Resources & Biodiversity Protection

Management Level

Native Forests Department

Deputy Director

Areas:

- Non-Timber Forest Products
- Statistics
- Sustainable Management
- Legal - Normative area

Forestry Evaluation System- Management Office (UMSEF)
B Provincial Level

Chart 1: Province of Santa Cruz

2 The Provinces have been selected so as to show a range of different administrative arrangements.
Forestry Programmes are implemented by the Under Secretariat for Production, subordinate to the Ministry for Production & Tourism. It is also entrusted with enforcing laws related to soil conservation and fiscal lands administration. Outside municipal areas, the provincial authorities are entirely responsible for forestry management and monitoring of activities. The Institute for Production Development (Instituto Autárquico de Desarrollo Productivo - IADEP) administers forestry plans created by Law 2367 (Annex A) and its system of benefits.

Other public bodies involved in with environmental policy making objectives are: COPADE (environmental policy) and General Department for Environment and Sustainable Development (subordinate to the Ministry for Production and Tourism) for E&SD policy and management.
C ProSoBo: Institutional diagram
Appendix II

Legislative digest (Federal and Provincial Law Summary)

- National Environmental Legislation
- National Forestry Legislation
- COFEMA Resolutions
- Provinces adhered to Forestry National Plan - Law 25.080
- Provinces adhered to Law 23.302 on indigenous rights\(^3\)
- Provinces adhered to Law 24.857

National Environmental Legislation

Law 25.675 on General Framework for Environment
Law 25.612 on Industrial and Services Activities Waste
Law 26.670 on the Management and Elimination of PCBs
Law 25.688 on Environmental Management of Waters
Law 25.831 on Free Access to Environmental Information
Law 25.916 on Solid Waste Management

Climate change and CDM legislation

Law 24.295. Approves\(^3\) UNFCCC.


Decree 2213/02. Entrusts Environment Secretariat with the implementation of the Kyoto Protocol.
Decree 295/03. Establishes Environment Secretariat (SAyDS) organizational chart and establishes administrative boundaries.
Dec. 487/04. Modifies Environment Secretariat (SAyDS); charts and boundaries.

Res. 345/02 (SAyDS). CDM Projects Design Format – OAMDL.
Res. 579/03 (MDS). Appoints Secretary of Environment to preside over OAMDL.
Res. 376/1997. Exotic species; introduction; requirements.

Disp. 167/01 (SsOyPA). OACI is renamed OAMDL.
Disp. 169/01 (SsOyPA). CDM project management and approval. Sets proceedings norms to offer/presents projects at DNA to its validation.
Resolution 845/04 (SAyDS). Establishes the guidelines for the evaluation of project activities submitted to the OAMDL.

\(^3\) Constitutional reform has virtually superseded the need for the system of provincial adherence to this regime.
\(^4\) The technical term for parliamentary ratification of a treaty signed by the executive is approval. After legislative approval, the executive deposits the corresponding instrument of ratification with the Secretariat.
National Forestry Legislation

**Law 13723 to Dec 710/95.** Forest Protection Law.
**Law 24.688.** Afforestation-reforestation declared in the national interest.
**Law 25.080.** Forestry Promotion scheme.
**Law 25.509.** Creates right in rem for forestry exploitation.
**Law 25.845.** National Seed Institute (Instituto Nacional de Semillas).
**Law 24.857.** Forestry and Forest Resources Law 13273 schemes. Tax freeze commitment.

Decree 1332/02. Creates ProSoBo. Sustainable use of native forests.

Res. 152 (SAGPyA). Forestry enterprises and Registry of Professionals.
Res. 22/01 Entrusts Forestry Director with the responsibility for oversight of Law 25080; creates the following registries: Forestry enterprises; Responsible Owners and Operators; and Professionals. The Resolution also establishes the relevant administrative Procedures. (Modified by Res. 1052/2001 (SAGPyA) – 8/12/2001).

General Tax Authority Resolution 1042. Tax Proceedings related to forestry promotion schemes.

Resolution 860/02. Establishes bylaws pursuant to Decree 1332/2002.
Resolution 444/03. National Forests Scheme.
Res. 771/00 (SDSyPA). Creates the National Network for Model Forest Management.
Res. 1184/00. Establishes Advisory Board for Forestry Promotion Scheme.
Res. 403/96 (SRNyAH). Forestry Scheme Committee.

COFEMA Resolutions

Resolution N° 6/97. National Environmental Policy: Reference to the jurisdictional boundaries of the Province’s agencies.
Resolution N° 456/00. Environmental Policies involving one or more jurisdictions.
Resolution N° 31/00. Promotes the creation of Provincial Liaison offices for Climate Change Projects.
Resolution N° 72/03. Recommendation for the implementation of EIA at the highest administrative level in each Province.

Provinces adhered to Forestry National Plan – Law 25.080

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**Provinces adhered to National Law 23.302 on indigenous rights:**

- Córdoba: Law 8085
- Chubut: Law 3623
- La Pampa: Law 1228
- Mendoza: Law 5754 and Law 6920
- Río Negro: Law 2553
- Santa Fe: Law 10.375
- Salta: Law 6685
- San Juan: Law 6455
- Tierra del Fuego: Law 235
- Tucumán: Law 5778

**Provinces adhered to Law 24.857**

- Corrientes: Law 5273
- Jujuy: Law 5037
- Misiones: Law 3586
- Santa Cruz: Law 2530
Appendix III

Approval mechanism for CDM projects

Flow-chart: CDM approval cycle

The following chart and notes explain the required procedure at the DNA – (OAMDL) for national approval:

1) Letter of “No Objection” (Resolution 239/04)

2) Presenting the Project Design Document (PDD).

The approval process has been somewhat amended by the modifications introduced to CDM project approval by Res. 825/04. The amendments are commented at the end of this annex.

On November 1st of 2004, the Environmental Secretariat (SAyDS) introduced changes for the MDL project evaluation cycle in order to improve the mechanism. The following issues have been addressed by Resolution 825/2004 (SAyDS):

- to harmonize the regulations with other Latin American standards;
- to reduce transaction costs;
- to simplify the mechanism for faster project approval cycle.
- It was also necessary to avoid a confused and disordered regulation for the project approval cycle. Resolution 825/04 repealed several rules established since 1998.

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5 The approval process has been somewhat amended by the modifications introduced to CDM project approval by Res. 825/04. The amendments are commented at the end of this annex.

6 Regarding UNFCCC - DDP (last version): http://cdm.unfccc.int/Reference/Documents Res 345/02 (Annex) has created a Document based in the Working Draft of Report prepared by the Secretary of CMNUCC in October 1999 according to decision 17/Cp.7 adopted in Marrakesh. The OAMDL expected that the Model for Project Design would be very similar to official version of PDD (Disp 160/01 - Annex / 2.3).
Legal Aspects in the Implementation of CDM Afforestation and Reforestation Projects

PRE-EVALUATION

1. **Permanent Secretariat:** Reports about the Project in 5 working days. It aims to ensure that the Project is in compliance with national and local regulations and article 12 of Kyoto Protocol. It also examines project viability (Project Eligibility). Then, regarding of that, communicates draft to the Executive Committee.

2. **Executive Committee (EC):** Reports about the Project and decides if it will pass to the next step:

   - **REFUSED:** Requires RE-PROJECT or ENLARGE the Project information document.
   - **TECHNICAL EVALUATION** (5 working days: communicates to PP)

**EC: DESIGNATES AN EVALUATORY INSTITUTION (EI):**
- Registered by EC;
- Selected as the best qualified institution for each particular Project Evaluation;
- Subscribed in the term of 5 working days - a cooperation agreement with SAyDS (this will regulate its tasks and fees as a by law).

Asks for: Clarification Explanatory Information

**IE:**
- Analyzes Project in the term of 15 working days since its receipt (8.5.1 of Disp 169/01).
- Non-compliance of the term is considered a serious offense. The evaluator may seek an extension to this term from the Executive Board.

- **REFUSES**
- **APPROVES**

**SECRETARY of ENVIRONMENT RESOLVES**

**INTERNATIONAL APPROVAL**
- CDM Executive Board

**ANALYTICAL REPORT (EI):** Describes evaluated issues and conclusions.

**TECHNICAL REPORT (EC):** (10 working days)

**DEPOSITS ORIGINAL DOCUMENT AT OAMDL’S ARCHIVE. (LEGALIZE A COPY).**

**Sends document copy to other interested entities, with a path sheet.**
The Argentinean Experience

The Resolution introduces the following particular requirements:

- PDD must accord to the UNFCC web site model
- The PDD must also include:
  1. supporting text describing the contribution of the project to the sustainable development of Argentina
  2. a request form or note (Annex I)
  3. documentation regarding national and local legislative compliance (which will be verified by the Permanent Secretariat of OAMDL)
- The Permanent Secretariat must:
  1. Send the PDD to local authorities for consultation regarding the project. The opinion of local authorities will be given due consideration by the Executive Committee.
  2. Publish the project proposal on the SAyDS web site for 10 days for interested parties to make comments.
  3. Reports about the project may be received within 20 working days
- The Executive Committee may decide if the project requires further technical evaluation or not for approval. Further evaluation will be avoided if not considered necessary, as in the case of a project employing already tested and approved baseline methodologies.