



CREATING AN ENABLING LEGAL FRAMEWORK FOR REDD+ INVESTMENTS IN KENYA

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**Ministry of the Environment
Sweden**

The **REDD+ Law Project** is led by Baker & McKenzie and the Cambridge Centre for Climate Change Mitigation Research (University of Cambridge), working with international and local advisers/institutions to assist countries in the development and implementation of their national REDD+ legal frameworks.

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The Baker & McKenzie logo consists of a horizontal bar with a yellow-to-white gradient on top and a red-to-yellow gradient on the bottom. The text "BAKER & MCKENZIE" is written in white capital letters on the red section.

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ABOUT THIS REPORT

1. THE KENYAN REDD+ LAW PROJECT

1.1 About the REDD+ Law Project

This report is an output of the *Kenyan REDD+ Law Project*

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The Great Rift Valley, taken from the Nairobi-Lake Naivasha road, Kenya.

1.2 Contributions from Kenyan advisors and institutions

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**Kenyatta University School of Law
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1.3 Sponsor of this output of the Kenyan REDD+ Law Project

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4. A NOTE ON REFERENCING

The text of this document is footnoted to show the relevant sources. In many cases, the full details of each reference have been left rather than providing abbreviations - this is for ease of reference due to the large size of the document.

5 DISCLAIMER

REDD+ policy and the legal frameworks that support REDD+ implementation constantly evolve. To the best of the authors' knowledge, the information contained in this report was accurate at the time of writing. However, nothing in this report should be used as legal advice, and the status of any legal provision should be checked for updates.

The opinions expressed in this report do not necessarily reflect the views of any of the organisations involved. Any errors and omissions belong to the authors' of this report.

KEY ISSUES AND RECOMMENDATIONS FOR CREATING AN ENABLING LEGAL FRAMEWORK FOR REDD+ INVESTMENTS IN KENYA



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EXECUTIVE SUMMARY

Reducing Emissions from Deforestation and Forest Degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries (REDD+) has emerged out of the United Nations Framework Convention on Climate Change (UNFCCC)/Kyoto Protocol negotiations. **It is intended to be a mechanism to channel funding (from both public and private sources) for reducing emissions from the forest sector.** It is an international climate change policy that relies on national implementation. **In order to attract and manage REDD+ investments (both public and private), countries need to decide on their approach to REDD+ implementation through a series of policy choices, and then implement those policy choices through strong legal frameworks.** An important question for REDD+ host countries to consider, therefore, is how to **develop robust legal structures to facilitate REDD+ implementation.** These legal frameworks could be based on existing laws, and/or require new law making.

In Kenya's case, moving from the planning phase to the implementation phase of a national programme requires a comprehensive review of current legal frameworks in order to determine the extent to which they provide a foundation for governing REDD+ policy interventions. Many of Kenya's current legal structures (including those related to land, the environment, commerce and devolved governance) could be used to support REDD+ implementation, however, the links between Kenya's chosen approach to REDD+ implementation and existing laws needs to be further developed. A comprehensive REDD+ policy would provide the reference points needed for assessing how different laws apply to the various aspects of REDD+ implementation, including the identification of gaps and the best type of legal instrument to govern REDD+. It might be possible to house REDD+ provisions within existing laws (the new Forest Conservation and Management Bill 2014 and/or the Climate Change Bill 2014 might provide an opportunity for this), however, a wider 'umbrella law' capturing the many different elements of REDD+ implementation might be preferable in the longer-term to coordinate the development of REDD+-related rules in other existing regimes (such as those dealing with land, forests, investment etc). These options need to be explored further.

The issues of carbon rights and benefit sharing could be addressed using current legal frameworks as a starting point. The first step would be to clarify where carbon 'sits' in the current framework (in addition to defining forest carbon-based emissions reductions in the law), and then work through the different elements that form part of a benefit sharing system. It is important to understand that the

concept of 'carbon rights' is relatively new, and benefit sharing in the context of REDD+ is complex. When discussing these concepts, common terms of reference would be helpful, and the current status of the rights to land and carbon must be acknowledged before policy questions can be answered regarding how revenue should be shared (and in what form, whether cash or as 'in kind' benefits such as social infrastructure). This is important to avoid conflicts and design incentive structures that will engage multiple stakeholders to support REDD+ implementation, including landholders. Lastly, if Kenya seeks to attract both public and private investment to support REDD+ implementation, different legal issues should be clarified with respect to each (for example, regarding the rules applicable to grants and carbon transactions). While these issues are important, they are not the only ones to consider and the resources required to create a comprehensive implementation framework should not be underestimated.

It is recommended that the following steps be taken to further develop Kenya's REDD+ governance framework:

- ▶ Develop a more comprehensive REDD+ policy, addressing key elements of REDD+ policy;
- ▶ Consider the legal approach to the scale at which REDD+ is to be undertaken (i.e. national, sub-national or project-based);
- ▶ Ensure that the UNFCCC requirements are implemented;
- ▶ Clarify how the existing law will apply to REDD+ investments;
- ▶ Clarify the legal status of carbon rights;
- ▶ Consider each of the different elements of benefit sharing;
- ▶ Consider the adequacy of existing law or the need for a dedicated law; and
- ▶ Create a clear road-map for developing Kenya's national legal framework for REDD+.

Working to clarify how existing legal frameworks could support REDD+ implementation and also how new REDD+-specific concepts (such as carbon rights and benefit sharing) will be regulated in the Kenyan legal system will help to ensure that Kenya's national programme, and any project activities within it, comply with the emerging principles of the UNFCCC and other international expectations regarding the implementation of REDD+ at the national level. Robust legal frameworks that are consistent with such international benchmarks will help to ensure that Kenya can attract, and successfully manage, REDD+ investments.

1. OVERVIEW OF REDD+ LAW AND GOVERNANCE ISSUES

Reducing Emissions from Deforestation and Forest Degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries (REDD+)¹ has emerged out of the United Nations Framework Convention on Climate Change (UNFCCC)/Kyoto Protocol negotiations.² **It is intended to be a mechanism to channel funding (both public and private) for reducing emissions from the forest sector (from both public and private), and as an international climate change policy it relies on national implementation. In order to attract and manage REDD+ investments, countries need to implement appropriate policy choices supported by strong legal frameworks.** Therefore, countries seeking to implement REDD+ need to address various different issues in their REDD+ policies (discussed at 1.2), including the **development of robust legal structures to facilitate REDD+ implementation.** These legal frameworks could be based on existing laws, and/or require new law making (issues regarding both the ‘form’ and ‘content’ of law will be discussed below at 1.3).

The issues discussed in this report should not be considered specific to any particular approach to REDD+. It is necessary to appreciate that all of these issues are relevant in the context of a jurisdictional, ‘nested’ or project approach to REDD+ and must be carefully considered regardless of whether REDD+ interventions are funded by donors or via some market mechanism.

1.1 An international climate policy that relies upon national implementation

REDD+ is one of several different strategies to address climate change that Parties to the UNFCCC have developed as part of their mitigation commitments.³ Whilst the UNFCCC expressly recognises the importance of sinks in the removal of greenhouse gases from the atmosphere in its foundational principles and commitments,⁴ the scope of a REDD+ mechanism has only taken form in the last seven years (officially being established in 2010).⁵

¹ UNFCCC, "Background: REDD" [2013], available online at http://unfccc.int/methods_science/redd/methodological_guidance/items/4123.php (last accessed 14 April 2013).

² *Ibid.*

³ Under UNFCCC Art. 4(1)(d).

⁴ Article 4(1)(d) of the UNFCCC provides that Parties shall “*promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol, including biomass, **forests** and oceans as well as other terrestrial, coastal and marine ecosystems.*”

⁵ Via the Cancun Decisions (Decision 1/CP.16/2010 - "The Cancun Agreements").

Official decisions made by the Conference of the Parties to the UNFCCC (COP) provide guidance regarding the implementation of the principles and commitments of the UNFCCC and, relevantly, future REDD+ implementation. Even though the COP's decisions do not substitute for a legally-binding international treaty (and can be changed in subsequent meetings of the COP), countries generally follow COP guidance when designing their national implementation frameworks.

To prepare for future implementation of REDD+ under the UNFCCC, the guiding principles of the emerging UNFCCC framework for REDD+ need to be translated into national policy and law. Over time, further detail as to the exact nature of the requirements currently outlined by the COP is likely to develop, and it is also likely that national governments will adopt a variety of different approaches regarding how REDD+ will be implemented at the national level. Guidance about how REDD+ could be implemented can also be drawn from other national forest carbon schemes, the Verified Carbon Standard (VCS) and the work of the Forest Carbon Partnership Facility (FCPF).

The UNFCCC framework already requires countries to establish national strategies and action plans, and many are already developing these with the assistance of the UN REDD programme, the FCPF and bilateral donor funding. The practical implementation of these strategies and action plans will be facilitated by robust legal frameworks, meaning that the development of REDD+ law is an important part of a country's REDD+ readiness work.

1.2 Elements of national REDD+ policy

1.2.1 Specific issues that need to be addressed in national REDD+ policy

Although the exact details of REDD+ are still under negotiation in the UNFCCC, a framework for REDD+ implementation at the national level has gradually emerged. It includes different elements that must be addressed by a REDD+ host country, including safeguarding principles (such as protection for indigenous rights and actions to reduce the risk of reversals). At this stage of development, UNFCCC requirements are expressed as high-level objectives and it is ultimately left to national governments to develop their laws in a way that will reflect and further develop these principles.⁶

The UNFCCC defines the scope of REDD+ activities, including 1) reducing emissions from deforestation, 2) reducing emissions from forest degradation, 3) forest conservation, 4) sustainable management of forests, and 5)

⁶ This is very similar to the way in which the rules around the Clean Development Mechanism (CDM) developed. Initially, these rules were laid out in Article 12 of the Kyoto Protocol but over time developed through both the Marrakesh Accords and by governments introducing domestic frameworks to implement the CDM in manner that was consistent with those UNFCCC rules.

enhancement of forest carbon stocks.⁷ To prepare for undertaking these activities, the UNFCCC requests that countries develop:

- ▶ **A national strategy or action plan:**⁸ Countries have significant flexibility to design their strategies for implementing REDD+. Many countries seeking to implement REDD+ are supported by a grant from the FCPF Readiness Fund. Part of the application process for this grant includes completing a 'Readiness Preparation Proposal' (R-PP), which includes some guidance on what a national strategy should contain, including the development of a national legal framework to implement strategy options.⁹
- ▶ **A national forest reference emission level and/or forest reference level:** Sub-national forest reference emission levels and/or forest reference levels are permitted as an interim measure.¹⁰ The FCPF defines this as "an estimate of historic forest cover change and greenhouse gas (GHG) emissions and uptake from deforestation and/or forest degradation and the other REDD-plus activities, reflecting national circumstances, potentially including forward-looking projections of emissions."¹¹
- ▶ **A forest monitoring system:**¹² The FCPF defines this as a system "to measure, report and verify the effect of the REDD-plus strategy on GHG emissions and other multiple benefits, and to monitor the drivers of deforestation and forest degradation, as well as other variables relevant to the implementation of REDD-plus"¹³; and

⁷ Cancun Decisions (Decision 1/CP.16/2010 - "The Cancun Agreements"), paragraph 70: "Encourages developing country Parties to contribute to mitigation actions in the forest sector by undertaking the following activities, as deemed appropriate by each Party and in accordance with their respective capabilities and national circumstances: (a) Reducing emissions from deforestation, (b) Reducing emissions from forest degradation, (c) Conservation of forest carbon stocks, (d) Sustainable management of forests, and (e) Enhancement of forest carbon stocks."

⁸ Cancun Decisions (Decision 1/CP.16/2010 - "The Cancun Agreements"), paragraph 71(a).

⁹ Including: "... **adjustments to address the legal, regulatory, institutional and capacity gaps** affecting the effectiveness to respond to the priority environmental and social considerations associated with the key drivers of deforestation and forest degradation. This strategy also includes work **developing the REDD-plus institutional and legal implementation framework necessary to implement these strategy options**. The selection and design of strategy options should be guided by the assessment, the findings of analytical studies during implementation of the R-PP work, as well as the results from consultations and the public participation of the REDD-plus readiness process." *R-PP Template with Guidelines*, Version 6 - Working Draft April 20, 2012. Accessible at <http://www.forestcarbonpartnership.org/readiness-fund>, page 4.

¹⁰ Cancun Decisions (Decision 1/CP.16/2010 - "The Cancun Agreements"), paragraph 71(b).

¹¹ *R-PP Template with Guidelines*, Version 6 - Working Draft April 20, 2012. Accessible at <http://www.forestcarbonpartnership.org/readiness-fund>, page 4.

¹² Cancun Decisions (Decision 1/CP.16/2010 - "The Cancun Agreements"), paragraph 71(c).

¹³ *R-PP Template with Guidelines*, Version 6 - Working Draft April 20, 2012. Accessible at <http://www.forestcarbonpartnership.org/readiness-fund>, page 4.

- ▶ **A system to report on Cancun safeguards:**¹⁴ these safeguards are discussed further below at **1.3.2.3.**

In addition, principles have developed under other programmes and arrangements such as the VCS, the methodology adopted by the FCPF Carbon Fund and bilateral arrangements (such as Indonesia's partnership with Norway). A number of domestic emissions trading and offset schemes that support forest-based carbon sequestration activities (such as those in Australia, New Zealand and California) have developed or intend to develop more detailed and comprehensive legal mechanisms for dealing with relevant issues, particularly those regarding land, forest and carbon tenure, and permanence.

When considered together, the different schemes provide guidance regarding appropriate **elements of a national REDD+ policy** – including:

- ▶ Identifying the drivers of deforestation;
- ▶ Defining REDD and REDD+ qualifying activities (including peatlands and mangroves);
- ▶ Establishing institutional arrangements;
- ▶ Permissible public and private participation in REDD+ activities;
- ▶ Legal clarity over land, forest and carbon tenure;
- ▶ Spatial planning dealing with land mapping and land management;
- ▶ National forest carbon stock reference levels;
- ▶ Measurement, Reporting and Verification (MRV);
- ▶ Permanence of REDD+ activities and carbon stock/actions to address the risks of reversals;
- ▶ Safeguards, including: recognition of customary rights and Free Prior and Informed Consent (FPIC); public participation; and, environmental impact assessment;
- ▶ Incentive structures for community participation and benefit sharing;
- ▶ Implementation and enforcement, including forest types and concessions, sanctions for illegal logging and project approval requirements; and
- ▶ Developing national/sub-national approaches.

1.2.2 *Policy questions for designing a national REDD+ policy*

Although REDD+ is still under development within the UNFCCC, and also through other national schemes and standards, it is possible to identify several issues which are fundamental to the design and implementation of a policy framework for REDD+. Key questions to consider are listed below:

¹⁴ Cancun Decisions (Decision 1/CP.16/2010 - "The Cancun Agreements"), paragraph 71(d).

- ▶ **What is the scope of activities to be covered?** Will the law focus solely on REDD+ as defined under the UNFCCC, or will it include other land use, land use change and forestry (LULUCF) activities?
- ▶ **What is the coverage of the REDD+ policy or scheme?** Will a single unified scheme be implemented or will multiple agencies (and laws) be used to achieve the overarching REDD+ policy objectives?
- ▶ **What is the context in which the scheme is framed?** Will it be integrated into existing law (for example, an existing forest management regime), be housed in a stand-alone REDD+ law, or be part of a bigger climate change framework?
- ▶ **What scale¹⁵ of REDD+ activities will be implemented?** Will the scheme be implemented at the national or sub-national level? How will existing projects transition into the scheme? Will a ‘nested’ approach to REDD+ implementation be adopted?
- ▶ **Will market, non-market or a hybrid approach be used for financing REDD+?** Will the government seek funding from both public and private sector sources? Will the activities covered by the scheme be able to generate tradable credits, and if so, could they be used in international or domestic markets (or both)? This will depend to a large extent on who actually agrees to fund REDD+ and the basis upon which such funding is provided.
- ▶ **Who will oversee REDD+ activities?** Will the scheme be centrally coordinated, or will responsibilities be devolved to other national agencies and/or provincial governments and agencies?
- ▶ **How will REDD+ activities be implemented?** The standards and rules that will apply to REDD+ interventions need to be clear, for example:
 - Who will be able to participate in and undertake projects and other activities?
 - What rights to carbon tenure/emissions reductions will need to be demonstrated to ensure the participant is eligible?
 - How will the project or activity need to be carried out during different phases of implementation in order to secure available benefits?

¹⁵ The options regarding the scale of REDD+ implementation are a *jurisdictional approach* (where the accounting ‘jurisdiction’ in question is either at the national or sub-national level), *project-level* implementation, or a multi-scale *nested* approach. A **jurisdictional approach** - a **national-level approach** is likely to result at first instance in incentives flowing to the national government based on performance against a national reference level,¹⁵ or a **sub-national approach** will channel incentives to a sub-national governmental entity (e.g., a state, municipality, province, or district) based on performance against a sub-national reference level¹⁵ (unless this is overruled by a national government). A **project-level approach** means that incentives flow directly to project developers based on performance against a project baseline, and a project will not necessarily coincide with a governmental jurisdiction¹⁵ (noting that a government could overrule this). A **‘nested’ approach**: Incentives can flow directly to sub-national entities and/or project developers in addition to national governments. *Source*: Rane Cortez et al., *A Nested Approach to REDD+: Structuring effective and transparent incentive mechanisms for REDD+ implementation at multiple scales*, The Nature Conservancy and Baker & McKenzie (2010), page 7.

- How will issues such as permanence, leakage and additionality be dealt with?
- How will safeguarding measures be implemented, and reported?
- How will the scheme be enforced? Will there be a sanction for non-compliance with the scheme's rules?
- ▶ **What are the physical benefits generated by the project or activity?** Will both carbon and non-carbon benefits be created and in what form?
 - For carbon, who is entitled to create the benefits? For example, does the State retain ownership of carbon or does it follow land ownership or other recognised forms of tenure (such as community rights or third party rights)?
 - How are carbon benefits legally defined or conferred? For example, through express reservation (to the State), or is ownership implied as a result of existing laws (including the Constitution, property laws, forestry and natural resources laws) or new Statutes?
 - How are carbon benefits expressed as a right? For example, are they treated as a natural resource, an ecosystem service, a proprietary interest, or an expressly defined statutory right?
- ▶ **Can the carbon and non-carbon benefits created be conferred on third parties?** For example, conferred through the grant of concessions, licences, contracts or formal legal transfers of proprietary interests? If so, on what terms?
- ▶ **How will the carbon and non-carbon benefits generated be monetised?** Will the benefits created be linked to the creation of tradable units, legally recognised emission reductions, carbon or ecosystem services or other intangible benefits?
- ▶ **Will the State be entitled to all or part of the benefits created (and if so, on what basis)?** Do emission reductions and/or monetary benefits automatically flow to the government, or is the government entitled to benefits through some other means such as royalties, fees or taxes?
- ▶ **How will the financial benefits be shared?** On what legal basis might other stakeholders who are not directly involved in the creation of the carbon and non-carbon benefits be entitled to share in the financial benefits (whether in cash or 'in kind')?

Irrespective of the policy choices made regarding the points above (which collectively represent a country's chosen approach to REDD+ implementation), a strong legal framework will be required to implement REDD+ policy. Many different legal issues will need to be addressed in order to develop a national legal framework for REDD+ implementation, and these are outlined in the next section.

Irrespective of the policy choices made regarding the points above (which collectively represent a country's chosen approach to REDD+ implementation), a strong legal framework will be required to implement REDD+ policy. Many different legal issues will need to be addressed in order to develop a national legal framework for REDD+ implementation, and these are outlined in the next section.

1.3 Legal aspects of national REDD+ implementation

In order to implement a REDD+ policy framework (the details of which are discussed above at 1.2), the different **elements of REDD+ policy** need to be translated into national law. The importance of national legal frameworks for REDD+ implementation has been noted by UN-REDD,¹⁶ GLOBE¹⁷ and other leading commentators.¹⁸ It is important to understand that the process of developing a national legal framework is likely to be complex and time-intensive. This section discusses the following aspects of legal frameworks for REDD+ in more detail:

- The ‘form’ and ‘content’ of REDD+ law
- Minimum requirements established by the UNFCCC
- 2 important issues that many countries are currently exploring – carbon rights and benefit sharing.

1.3.1 The ‘form’ and ‘content’ of REDD+ legal frameworks

The ‘form’ of REDD+ law refers to the type of legal instrument used for REDD+. REDD+ implementation could draw on existing laws – for example, land and natural resource regimes (including forestry), public finance, community rights and constitutional provisions. It may be that REDD+ can be housed in existing laws regarding climate change, forests or natural resource management. Alternatively, new rules or laws may need to be developed (especially where the current laws cannot be adapted to accommodate REDD+). In either case, REDD+ rules must be consistent with the national constitutional framework.

The ‘content’ of REDD+ law refers to the specific issues that need to be addressed in that law. Identifying where different issues ‘sit’ within the current legal framework is the starting point for examining the relationship of the existing law to REDD+ implementation, and/or developing new law reforms to support REDD+.

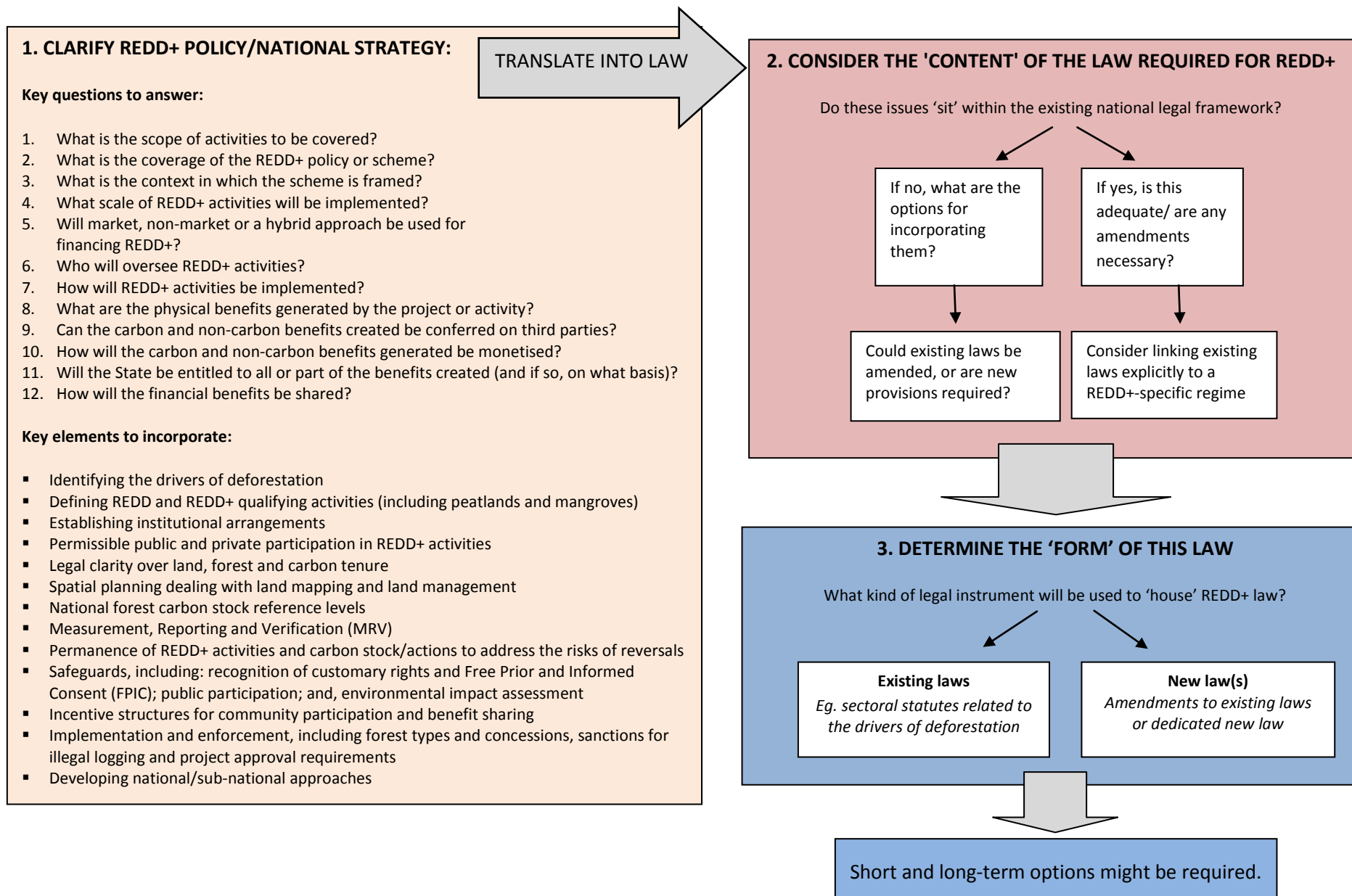
Please see below for a flow diagram showing the different steps involved in developing a legal framework for REDD+.

¹⁶ See Francesca Felicani Robles, 'Legal analysis of cross-cutting issues for REDD+ implementation: lessons learned from Mexico, Viet Nam and Zambia' UN-REDD Programme (2013).

¹⁷ Darragh Conway et al, 'The GLOBE Forest Legislation Study: A Review of Forest Legislation in Four Countries' (Report, The Global Legislators' Organisation, 2013), pages 33-34.

¹⁸ See International Union for Conservation of Nature (IUCN)/John Constenbader, ed., *Legal Frameworks for REDD: Design and Implementation at the National Level* (Bonn: IUCN, 2009); Covington & Burling LLP and Baker & McKenzie, *Background Analysis of REDD Regulatory Frameworks* (Report prepared for The Terrestrial Carbon Group and UN REDD Programme: May 2009); and, Arild Angelsen (ed), 'Realising REDD+: National Strategy and Policy Options' (Centre for International Forestry Research, 2009).

FLOW DIAGRAM OF THE PROCESS FOR DEVELOPING A REDD+ LEGAL FRAMEWORK FOR REDD+



1.3.2 *Specific UNFCCC requirements*

If a country intends to align its domestic legal regime for REDD+ with a future UNFCCC mechanism, it will be important to address each of the elements emerging through the UNFCCC's REDD+ framework. These aspects of REDD+ implementation might already 'sit' within the current legal frameworks in some form (noting that the effectiveness of this law is a separate question). For example, land tenure issues related to existing land law and policy, forest governance issues related to existing forest law and policy, and the safeguarding requirement of 'full and effective' participation could each draw on existing laws relating to public participation in natural resource management.

Further details about the major elements of the current UNFCCC framework are set out below.

1.3.2.1 *Phased implementation*

Paragraph 73 of the Cancun Agreement provides that the activities undertaken by Parties (referred to in paragraph 70) should be implemented in phases, "beginning with the development of national strategies or action plans, policies and measures, and capacity-building, followed by the implementation of national policies and measures and national strategies or action plans that could involve further capacity-building, technology development and transfer and results-based demonstration activities, and evolving into results-based actions that should be fully measured, reported and verified".¹⁹

The phased funding approach allows countries to participate in REDD+ initiatives according to their capacity and creates incentives for ongoing funding by allowing countries to progress from one phase to next upon achieving key outcomes in a phase.²⁰ REDD+ requires the adoption of new land use strategies, requiring REDD+ host countries to undergo a process of policy design, consultation and consensus building, testing and evaluating before moving to full-scale implementation.²¹ There could be overlap between the different phases, which can be individually described as²²:

- ▶ The **first phase** includes preparing a national REDD+ strategy through inclusive multi-stakeholder consultations, building capacity in MRV, and beginning demonstration activities;

¹⁹ Cancun Decisions (Decision 1/CP.16/2010 - "The Cancun Agreements"), paragraph 73.

²⁰ Zarin, Daniel (coordinating author) et al, *Reducing Emissions from Deforestation and Forest Degradation (REDD): An Options Assessment Report* (Meridian Institute 2009), page 3.

²¹ *Ibid*, page 3.

²² Wertz-Kanounnikoff, Sheila and Angelsen, Arild., 'Global and National REDD+ architecture: Linking Institutions and actions', in Arild Angelsen (ed.), *Realizing REDD+: National strategy and policy options* (CIFOR 2009), pages 15-17.

- ▶ The **second phase** requires implementation of policies and measures that reduce emissions. For example, the national REDD+ Strategy for Kenya outlines the particular land-based emissions reduction policies and measures applicable in the country²³; and
- ▶ The **third phase** will involve the transfer of finance for quantified forest emission and removals against agreed criteria and established reference levels.

1.3.2.2 National institutional framework

The UNFCCC framework asks countries to include a national REDD+ institutional framework with certain key elements, many of which will draw on existing legal frameworks. For example, as part of their **national strategies and action plans** (discussed above), countries are requested to address:

- ▶ **Land tenure issues:**²⁴ The importance of land tenure for regulating land use and assigning benefits from REDD+ has been widely noted. Nonetheless, clarifying and then administering land tenure is a complicated issue that presents a challenge for many countries. Tenure systems can contain many different kinds of rights²⁵, and land rights can be a source of conflict and political debate. REDD+ presents a new opportunity to consider this challenge, in addition to creating what could be new resource rights (eg. to carbon);
- ▶ **Forest governance issues:**²⁶ It is likely that REDD+ policy will build on existing forest governance structures and strategies, which could include efforts to police illegal logging, anti-corruption work, the administration of concessions (if they exist), the establishment of national parks, and so on. REDD+ is seen by some countries as a mechanism to bolster existing national programmes with a new source of revenue;

²³ Forest Carbon Partnership Facility, *REDD Readiness Progress Fact Sheet: Country Kenya* (2012). Available at http://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/PDF/June2012/Kenya%20FCPF%20Readiness%20Progress%20Sheet_June%202012.pdf.

²⁴ Cancun Decisions (Decision 1/CP.16/2010 - "The Cancun Agreements"), paragraph 72.

²⁵ Different kinds of *rights* can be found within a land tenure system, such as:

- Right to ownership: the owner is entitled to use, control and dispose of the property.
- Right to use:
 - Right to access: for example, an easement confers the right to use the real property of another for a specific purpose (for example, access to another property).
 - Usufructuary right: Refers to the right of one individual to use and enjoy the property of another, provided its substance is neither impaired nor altered (for example, rights to use water from a stream for household use).
 - Right to exploit: For example, a *profit a prendre* is the right of persons to share in the land owned by another, enabling a person to take part of the soil or produce of land that someone else owns (for example, a logging concession).
- Right to control, ie. entitled to make decisions about how land should be used.
- Right to transfer, ie. entitled to sell, inherit and/or reallocate property rights.

²⁶ Cancun Decisions (Decision 1/CP.16/2010 - "The Cancun Agreements"), paragraph 72.

- ▶ **Gender considerations:**²⁷ It has been noted that ‘REDD+ has the potential to positively affect women’s roles and status in relation to land ownership and management’²⁸ and that governments need to develop land tenure frameworks ‘that officially recognise women’s rights to forest products and carbon from forests.’²⁹ Legal issues may arise as to the effective participation of stakeholders if there are local laws prohibiting land ownership or use rights based on gender;
- ▶ **The drivers of deforestation and forest degradation:**³⁰ Drivers of deforestation are often categorised as either proximate/direct causes (human activities that directly impact forest cover and loss of carbon, such as agricultural expansion, infrastructure extension and wood extraction³¹) or underlying/indirect causes of deforestation and forest degradation (complex interactions of fundamental social, economic, political, cultural and technological processes that are commonly distant from their area of impact; these underpin the proximate causes and either operate at the local level or have an indirect impact from the national or global level³²); and
- ▶ **Safeguards:**³³ The Cancun safeguards are found in Annex 1/paragraph 2 of the Cancun Agreement. They are described in the next section.

1.3.2.3 The Cancun safeguards

The "safeguards" apply to the implementation of REDD+ activities. They are:

- **Consistency with national forest programmes and commitments under international agreements:**³⁴ Many countries will already have a national forest management programme in place, so this safeguard asks that REDD+ implementation works in harmony with these programmes, in addition to existing obligations under international law (which could range from human rights obligations to environmental obligations).

²⁷ *Ibid.*

²⁸ Dr. Jeannette Gurung et al., Women Organizing for Change in Agriculture and Natural Resource Management (WOCAN), and Dr. Elizabeth Lebow, United States Forest Service, *Getting REDD+ Right for Women: An analysis of the barriers and opportunities for women’s participation in the REDD+ sector in Asia*, at 12 (Sept. 2011), available at http://transition.usaid.gov/our_work/cross-cutting_programs/wid/pubs/Gender_REDD+_Asia_Regional_Analysis.pdf.

²⁹ *Ibid.*, at 14.

³⁰ Cancun Decisions (Decision 1/CP.16/2010 - "The Cancun Agreements"), paragraph 72; further guidance is provided by Warsaw decision (15/CP.19) "Addressing the drivers of deforestation and forest degradation."

³¹ Gabrielle Kissinger, Martin Herold and Veronique De Sy, *Drivers of Deforestation and Forest Degradation: A Synthesis Report for REDD+ Policymakers* Lexeme Consulting, Vancouver Canada, August 2012, page 10, paragraph 1.

³² *Ibid.*, page 10, paragraph 2.

³³ Cancun Decisions (Decision 1/CP.16/2010 - "The Cancun Agreements"), paragraph 72.

³⁴ *Ibid.*, Appendix 1, paragraph 2(a) .

- **Transparent and effective forest governance:**³⁵ Corruption, institutional capacity and conflicting policies/regulations are common challenges in forest governance in developing countries, and this safeguard asks that REDD+ implementation supports transparent and effective forest governance.
- **Respect for indigenous and community rights:**³⁶ International policy and agreements acknowledge that indigenous peoples and communities are often marginalised political actors, who may have difficulty realising their rights under national (and international) law. Given that REDD+ also creates a new resource (in the form of carbon), the potential for "land grabs" of forested areas has been raised by numerous community advocacy and human rights groups. This safeguard attempts to highlight these concerns, asking countries to respect indigenous and community rights. The implementation of this safeguard may be problematic, however, given that many such rights are often unclear or contested by the State.
- **Stakeholder participation:**³⁷ It is recognised that national REDD+ implementation can only be successful if all stakeholders are engaged. It is also acknowledged that vulnerable stakeholders may have difficulty participating in REDD+ decision-making. This safeguard aims to prioritise the "full and effective participation" of all stakeholders, including vulnerable groups.
- **Conservation of natural forests:**³⁸ Concerns have been raised about the potential for REDD+ to create perverse incentives for forest destruction (for example, clear-felling trees in order to create plantations that could produce carbon credits). This safeguard aims to ensure that "natural forests" will be conserved.
- **Measures to address the risk of reversals:**³⁹ The longer-term success of national REDD+ implementation depends on whether the emissions reductions created by forest mitigation activities are permanent - for example, there is a risk that a short-term REDD+ strategy could protect forest in the short-term, but over time the forest continues to be threatened. By encouraging countries to take "actions to address the risks of reversals", the UNFCCC is asking countries to take a long-term view, often discussed in terms of a transition from economic growth based on resource exploitation to "green growth".⁴⁰

³⁵ *Ibid*, Appendix 1, paragraph 2(b).

³⁶ *Ibid*, Appendix 1, paragraph 2(c).

³⁷ *Ibid*, Appendix 1, paragraph 2(d).

³⁸ *Ibid*, Appendix 1, paragraph 2(e).

³⁹ *Ibid*, Appendix 1, paragraph 2(f).

⁴⁰ 'Green growth' is a term used to define those policies and practices that aim at making growth processes resource-efficient, cleaner and more resilient without necessarily slowing them. *Source:* Stéphane Hallegatte, Geoffrey Heal, Marianne Fay and David Treguer, 'From Growth to Green Growth: A Framework'; Policy Research Paper 5872, World Bank, Sustainable Development Network, Office of the Chief Economist (November 2011).

- **Measures to prevent leakage:**⁴¹ Avoiding deforestation (and/or) forest degradation in one forested area could mean that such deforestation is "displaced" to another forested area - for example, if a certain country bans logging, it might turn to its neighbouring countries to buy timber products. Therefore, the emissions reduced in one country (or region) could simply move to another country or region, a phenomenon known as "leakage". This safeguard asks countries to take steps to prevent leakage (using the term 'displacement of emissions').

1.3.2.4 Measurement, reporting and verification (MRV)

REDD+ results should be fully measured, reported and verified.⁴² Results should be measured against a national forest reference emission level and/or forest reference level, or as an interim measure, a sub-national forest reference emission level and/or forest reference level.⁴³

MRV is to be consistent with methodological guidance of the COP, including⁴⁴:

- ▶ use of transparent data;
- ▶ stable forest reference emission levels and/or forest references levels (over time);
- ▶ results expressed in carbon dioxide equivalent per year; and
- ▶ biennial reporting.

1.3.2.5 Conditions for REDD+ finance

Different types of financing mechanisms are broadly linked to the different phases of REDD+ implementation articulated in the Cancun decisions (namely, preparation and planning, implementation of policies and measures to reduce deforestation and forest degradation, and results-based payments for verified emission reductions). These different mechanisms can be categorised as:

- ▶ **Up-front investments:** Advance payments for building capacity or to support the implementation of policies and measures that have been agreed upon in advance by the donor and recipient;
- ▶ **Performance-based payments for actions:** Finance is delivered in exchange for successfully implementing REDD+ actions that are considered necessary to the success of REDD+ (for example, improvements to forest governance); and

⁴¹ Cancun Decisions (Decision 1/CP.16/2010 - "The Cancun Agreements"), Appendix 1, paragraph 2(g).

⁴² *Ibid*, paragraph 73.

⁴³ *Ibid*, paragraph 71(b).

⁴⁴ Warsaw Decisions (Decision 14/CP.19/2013 - "Modalities for measuring, reporting and verifying"), paragraphs 3, 4 and 6.

- ▶ **Performance-based payments for carbon:** Finance delivered upon demonstration of verified emissions reductions generated by REDD+ activities (which may or may not be for carbon credits).⁴⁵

Paragraph 76 of the Cancun Agreement “urges Parties, in particular developed country Parties, to support, through multilateral and bilateral channels, the development of national strategies or action plans, policies and measures and capacity-building.” Funding for developing countries to build capacity for REDD+ is currently being provided bilaterally (by donors such as AusAID, USAid, GIZ and SIDA) and multilaterally (through international institutions such as the agencies working under the auspices of the UN REDD programme, and the FCPF). The Warsaw decisions acknowledge that the Green Climate Fund will play a key role in results-based finance for REDD+.⁴⁶

The Durban Platform recognises that results-based finance may come from a variety of sources including public, private, bilateral and multilateral,⁴⁷ and that market-based approaches could be developed under the UNFCCC framework to generate results-based finance.⁴⁸ The Doha Platform called for the creation of a work programme on results-based finance in 2013,⁴⁹ aiming to scale-up and improve the effectiveness of finance for REDD+ activities⁵⁰ and seeking to identify:

- ▶ ways and means to transfer payments for results-based actions;
- ▶ ways to provide incentives for non-carbon benefits; and
- ▶ ways to improve the coordination of results based finance.⁵¹

⁴⁵ USAID, *Institutional mechanisms for sharing REDD+ benefits* (USAID: 2009), page 1 at 1.1.

⁴⁶ Warsaw Decisions (Decision 9/CP.19/2013 - "Work Programme on Results-Based Finance to Progress the Full Implementation of the Activities referred to in Decision 1/CP.16, paragraph 70"); Preamble: “recognising the key role that the Green Climate Fund will play in channelling financial resources to developing countries and catalysing climate finance), **and** paragraph 5 “encourages entities financing [REDD+ activities] through the wide variety of sources referred to in decision 2/CP.17, paragraph 65, including the Green Climate Fund in a key role, to collectively channel adequate and predictable results-based finance in a fair and balanced manner, taking into account different policy approaches, while working with a view to increasing the number of countries that are in a position to obtain and receive payments for results-based actions ...”.

⁴⁷ “Agrees that results-based finance provided to developing country Parties that is new, additional and predictable may come from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources.” Durban Decisions (Decision 2/CP.17/2011 - "Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention"), paragraph 65.

⁴⁸ “Considers that, in the light of the experience gained from current and future demonstration activities, appropriate market-based approaches could be developed by the Conference of the Parties to support the results-based actions by developing country Parties [etc]”; Durban Decisions (Decision 2/CP.17/2011 - "Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention"), paragraph 66.

⁴⁹ Doha Decisions (Decision 1/CP.18/2012 - "Agreed outcome pursuant to the Bali Action Plan"), paragraph 25.

⁵⁰ *Ibid*, paragraph 28.

⁵¹ *Ibid*, paragraph 29.

This work programme led to the Warsaw decision regarding results-based finance.⁵² This decision reaffirmed the objective of reducing forest and carbon loss and recognised the importance of scaling up predictable financial and technological support, including the key role of the new Green Climate Fund in channelling resources and catalysing climate finance. In summary, the Warsaw decision provides that:

- ▶ Results-based finance can flow from a variety of sources⁵³, and both market and non-market based approaches to financing REDD+ activities is contemplated.⁵⁴
- ▶ Results-based finance is to be paid for fully measured, reported and verified results, and the following elements should be in place⁵⁵:
 - A national strategy or action plan;
 - A national forest reference emission level and/or forest reference level;
 - A forest monitoring system; and
 - A system to report on safeguards.
- ▶ Results-based finance will be received once reporting on the safeguards has been done⁵⁶. An information "hub" for tracking results-based finance will be established on the UNFCCC website.⁵⁷
- ▶ Possibility for a nominated national focal point/entity to receive results-based payments.⁵⁸

⁵² Warsaw Decisions (Decision 9/CP.19/2013 - "Work Programme on Results-Based Finance to Progress the Full Implementation of the Activities referred to in Decision 1/CP.16, paragraph 70").

⁵³ Durban Decisions (Decision 2/CP.17/2011 - "Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention"), paragraph 65; reaffirmed by the Warsaw Decisions (Decision 9/CP.19/2013 - "Work Programme on Results-Based Finance to Progress the Full Implementation of the Activities referred to in Decision 1/CP.16, paragraph 70"), paragraph 1.

⁵⁴ Durban Decisions (Decision 2/CP.17/2011 - "Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention"), paragraph 66.

⁵⁵ Warsaw Decisions (Decision 9/CP.19/2013 - "Work Programme on Results-Based Finance to Progress the Full Implementation of the Activities referred to in Decision 1/CP.16, paragraph 70"), paragraph 3; referencing the Cancun Decisions (Decision 1/CP.16/2010 - "The Cancun Agreements"), paragraph 71(a-d).

⁵⁶ Warsaw Decisions (Decision 9/CP.19/2013 - "Work Programme on Results-Based Finance to Progress the Full Implementation of the Activities referred to in Decision 1/CP.16, paragraph 70"), paragraph 4.

⁵⁷ *Ibid*, paragraphs 9, 11-12.

⁵⁸ Warsaw Decisions (Decision 10/CP.19/2013 - "Coordination of support for the implementation of activities in relation to mitigation actions in the forest sector by developing countries, including institutional arrangements"), paragraph 2.

1.3.3 *‘Carbon rights’ and ‘benefit sharing’ in the context of REDD+*

Two issues that are likely to draw on existing law *and* require REDD+-specific clarifications are the definition/treatment of carbon rights, and benefit sharing arrangements. In legal terms, carbon rights and benefit sharing are two different concepts, although they are closely related. Defining carbon rights is the first step in a process of allocating and distributing the benefits flowing from REDD+ implementation amongst different stakeholders, but it is not the only issue that must be addressed when designing benefit sharing arrangements. Each concept is discussed below.

1.3.3.1 *Carbon rights*

In the context of REDD+, the term ‘carbon rights’ is used in a number of different ways. It can be used to refer to a tonne of sequestered⁵⁹ carbon, the legal right to own that sequestered carbon, or (more broadly) a moral claim to benefit from carbon-based payments. In this brief, a **legal interpretation** is used – ‘carbon rights’ is the term given to the ‘legal form’ for carbon. The actual ownership of these carbon rights is a separate question.

Carbon (and non-carbon) benefits are created from the direct physical act of undertaking a REDD+ intervention. However, on their own, such benefits have no legal or property status unless the law gives them one. In the case of carbon, this has led to a variety of different approaches to creating a ‘legal form’ for carbon - such as a **carbon unit**, **carbon credit** or **emissions reduction (each of which might be referred to as a ‘carbon right’)**. In some cases, these ‘legal forms’ have been given a value within an emissions trading scheme.

Given the different interpretations, it is important to distinguish between the following:

- The physical outcome of the REDD+ intervention, namely, the preservation of terrestrial carbon;
- The ‘legal form’ given to the sequestered carbon, which could be called a carbon unit, carbon credit, emissions reduction or carbon right depending on the legal framework or contract⁶⁰ used. In the context of REDD+, these units/credits/emissions reductions/rights represent the equivalent of one tonne of sequestered carbon or carbon dioxide (CO₂).⁶¹ Once specific criteria under the

⁵⁹ ‘Sequestered’ forest carbon is carbon that is removed from the atmosphere and stored in a carbon sink (such as a growing tree or in soil).

⁶⁰ In the absence of any specific REDD+ law, private developers of REDD+ projects have entered into private contracts (Emissions Reduction Purchase Agreements, or “ERPAs”). This is similar to the current approach by the FCPF where emissions reductions are defined in the seller’s contract.

⁶¹ A carbon (C) atom is oxidised into carbon dioxide (CO₂) when burnt, or upon rotting. This gas is then released into the atmosphere, contributing to climate change. As CO₂ is the pollutant, emission reductions are quantified in this form, meaning that sequestered or trapped carbon is calculated as if it were in its oxidised state. A carbon

relevant legislative framework or contract have been met, the unit/credit/emissions reduction/carbon right will be issued by the scheme's regulator. For example, a 'Verified Carbon Unit' (VCU) would be issued under the Verified Carbon Standard, or an 'Australian Carbon Credit Unit' (ACCU) would be issued under the Carbon Farming Initiative (a domestic scheme that is implemented by the *Carbon Credits (Carbon Farming Initiative) Act 2011*). At the international level, forestry-based credits called 'tCERs' (Temporary Certified Emission Reductions) are issued under the Clean Development Mechanism (CDM). In this way, **the physical carbon transforms into formal statutory or contractual rights;** and

- The actual legal ownership of the 'trapped' carbon as opposed to the ownership of the units/credits/emissions reductions/rights created from it, which might not be the same. For example, the Australian Carbon Farming Initiative states that the person proposing the project must have the legal right to carry out the project and they must hold the Carbon Sequestration Right (CSR). This right may be held by a landholder, or may be separated from land by the landholder and transferred to a third party.

Unless the law states otherwise, it has generally been presumed that the owner of the land owns the forest and, therefore, owns the carbon and non-carbon benefits attached to the forest. In this way, it is assumed that carbon is another type of forest resource. However, it might not be clear who owns the forest and many forest users might lack formal rights to ownership or use. This indicates why clarifying forest tenure is an important component of REDD+ implementation.

This map shows the different tenure arrangements across Wildlife Works' Kasigau Corridor REDD Project in the Tsavo region of Kenya – the photograph shows a division of untitled land.

Determining ownership rights is important for both controlling activity in the project area, and also for allocating carbon rights.

Courtesy of Wildlife Works 2012.



figure can be converted to carbon dioxide by multiplying by 3.644 to account for the different molecular weights (3.644 tonnes of CO₂ contains 1 tonne of carbon).

Carbon rights could be vested in governments, land owners, forest users, or exist as separate property (where a carbon right is ‘detached’ from other land and resource rights to facilitate carbon trading). The ownership of carbon rights can affect how carbon (and non-carbon) benefits are managed and shared between stakeholders.

REDD+ projects and programmes offer a way to ‘monetise’ carbon rights. For example, if a country successfully generates emissions reductions through REDD+ activities, it might then be eligible for future ‘results-based’ payments through an international or bilateral mechanism (where the ‘result’ is the reduction in carbon emissions). Alternatively, a REDD+ project developer might sell ‘carbon credits’ produced from a project to a buyer in the voluntary forest carbon market (requiring the carbon rights to be transferred to a third party).

Once REDD+ revenue has been generated, decisions about how to *share* that revenue need to be addressed – in other words, benefit sharing.

1.3.3.2 *Benefit sharing*

Benefit sharing is a means to identify the outcomes from an activity (financial or non-financial), and then distribute them. Benefit sharing has been defined as the distribution of both the monetary and the non-monetary benefits generated through the implementation of REDD+ projects⁶² and programmes, and can be understood as the sum of many different mechanisms.⁶³

Effective benefit sharing arrangements will create incentives for different stakeholders (from national and sub-national governments, communities and businesses) to initiate and support action to reduce emissions from deforestation and forest degradation. It is helpful to think of benefit sharing as the final stage of a process that seeks to generate, monetise and allocate REDD+ benefits (both carbon and non-carbon). Further, a distinction can be drawn between benefit allocation and benefit distribution.

It is important to note that a *moral* claim to benefits (how benefits *should* be shared) might be very different from the *legal* claim to benefits. The basis for a benefit claim could be linked to land/carbon ownership or other eligibility criteria (such as participation). Beneficiaries could include different

⁶² Thuy et al (CIFOR), *Approaches to benefit sharing: A preliminary comparative analysis of 13 REDD+ countries* (Working paper 108; 2013); page 1, paragraph 2.

⁶³ Cecilia Luttrell et al, ‘Who should benefit from REDD+? Rationales and realities’ 2013 *Ecology and Society* (18)4, pages 51-52.

levels of government, communities, civil society and/or project developers. To avoid confusion, the basis for benefit claims should be clarified in law.



A list of the different community groups affected by Wildlife Works' Kasigau Corridor REDD Project in the Tsavo region of Kenya.

Wildlife Works designed benefit sharing arrangements to accommodate numerous stakeholders.

Courtesy of Wildlife Works 2012.

Although the UNFCCC emphasises the need for REDD+ implementation to enhance social and environmental benefits,⁶⁴ it does not prescribe a particular approach to doing this. In a similar way, the Nagoya Protocol⁶⁵ under the Convention on Biological Diversity⁶⁶ addresses benefit sharing, but does not define a particular benefit sharing mechanism – instead, it encourages national action by requiring parties to: take legislative, administrative and policy measures to ensure that indigenous and local communities gain fair and equitable benefits from the utilization of genetic resources⁶⁷; create a

⁶⁴ Appendix 1 of the Cancun Agreement, at (2): When undertaking the activities referred to in paragraph 70 of this decision, the following safeguards should be promoted and supported: ... (e) That actions are consistent with the conservation of natural forests and biological diversity, ensuring that the actions referred to in paragraph 70 of this decision are not used for the conversion of natural forests, but are instead used to incentivize the protection and conservation of natural forests and their ecosystem services, and to enhance other social and environmental benefits [Taking into account the need for sustainable livelihoods of indigenous peoples and local communities and their interdependence on forests in most countries], reflected in the United Nations Declaration on the Rights of Indigenous Peoples, as well as the international Mother Earth Day].

⁶⁵ Article 1 outlines the objective of the Nagoya Protocol: “The objective of this Protocol is the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding thereby contributing to the conservation of biological diversity and the sustainable use of its components.” *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, adopted 29 October 2010 at the Conference of the Parties to the Convention on Biological Diversity (2010: Nagoya, Japan).

⁶⁶ *Convention on Biological Diversity* (opened for signature 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79; 31 ILM 818 (1992).

⁶⁷ *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, adopted 29 October 2010 at the Conference of the Parties to the Convention on Biological Diversity (2010: Nagoya, Japan), Article 5(2).

national focal point on access and benefit sharing⁶⁸; and, develop and update voluntary codes of conduct, guidelines and best practices/standards in relation to access and benefit sharing.⁶⁹ This reflects a general recognition in international agreements and conventions that countries will implement measures in a way that is consistent with their unique national circumstances (which are reiterated for climate change mitigation and adaptation measures under the UNFCCC, including for REDD+).

The FCPF Readiness Fund⁷⁰ requires that benefit sharing arrangements be assessed as part of national ‘readiness’ preparations, and requires countries to have a Benefit Sharing Plan under its Carbon Fund, but has also commented that a prescriptive approach to benefit sharing is unlikely to be effective.⁷¹ Project-level forest management initiatives (including REDD+ projects) do not adopt a ‘one size fits all’ approach to benefit sharing, reflecting the fact that the stakeholders, and their rights and interests, will vary between projects. In the absence of explicit benefit sharing requirements within the UNFCCC or other frameworks, countries need to decide what approach to benefit sharing will be most appropriate for their REDD+ programmes.

In summary, benefit sharing involves a number of different elements:

- ▶ What is the benefit that will be shared?
- ▶ What is the legal basis for a benefit claim, and who are the beneficiaries?
- ▶ How will the payment be distributed to different beneficiaries?
- ▶ How will public participation be supported (including grievance redress), and what transparency measures will be put in place?

Please refer to the picture on the next page for a flow diagram of how benefits are generated and allocated between beneficiaries.

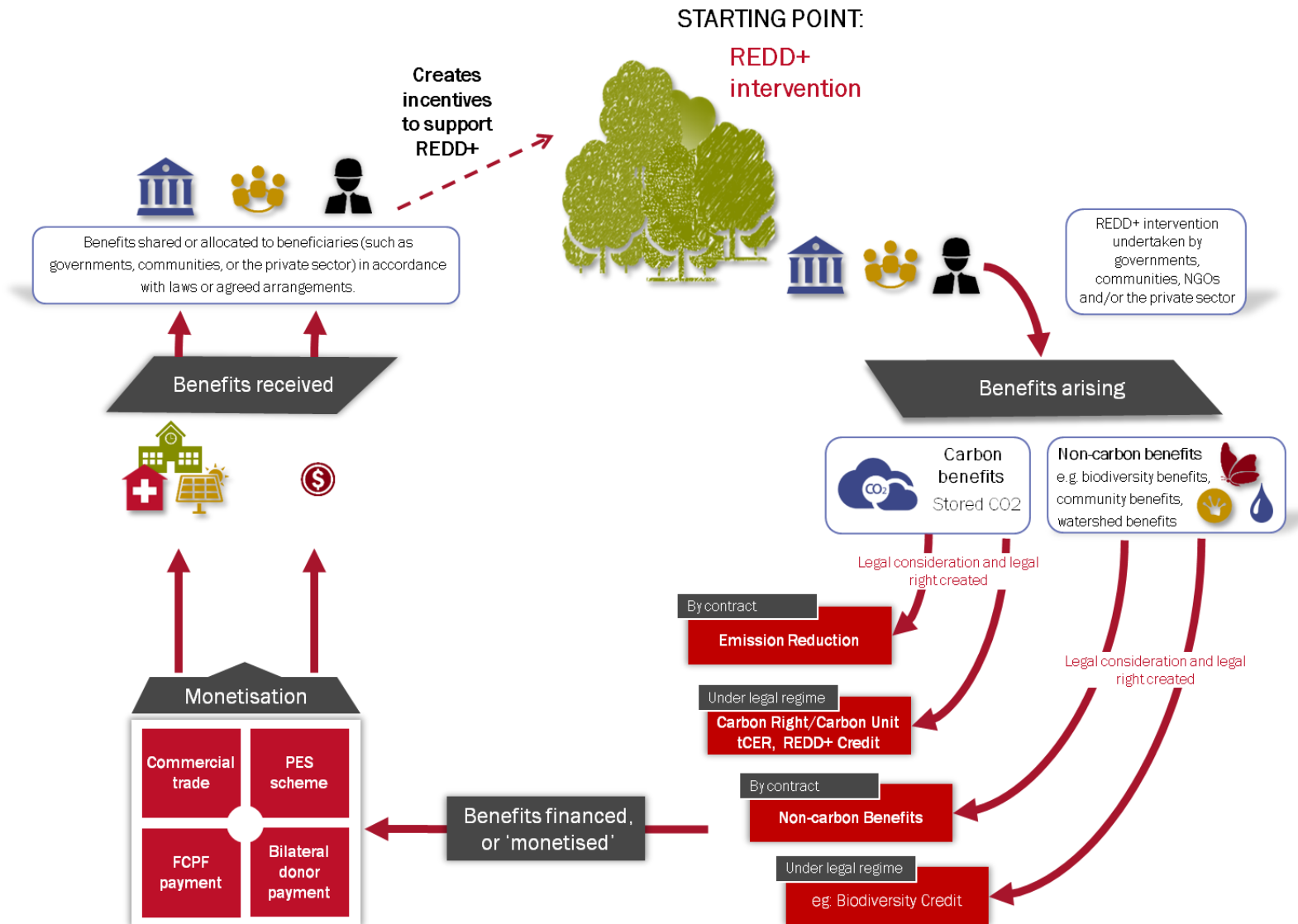
⁶⁸ *Ibid*, Article 13.

⁶⁹ *Ibid*, Article 20.

⁷⁰ The Readiness Fund is a capacity-building fund with a target of \$US 300 million, which assists 36 tropical and sub-tropical developing countries to prepare themselves to participate in a future, large-scale system of positive incentives for REDD.

⁷¹ FCPF Carbon Fund Discussion Paper #9: Benefit Sharing (Original February 2013; Posted October 2013), page 18 at 6.

FLOW DIAGRAM OF HOW REDD+ BENEFITS CAN BE CREATED AND ALLOCATED BETWEEN BENEFICIARIES



2. ISSUES AND RECOMMENDATIONS FOR DEVELOPING AN ENABLING FRAMEWORK FOR REDD+ INVESTMENTS IN KENYA

In this section, both the form and content of REDD+ law (limited to certain key issues) are discussed in the context of Kenya. **By addressing these key implementation issues, the likelihood of attracting REDD+ investments (public and private) is increased.**

2.1 Kenya's REDD+ policy framework and objectives

Kenya has made significant progress in planning for REDD+ implementation, although many issues remain to be resolved. Certain key policy choices also need to be clarified - for example:

- Kenya currently hosts forest carbon projects that might, in future, seek to sell REDD+ credits. Is the intention that these projects should be absorbed into the wider national programme? Will new projects be permitted, ie. the 'nesting' of projects within a wider jurisdictional programme? To address uncertainty (which could have a negative impact on investment), this point should be explicitly clarified within REDD+ policy;
- REDD+ implementation needs to be consistent with Kenya's national development priorities, including increasing food security. The potential to support a transition to climate-smart agriculture could be explored as a REDD+ strategy option, noting that agricultural expansion is identified as a direct driver of deforestation in Kenya⁷² (please refer to **Background Report 4** for a fuller discussion of climate-smart agriculture);
- The financing strategy to be relied upon to deliver performance-based payments should be clarified; this is related to how REDD+ evolves internationally. The R-PP was drafted in 2010, and since that time the concept of REDD+ within the UNFCCC has evolved; the initial intention to link REDD+ credits to an international compliance market has shifted to the implementation of a national programme funded largely by international climate finance (although the exact shape of a future UNFCCC mechanism remains to be seen). This does not necessarily preclude Kenya from establishing an internal scheme to trade REDD+ credits (such as a cap-and-trade system, which could be part of a wider scheme dealing with emissions reductions from other sectors), or from seeking bilateral partners willing to pay for carbon (ie. for emissions reductions generated by the national programme). The options available to Kenya with respect to financing should be explored, and any potential linkages between REDD+ and future climate financing strategies should be clarified (including whether REDD+ could be financed through a future national Climate Fund); and

⁷² Kenya - Revised REDD Readiness Proposal ("R-PP"), August 2010; page 29, Table 2a-2.

- Regardless of the financing model adopted, UNFCCC requirements are likely to form a minimum benchmark for national REDD+ implementation. This means that a system to report on the Cancun safeguards needs to be developed, and the content of each safeguarding principle needs to be translated into domestic requirements. Where the safeguards ‘sit’ within the current legal framework should be explored – for example:
 - Public participation rules (found in the Constitution and forest regime, for example) will be relevant for ‘the full and effective participation of stakeholders’ safeguard (Cancun Agreement, Annex 1, 2d);
 - Anti-corruption frameworks will be relevant for the ‘transparency and effective forest governance’ safeguard (Cancun Agreement, Annex 1, 2b), noting that Kenya has well-developed regulatory structures seeking to address corruption; and
 - Provisions of international treaties relevant to REDD+ implementation (including those addressing gender rights and indigenous rights) will need to be compared with the design of the national programme in order to ensure consistency, and comply with this safeguarding principle (Cancun Agreement, Annex 1, 2a).

The National Forestry Policy (2014) is particularly relevant in the context of REDD+ implementation. It contains a revised policy framework that is designed to be consistent with the principles articulated in the Constitution of 2010, and will be implemented via a new forests statute (at present, the Forest Conservation and Management Bill 2014 is under discussion for this purpose). This policy framework emphasises community participation in forestry management, and also emphasises the role of both State and non-State actors in the forest sector (including the private sector) in contributing to economic growth and poverty alleviation goals. **REDD+ interventions will need to be consistent with the Forest Policy 2014 and its implementing law.**

It is important to note that key questions regarding Kenya’s policy approach to REDD+ implementation are not legal questions, but will be implemented through legal frameworks; the answers to these questions might not be found in current law, but the law that is relevant to each issue can be identified and developed once the policy choice has been made.

2.2 Existing Kenyan legal frameworks as a foundation for REDD+ implementation

Strategy options have been generated and an institutional framework for overseeing REDD+ implementation has been established, however, the relationship between existing legal structures relevant to REDD+ strategies has not been explored in great depth. In addition, REDD+-specific issues (such as carbon rights and benefit sharing) have not been addressed. **In order to move out of**

the planning phase and into the implementation phase of a national programme, the links between existing law and REDD+ policy need to be better understood.

2.2.1 *Content of the law*

The existing legal frameworks surrounding land, environment and anti-corruption (please refer to **Background Report 1 for details of each, and for further details about transparency laws to Background Report 2**) could support Kenya's REDD+ implementation, noting that the application of these laws to Kenya's chosen REDD+ strategies needs to be further explored. For example, specific REDD+ interventions might be governed by a selection of the laws described in this section (ie. climate-smart agriculture would involve land and agricultural laws – please refer to **Background Report 4**), but the effectiveness of these individual regimes would need to be considered in more detail before concluding whether they were fit for purpose. In addition, the REDD+-specific issues of carbon rights and benefit sharing need to be clarified in law (discussed in **Background Report 1**, and below).

At a minimum, outstanding land governance issues need attention – this is important for both controlling land use, and assigning benefits from REDD+. New land laws made under the Constitution of 2010 have yet to be fully implemented, with considerable uncertainty surrounding the legal treatment of community land (further details in **Background Report 1**). In terms of oversight of REDD+ activities, the devolution laws also need to be considered (further details in **Background Report 1**). If REDD+ activities are to be implemented at the county level, then the role and powers of the County governments with respect to REDD+ interventions need to be clear (in addition to the role of the National government, and its relationship with the Counties).

Given that the framework for REDD+ under the UNFCCC requires gender issues to be addressed, Kenya's existing challenges around gender equality need to be considered in the context of REDD+ implementation; for example, this will be relevant for the participation safeguard (Cancun Agreement, Annex 2d), and will inform what is considered to be 'equitable' benefit sharing (see **Background Report 1** for a for a discussion of how gender equality is dealt with in Kenyan law). The extent to which current dispute resolution processes in Kenya could be used to address grievances related to REDD+ implementation (for example, conflicts regarding land use or benefit sharing) in a manner accessible to all stakeholders, including vulnerable groups, should also be explored (existing dispute settlement mechanisms are discussed in **Background Report 1**).

2.2.2 *Form of the law*

The above points speak to the content of REDD+-related laws, but do not address the form of legal instrument that specific REDD+ laws or regulations would adopt. Options include the following:

- Given that Kenya's gazetted forests will be the site of the REDD+ activities as defined by the UNFCCC, a logical place to house REDD+ provisions would be the Forests Act, either within the new Forest Conservation and Management Bill 2014 or as regulations made under it (the Forests Act is discussed in detail in **Background Report 1**). However, given that Kenya's proposed national REDD+ programme contemplates different REDD+ interventions outside of gazetted forest, it should be noted that other aspects of the drivers of deforestation might not fall within the powers of the Forests Act, requiring coordination with other natural resource management regimes;
- A new dedicated REDD+ law, which could be an umbrella framework referring to the numerous other legal frameworks relevant to different aspects of REDD+ implementation in addition to specifying how REDD+ issues such as permanence, carbon rights and benefit sharing should be dealt with. Such a law could reflect a higher-level policy on REDD+ which clearly outlines Kenya's approach to REDD+ implementation (ie. addressing each policy question addressed above at 1.2.2); and
- The Climate Change Bill 2014⁷³ should be considered for its potential role in governing aspects of REDD+, for example, oversight of REDD+ activities and potentially a REDD+ finance tranche within the anticipated national Climate Fund. Kenya could also consider expanding its climate change regime to include emissions trading, which could accept REDD+-based offsets (however, a feasibility study for this option would need to be conducted).

2.3 **Some specific legal issues to clarify**

As described in section 1 above, several law and governance issues need to be addressed as part of national REDD+ implementation. Due to space limitations, not all have been considered here; in order to support current policy dialogue, the following issues are explored in greater detail below:

- Carbon rights and benefit sharing, key issues which are the subject of contemporary debate. They provide pertinent examples of how existing law forms the basis, and starting point, for developing REDD+ specific rules; and
- Issues related to public and private investments, which also draw heavily on existing legal frameworks.

⁷³ The Climate Change Bill's date of origination is 20 January 2014. The first reading of the bill in the National Assembly was on 6 March 2014. It is awaiting the second reading.

2.3.1 *Carbon rights*

The term "carbon rights" is often used in a number of different ways - such as referring to carbon ownership, or the legal right to own the tonne of sequestered carbon (ie. the emissions reduction). The ownership of the physical carbon can be treated as a separate issue to the ownership of the emissions reduction. It is the emissions reduction that will be 'monetised' or, put more simply, be paid for (via private transactions in a market setting, or via international transfers that are performance-based); however, it is likely that the emissions reduction will be created only with the cooperation of those holding land rights to the area in question. **It is therefore important for REDD+ policy to clearly define carbon rights**, in terms of both:

- the **physical carbon** – for example, one option is to recognise carbon as a new type of natural resource that is linked to existing land and tree tenure; and
- the legal character of an **emissions reduction** created by sequestering/storing the carbon (including the process that creates it, and whether it could be traded either domestically or internationally). It would also be helpful to specify whether any restrictions apply to the transfer of emissions reductions between parties (whether between private parties in a market setting, or between governments); for example, the Government might choose to reserve a percentage of the emissions reductions created through successful REDD+ implementation for itself, or place restrictions on how many emissions reductions can be transferred offshore.

2.3.1.1 *Ownership/use rights of physical forest carbon*

Determining ownership of the physical forest carbon is important for two reasons. First, in order to create the emissions reduction it will be necessary to control how the land/forest area in question is being used (noting that secure tenure arrangements are an important step towards controlling land use). Second, benefit claims can be based on land rights (either in whole or in part).

The Constitution of 2010 defines **property** to include "any vested or contingent right to, or interest in or arising from [...] land, or permanent fixtures on, or improvements to land,"⁷⁴ defining **land** to include "the surface of the earth and the subsurface rock,"⁷⁵ and also "natural resources completely contained on or under the surface."⁷⁶ Section 2 of the Land Act and Section 2 of the Land Registration Act refer to this description in their definition of Land and also define "unexhausted improvements" to include fixtures on the land as well as trees, crops and growing produce. The Constitution of 2010 defines **natural resources** as "physical, non-human factors and components,

⁷⁴ Constitution of Kenya 2010, Article 260, "property".

⁷⁵ *Ibid*, Article 260, "land" – subparagraph (a).

⁷⁶ *Ibid*, Article 260, "land" – subparagraph (d).

whether renewable or non-renewable⁷⁷ **including forests and biodiversity.**⁷⁸ **Therefore, sequestered forest carbon appears to be consistent with the Constitution's definition of both property and natural resources; if this was considered to be the case (and it needs to be clarified in law), it would mean that existing regimes regarding land and forests would apply to its management and use.** Please refer to **Background Report 1** for fuller discussion of the Constitution, land laws and tree tenure.

Depending on the scope of permitted REDD+ activities, the 'trapped' carbon that will be rewarded under a REDD+ scheme could be sequestered in soil, rather than forest. Regarding the ownership of **soil carbon**, it appears that there are two ways to characterise it under Kenyan law: a) that soil is part of the land (and so soil tenure runs with land tenure), or b) that the carbon in the soil has the components of a mineral that is found in the soil but not part of the soil (attracting different ownership rights). For the purposes of REDD+, it is likely (but not certain) that soil carbon would be defined as *part of* the land, rather than as a separate mineral component to it. **Again, this issue pertains to the definition of carbon for the purposes of a REDD+ programme or project, and should be clarified in law.**

In summary, *if* defined as part of the land and forest, and **assuming that the carbon attaches to the land in the absence of any legal authority to the contrary**, the ownership and use rights attaching to carbon would follow current forest tenure arrangements. In this case, the starting point for clarifying carbon rights would be to recognise that land in Kenya can public land, private land or community land; *if* following the assumption that carbon is part of that land and owned by the landholders, then:

- Forest carbon could be owned by the State, local authorities or private owners. It could be possible to hold use rights to the carbon (for example, through a leasehold arrangement) without holding full ownership rights (discussed further in the paragraph below);
- Tree ownership depends on whether trees are indigenous or planted, and on the type on land on which the tree stands; and
- Ownership of soil carbon would be determined by its technical definition as either *part of* the land or as a *mineral component* of the land.

The current Forest Conservation and Management Bill 2014 would, if passed into law, update the Forests Act and provide a revised framework for assigning user rights to communities (amongst many other provisions) This Bill is intended to be the implementing Act of the Forestry Policy 2014. With

⁷⁷ Constitution of Kenya 2010, Article 260, "natural resources."

⁷⁸ *Ibid*, "natural resources" – subparagraph (c).

respect to community participation, the Bill authorises the formation of Community Forest Associations (under the Societies Act), and proceeds to outline the user rights that can be granted to a Community Forest Association by the Government by a Management Agreement. The relationship between these user rights and REDD+ interventions should be clarified – for example:

- Does section 50(2)(k) stating that forest user rights could include ‘other benefits which may from time to time be agreed upon between an association and the [government]’ provide scope for a Community Forest Association to manage a REDD+ intervention?
- Similarly, would 50(2)(j) allowing for the development of non-wood forest-based industries capture REDD+ projects?

The issue of whether use rights to carbon could be assigned through this mechanism should be clarified.

2.3.2.2 *Ownership of the emissions reductions*

Ownership of the physical forest carbon is a **separate issue** to ownership of the emissions reduction created by protecting the sequestered carbon under a REDD+ scheme.

A REDD+ scheme (such as the Verified Carbon Standard (VCS) – please refer to **Annex 1**) could outline requirements for recognising an emissions reduction unit. Such requirements could specify that the process used to create emissions reductions should respect the Cancun safeguards (please refer to **Annex 9** for the UNFCCC text regarding the Cancun safeguards) and clearly define the 'legal character' of the end result, for example, an emissions reduction ‘unit’ or ‘credit’ could represent one tonne of sequestered carbon. Once they have been created, whether such emissions reductions could then be transferred to a third party should also be clarified (for example, a private buyer in a carbon market or sovereign State).

In order to transfer the emissions reduction created by successful REDD+ activities (whether to a private buyer to use as an offset, or to a sovereign nation to count towards their mitigation targets), it could be necessary to create a **separate right** to the emissions reduction, noting that this separate right is conditional on protecting the physical forest carbon and ensuring that it will be stored for a given period of time (ie. ‘permanence’ requirements). Such a separate right has no value if the sequestered carbon is released into the atmosphere, meaning that the use of the land area that stores the forest carbon must be carefully managed (which is likely to require the agreement and cooperation of those holding land rights to the area). Providing an example of separable carbon rights, Australia has used them within its land-based emissions reductions schemes (please refer to **Annex 7** for details).

In this context, it should be noted that Article 71 of the Constitution of 2010 provides that Parliament needs to approve a transaction if it “involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya.”⁷⁹ Article 71 also provides for Parliament to enact legislation regarding the classes of transactions that are subject to such ratification.⁸⁰ Whether transactions involving emissions reductions created through REDD+ activities falls into this category should be clarified.

It will be necessary for Kenya to make clear policy choices about how to manage the sale/transfer of emissions reductions generated from successful REDD+ interventions. These policy choices can then be translated into law, within the boundaries of the Constitution of 2010 and using current legal frameworks as a foundation for further development.

2.3.2 Benefit sharing

2.3.2.1 Determining the basis for benefit claims

The approach to REDD+ implementation will affect the basis of benefit claims

Within the voluntary carbon market, the holder of carbon rights (whether ownership or use rights) will most likely be the recipient of carbon-based payments which will then be shared between participants based on a pre-determined benefit sharing agreement (for example, the model used by Wildlife Works’ Kasigau Corridor REDD Project in the Tsavo region of Kenya).

However, under a national or sub-national programme (where both a national and sub-national programmes is a ‘jurisdictional’⁸¹ approach to REDD+ implementation, *as opposed to* a project-level approach), the stakeholders who participate in creating emissions reductions might not have any connection to the forested land where the emissions reductions are calculated. Various nation-wide strategies used to implement REDD+ could be used (as contemplated in Kenya’s R-PP), meaning that many stakeholders need to be engaged - not just landholders. **For a national programme, benefit distribution mechanisms might therefore need to base benefit claims on other criteria (not just land rights).** Nonetheless, tenure arrangements related to the land/forest storing the carbon need to

⁷⁹ Constitution of Kenya 2010, Article 71(1)(a).

⁸⁰ *Ibid*, Article 71(2).

⁸¹ As a point of terminology, this report uses the term ‘jurisdictional’ to refer to accounting boundaries drawn at either the national or sub-national level. This is different to measuring the emissions reductions achieved within the boundaries of a specific project-area.

be clear and those holding the rights to that area will be an important stakeholder in REDD+ implementation.

At present, Kenya is preparing for a national REDD+ programme which is likely to include existing projects (and potentially future projects) ‘nested’ within it. **Therefore, a benefit distribution mechanism at the national level will need to be considered in addition to project-level arrangements.** Decisions about how to divide benefits between different stakeholders need to respect existing laws, including relevant constitutional provisions (for example, regarding how natural resources are managed, and to what extent funds will be managed by County governments under devolution).

Obligations to share benefits from forests

Equitable benefit sharing and community engagement in natural resource management are emphasised as principles of both law and policy in Kenya.

The Constitution of 2010, under Article 69(1)(a), places the obligation to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources on the State. In addition, the State is obliged to ensure that there is **equitable sharing of the accruing benefits**.⁸² Under Article 69(1)(h) and (d), the State is also mandated to utilise the environment and natural resources for the benefit of the people of Kenya as well as to encourage public participation in the management, protection and conservation of the environment. In a broad sense, the Constitution therefore contains principles regarding benefit sharing (in terms of both equitable distribution and public participation) that should apply to REDD+.

The Forests Act defines monetary benefits⁸³ and non-monetary benefits⁸⁴, recognising that benefits from forest resources could be in the form of cash or ‘in kind’ benefits (such as social infrastructure).

⁸² See Article 69(1)(a) of the Constitution of Kenya.

⁸³ The Forests Act, 2005. Monetary benefits are defined in §20(3): access fees or fee per sample collected or acquired; up-front payments; milestone payments; payment of royalties; licence fees in the case of genetic resources being utilised for commercial purposes; fees to be paid to trust funds supporting conservation and sustainable use of biodiversity; salaries and preferential terms where mutually agreed; research funding; joint ventures; joint ownership; and joint ownership of relevant intellectual property rights.

⁸⁴ The Forests Act 2005. Non-monetary benefits are defined in §20(4) as ‘Sharing of research and development results; collaboration, co-operation and contribution in scientific research and development programmes; participation in product development, admittance to *ex situ* facilities of genetic resources and to databases by participating institutions; transfer to Kenya of genetic resources of knowledge and technology under fair and most favourable terms, including concessional and preferential terms; strengthening capacities for technology transfer to Kenya; institutional capacity building; human and material resources to strengthen capacities for administration and enforcement of access regulations; training related to genetic resources with the full participation of Kenya and where possible in Kenya; access to scientific information relevant to conservation and sustainable use of biological diversity, including biological inventories and taxonomic studies; institutional

Although the types of monetary and non-monetary benefits flowing from REDD+ could be different, this distinction is analogous to the distinction between carbon and non-carbon benefits within the UNFCCC context; a REDD+ benefit sharing scheme in Kenya could build upon this existing distinction in the Forests Act to define the ‘non-carbon benefits’ Kenya expects REDD+ to deliver.

In addition, the National Land Policy discusses benefit sharing⁸⁵ as a way of integrating the economic, social and environmental imperatives of land activities. The policy recommends that strategies should be developed to ensure that benefit sharing arrangements take into account the nature of the resources involved and **the contribution that diverse actors make to the management of the resources**. To protect community and individual interests over land-based resources and facilitate benefit sharing, the policy recommended that the Government should:

- (a) **Establish legal frameworks to recognise community and private rights over renewable and non-renewable land-based natural resources** and incorporate procedures for access to and sustainable use of these resources by communities and private entities;
- (b) Devise and implement participatory mechanisms for compensation for:
 - i. Loss of land and related non-renewable natural resources;
 - ii. Loss of land where this is deemed imperative in the public interest for the sustainable management of renewable natural resources; and
 - iii. Damage occasioned by wild animals;
- (c) Put in place **legislative and administrative mechanisms for determining and sharing of benefits emanating from land-based natural resources** by communities and individuals where applicable;
- (d) Make **benefit-sharing mandatory** where the land-based resources of communities and individuals are **managed by national authorities for posterity**; and
- (e) Ensure the management and utilization of land-based natural resources **involves all stakeholders**.⁸⁶

Read together, the Constitution, Forests Act and Land Policy provide a **strong basis to promote ‘equitable’ sharing of REDD+ revenues**. However, the manner in which such broad principles should be implemented is not clearly specified and **how it will be applied in practice needs to be defined**.

Current models within Kenyan law for managing benefit sharing at the local level include:

- The Forest Policy 2014 contains broad policy guidance emphasising the importance of equitable benefit sharing in the forest sector, stating at 8.2 that the Government will “develop and implement an equitable benefits sharing scheme in the forests sector.”
- The Wildlife (Conservation and Management) Act 2013 Sections 73–76 create general principles applying to access, incentives and benefit sharing with respect to wildlife resources. In particular,

and professional relationships that can arise from access and benefit sharing agreements and subsequent collaborative activities and joint ownership of relevant intellectual property rights’.

⁸⁵ Under clause 3.3.4.1.

⁸⁶ *Ibid.*

Section 76 authorises the Cabinet Secretary, in consultation with the Commission on Revenue Allocation, to formulate guidelines regarding incentives and benefit sharing (including benefit distribution). The formulation of these guidelines is open to public scrutiny⁸⁷ and it is specified that private investments in conservancies should benefit local communities with the option for investors to provide social infrastructure⁸⁸ (eg. a non-monetary benefit).

- The Forests Act 2005 at 13(2)(e) creates a forest conservation committee and gives this committee and the Forest Board power to assist local communities to benefit from royalties and other rights derived from flora and fauna traditionally used or newly discovered by such communities.⁸⁹
- The Forest Conservation and Management Bill 2014, Section 55 contains benefit sharing provisions. Section 55(1) states that Section 19 of the Land Act 2012 applies for benefit sharing at Section 55, including “measures to facilitate the access, use and co-management of forests, water and other resources by communities who have customary rights to these resources.”⁹⁰ Further, this section authorises the Cabinet Secretary to develop guidelines and regulations on payment for environmental services (including benefit flow mechanisms and funding mechanisms). *If* REDD+ is treated as a Payment for Ecosystem Services scheme (PES scheme), it is possible that Section 55 of the Forest Conservation and Management Bill 2014 could provide the authority for establishing benefit sharing mechanisms for REDD+. **This should be clarified.**
- The Natural Resources (County Royalties) Bill 2013 also speaks to benefit sharing issues. An Adhoc Committee on Legislation on Royalties accruing from natural resources was established by the Senate to draft this bill.⁹¹ It makes provisions for the sustainable exploitation of natural resources and the equitable apportionment of royalties and other accruing benefits to Counties. It defines benefit sharing as “the distribution of a portion of proceeds of and gains derived from mining and related activities to communities affected by mining operations and those in whose locality mining takes place. ‘Natural Resources’ is defined as “forests, biodiversity and genetic resources.”⁹²

⁸⁷ Section 76(3).

⁸⁸ Section 76(5)

⁸⁹ The Forests Act 2005, Section 13(2)(e). This section creates a forest conversation committee and gives this committee and the Forest Board power to assist local communities to benefit from royalties and other rights derived from flora and fauna traditionally used or newly discovered by such communities.

⁹⁰ Forest Conservation and Management Bill 2014, 55(1)(b)

⁹¹ In drafting the bill, the Senators were to collect all stakeholders' views and recommendations as required by the Constitution. Honourable Senator Agnes Zani is the Chairperson of the said committee.

⁹² The establishment of a National, County and Community Natural Resources Committee is proposed in Sections 4, 6 and 8 of the Bill respectively. The committees shall be responsible for, inter alia, the general supervision of the exploitation of the natural resource and the harmonization and coordination of the functions

Options to share benefits equitably could include an obligation to redistribute revenues from projects or programmes, or an obligation for the State to invest in social infrastructure using REDD+ payments received by it (whether these are international transfers received at the national level, or taxes on carbon transactions). Financial benefits from REDD+ need to be shared in a way that encourage stakeholders to support REDD+ implementation (and/or provide compensation for the opportunity cost of changed land use), and what is considered to be ‘equitable’ (and motivational) could vary between communities. **A process for identifying stakeholder needs and allocating available revenue between participants could be outlined in regulations** (noting that these would need to be flexible enough to accommodate different regions and future learning about how REDD+ will work in Kenya). Voluntary standards such as the Climate, Community and Biodiversity Standards (CCB Standards) or Plan Vivo (see **Annex 1**) could provide some guidance about similar processes used at the project-level. **The role of County governments in benefit sharing arrangements (including their possible status as a beneficiary of REDD+ revenue) should also be clarified.**⁹³

Issues and options for establishing benefit claims

It will be necessary to clearly state the eligibility criteria for claiming benefits from REDD+. Irrespective of which options are chosen (discussed further below), the Constitutional requirements pertaining to land and equitable benefit-sharing must be respected. **The law has an important role to play in clarifying the basis of benefit claims** and such clarity is likely to encourage stakeholder confidence and participation. Benefit claims could be based upon one or a combination of the following:

- land rights (including use rights); and/or
- participation in REDD+ interventions, either via
 - direct contribution (such as providing labour or a service for the REDD+ intervention), or,
 - by omission (such as compensation for actions foregone).

For claims based on land rights, the ownership of the carbon is important. ***If carbon is defined as part of the land/forest, and assuming that the carbon attaches to the land in the absence of any***

of all sub-sector policies and legislation for the proper and sustainable development and management of Kenya’s natural resources.

⁹³ According to Section 6(1) of the County Government Act No. 17 of 2012, a County Government is a corporate body with perpetual succession. In this regard, it can enter into agreements with persons, institutions and/or entities for purposes of implementation of specific national government policies on natural resources and environmental conservation such as forestry, soil and water conservation. According to Section 21(1) of the County Government Act, the County Assembly has legislative powers, which would appear it to make laws on benefit sharing on behalf of its county.

legal authority to the contrary, the ownership and use rights attaching to carbon would follow current forest tenure arrangements. This means that carbon would be owned by the owners of the land/forest in Kenya: given that land can be public land, private land or community land, carbon would therefore be owned by the State, local authorities or private owners. It might be possible to assign (and subsequently claim) use rights to the carbon (for example, through a leasehold arrangement) without assigning full ownership rights. Specific issues regarding how existing land, forest and tree tenure is linked to carbon rights and benefit claims therefore needs to be clarified.

Ensuring that communities are remunerated under REDD+ is a priority for Kenya. For Government Land or Community Land (yet to be fully defined under new legislation), the Government could choose to:

- (i) retain ownership of the carbon, assume responsibility for ‘monetising’ it under a REDD+ scheme (whether through the multilateral UNFCCC process or via a carbon market), and then redistribute the carbon funds to other stakeholders, including communities, via another mechanism (such as a fund); or
- (ii) assign use rights to carbon directly to community participants (or other stakeholders), and give communities the responsibility for monetising carbon and redistributing the carbon payments.

Options for **distributing** carbon payments are discussed in the next section.

2.3.2.2 *Benefit distribution*

Scales of benefit distribution

The scale of REDD+ implementation will also affect the benefit **distribution** mechanisms used. At the project level, bespoke arrangements can be designed to engage and reward stakeholders. Within a national programme, mechanisms for distributing benefits to different stakeholders will be required. From a theoretical perspective, benefit sharing is often described as either ‘horizontal’ or ‘vertical’ and both might be needed for distributing REDD+ payments within a country:

- ‘Vertical’ distribution occurs between different institutional levels, such as a multilateral fund to a national government, and/or a national government to a sub-national government. **A fund structure could be used for this purpose; whether the Climate Fund contemplated by the current Climate Change Bill 2014 could be used to receive and disburse REDD+ finance should be clarified.**

- ‘Horizontal distribution’ refers to how benefits are distributed between participants at the local level, for example, between communities and/or between households. Options for legal vehicles to distribute money ‘horizontally’ could be **community trust funds or contracts** (and **MPESA** could also be considered as viable option to disburse monetary payments to community members who might not have any formal banking arrangements). Non-monetary ‘payments’ such as investments in social infrastructure should also be considered, with the option to outline a process for identifying community needs and managing such investments set out in relevant regulations.

Options for ‘horizontal’ and ‘vertical’ benefit distribution

Under a national programme, REDD+ outcomes are likely to be rewarded at the national level. This means that the national government will receive REDD+ payments and then need to redistribute these funds between eligible stakeholders. The UN REDD programme has been exploring the development of such **Benefit Distribution Mechanisms (BDMs)** in several contexts and it is our understanding that this work will soon be prioritised in Kenya. **It is important to note that the laws regulating the management of public finance (discussed at length in Background Report 2) will apply to a BDM.**

As already noted above, policy choices regarding the eligibility criteria for benefit claims will need to be made. The status of the County Governments as potential beneficiaries and fund managers needs to be clarified, in addition to the other bases for making benefit claims from a national BDM.

In Kenya, mechanisms for ‘horizontal’ benefit distribution have already been explored in different contexts. For example:

- Existing law regarding **community land** could offer one model for distributing benefits between the members of a group. The Constitution creates a category of land known as ‘community land’⁹⁴ and Parliament is required to enact legislation with respect to it by 2015; however, until replaced or clarified by the new law on community land, existing laws apply to collective landholdings. At present, the Land (Group Representatives) Act (Chapter 287) deals with the rights of a group to land⁹⁵; under the Constitution, land lawfully registered in

⁹⁴ Article 63.

⁹⁵ ‘Group’ is defined in the Land Adjudication Act (Chapter 284) to include a tribe, clan, section, family or other group of persons whose land under recognised customary law belongs communally to the member of that group, and the same definition applies to the Land (Group Representatives) Act.

the name of group representatives⁹⁶ would constitute community land. The group representatives are under a duty to hold any property on behalf of and for the collective benefit of all group members, and to consult the other members of the group during such an exercise. Group representatives can enter into a transaction/contract subject to the provisions of their constitutional document.⁹⁷ Any money that needs to be distributed to the group members would need to be paid to the group representatives who would then distribute it to the group members (for example, through a trust fund).

- Tailored benefit sharing arrangements designed for the unique circumstances of numerous carbon projects around the country (including Wildlife Works' Kasigau Corridor REDD Project) offer lessons for benefit sharing between communities.
- MPESA could offer a viable mechanism to transfer payments and should be explored for this purpose.

2.3.3 *Managing different sources of REDD+ finance*

2.3.3.1 *Issues related to public investments*

REDD+ finance from public sources (multilateral and bilateral) is already flowing into Kenya, mainly for capacity-building purposes. In order to attract and manage further grants, and also to prepare for future performance-based payments for REDD+ outcomes, it is important to clarify how funds will be managed. Given acknowledged risks regarding corruption in Kenya, building transparency safeguards should form part of such preparations.

Kenya already has well-developed public finance and transparency laws which could serve as a foundation for any explicit policy regarding the management of REDD+ finance. Nonetheless, several issues need to be clarified. Rules regarding the equitable distribution of public revenue between the National and County governments could apply to international REDD+ payments, and if such disbursements were to be made, the management obligations (and capacities) of the County governments in question should be clarified. The possibility of establishing a 'special purpose' fund for REDD+ (or, a REDD+ revenue stream within a national climate change fund), could provide a centralised vehicle for managing and disbursing REDD+ funds received at the national level (whether

⁹⁶ Under the Land (Group Representatives) Act not more than three and not less than ten members of a group are elected by a group to be the representatives of the group and the representatives would then apply to the Registrar of Group Representatives for their incorporation under the said Act.

⁹⁷ The constitution of the group would provide how the corporate body would execute documents but execution would be under common seal in the presence of a minimum of three officers.

through international transfers or, possibly, a tax on carbon transactions or other categories of transactions), and should be explored. Further, whether greater monitoring of grants paid directly to civil society is needed should be considered, even if only in terms of oversight - a centralised database of REDD+ implementation activities and the development partners involved in them could help to ensure efficiency in the use of REDD+ funds and facilitate coordination between different initiatives.

Please see **Background Report 2** for a fuller discussion of the issues related to public investments in REDD+.

2.3.3.2 *Issues related to private investments*

The private sector will be an important player in REDD+ implementation – however, the role of the private sector in Kenya’s national programme is uncertain. Two key entry points for private sector involvement can be identified:

- as project developers or offset buyers in commercial REDD+ projects; and
- as actors in the wider green economy.

Regarding commercial projects, the current lack of demand for carbon credits in the voluntary market should be noted (ie. private buyers for carbon credits cannot be guaranteed), and it is uncertain whether a future international compliance market for REDD+ credits will be created. Alternatively, it might be possible (although not guaranteed) to secure bilateral support for credits generated from projects or to establish a national scheme for their purchase (such as a PES scheme). Two important issues need to be clarified with regard to commercial projects:

- (i) whether they will be permitted under a future national programme, and
- (ii) whether the sale of carbon credits is subject to special approval.

More broadly, the private sector’s role in developing a ‘green economy’ can be explored for opportunities to support the reduction of emissions from REDD+ activities (such as providing low-emission alternatives to charcoal and fertilisers). It is our understanding the UNEP is leading this dialogue in Kenya, and it has not been explored at length here. Nonetheless, the possibility for Payment for Ecosystem Services schemes and climate-smart agriculture to be included in plans to develop a green economy was identified (see **Background Report 3** for a fuller discussion of this point).

Irrespective of whether the private sector will be involved in projects or business opportunities in the green economy, existing legal frameworks regulating commercial activity in Kenya will apply. These

include the laws regarding business associations, taxation, employment, contracts and (more generally) land rights and anti-corruption. Notwithstanding possible issues regarding implementation processes and enforcement of these laws, Kenya's commercial frameworks are well developed and include measures to attract foreign investment.

Please see **Background Report 3** for a fuller discussion of the issues related to private investments in REDD+.

2.4 Recommendations for developing an enabling legal framework for REDD+ investments

Working to clarify how existing legal frameworks could support REDD+ implementation and also how new REDD+-specific concepts (such as carbon rights and benefit sharing) will be regulated in the Kenyan legal system will help to ensure that Kenya's national programme, and any project activities within it, comply with the emerging UNFCCC framework and other international expectations regarding REDD+ implementation. Robust legal frameworks that are consistent with international benchmarks will help to ensure that Kenya can attract, and successfully manage, REDD+ investments.

In order to develop an enabling legal environment for REDD+ investments in Kenya, this report offers the following recommendations:

► Recommendation 1: Develop a more comprehensive REDD+ policy.

Develop a more detailed REDD+ policy addressing all REDD+ implementation issues (including but not limited to the chosen approach to carbon rights, benefit sharing, permanence and scale). Such a policy would provide reference points for applying existing law and assessing the governance gaps that need to be addressed.

Each of the policy questions outlined above (at 1.2) should be addressed.

► Recommendation 2: Consider legal approach to scale.

Consideration needs to be given to how Kenya's chosen approach to scale will be accommodated within the legal system. The issue of whether existing projects will be 'grandfathered' into a national

REDD+ programme, and whether future projects will be ‘nested’ in a national REDD+ programme, needs to be clarified – and if this will be the case, the modalities for doing so.

► **Recommendation 3: Ensure that UNFCCC requirements are implemented.**

To align with the UNFCCC framework (including the Cancun safeguards), its principles need to be incorporated into national REDD+ policy and legal frameworks. For example:

- Tenure arrangements for the sites of REDD+ activities (namely, gazetted forests) need to be very clear in order to control land use and reduce the risk of reversals;
- In order to comply with the provisions of the UNFCCC framework for REDD+, Kenya's national REDD+ programme needs to take note of both the constitutional and statutory requirements regarding gender equality and seek to ensure that these principles are implemented. These will be particularly relevant when reviewing tenure and designing equitable benefit sharing arrangements;
- Existing concerns regarding transparency in forestry governance need to be addressed, with the potential for REDD+ finance to bolster existing anti-corruption initiatives;
- The rights of communities need to be clarified, in terms of both rights to land targeted by REDD+ and entitlements to REDD+ benefits; and
- A system to monitor and report on the implementation of the Cancun safeguards needs to be developed.

To achieve this, further analysis with respect to where these safeguarding principles, and mechanisms, 'sit' within current legal frameworks is required.

► **Recommendation 4: Clarify how existing law will apply to REDD+ investments (both public and private).**

The management of public REDD+ investments could be supported by existing public finance and transparency laws. Rules regarding the entitlements (and administrative capacities) of County governments should be clarified. The possibility of using a ‘special purpose’ fund for REDD+ should be explored. Further, whether greater monitoring of grants paid directly to civil society is needed should be considered.

Regarding commercial projects, the current lack of demand for carbon credits in the voluntary market should be noted, in addition to the uncertainty regarding whether a future international compliance market for REDD+ credits will be created. With respect to commercial projects, particular issues to

clarify are i) will they be permitted under a future national programme, and ii) is the sale of carbon credits subject to special approval. The possibility to support REDD+ implementation by financing non-carbon benefits (such as water services) could also be explored in the context of either public or private finance.

► **Recommendation 5: Clarify the legal status of carbon rights.**

The legal definition of carbon, and the rights to it, needs to be clarified. *If* the physical forest carbon (or soil carbon) is **defined to be a new type of natural resource** (an interpretation which appears consistent with the Constitution), then its link to the land and forest in which it is stored should be recognised. If this is the case, then **existing land and tree tenure arrangements would apply to carbon (in both the forest and soil)** and help to determine its ownership.

The sustainable management of that forest/soil carbon in the mid-long term could generate emissions reductions; although these emissions reductions are intangible, their existence is based upon the ongoing storage of the physical forest carbon. **The law can outline a process by which the emissions reductions are created** (for example, stating the time period over which the emissions reduction should be stored and verification requirements), **and define the legal character of the emissions reduction** (for example, as a unit or a credit). **The way in which emissions reductions can be used can also be outlined in the law** (for example, whether they can be transferred - internally or offshore, and who could own them - whether public or private).

Once the emissions reductions are monetised, rules regarding the sharing of financial benefits (and whether these benefits should be directed into non-carbon benefits such as social infrastructure) will be needed.

► **Recommendation 6: Consider each of the different elements of benefit sharing.**

Kenya's Constitution requires benefits from natural resources to be shared equitably (without providing any further guidance regarding the application of this principle), arguably providing an imperative to consider the question of what is 'equitable' in the context of REDD+. As noted above, there are different legal elements of a benefit sharing system. Each must be addressed:

- **What is the benefit that will be shared?** This refers to the carbon and non-carbon benefits flowing from REDD+ implementation, eg. the emissions reductions and/or other ecosystem services produced. These 'products' of REDD+ will then be monetised, and the financial revenue can be shared between stakeholders (as either cash, or as investments in social infrastructure). In

Kenya's case, both the legal definition of forest carbon/soil carbon and the emissions reductions created from its protection need to be clarified;

- **What is the legal basis for a benefit claim, and who are the beneficiaries?** Direct beneficiaries of REDD+ payments in Kenya could include the State (at both the National and County levels), project developers/implementing entities, and communities (including their individual members). Stakeholders could claim financial benefits based on rights to the physical forest/soil carbon, or from other forms of participation in a REDD+ programme (in which case clear eligibility criteria need to be defined in the law). *Assuming* that carbon tenure is attached to land tenure, existing land laws will determine the ownership of that carbon and identify a key stakeholder (the landholder) in any REDD+ interventions on that land. Whether the right to carbon could be assigned to communities (as a use right, or through leasehold etc) and be used as a basis for a benefit claim is an open question that should be clarified; new law with respect to community land could present an opportunity to clarify this point. **Land rights may not be the only basis for a benefit claim;** contributions to REDD+ implementation could also be referred to as 'service-based benefit claims,' in which case the benefits owed for defined 'services' need to be clarified. The funding source for these 'service-based benefits' would need to be identified (for example, REDD+ project developers could be required to share a percentage of financial revenues with affected communities for their role in REDD+ implementation; under a national programme, a centralised fund could collect and disburse funds based on eligibility criteria). In addition, the role of the County governments in benefit sharing (including any obligation to pay the County governments a share of REDD+ revenues received at the national level) needs to be clarified;
- **How will the payment be distributed to different beneficiaries?** Different kinds of distribution vehicles could be used. At the national level, a centralised fund could be used to deposit and then disburse REDD+ payments (from different sources, and to different beneficiaries); a 'special purpose' fund could be considered for this purpose. At the local level, community trust funds or even MPESA could be used to distribute payments. The issue of whether financial benefits should be distributed as cash or 'in kind' (for example, social infrastructure) also needs to be addressed; and
- **How will public participation be supported (including dispute resolution), and what transparency measures will be put in place?** Existing rules regarding public participation in natural resource management should be explored as a possible basis for supporting public participation in REDD+ decision-making, and transparency/anti-corruption measures could be explored for their capacity to manage the corruption risks associated with REDD+.

► **Recommendation 7: Consider adequacy of existing law or the need for a dedicated law.**

The option to house dedicated REDD+ provisions in the new Forests Conservation and Management Bill 2014 or Climate Change Bill 2014 should be further explored, including how to link REDD+-specific provisions to other existing frameworks (such as anti-corruption laws). As an alternative, a new ‘umbrella’ law specific to REDD+ could be developed, with the advantage of being able to capture the broad range of issues relevant to REDD+ in a single dedicated instrument. Whether to house REDD+ in a law or in regulations made pursuant to a law should also be considered, noting issues such as the legal certainty offered by a particular instrument, the length of time required to enact the instrument, and how many of the substantive issues that need to be addressed can be housed within the instrument.

If current Bills are to be amended to include REDD+ provisions, timing must be considered carefully.

► **Recommendation 8: Create a road-map for developing Kenya’s national legal framework for REDD+ (addressing issues of both ‘content’ of the law and ‘form’ of the law).**

The development of a legal framework for REDD+ will require consideration of both the ‘content’ of legal provisions and the ‘form’ of the legal instrument in which those provisions will be housed. The starting points for assessing appropriate content and form are:

- (a) national policy choices regarding key elements of REDD+, and
- (b) existing legal structures.

Depending on the ambition of Kenya's REDD+ programme, the incorporation of legal provisions for REDD+ into existing legal frameworks might need to be phased (ie. short and long term options). It would be helpful, therefore, to clearly set out the policy objectives for REDD+ and then assess how existing laws (including those relevant to land, forests, public finance and commercial activities) apply to these objectives. Existing laws could be silent on, be supportive of, or contradict REDD+ policy objectives, informing the ‘content’ of REDD+ provisions; in addition, the existing legal architecture will dictate options regarding the ‘form’ of the law.

A ‘road map’ which seeks to assess existing legal frameworks against REDD+ policy choices - with a view to determining both the 'content' of REDD+ provisions (such as those outlined in the issue-specific recommendations above) and the 'form' of law in which such provisions will be contained – would assist Kenya’s efforts to develop a robust governance framework for REDD+.

PART B:

BACKGROUND REPORTS



A designated forest sanctuary in Nairobi.

LIST OF ACRONYMS

ACCU	Australian Carbon Credit Unit
ACECA	Anti-corruption and Economic Crimes Act
ACoGS	Avoided Conversion of Grasslands and Shrublands
AFOLU	Agriculture, Forestry and Other Land Use
ALM	Agricultural Land Management
APRM	African Peer Review Mechanism
ARR	Afforestation, Reforestation and Revegetation
ASAL	Arid and Semi-Arid Land
ASCU	Agricultural Sector Coordination Unit
ASDS	Agricultural Sector Development Strategy 2010-2020 (Kenya)
ATAR	Adaptation Technical Analysis Report
ATIA	African Trade Insurance Agency
BAU	Business as usual
BDM	Benefit Distribution Mechanism
CBD	Convention on Biological Diversity
CBDR	Common but Differentiated Responsibility
CCAFS	Research Program on Climate Change, Agriculture and Food Security of the Consultative Group on International Agricultural Research [CIGAR]
CCBA	Climate, Community and Biodiversity Alliance
CDM	Clean Development Mechanism
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CGIAR	Consultative Group on International Agricultural Research
CIFOR	Centre for International Forestry Research
CITES	Convention on International Trade of Endangered Species
COMESA	Common Market for East and Central African States
COP	Conference of the Parties to the UNFCCC
CRPD	Convention on the Rights of Persons with Disabilities
CSR	Carbon Sequestration Right (Australia)
DPP	Director of Public Prosecutions
DRD	Declaration on the Right to Development
DSPD	Declaration on Social Progress and Development
EIA	Environmental Impact Assessment

EAA	East African Association
EAC	East African Community
EMCA	Environmental Management and Coordination Act
EPZ	Export Processing Zone
FAO	Food and Agriculture Organization
FCPF	Forest Carbon Partnership Facility (World Bank)
FDI	Foreign direct investment
FIDA	Federation of Women Lawyers
FKE	Federation of Kenya Employers
FONAFIFO	National Fund for Forest Financing (Fondo Nacional de Financiamiento Forestal), Costa Rica
FPEAK	Fresh Produce Exporters Association of Kenya (FPEAK)
FPIC	Free, Prior and Informed Consent
FSNP	National Food and Nutrition Security Policy (Kenya)
GHG	Greenhouse gas
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH (German International Development Agency)
GMO	Genetically modified organism
GoK	Government of Kenya
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDDRI	Institute for Sustainable Development and International Relations
IFAD	International Fund for Agricultural Development
IFM	Improved Forest Management
IFPRI	International Food Policy Research Institute
IIED	International Institute for Environment and Development
ILRI	International Livestock Research Institute
IPCC	Intergovernmental Panel on Climate Change
KAM	Kenya Association of Manufacturers
KEPSA	Kenya Private Sector Alliance
KFC	Kenya Flower Council
KFRI	Kenya Forestry Research Institute
KFS	Kenya Forest Service
KWS	Kenya Wildlife Service

LULUCF	Land Use, Land Use Change and Forestry
MEMR	Ministry of Environment and Mineral Resources
MMBA	Miti Mingi Maisha Bora (Kenya - Finland Forestry Programme)
MoA	Ministry of Agriculture, Kenya (<i>formerly Ministry of Agriculture; now Ministry of Agriculture, Livestock and Fisheries</i>)
MRV	Measurement, reporting and verification
NAAIAR	National Accelerated Agricultural Inputs Access Program
NACOFA	National Alliance of Community Forest Associations
NAMA	Nationally Appropriate Mitigation Action
NCCAP	National Climate Change Action Plan 2013-2017 (Kenya)
NCCRS	National Climate Change Response Strategy (Kenya)
NEAP	National Environment Action Plan
NEC	National Environmental Council
NET	National Environmental Tribunal
NEMA	National Environment Management Authority (Kenya)
NEP	National Environment Policy of 2012
NEPAD	New Partnership for Africa's Development (African Union)
NSW GHG	New South Wales Greenhouse Gas Reduction Scheme (NSW GHG)
NGO	Non-Governmental Organisation
NRCO	National REDD+ Coordination Office
NRMP	Natural Resources Management Project
OAU	Organisation of African Unity
ODA	Overseas development assistance
ODI	Overseas Development Institute
OECD	Organisation for Economic Co-operation and Development
OTC	Over The Counter (carbon) market
PCC	Public Complaints Committee
PD	Project Description
PDD	Project Design Document
PIC	Prior, Informed Consent
PIN	Project Idea Note
PP	Project Proponent
PPOA	Public Procurement Oversight Authority
REALU	Reducing Emissions from All Land Uses
REDD+	Reducing Emissions from Deforestation and Forest Degradation
R-PP	Readiness Preparation Proposal for the FCPF

SERC	Standards and Enforcement Review Committee
SACCO	Savings and Credit Co-operative Society
SALM	Sustainable Agricultural Land Management
SBSTA	Subsidiary Body for Scientific and Technological Advice
SESA	Strategic Environmental and Social Assessment
STR	Suspicious Transaction Reporting
TWG	Technical Working Group
UAP	German Independent Labour Party
UNDP	United Nations Development Program
SIDA	Swedish International Development Agency
UDHR	Universal Declaration of Human Rights
UNCCD	United Nations Convention to Combat Desertification
UNCTAD	United Nations Conference on Trade and Development
UNDM	United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Program
UNEP-WCMC	UNEP World Conservation Monitoring Centre
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNTC	United Nations Treaty Collection
UNTS	United Nations Treaty Series
USAID	United States International Development Agency
USAid	United States Agency for International Development
VCS	Verified Carbon Standard
VCU	Verified Carbon Unit
VERs	Verifiable Emissions Reductions
VVBs	Validation and Verification Bodies
WRC	Wetlands Restoration and Conservation

BACKGROUND REPORT 1

OVERVIEW OF KENYAN LAW APPLICABLE TO REDD+ IMPLEMENTATION

POLITICAL MAP OF THE REPUBLIC OF KENYA



Image courtesy of *The Commonwealth* online

Available at <http://www.thecommonwealth.org/YearbookHomeInternal/139131/> (accessed June 13 2013).

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1. INTRODUCTION

At its core, REDD+ policy aims to address the drivers of deforestation for the purposes of generating carbon emissions. As such, a national REDD+ programme will be built upon existing land and environmental governance. It is therefore important to identify the general law that provides a foundation for REDD+ implementation and a starting point for any new REDD+-specific laws. This report includes an overview of

- REDD+ readiness work in Kenya;
- Kenya's legal system;
- Laws, policies and institutions relevant to REDD+ in Kenya (including land and environmental law and governance);
- Gender issues in Kenyan law;
- Transparency provisions in Kenyan law;
- International law applicable in Kenya; and
- Dispute resolution in Kenya.

In order to contribute to the current policy dialogue in Kenya, it concludes with a discussion of two key issues for REDD+ implementation that will draw from and build upon the existing general law framework in Kenya – carbon rights and benefit sharing.

2. OVERVIEW OF REDD+ IN KENYA

2.1 Background⁹⁸

Kenya's economy has a very strong dependence on the natural environment and, in particular, forestry resources. Forestry underpins most sectors, including agriculture, horticulture, tourism, wildlife, and the energy. In some rural areas, the forests contribute over 75% of the cash income and provide almost all of households' energy requirements.

Although Kenya is classified as a low forest cover country, it loses about 54,000 hectares of forest cover every year. The major reasons for this loss are:

- Conversion of forest land to agriculture, settlements and other uses;
- Unsustainable utilization of forest products (including charcoal);
- Forest fires; and
- Shifting cultivation.

Loss of forest cover is particularly severe in the Arid and Semi-arid zones, where the agricultural frontier is expanding and charcoal burning is rampant. Significant forest cover loss has also occurred in the major catchment areas (popularly referred to as 'water towers') over the last three decades.

Kenya's forests resources contribute more than 3.6 per cent of Gross Domestic Product (GDP), and economic benefits of forest ecosystem services are more than four times higher than the short-term gains of deforestation. Preventing the further destruction of Kenya's forests and wetlands and investing in their restoration and sustainable use is one of the smartest and cost-effective natural capital investments Kenya can make, to not only combat climate change, but to create jobs and wealth, ensure water and food security, and deliver the *Vision 2030* objectives. Kenya needs strong political, fiscal, and technical support and commitment for the restoration and sustainable management of this critical resource.

Vision 2030, the country's economic blueprint, identifies forestry as one of the key drivers of the economy through its support to the primary sectors including agriculture, infrastructure, tourism and energy. Under *Vision 2030*, the country aims to protect the five water towers (Mt. Kenya, Aberdares, Mau, Cherangani and Mt. Elgon) and increase the forest cover to a minimum 10% through an aggressive afforestation, reforestation and restoration program. In addition, the country is addressing

⁹⁸ This text in this section is courtesy of the Kenya Forest Service (KFS).

climate change through the development of a National Climate Change Response Strategy (NCCRS) and supporting Action Plans. This strategy provides a framework for re-orienting national programmes towards a low carbon development pathway, and has identified the forestry sector as a strong vehicle for supporting this effort.

2.2 REDD+ developments in Kenya⁹⁹

2.2.1 *Readiness phase*

REDD+ in Kenya is evolving as an attractive means to reduce forest sector carbon emissions. A number of activities are currently ongoing in the country to support efforts to design, develop and apply strategies and programs (**REDD+ Readiness**) to reduce emissions and enhance carbon sink capacities of forest ecosystems. The Forest Carbon Partnership Facility (FCPF), Natural Resources Management Project under KFS, and other bilateral supported programmes have been instrumental in providing technical and financial support for these efforts. Kenya has also benefited from the global programme support of the UN-REDD Programme in support of its REDD+ readiness activities. The Ministry of Environment, Water and Natural Resources coordinates the Readiness process, and a National REDD+ Coordination Office has been established within the Ministry to offer secretariat services for the activities.

Significant policy, legislative and institutional changes have occurred over the last few years in Kenya that complement the REDD+ efforts in the country. The Constitution, National Development Plan (Vision 2030), The Arid and Semi Arid Lands (ASALs) Policy, the National Land Policy and the National Climate Change Response Strategy (NCCRS) and Action Plan (NCCAP) identify forestry as one of the key sectors for delivering national sustainable development and climate change goals. The Environment and Forest Policies and supporting legislation are currently under review to align them with the Constitution and to embrace emerging issues like climate change, participatory management and REDD+. Capacities of key institutions like Kenya Forest Service (KFS) and Kenya Wildlife Service (KWS) are also being strengthened to provide the required support and guidance for sustainable management and conservation of forestry resources. Similar efforts are being directed to community associations to strengthen their engagement in forest conservation efforts. The KFS has also undergone significant transformation, in line with the Forests Act 2005, to embrace a modern, decentralized and transparent approach to forest management that ensures full participation of stakeholders. The World Bank, United Nations Development Programme (UNDP) and the Finnish

⁹⁹ This text in this section is courtesy of the Kenya Forest Service (KFS).

Government have significantly supported forestry conservation efforts in the dry lands, aware that these areas hold most of the country's forest resources and equally hold the greatest potential for reducing carbon emissions and enhancement of forest carbon stocks. The REDD+ readiness process should reinforce these activities and future sector engagements.

Kenya hosts a number of land-based carbon projects, including Wildlife Works Kasigau Corridor REDD Project that has sold carbon credits in the voluntary market.

Kenya's Readiness Preparation Proposal (R-PP) outlines a strategy for developing REDD+ in Kenya, with the broader goal of implementing "environmentally and socially sustainable land-use and forest policies."¹⁰⁰ The R-PP contains:

- 4 REDD+ strategy options, where 'REDD+ strategy' is used to refer to various policies, measures and actions taken by public and private actors that are developed for the purpose of reducing emissions and increasing removals of Greenhouse Gases (GHG) in the forest sector.¹⁰¹ The REDD+ strategies to be tested are: 1) reducing pressure to clear forests for agriculture and other uses; 2) promoting sustainable utilisation of forests; 3) Improving forest law enforcement and governance; and 4) enhancement of carbon stocks¹⁰²;
- A management and consultation approach to underpin all activities undertaken as part of the REDD+ implementation phase;
- An approach to design Kenya's carbon reference emission level/reference level, and monitoring system; and
- An approach to assess and monitor social and environmental impacts from the REDD+ strategies.

Kenya seeks to attract both public and private investment through REDD+, and hopes that REDD+ will contribute to 'green growth.'

¹⁰⁰ *Kenya - Revised REDD Readiness Proposal* ("R-PP"), August 2010; Executive Summary, page v: para 1.

¹⁰¹ *Ibid*, page 35: paragraph 7. Further: "A REDD+ strategy can involve programs, investments by authorities in the capacities and management structures of their respective institutions, and financial incentives and instruments that induce a change in behaviour."

¹⁰² *Ibid*, Section 2b: pages 34-43.

2.2.2 *Demonstration activities and REDD+ projects*

See **Annex 8** for a list of different REDD and REDD+ projects in Kenya.

2.2.3 *Key stakeholders in REDD+ in Kenya*

Key stakeholders in Kenya's REDD+ implementation are:

- National and County level governments (including the Ministries of Finance; Devolution and Planning; Agriculture, Livestock and fisheries; Lands, Housing and Urban Development; Energy and Petroleum; and, Environment, Water and Natural Resources), the Kenya Forest Service, the National Environment Management Authority, the Kenya Forest Research Institute, the Kenya Wildlife Service, and the National Museums of Kenya;
- Civil society: international NGOs (WWF, IUCN); National NGOs (Greenbelt Movement, Kenya Forests Working Group, Forest Action Network, NACOFA, Nature Kenya, other NGOs that articulate interests of vulnerable and marginalized groups);
- Development partners: JICA, Finnish Government, USAID, World Bank, UNDP, FAO, UNEP;
- Universities and Research Institutions: Jomo Kenyatta University of Agriculture and Technology, Kenyatta University, Moi and Nairobi Universities, KARI; and
- Banks, timber industry, farmers and investors (the private sector).

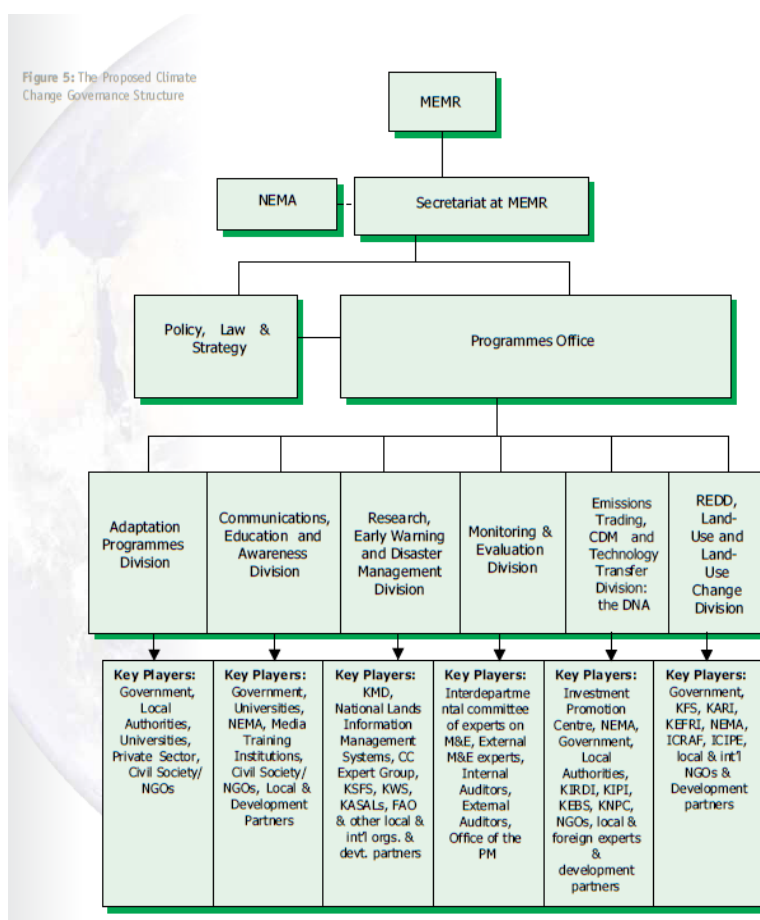
2.2.4 *Emerging framework for REDD+ governance*

2.2.4.1 *Climate change governance*

Kenya has ratified the United Nations Framework Convention on Climate Change (UNFCCC). Regionally, Kenya is a member of the East Africa Community (EAC) which has adopted the *East African Community Climate Change Policy*, dealing with forestry and sustainable land management in the contexts of both adaptation and mitigation.

Before 2013, climate change coordination activities in Kenya were vested in the Ministry of Environment and Mineral Resources (with the mandate for forest conservation and management vested in the Ministry for Forestry and Wildlife). The current Government places both of these responsibilities within the new, consolidated Ministry for Environment, Water and Natural Resources. Consistent with the NCCRS, a Climate Change Secretariat has been established within the Ministry of Environment, Water and Natural Resources. The NCCRS proposed a structure for climate change

governance in Kenya (see diagram below); the new Climate Change Bill 2014 could also affect the structure this structure.



National Climate Change Response Strategy (Government of Kenya, April 2010), page 91.

IMPORTANT NOTE: *This proposed structure is likely to be updated.*

2.2.4.2 REDD+ institutions

Kenya's R-PP notes that the policy, legal and institutional arrangements for REDD+ will fall under the institutional framework proposed by the NCCRS (see diagram below). REDD+ implementation will be linked to the REDD+, Land use and Land Use Change division, and a tiered structure has been created to oversee REDD+ implementation:

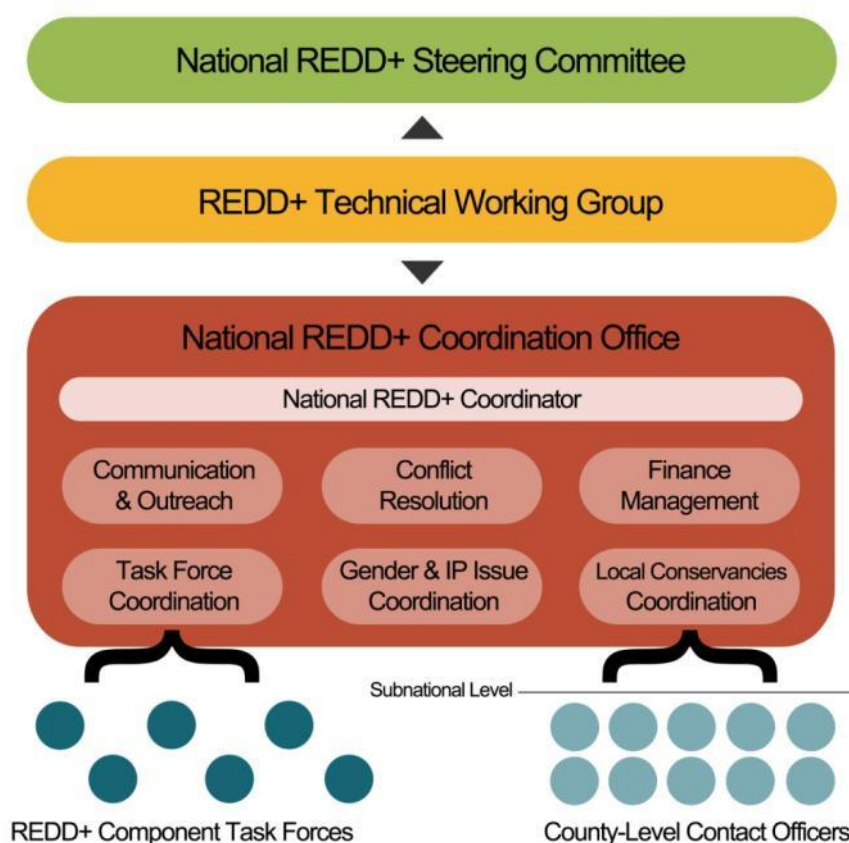
- National REDD+ Steering Committee;
- Technical Working Group;
- National REDD+ Coordination Office; and

- REDD+ Component Task Forces and Local Conservancy Officers (however, the Local Conservancy Officers will change according to the new County government arrangements, and will become ‘County Level Contact Officers’).

The REDD+ process in the country proposes a four tier management arrangement whose objectives are to:

- Integrate and contribute to broader climate change goals as stated in the National Climate Change Response Strategy;
- Provide support to development of a coherent and successful REDD+ Strategy;
- Bring clear decision making authority to the REDD+ process that is informed by both national climate change goals and REDD+ goals; and
- Ensure Kenya has its own high level expert technical working group to advise the decision making authority.

REDD+ GOVERNANCE STRUCTURE



Adapted from the Government of Kenya, 'REDD Readiness Preparation Proposal' (Submitted to the Forest Carbon Partnership Facility, June 2010) 9 fig 5, updated to change 'Local Conservancy Officers' to 'County-level Contact Officers.'

2.2.4.2a The National REDD+ Steering Committee (RSC):

The National REDD+ Steering Committee has a varied role:

- Policy guidance and implementation of REDD+ activities;
- Resource mobilization;
- Assurance of timely delivery of a national REDD+ strategy, national reference emission level and an effective carbon monitoring system;
- Quality control of REDD+ preparedness deliverables; and
- Providing a mechanism for international collaboration with other REDD+ processes.

The apex body for REDD+ management is the **National REDD+ Steering Committee (NCS)**. The Terms of Reference were developed and approved during the Committee Meeting in December 2010. The NSC is chaired by the Principal Secretary in the Ministry responsible for forestry. RSC membership comprises the Principal Secretaries from the Ministries in charge of Environment, Water and Natural Resources; Energy and Petroleum; Devolution and Planning; and Finance, as well as the Directors of KFS, KEFRI and NEMA. Others are IUCN, WWF, KFWG, a representative from Universities, UNDP/UNEP and the Donor Coordination Group; and the National Association of Community Forest Associations (NACOFA).

2.2.4.2b REDD Technical Working Group (TWG)

The Technical Working Group (TWG) is comprised of different individuals who have been engaged in REDD+ discussions in Kenya since 2009. It is currently divided into 3 subgroups: Consultation and Participation; Methodology; and Policy and Institutions. The subgroups and the current TWG are expected to disband, and the new TWG for R-PP implementation will be redefined as a smaller entity bringing together specific expertise. Among other qualifications, members are expected to have expertise in forestry, finance, land use, agriculture, wildlife management, timber production and the management of private sector enterprises. In addition, there will be one representative from civil society organisations, one representative from community forest associations, one representative from water resource users groups, and one representative from indigenous communities living in forests.

The TWG is expected to play a key advisory role for the National REDD+ Steering Committee, and to liaise with the National REDD+ Coordination Office in carrying out operationalization of the R-PP. Specifically, it will be responsible for oversight of the R-PP implementation process, and be responsible for managing the monitoring and evaluation activities.

2.2.4.2c The National REDD+ Coordination Office (NRCO)

The National REDD+ Coordination Office has been established at the Ministry of Environment, Water and Natural Resources to facilitate implementation of proposed R-PP activities and a Coordinator has been recruited. In addition the Steering Committee has approved the establishment of a National Technical Working Group (TWG) and six thematic working groups to drive the REDD+ implementation process. Thematic Working Groups on SESA, Consultation and Participation and MRV have already been established and are operational. The TOR for the SESA process has been finalized and Recruitment for the SESA Facilitator concluded.

2.2.4.2d REDD+ Component Task Forces

Six thematic groups have been established.

2.3 Regulatory framework for REDD+ investment

2.3.1 *Policy framework for development, climate change and REDD+*

The National Climate Change Action Plan (NCCAP) seeks to assist development partners in aligning their investments with the Government of Kenya's climate change priorities and that "investments are nested within Vision 2030 and Kenya's national planning process."¹⁰³ Kenya's policy framework regarding sustainable development contains a number of guiding documents relevant to REDD+ investment, including:

- Vision 2030;
- National Climate Change Response Strategy (NCCRS);
- National Climate Change Action Plan (NCCAP);
- National Land Policy;
- National Environmental Policy;
- Draft Carbon Investment Policy; and
- National Forest Policy.

The Forestry Policy (2014) is particularly relevant in the context of REDD+ implementation. It contains a revised policy framework that is designed to be consistent with the principles articulated in the Constitution of 2010, and will be implemented via a new forests act (at present, the Forest

¹⁰³ National Climate Change Action Plan 2013-2017, page 27, bullet point 5.

Conservation and Management Bill 2014 is under discussion for this purpose). This framework emphasises community participation in forestry management, and also emphasises the role of both State and non-State actors in the forest sector, and the role of the forest sector in contributing to economic growth and poverty alleviation goals (including the private sector). **REDD+ interventions will need to be consistent with the Forest Policy (2014) and its implementing law.**

2.3.2 *Legal frameworks relevant to different aspects of REDD+ investments*

In addition to the overarching constitutional obligation regarding a right to a clean and healthy environment, many different areas of Kenyan law are relevant to REDD+ implementation. These will be discussed in the next section (Section 3).

3 BACKGROUND TO KENYA'S LEGAL SYSTEM

The purpose of this section is to provide background context to Kenya's legal system. Any country's legal system is made up of policies, laws, institutions, conventions and historical memory. Together these elements create a unique context in which to consider any given law or regulatory issue.

3.1 Difference between government policy and law

Within Kenya's legal system, different kinds of documents have different legal statuses. Statutes can be distinguished from policy. Kenya's National Climate Change Response Strategy notes that "one of the key functions of policy is to advise and direct the government and the governed on necessary actions to address identified problems," however, "given that *policy is not binding*, there would be no legal consequence on a government or a people for failing to implement their policy."¹⁰⁴

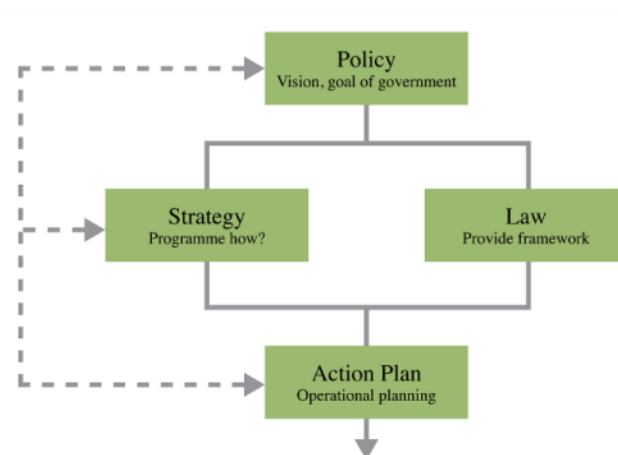
An important source of government policy is government **sessional papers**. Sessional papers can be reports, or other documents that reflect on either the government's strategy, administrative guidelines or policy. While sessional papers are not law, they reflect what the government intends to create and implement as law.

The laws that create legal frameworks are binding, and although their implementation might be guided by Government policy (including sessional papers), the creation and amendment of laws involves approval by the legislature (rather than just the Government in power, or individual members

¹⁰⁴ Government of Kenya, *National Climate Change Response Strategy* (April 2010), page 88.

of that Government). Laws are enforceable, and violation of the law could result in a penalty or other legal remedy (such as compensation for a person who has been harmed by an unlawful act).

RELATIONSHIP BETWEEN POLICY AND LAW



Food and Agriculture Organisation of the United Nations, 'Developing Effective Forest Policy: A Guide' (FAO Forestry Paper 161, 2010) 11 fig 1.

3.2 Constitutional law

3.2.1 Constitutional history of Kenya: From 1964 to 2010

Kenya, formally a British Colony, was granted full independence on 12 December 1963 and thus became a Republic. Prior to independence, Kenyan political leaders went to London to negotiate the Independence Constitution with the British colonial office. The negotiations occurred in 1960 and 1962 during the Lancaster House constitutional conferences held in London and continued in Nairobi in 1963.

The Independence Constitution became effective in 1963 following Kenya's attainment of full independence. Features of the Independence Constitution include:

- A multi-party system of government¹⁰⁵;
- A Westminster-style parliamentary government, with a Prime Minister as the Head of Government and the Queen as the Head of State;

¹⁰⁵ The executive authority of the Government of Kenya was vested in Her Majesty (Queen of England), and exercised on her behalf by the Governor-General either directly or by officers subordinate to him. The Prime Minister was appointed by the Governor-General from among members of the House of Representatives, chosen for his potential to command the support of a majority of the members of the House.

- A majimbo¹⁰⁶ (or decentralized) system of governance;
- A bicameral legislature¹⁰⁷;
- A Supreme Court¹⁰⁸, Kadhi¹⁰⁹ Court and various Commissions¹¹⁰.

In 1964, Kenya became a Republic.¹¹¹ A constitutional amendment replaced the Prime Minister with the Office of the President,¹¹² making the President the Head of State and the Head of Government. Numerous other amendments to the Independence Constitution had an impact on the operation of democracy and respect for the rule of law¹¹³; amendment procedures allowed change for political purposes.¹¹⁴ Major amendments to the Independence Constitution made between 1964 and 2008 are outlined in **Annex 2**.

¹⁰⁶ Kiswahili word for decentralization. It means distribution of power between the central government and the seven regions listed in Article 91 of the Independence Constitution of Kenya. This provided for equal sharing of power and a channel for all tribes (especially the minorities) to participate in the process of government. See Lumumba PLO, Mbondenyei M K and Odera SO The Constitution of Kenya: Contemporary Readings (2001) LawAfrica Publishing (K) Limited.

¹⁰⁷ The Parliament consisted of Her Majesty and the National Assembly. The National Assembly comprised of two houses, ie. a House of Representatives and a Senate. The Senate represented the 40 districts and Nairobi area while the House of Representatives represented the constituencies. See Part IV of the Independence Constitution of Kenya available at <http://www.mlgi.org.za>.

¹⁰⁸ The Supreme Court had unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.

¹⁰⁹ The Kadhi's Court is one of the subordinate courts in Kenya as stipulated in Article 169(1) of the Constitution. The jurisdiction of the Kadhi's court is limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance. All the parties to any proceedings should profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts (see Article 170(5) of the Constitution).

¹¹⁰ Such as the Judicial Service Commission and a Public Service Commission.

¹¹¹ This was effected through the Kenya Amendment Act No. 28 of 1964. It declared Kenya a sovereign republic as from 12 December 1964. See Ojwang, J.B., Constitutional Reform in Kenya (2001). Available at <http://www.commonlii.org/ke/other/KECKRC/2001/9.html>, accessed on May 15 2013; and, Lumumba, P.L.O., Mbondenyei, M. and Odera, S.(eds.), The Constitution of Kenya: Contemporary Readings (2011) LawAfrica Publishing (K) Limited, at page 24

¹¹² By virtue of Section 8 of the amendment Act, the first Prime Minister became the first President of Kenya.

¹¹³ In *Njoya & 6 others v Attorney General and 3 others* (2008) 2 KLR (EP), the High Court noted that: "Since independence in 1963, there have been thirty-eight (38) amendments to the Constitution. The most significant ones involved a change from Dominion to Republic status, abolition of regionalism, change from parliamentary to a presidential system of executive governance, abolition of a bi-cameral legislature, alteration of the entrenched majorities required for constitutional amendments, abolition of the security of tenure for judges and other constitutional office holders (now restored), and the making of the country into a one party state (now reversed). And in 1969 by Act No. 5 Parliament consolidated all the previous amendments, introduced new ones and reproduced the Constitution in a revised form. The effect of all those amendments was to substantially alter the Constitution. Some of them could not be described as anything other than an alteration of the basic structure or features of the Constitution. And they all passed without challenge in the courts." Available online at www.kenyalawreports.or.ke.

¹¹⁴ Thresholds for approving constitutional amendments were reduced. The constitutional amendment procedure (regarding a 14 day requirement for publication of an amendment bill) was violated in 1974 in order to adopt a presidential directive requiring parliamentary proceedings to be in Kiswahili. All stages were debated in one sitting to effect this constitutional change.

In response to the weaknesses in constitutional procedures, demands for reform to the Constitution were made by both the judiciary and civil society during the 1990s.¹¹⁵ Reform work eventually led to the Constitution of Kenya Review Act (2008) and the Constitution of Kenya (Amendment) Act (2008). Following a consultative process, the Harmonised Draft Constitution was subjected to a national referendum in 4th August 2010. It was accepted by a majority of Kenyans and promulgated into law on 27 August 2010.

3.2.2 Overview of the Constitution of Kenya 2010

The Constitution of 2010 establishes a governing framework for Kenya. It includes provisions with respect to the following:

- Citizenship (Chapter 3);
- A bill of rights (Chapter 4);
- Land and environment (Chapter 5);
- Leadership and integrity (Chapter 6);
- The structure of the legislature, executive and judiciary (Chapters 8, 9 and 10 respectively); and
- Public finance (Chapter 12).

The transitional provisions of the new Constitution require that all existing law should be interpreted with “the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with [the new Constitution].”¹¹⁶

The Constitution contains a power to make new laws regarding:

- Community land (Article 63);
- Regulation of land use and property (Article 66);
- Legislation on land (Article 68), agreements relating to natural resources (Article 71); and
- Legislation regarding environment (Article 72).

¹¹⁵ Lumumba, P.L.O., Mbondenyi, M. and Odera, S. (eds.), *The Constitution of Kenya: Contemporary Readings* (2011) LawAfrica Publishing (K) Limited, page 37.

¹¹⁶ Constitution 2010, Sixth Schedule: Transitional and Consequential provisions, Part 2: Existing Obligations, Laws and Rights, 7(1) – All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

Article 69 of the Constitution deals with **obligations in respect of the environment**, and provides for the State to:

- Ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits¹¹⁷;
- Work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya¹¹⁸;
- Encourage public participation in the management, protection and conservation of the environment¹¹⁹;
- Protect genetic resources and biological diversity¹²⁰;
- Establish systems of environmental impact assessment, environmental audit and monitoring of the environment¹²¹;
- Eliminate processes and activities that are likely to endanger the environment¹²²; and
- Utilise the environment and natural resources for the benefit of the people of Kenya¹²³.

3.2.3 *Devolution of authority*

3.2.3.1 *Introduction*

When Kenya attained independence in 1963, the Independence Constitution (that was negotiated between 1960 and 1962 during the Lancaster House constitutional conferences held in London, and continued in Nairobi in 1963) became effective. Although the Independence Constitution provided for a devolved system of governance,¹²⁴ several constitutional amendments created a centralised system of governance.¹²⁵ It was widely perceived that centralised government bureaucracies prevented the effective delivery of public services,¹²⁶ prompting calls for the devolution of power that was

¹¹⁷ Constitution of Kenya 2010, Article 69(1)(a).

¹¹⁸ *Ibid*, Article 69(1)(b).

¹¹⁹ *Ibid*, Article 69(1)(d).

¹²⁰ *Ibid*, Article 69(1)(e).

¹²¹ *Ibid*, Article 69(1)(f).

¹²² *Ibid*, Article 69(1)(g).

¹²³ *Ibid*, Article 69(1)(h).

¹²⁴ The regions were given significant responsibilities such as collection of taxes, maintenance of schools, health facilities and minor roads.

¹²⁵ These constitutional amendments were effected through the Constitution of Kenya (Amendment) Act No. 38 of 1964, Constitution of Kenya (Amendment) Act No. 16 of 1968 and Constitutional Amendment Act No. 40 of 1966.

¹²⁶ Kibau, T. and Mwabu, G. (eds.), *Decentralisation and Devolution in Kenya: New Approaches* (2008) University of Nairobi Press, page 1.

eventually included in the Constitution of 2010. The constitutional devolution of power is enacted by several pieces of legislation, including:

- a) Urban Areas and Cities Act (No. 13 of 2011);
- b) Commission of Revenue Allocation Act (No. 16 of 2011);
- c) Intergovernmental Relations Act (No. 2 of 2012);
- d) Public Finance Management Act (No.18 of 2012);
- e) National Government Coordination Act (No. 1 of 2013);
- f) Transition County Allocation of Revenue Act (No. 6 of 2013);
- g) Transition County Appropriation Act (No. 7 of 2013);
- h) County Governments Public Finance Management Transition Act (No. 8 of 2013);
- i) The County Governments Act (No. 17 of 2012);
- j) Constituencies Development Fund Act (No. 30 of 2013); and
- k) Division of Revenue Act (No. 31 of 2013).

3.2.3.2 Constitutional provisions on devolution

3.2.3.2a Objectives of devolution

The objectives of devolution are elucidated in Article 174 of the Constitution. They are:

- (a) To promote democratic and accountable exercise of power;
- (b) To foster national unity by recognising diversity;
- (c) To give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
- (d) To recognise the right of communities to manage their own affairs and to further their development;
- (e) To protect and promote the interests and rights of minorities and marginalised communities;
- (f) To promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- (g) To ensure equitable sharing of national and local resources throughout Kenya;
- (h) To facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and
- (i) To enhance checks and balances and the separation of powers.

3.2.3.2b Levels of Government in Kenya

The State is divided into two levels of government, being

- i) the National Government, and
- ii) the County Governments (consisting of 47 counties).

The two levels of government are both distinct and interdependent, required to conduct their mutual affairs on the basis of consultation and cooperation.¹²⁷

The Fourth Schedule of the Constitution clearly states that the National Government is responsible for the protection of the environment and natural resources. However, the County Governments are responsible for the implementation of specific national government policies on natural resources and environmental conservation such as forestry, soil and water conservation.¹²⁸

3.2.3.2c Cooperation between National and County Governments¹²⁹

The two levels of government are supposed to perform their functions and exercise their powers in a manner that respects the functional and institutional integrity, as well as constitutional status and institutions, of the other level. In addition, they are supposed to assist and support each other.

In the event that a dispute between the two levels of governments occurs, they are expected to make every reasonable effort to settle the dispute by negotiation, mediation and arbitration.¹³⁰

The Intergovernmental Relations Act (No.2 of 2012) was enacted to establish a framework for consultation and co-operation between the National and County Governments and amongst County governments. It also establishes mechanisms for the resolution of intergovernmental disputes.

3.2.3.2d The Role of the National Assembly and the Senate

Parliament is divided into the National Assembly and the Senate. The National Assembly represents the people of the constituencies¹³¹ while the Senate represents the Counties.¹³² In this regard, the National Assembly is responsible for determining the allocation of national revenue between the two levels of government as well as overseeing their expenditure, while the Senate is responsible for

¹²⁷ Article 6 of the Constitution.

¹²⁸ See Section 5 of the County Government Act (No. 17 of 2012) and Fourth Schedule of the Constitution.

¹²⁹ Article 189 of the Constitution.

¹³⁰ Article 189 (2) and (3) of the Constitution.

¹³¹ According to Article 89 of the Constitution, Kenya has 290 constituencies.

¹³² Articles 95 and 96 of the Constitution.

allocation of national revenue among Counties and overseeing the national revenue allocated to the County governments.¹³³

3.2.3.2e National Executive

The National Executive comprises of the President, the Deputy President and the rest of the Cabinet.¹³⁴

3.2.3.2f County Government

The County Government comprises of the County Executive and the County Assembly.

3.2.3.2g County Assembly

The County Assembly representatives are elected by registered voters of a ward on the same day as the general elections of Members of Parliament.¹³⁵ The County Assembly has a Speaker who is elected by the County Assembly from among persons who are not members of the said Assembly.¹³⁶

3.2.3.2h County Executive Committee

The County Executive Committee consists of the Governor, Deputy Governor and members¹³⁷ appointed by the County Governor, with the approval of the County Assembly, from among persons who are not members of the County Assembly.¹³⁸

¹³³ Article 96 (3) of the Constitution of Kenya.

¹³⁴ Article 130 of the Constitution. According to Article 152 of the Constitution, the Cabinet consists of the President, the Deputy President, the Attorney General and the Cabinet Secretaries. The Cabinet Secretaries should not be less than fourteen and more than twenty two. The Cabinet Secretaries are nominated by the President and the names are presented to Parliament for approval. Once approved by Parliament, the persons are appointed as Cabinet Secretaries by the President. A Member of Parliament cannot be a Cabinet Secretary.

¹³⁵ Article 177 of the Constitution.

¹³⁶ Article 178 of the Constitution.

¹³⁷ According to Article 179(3), the members should not exceed one-third of the number of members in the county assembly if the assembly has less than thirty members. In the event that the assembly has more than thirty members, then the members should not exceed ten.

¹³⁸ Article 179 (1) and (2) of the Constitution.

3.2.3.2i *Functions of the County Executive Committee*

The functions of the County Executive Committee are spelt out in Article 183 (1), (2), and (3) of the Constitution. They include:

- a) Implementing county legislation;
- b) Implementing, within the county, national legislation to the extent that the legislation so requires;
- c) Managing and coordinating the functions of the county administration and its departments;
- d) Preparing proposed legislation for consideration by the county assembly;
- e) Providing the county assembly with full and regular reports on matters relating to the county; and
- f) Performing any other functions conferred on it by this Constitution or national legislation.

3.2.3.2j *Functions of County Assemblies*

The functions of the County Assemblies are stipulated in Article 185 of the Constitution and Section 8(1) of the County Government Act (No. 17 of 2012). They include:

- a) Making laws that are necessary for, or incidental to, the effective performance of the functions and powers of the county government;
- b) Exercising oversight over the County Executive committee and any other County Executive organs but while doing so must respect the principle of separation of powers;
- c) Receiving and approving plans and policies for the management and exploitation of the resources of the county as well as the development and management of the infrastructure and institutions of the County;
- d) Vet and approve nominees for appointment to county public offices;
- e) Approve the budget and expenditure of the county government;
- f) Approve the borrowing by the county government; and
- g) Approve county development planning.

3.2.3.2k *Functions of the National Government*

The distribution of functions between the County Government and the National Government are contained in the Fourth Schedule of the Constitution.¹³⁹ In this regard, the functions of the National Government include, *inter alia*:

¹³⁹ If there is a function that is not assigned by the Constitution or national legislation to a county, then it is a function or power of the National Assembly. See Article 186(3) of the Constitution.

- a) Foreign affairs, foreign policy and international trade;
- b) General principles of land planning and the co-ordination of planning by the counties;
- c) Protection of the environment and natural resources;
- d) Immigration and citizenship;
- e) National defense;
- f) Police services;
- g) Courts; and
- h) Transport and communications.

3.2.3.2l *Functions of County Government*¹⁴⁰

The functions of the County Government include, *inter alia*:

- a) Agriculture;
- b) Implementation of specific national government policies on natural resources and environmental conservation such as forestry, soil and water conservation;
- c) County transport;
- d) County health services;
- e) Trade development and regulation;
- f) Development and reform of county legislation; and
- g) Establishment and staffing on county public service.

3.2.3.2m *Transfer of functions or powers between the two levels of government*¹⁴¹

A function or power of one level of government may be transferred to the other level of government by agreement between the two levels of government if:

- a) The function or power would be more effectively performed or exercised by the receiving government;
- b) The said transfer is not prohibited by any legislation

In such an event, arrangements will have to be made to ensure that the resources required to facilitate performance of the function or power are transferred to the receiving county.¹⁴² However, the constitutional responsibility for the performance of the function or exercise of the power remains with

¹⁴⁰ See Section 5 of the County Government Act (No. 17 of 2012), and Fourth Schedule of the Constitution.

¹⁴¹ See Article 187 of the Constitution.

¹⁴² See Article 187(2a).

the government to which the function or power was assigned by the fourth schedule of the Constitution.¹⁴³

3.2.3.2n Conflict of laws

In certain matters, the National government and the County government have concurrent jurisdiction, hence, the County legislation could contradict National legislation. If this happens, national legislation will prevail over County legislation if the national legislation in question applies uniformly throughout Kenya and the national legislation is aimed at preventing unreasonable action by a county that would be prejudicial to the economic, health or security interests of Kenya or another county, or would impede the implementation of national economic policy.¹⁴⁴

However, it should be noted that a decision by a court that a provision of legislation of one level of government prevails over a provision of legislation of another level of government does not invalidate the other provision. The other provision is only deemed inoperative to the extent of the inconsistency.¹⁴⁵

3.2.3.2o Powers of County Government

The purpose of the County Government Act (No. 17 of 2012) is to provide for county governments' powers, functions and responsibilities to deliver services and for connected purposes. In this regard, Section 6 of the said Act provides for the legal status and powers of a county government.

A county government is a body corporate with perpetual succession.¹⁴⁶ Hence, a County Government can:

- a) Enter into a contract;
- b) Acquire, purchase or lease any land; or
- c) Delegate any of its functions to its officers, decentralised units or other entities within the county.

To enable the county government to perform its functions, the County Government Act (No. 17 of 2012) at Section 6 (3) permits the county government to enter into partnerships with any public or private organization. In addition, Section 6(5) allows the county government to establish a company,

¹⁴³ See Article 187(2b).

¹⁴⁴ See Article 191 of the Constitution.

¹⁴⁵ Article 191(6) of the Constitution.

¹⁴⁶ Section 6(1) of the County Government Act (No. 17 of 2012).

firm or body, or contract a person, company, firm or body to deliver a particular service or carry out a particular function of the county government

3.2.3.2p Transition to a devolved system of government

Schedule Six Part 4 of the Constitution provides for the transition from a centralized to a decentralized system of government. In this regard, it provides for the enactment of legislation to effect the said transition. One of these statutes is the Transition to Devolved Government Act (No. 1 of 2012), the objectives of which are to:¹⁴⁷

- [(a) provide a legal and institutional framework for a coordinated transition to the devolved system of government while ensuring continued delivery of services to citizens;
- (b) provide, pursuant to section 15 of the Sixth Schedule to the Constitution, for the transfer of powers and functions to the national and county governments;
- (c) provide mechanisms to ensure that the Commission for the Implementation of the Constitution performs its role in monitoring and overseeing the effective implementation of the devolved system of government effectively;
- (d) provide for policy and operational mechanisms during the transition period for audit, verification and transfer to the national and county governments of—
 - (i) assets and liabilities;
 - (ii) human resources;
 - (iii) pensions and other staff benefits of employees of the government and local authorities; and
 - (iv) any other connected matters;
- (e) provide for closure and transfer of public records; and
- (f) provide for the mechanism for capacity building requirements of the national government and the county governments and make proposals for the gaps to be addressed.]

Section 4 of the Transition to Devolved Government Act (No. 1 of 2012) establishes the ***Transition Authority*** whose mandate is to facilitate and co-ordinate the transition to the devolved system of government.¹⁴⁸ The Authority is required to come up with a transition implementation plan to facilitate the transition process.¹⁴⁹ The activities of the said authority are to be undertaken in two phases. Phase one is the period between the time that the Transition to Devolved Government Act

¹⁴⁷ Section 3 of the Transition to Devolved Government Act (No.1 of 2012).

¹⁴⁸ See also Section 7 of the Transition to Devolved Government Act (No.1 of 2012).

¹⁴⁹ See Article 16 of the Transition to Devolved Government Act (No.1 of 2012).

(No. 1 of 2012) came into effect and the general elections of 4th March 2013.¹⁵⁰ Phase one is basically for carrying out audits of assets, liabilities, infrastructure and staff of national and county governments; civic education; facilitating the initial preparation of county budgets and county profiles; providing mechanisms for closure and transfer of public records and information; facilitating the development of county public finance management system; providing a mechanism for the transition of government and local authority employees; providing for a mechanism for the transfer of government net assets and liabilities to national and county governments; and, providing mechanisms for the transfer of assets and liabilities. Phase two is the period of three years after the first general election under the new Constitution (that is, 4th March 2013). Phase two entails overseeing the transfer of functions from the national government to the county government, and facilitating the county governments in the performance of their functions.¹⁵¹

The Commission for the Implementation of the Constitution is mandated to monitor and oversee the transition process to devolved government.¹⁵²

The Commission for Revenue Allocation is established under Article 215 of the Constitution. Its functions are to, inter alia, make recommendations concerning the basis for the equitable sharing of revenue raised by the national government between the national and county governments and among the county governments. It is also mandated to make recommendations about the financing of and financial management by county governments.¹⁵³ Its recommendations are to be submitted to the Senate, the National Assembly, the National Executive, County Assemblies and County Executives for consideration and adoption.

The Commission on Revenue Allocation Act (No. 16 of 2011) was enacted to make further provision on the functions and powers of the Commission on Revenue Allocation.

The Division of Revenue Act (No. 31 of 2013) is a very short statute containing about six pages. It provides for the equitable division of revenue raised nationally between the national and county governments in 2013/14 financial year.

¹⁵⁰ Section 2 of the Transition to Devolved Government Act (No. 1 of 2012).

¹⁵¹ Fourth Schedule of the Transition to Devolved Government Act (No. 1 of 2012).

¹⁵² See section 15 (d) of the Sixth Schedule to the Constitution and Section 15 of the Transition to Devolved Government Act (No. 1 of 2012).

¹⁵³ See Article 216 of the Constitution.

3.2.3.2q Transition period

According to Section 2 of the Transition to Devolved Government Act (No. 1 of 2012), transition from centralized to decentralized system of government is supposed to commence on the date that the Transition to Devolved Government Act (No. 1 of 2012) came into effect to three years after the first general election (hence three years after 4th March 2013). The transition process is divided into two phases (as discussed above).

3.2.3.2r Effect of Devolution on the Kenyan Legal System

The introduction of a decentralized system of government necessitated the repeal and enactment of various legislation. For example, the Local Government Act (Cap 265 of the Laws of Kenya) was repealed. Various statutes were enacted and continue to be enacted. The Fifth Schedule of the Constitution provides for timeliness for the enactment of relevant legislation to give effect to the provisions of the Constitution.

3.2.3.2s Challenges of decentralisation and devolution

There is a clear disparity in the level of development between different Counties in Kenya. For example, Uasin Gishu and Nakuru County cannot be said to be at the same level of development in terms of infrastructure and service delivery. This creates a challenge for devolution. The Constitution of Kenya at Article 204 tries to bridge the development gap through the equalization fund to be financed by one-half per cent (0.005 percent) of nationally collected revenues. The purpose of this fund is 'to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation.' The fund will be maintained for a period of twenty years, a term which the National Assembly may extend.

According to the Institute of Social Accountability, a lot of tasks that were to be performed under Phase One of the Transition Authority Plan discussed above are yet to be undertaken. In addition, there is poor public participation in the process of devolution and decentralisation. Moreover, the Authority has not been submitting functional reports as required by the Transition to Devolved Government Act (No. 1 of 2012), therefore, it is difficult for the progress in devolution to be clearly tracked. All these are seen as challenges of the devolution and decentralization process. To ensure that the devolution and decentralization process is successful, the Constitution of 2010 should be fully implemented.

3.3 The Law-making process in Kenya

3.3.1 Sources of Kenyan law

Article 2(5) and (6) of the Constitution of Kenya and Section 3 of the Judicature Act outline 6 sources of law in Kenya:

1. The Constitution of 2010, as the supreme law of Kenya¹⁵⁴;
2. Legislation by Parliament¹⁵⁵;
3. General rules of international law¹⁵⁶;
4. Any treaty or convention ratified by Kenya¹⁵⁷;
5. Common Law, doctrines of equity and statutes of general application in force in England on the 12th August, 1897 shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary¹⁵⁸; and
6. African Customary Law, provided that it is not repugnant to justice and morality or inconsistent with any written law¹⁵⁹.

There is a hierarchy of different kinds of statutes (all of which are superior to African customary law):

- Acts of the Kenyan Parliament;
- Specific Acts of the Parliament of the United Kingdom (as cited in Part I of the schedule to the Judicature Act);
- Subsidiary or Delegated or Subordinate legislation; and
- Statutes are English statutes of General application, in force in England on the 12th August 1897¹⁶⁰.

In addition to the above sources of law, there are policies established by various government Ministries which set out their goals and planned activities to achieving the stated goals. They are

¹⁵⁴ Constitution, Article 2.

¹⁵⁵ Judicature Act, Section 3(1)(b).

¹⁵⁶ Constitution, Article 2(5).

¹⁵⁷ Constitution, Article 2(6).

¹⁵⁸ Judicature Act, Section 3(1)(c).

¹⁵⁹ Judicature Act, Section 3(2); and, Constitution, Article 2(4).

¹⁶⁰ This date is significant because it is the date when Kenya became a British Colony, and therefore the laws of Great Britain began applying.

usually contained in policy papers, sessional papers and development plans. An example of such a policy is the Kenya National Land Policy that informed the consolidation and revision of the Land Laws of Kenya.

3.3.2 *Primary legislation*

Article 93 of the Constitution of 2010 establishes the Parliament of Kenya, giving it law-making power in Articles 95-96¹⁶¹. The Parliament consists of both:

- the National Assembly, which makes laws that affect national issues; and
- the Senate, which makes laws concerning counties.

Chapter 8, Part 4 of the Constitution of 2010 lays down the procedure for enacting legislation in Kenya. Parliament exercises its legislative power through Bills¹⁶² passed by Parliament¹⁶³, which can be either a Public Bill or a Private Bill:

- **A Public Bill**, except a Money Bill¹⁶⁴, is a Bill introduced by any member or committee of either the National Assembly or Senate.¹⁶⁵ It deals with matters of public policy under the national or county level. Any Public Bill may originate from the National Assembly. However, a Public Bill not concerning county governments can only be considered in the National Assembly.¹⁶⁶
- **A Private Bill** is a Bill which is intended to affect or benefit some particular person, association or corporate body. Its manner of introduction to Parliament and other points of procedure are different from those relating to a Public Bill.

Please refer to **Annex 3** for a detailed description of Public and Private Bills.

¹⁶¹ At Articles 95(3) and 96(2) of the Constitution of Kenya, 2010.

¹⁶² A bill is draft legislation. After passing through the National Assembly and receiving the President's assent, it becomes an Act of Parliament or statute.

¹⁶³ Article 109(1) of the Constitution of Kenya, 2010.

¹⁶⁴ A money bill is a bill that contains provisions dealing with taxes and public funds. However, a bill regarding division and allocation of revenue is not considered a money bill and can only be introduced in the National Assembly. See Articles 114 and 218 of the Constitution of Kenya 2010.

¹⁶⁵ See Article 109(5) of the Constitution of Kenya 2010 and Article 124(1) of the National Assembly Standing Orders and Article 115(1) of the Senate Standing Orders.

¹⁶⁶ A bill concerning county government is a bill that contains provisions related to the functions and powers of the county governments, the finances of county governments, or the election of members of county assembly or county executive. It can be either a special bill or an ordinary bill. A special bill concerns the election of members of a county assembly or county executive, or the annual county allocation of revenues bill. This is stipulated in Article 110 of the Constitution of Kenya, 2010.

Once the President assents the Bill, it becomes law.

3.3.3 Subordinate Legislation (including Regulations)

In some cases, it is necessary for a non-parliamentary body (such as a Ministry working under a delegated power) to formulate subordinate legislation that gives more details on matters contained in the law.

Regulations are part of subsidiary legislation made pursuant to Acts of Parliament (also called *primary legislation*). The Interpretation and General Provisions Act (Chapter 2) defines "subsidiary legislation" to mean any legislative provision (including a transfer or delegation of powers or duties) made in exercise of a power in that behalf conferred by a written law, by way of by-law, notice, order, proclamation, regulation, rule, ruling of the court or other instrument.

Generally, laws are made by the legislature whereas subsidiary legislation is made by a person or bodies other than the legislature but with the legislature's authority under a power conferred on them by Acts of Parliament in order to implement and administer the requirements of that primary legislation. Laws made in subsidiary legislation are usually called *rules, regulations, orders and notifications*. Often, a legislature passes statutes that set out broad outlines and principles and delegates authority to an executive branch official to issue delegated legislation that provides both the details (*substantive regulations*) and procedures for implementing the substantive provisions of the statute and substantive regulations (*procedural regulations*). Subsidiary legislation can also be amended faster than primary legislation.

Section 32 of the Interpretation and General Provisions Act (Chapter 2) provides that a reference to a written law in another written law shall include a reference to subsidiary legislation made under the written law to which reference is made. In addition, it is worth noting that the Interpretation and General Provisions Act (Chapter 2) at 24 states that "where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made there under." In this way, subsidiary regulations made under repealed Acts can remain valid until superceded.

3.4 Relationship between customary law and statute law

Customary law is one of the legally acknowledged sources of law in Kenya.¹⁶⁷ The sources of law are listed in section 3[1] of the Judicature Act according to their superiority. This is in acknowledgement of the fact that there may be, and indeed there are, conflicts within the laws and it is imperative to determine which law will supersede in such cases.¹⁶⁸

Section 3 of the Judicature Act ranks the application of the laws in Kenya (noting that the Judicature Act could be revised to align with the 2010 Constitution):

1. The Constitution,
2. Statutes;
3. English Common Law and Equity; and
4. African Customary Law.

Statute law is superior to customary law and in the event of conflict between the two, statute law prevails.¹⁶⁹ Under the Judicature Act, customary law will guide the courts only in civil matters, and will apply only as long as it is not inconsistent with any written law applicable in Kenya and it is not repugnant to justice and morality.¹⁷⁰ Moreover, customary law will only guide the courts in civil cases where one or more of the parties is subject to it or is affected by it.¹⁷¹

Article 2 of the Constitution of 2010 provides that any law, including customary law, which is inconsistent with the Constitution, is void to the extent of the inconsistency. The transitional clauses under the Constitution also provide that all laws in force on the day of its coming into force must be construed with the alterations, qualifications and exceptions necessary to bring them into conformity with the Constitution. This means that all laws must be read in the light of the equality and non-discrimination provisions of the Constitution and Kenya's international human rights obligations.

¹⁶⁷ A variety of approaches can be used for integrating customary land law into national legal systems: judicial recognition, resulting in the selective absorption of customary legal rules into the nation's common law (a process which can be supported by deducing the content of customary law and providing members of the judiciary with access to this information); codification of customary law; registration of customary land rights as customary rights (rather than converting them to statutory tenure); modification by legislation of negative aspects of customary land law (such as gender biases); creating hybrid institutions that administer customary land rights, involving both officials and traditional authorities; and, modernising traditional land administration institutions through mechanisms such as registration of land allocations/dealings, with increased public participation in and transparency of decision-making. *Source: USAID, Kenya Land Policy: Analysis and Recommendations* (April 2008, Updated May 2009).

¹⁶⁸ For instance, the Customary Laws of some communities in Kenya tolerate forced marriage, child marriage and the exclusion of women from inheritance, practices that offend the Constitution, Statute and other laws.

¹⁶⁹ See *Martha Gukiya Thui & Another V Kibugi Hingi & Another* [2010] eKLR.

¹⁷⁰ Section 3(1) of the Judicature Act and *Omwoyo Mairura Vs. Bosire* [1958].

¹⁷¹ Section 3(2) Judicature Act.

3.5 Organisation of government

The Government has three arms: the Executive, the Legislature and the Judiciary.

3.5.1 Executive

The Executive is divided into the National Executive and the County Executive:

- The National Executive arm of government is led by the President and the Deputy President; and
- The County Executive is led by the Governor and the Deputy Governor.

There are 18 Ministries in the National Executive that are headed by Cabinet Secretaries:

LIST OF GOVERNMENT MINISTRIES IN KENYA

NO.	MINISTRY	CABINET SECRETARY
1.	Agriculture, Livestock and Fisheries	Mr. Felix Kosgey
2.	National Treasury	Mr. Henry Rotich
3.	Devolution and Planning	Ms. Ann Waiguru
4.	Land, Housing and Urban Development	Ms. Charity Ngilu
5.	Transport and Infrastructure	Mr. Michael Kamau
6.	Interior and Coordination of National Government	Mr. Joseph Ole Senku
7.	Defence	Mrs. Raychelle Omamo
8.	Foreign Affairs	Mrs. Amina Mohammed
9.	Education, Science and Technology	Prof. Jacob Kaimenyi
10.	Health	Mr. James Wanaina
11.	Environment, Water and Natural Resources	Prof. Judy Wakhungu
12.	Information, Communication and Technology	Mr. Fred Matiangi
13.	Sports, Culture and Arts	Mr. Hassan Wario
14.	Labour, Social Security and Services	Mr. Kazungu Kambi
15.	Mining	Mr. Najib Balala
16.	Energy and Petroleum	Mr. Davis Chirchir
17.	Industrialisation and Enterprise Development	Mr. Adan Mohammed
18.	East African Affairs, Commerce and Tourism	Ms Phyllis Kandie

3.5.2 *Legislature*

Parliament has two houses, the National Assembly and the Senate:

- **The National Assembly** consists of 290 members elected by the registered voters of each constituency, 47 women elected from every county and the Speaker; and
- **The Senate** comprises of 47 elected members from the counties, 16 nominated women, 2 nominated representatives of the youth, 2 representatives of persons with disabilities and the Speaker.

3.5.3 *Judiciary*

The judiciary consists of:

- The Supreme Court¹⁷²;
- the Court of Appeal¹⁷³;
- the High Court¹⁷⁴; and
- the Subordinate Courts. The subordinate courts are the Magistrates' Courts, the Kadhis' Courts, the Courts Martial and Tribunals.¹⁷⁵

3.5.4 *Devolved structure of government*

Please see above at 3.2.3.2 - Constitutional provisions on devolution.

The Constitution of 2010 in Article 184 provides for the enactment of a national legislation to provide for the governance and management of urban areas and cities. The said legislation is contemplated to, *inter alia*, establish criteria for classifying areas as urban areas and cities, establish mechanisms for identifying different categories of urban areas and cities and their governance, establish the principles of governance and management of urban areas and cities, and, provide for participation by residents in the governance of urban areas and cities.

Consequently, the Urban Areas and Cities Act (No. 13 of 2011) was enacted in 2011 within the time frame stipulated in the 5th Schedule of the Constitution. It became effective after the general elections

¹⁷² Constitution, Article 163.

¹⁷³ Constitution, Article 164.

¹⁷⁴ Constitution, Article 165.

¹⁷⁵ See Articles 84, 163, 164, 165, 169 of the Constitution of Kenya.

held on 4th March 2013. The Act defines a City as an urban area¹⁷⁶ with a population of at least five thousand residents and has been conferred the status of a city by the Urban Areas and Cities Act (No. 13 of 2011).¹⁷⁷ On the other hand, a municipality defined as a town with a population of at least two hundred and fifty thousand residents and has been conferred the status of a municipality in accordance with the provisions of the Urban Areas and Cities Act (No. 13 of 2011).¹⁷⁸

The management of a city or a municipality is vested in the county government and administered on its behalf by a board¹⁷⁹, a manager¹⁸⁰ and such other staff as the county public service may determine.¹⁸¹ The functions of the board are to, *inter alia*¹⁸²:

- a) Exercise executive authority as delegated by the county executive;
- b) Ensure provision of services to its residents through developing and adopting policies, plans, strategies and programmes;
- c) Control land use, land sub-division, and land development and zoning within the spatial and master plans of the city or municipality;
- d) Promote safe and healthy environment;
- e) Undertake infrastructural development as delegated by the county government;
- f) Enter into contracts, partnerships or joint ventures as it may consider necessary for discharge of its functions;
- g) Implement county and applicable national legislation;
- h) Impose rates, taxes, duties, fees, and surcharges on fees as authorised by the county government for delivery of services by the municipality or city;
- i) Settle and implement tariff, rates and tax and debt collection policies as delegated by the county government; and
- j) Make by-laws.

¹⁷⁶ An urban area is defined as a municipality or a town under Article 8 of the Urban Areas and Cities Act (No. 13 of 2011).

¹⁷⁷ Section 5 of the Urban Areas and Cities Act (No. 13 of 2011).

¹⁷⁸ Section 9 of the Urban Areas and Cities Act (No. 13 of 2011).

¹⁷⁹ The said board shall be a body corporate with perpetual succession and a common seal. The said board should not have more than eleven members. At least five members of the said board shall be nominated by the private sector association, informal sector association, registered neighborhood associations and an association of urban areas and cities. Six of the said members are appointed through a competitive process by the County Executive Committee, with the approval of the County Assembly. See Articles 12(2) and 13 of the Urban Areas and Cities Act (No. 13 of 2011).

¹⁸⁰ According to Article 28 of the Urban Areas and Cities Act (No. 13 of 2011), the manager is responsible for implementing the decisions and functions of the board and is answerable to the board.

¹⁸¹ Article 12(1) of the Urban Areas and Cities Act (No. 13 of 2011).

¹⁸² Article 20 and 21 of the Urban Areas and Cities Act (No. 13 of 2011).

The governance and management of the city is in accordance with the County Government Act (No. 17 of 2012).

If an area is granted a status of a town, it shall not be a body corporate. Every town shall have an administrator whose functions are determined by a committee appointed by the county governor and approved by the county assembly. The committee performs the same functions as those of a board of a municipality or a town.

4 OVERVIEW OF LAWS, POLICIES AND INSTITUTIONS RELEVANT TO REDD+ IN KENYA

The purpose of this section is to identify the laws, policies institutions relevant to the implementation of a national REDD+ programme in Kenya.

4.1 Land law and policy

4.1.1 Recent changes to Kenya's land law regime

The issue of land rights is highly contested in Kenyan politics.¹⁸³ Boone states that “throughout Kenya’s history, land politics and policy have revolved around debates over whose rights are to be recognized by the state”¹⁸⁴ and questions the level of consensus around Kenya’s revised land policy.¹⁸⁵ Harbeson has also questioned how effective the new land regime outlined in the Constitution of 2010 will be, noting Kenya’s turbulent history of land administration.¹⁸⁶ Commentators note that land ownership, use and management was one of the key issues prompting the development of the new Constitution¹⁸⁷.

The Land Policy of 2007 was developed through a very consultative process. Stakeholders from the public and private sector as well as civil society were involved in the process. The aim of the National

¹⁸³ For a discussion of land rights as a possible driver of the election violence in 2008, see generally Patricia Kameri-Mbote and Kithure Kindiki, ‘Trouble in Eden: How and Why Unresolved Land issues Landed ‘Peaceful Kenya’ in Trouble in 2008’ 2 *Forum for Development Studies* (2008), pp.167-193.

¹⁸⁴ Catherine Boone, ‘Land Conflict and Distributive Politics in Kenya’ 55(1) *African Studies Review* (2012), page 94, paragraph 3.

¹⁸⁵ *Ibid*, paragraph 4.

¹⁸⁶ John W. Harbeson, ‘Land and the Quest for a Democratic State in Kenya: Bringing Citizens Back in’ 55(1) *African Studies Review* (2012), pp. 15-30.

¹⁸⁷ Coulson Harney – Advocates, “A Snapshot of the new land laws in Kenya” (May 31, 2012), page 1.

Land Policy is to guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity. In addition, it addresses historical land injustices, land rights of minority communities as well as vulnerable groups. The provisions of the National Land Policy, the Constitution of 2010 and the new land Acts are similar. This therefore implies that the National Land Policy guided the drafters of the new land Acts as well as the land provisions in the current Constitution.¹⁸⁸



Sign claiming ownership of land in Nairobi.

Signs claiming ownership of land are common in Nairobi. Challenges associated with the land registry system mean that land tenure and ownership rights can appear unclear and be subject to multiple claims (including fraudulent ones).



Land status signs for sale beside the road, Nairobi.

A street-side vendor selling a large number of different signs used for displaying the ownership of land. The sign declaring 'This plot is not for sale' is used to prevent fraudulent transactions – for example, land might be advertised for sale by parties who do not actually hold the land rights.

¹⁸⁸See <http://www.lands.go.ke> for a copy of the National Land Policy.



A 'Green Belt Movement' sign protecting a public playground, Nairobi.

This photograph shows public land used for a children's playground in downtown Nairobi. A representative of the school (anon) told the photographer that this sign was erected to stop prospective real estate developers from claiming the space as private land.

Land ownership, use and management was one of the issues addressed by Kenya's new Constitution. Pursuant to the Constitution of 2010, 3 new Acts of Parliament came into force on May 2, 2012¹⁸⁹:

- The Land Act No. 6 of 2012;
- The Land Registration Act No. 3 of 2012; and
- The National Land Commission Act No. 5 of 2012.

These replaced the following repealed laws¹⁹⁰:

- The Indian Transfer of Property Act 1882;
- The Government Lands Act (Chapter 280 of the Laws of Kenya);
- The Registration of Titles Act (Chapter 281 of the Laws of Kenya);
- The Land Titles Act (Chapter 282 of the Laws of Kenya);
- The Registered Land Act (Chapter 300 of the Laws of Kenya);
- The Wayleaves Act (Chapter 292 of the Laws of Kenya); and
- The Land Acquisition Act (Chapter 295 of the Laws of Kenya)

The new land laws have created the following noteworthy changes¹⁹¹:

- One Land Registry and one land registration system (not yet implemented);
- Titles to be called 'certificates of lease' or 'certificates of title' (not yet implemented);
- Three categories of land: public land, community land and private land;
- New legal treatment of non-Kenyan citizens;

¹⁸⁹ Mona Doshi (ed.), *The Land Laws of Kenya: A summary of the changes* (October 2012), an Anjarwalla & Khanna/A report, page 3.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

- Consent of spouses to certain transactions;
- Creation of the Land and Environment Court;
- New formats for documents (new forms have not yet been prescribed, and old forms are still in use); and
- Creation of the National Land Commission.

Changes have not been fully implemented, creating uncertainty within Kenya's land law and administration¹⁹².

4.1.2 Key laws governing land

4.1.2.1 The Constitution

Chapter 5 of the Constitution of 2010 deals with Land and Environment. Article 60 articulates the principles of land policy and holds that land should be "held, used and managed in a manner that is equitable, efficient, productive and sustainable."¹⁹³ Principles of land policy include:

- Security of land rights¹⁹⁴;
- Sustainable and productive management of land resources¹⁹⁵; and
- Sound conservation and protection of ecologically sensitive areas¹⁹⁶.

Chapter 5 of the Constitution of 2010, Article 66, gives the State the authority to regulate "the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning."¹⁹⁷

¹⁹² Mona Doshi (ed.), *The Land Laws of Kenya: A summary of the changes* (October 2012), an Anjarwalla & Khanna/ALN report, page 3.

¹⁹³ Constitution of Kenya 2010, Article 60(1).

¹⁹⁴ *Ibid*, Article 60(1)(b).

¹⁹⁵ *Ibid*, Article 60(1)(c).

¹⁹⁶ *Ibid*, Article 60(1)(e).

¹⁹⁷ *Ibid*, Article 66(1).

4.1.2.2 *Land Act 2012*¹⁹⁸

This is an Act of Parliament enacted to revise, consolidate and rationalize land laws, to provide for the sustainable administration and management of land and land based resources, and for connected purposes.

4.1.2.3 *Land Registration Act 2012*¹⁹⁹

This is an Act of Parliament enacted to revise, consolidate and rationalize the registration of titles to land, to give effect to the principles and objects of devolved government in land registration, and for connected purposes.

4.1.2.4 *National Land Commission Act 2012*²⁰⁰

The National Land Commission is established by Article 67 of the Constitution. The National Land Commission Act makes further provision as to, *inter alia*, the functions and powers of the National Land Commission, qualifications and procedures for appointments to the Commission and gives effect to the objects and principles of devolved government in land management and administration.²⁰¹

4.1.2.5 *Trust Lands Act 1970/Revised 2009*

This is an Act of Parliament to make provision for Trust Land (Chapter 288 of the Laws of Kenya).

Part IV of the Act provides for setting apart of land by the Government or local authorities and the payment of compensation to the affected parties. Under Section 4 of the Act, a local authority is empowered to divide the Trust land vested in it into such divisions as appear to it to be necessary or expedient for proper administration and each such division is governed by a Divisional Land Board which is headed by a chairman who is appointed by the Cabinet Secretary responsible for land. Section 8 of the Act provides for payment of full compensation which must be prompt. Section 10 of the Act provides that any person who is dissatisfied with the award of compensation may appeal to the Provincial Agricultural Board of the province where the land to be set aside and the final appeal lies

¹⁹⁸ Act No.6 of 2012.

¹⁹⁹ Act No.3 of 2012.

²⁰⁰ Act No.5 of 2012.

²⁰¹ See Article 67(3) of the Constitution of Kenya.

in the High Court. Section 12 guarantees the right of access to the High Court to any person claiming a right or interest in land set apart for the determination of the legality of the setting apart and obtaining prompt payment of any compensation awarded.

4.1.2.6 *Land Control Act 1967/Revised 2010*

This is an Act of Parliament enacted to control dealings in agricultural land (Chapter 302 of the Laws of Kenya).

Section 2 of the Act defines Agricultural Land as land that is not within a municipality, township, urban centre or market. The Cabinet Secretary in charge of land housing and urban development can, however, declare by notice in the Gazette a land within a municipality, township, urban centre or market as agricultural land.

The Land Control Board²⁰² of every land control area is responsible for the issuance of the Land Control Board consent to land owners²⁰³ with regard to transactions that require their consent.²⁰⁴ If the consent is not obtained, the transaction is deemed void. The decision of the Land Control Board is based on considerations laid down in Section 9 of the Act. They include, *inter alia*, whether the intended purchaser is likely to farm the land, use the land profitably or already has sufficient agricultural land.²⁰⁵ The decision of the Land Control Board can be appealed to the provincial land control appeals board or the central land control appeals board.²⁰⁶

²⁰² The membership of the Land Control Board is provided in the schedule of the Land Control Act 1967 (revised 2010), Chapter 302 of the Laws of Kenya.

²⁰³ Land owners include individuals as well as companies and cooperative societies. Hence, if a private company or cooperative society owns agricultural land, it cannot issue, sale, transfer, mortgage or carry out any other disposal of or dealing with any of its shares without the consent of the Land Control Board of the area where the land is situated. See section 6(1)(c) of the Land Control Act.

²⁰⁴ The landowner applies for the consent using prescribed forms. The Land Control Act 1967/revised 2010 at Section 6 gives details of the transactions that require the consent of the Land Control Board. They include sale, transfer, lease, mortgage, subdivision and declaration of trust of agricultural land. However, consent of the Land Control Board is not needed for transmission of land by virtue of a will (testate succession), provided that no subdivision of the land is undertaken and the Government is not a Party to the transaction.

²⁰⁵ See section 9 of the Land Control Act 1967 (revised 2010), Chapter 302 of the Laws of Kenya.

²⁰⁶ See section 11, 12 and 13 of the Land Control Act 1967 (revised 2010), Chapter 302 of the Laws of Kenya. The decision of the Central Land Control Appeals Board is final and conclusive, and shall not be questioned in any court. See section 13(2) of the Land Control Act 1967 (revised 2010), Chapter 302 of the Laws of Kenya.

4.1.2.7 *Land (Group Representatives) Act 1970/Revised 2012*

This is an Act of Parliament to provide for the incorporation of representatives of groups who have been recorded as owners of land under the Land Adjudication Act, and for purposes connected therewith (Chapter 287 of the Laws of Kenya).

4.1.2.8 *Land Adjudication Act 1977/Revised 2010*

This is an Act of Parliament to provide for the ascertainment and recording of rights and interests in Trust land, and for connected purposes. It governs Trust Land. It is contained in Chapter 284 of the Laws of Kenya.

4.1.2.9 *Land Consolidation Act 1977/Revised 2012*

This is an Act of Parliament to provide for the ascertainment of rights and interests in, and for the consolidation of, land in the special areas, and for the registration of title to, and of transactions and devolutions affecting, such land and other land in the special areas and for connected purposes. It governs Trust Land.²⁰⁷ It is contained in Chapter 283 of the Laws of Kenya.

4.1.2.10 *Environmental Management and Coordination Act 1999/Revised 2012*²⁰⁸

The purpose of the Environmental Management and Coordination Act, as stated in its preamble, is “to provide for the establishment of an appropriate legal and institutional framework for the management of the environment in Kenya and for matters connected therewith and incidental thereto.”

Prior to 1999, a prominent feature of Kenya’s environmental legislation was its diffuse nature – sectoral legislation contained environmental management components formulated “largely in line with natural resource sectors.”²⁰⁹ The Environmental Management and Coordination Act is “based on

²⁰⁷ The Interpretation and General Provisions Act defines “**the special areas**” as ‘areas of land the boundaries of which are for the time being set out in the First Schedule to the Trust Land Act (Cap. 288) as it stood immediately before 1st June, 1963.’

²⁰⁸ Chapter 387 of the Laws of Kenya.

²⁰⁹ Anne N Angwenyi, ‘An Overview of the Environmental Management and Co-ordination Act’ Chapter 6 in C.O. Okidi, P. Kameri-Mbote, Migai Akech, *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers Ltd: 2008), page 142, paragraph 1.

the recognition that improved coordination of the diverse sectoral initiatives is necessary for better management of the environment.’²¹⁰

It is the main Act of Parliament in Kenya that deals with the management of the environment. It contains 148 sections, schedules, and subsidiary legislations. A large section of the EMCA contains provisions that create institutions for environmental management.²¹¹ Apart from the establishment of these institutions, EMCA also contains provisions on the protection of biological diversity,²¹² resources,²¹³ the coastal zone,²¹⁴ and the ozone.²¹⁵ The EMCA also consists of subsidiary legislation.²¹⁶

The EMCA requires that ‘any written law, in force immediately before the coming into force of this Act relating to the management of the environment shall have effect subject to modification as may be necessary to give effect to this Act, and where the provisions of any such law conflict with any provisions of this Act, the provisions of this act will prevail.’²¹⁷ The Water Act, Forests Act, Energy Act and Wildlife Management and Conservation Act were revised after the EMCA came into force.²¹⁸

²¹⁰ Anne N Angwenyi, ‘An Overview of the Environmental Management and Co-ordination Act’ Chapter 6 in C.O. Okidi, P. Kameri-Mbote, Migai Akech, *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers Ltd: 2008), page 143, paragraph 2.

²¹¹ See further Section 4.3 regarding institutions under EMCA.

²¹² Section 50, Environmental Management and Coordination Act, Act No 8 of 1999.

²¹³ Section 51 and 52, Environmental Management and Coordination Act, Act No 8 of 1999.

²¹⁴ Section 53, Environmental Management and Coordination Act, Act No 8 of 1999.

²¹⁵ Section 55, Environmental Management and Coordination Act, Act No 8 of 1999.

²¹⁶ This includes the following:

- The Environmental Management And Coordination (Public Complaints Committee) Regulations, 2012;
- The Environmental Management And Coordination (Noise And Excessive Vibration Pollution) (Control) Regulations, 2009;
- The Environmental Management And Coordination (Wetlands, River Banks, Lake Shores And Sea Shore Management) Regulations, 2009;
- The Environmental Management And Coordination (Conservation Of Biological Diversity And Resources, Access To Genetic Resources And Benefit Sharing) Regulations, 2006;
- Environmental Management And Co-ordination (Fossil Fuel Emission Control) Regulations, 2006;
- The Environmental Management And Coordination, (Waste Management) Regulations, 2006;
- Environmental Management And Coordination (Waste Management) Regulations 2006;
- The Environmental Management And Coordination (Water Quality) Regulations, 2006;
- The Environmental Management And Coordination (Water Quality) Regulations, 2006;
- The National Environmental Tribunal, Procedure Rules, 2003;
- The Environmental (Impact Assessment and Audit) Regulations, 2003; and
- The Environmental (Impact Assessment and Audit) Regulations, 2003.

²¹⁷ Environmental Management and Coordination Act, Act No 8 of 1999, Section 148.

²¹⁸ Patricia Kameri-Mbote, ‘Kenya’ - Chapter 14 in L.J Kotze & A.R. Paterson eds, *The Role of the Judiciary in Environmental Governance: Comparative perspectives* (Kluwer Law international: 2009), pp.454, paragraph 4.

A court may, on an application made by any person or a group of persons grant an environmental easement. The court may impose such conditions on the grant of an environmental easement as it considers to be best calculated to advance the object of an environmental easement²¹⁹. The object of an environmental easement is to further the principles of environmental management by facilitating the conservation and enhancement of the environment.²²⁰

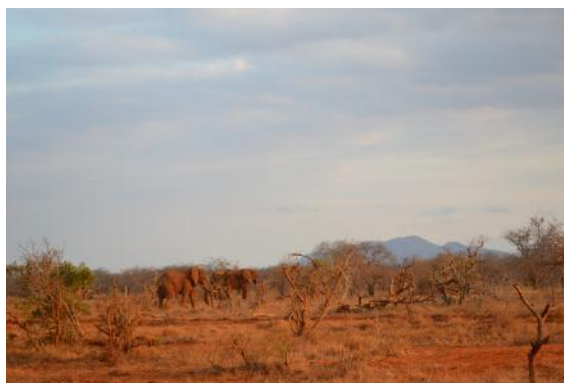
It is important to note that the Environmental Management and Coordination (Amendment) Bill 2013 would amend EMCA if passed into law. At the time of writing, this bill is currently undergoing internal review and stakeholder consultation.

4.1.2.11 Forests Act 2005/Revised 2012

In brief, this is an Act of Parliament to provide for the establishment, development and sustainable management, including conservation and rational utilization of forest resources for the socio-economic development of the country. Section 2 of the Act provides that the Act shall apply to all forests and woodlands on State, local authority and private land.

It is important to note that the current Forest Conservation and Management Bill 2014 would, if passed into law, update the Forests Act.

For more detail about the Forests Act and the Forest Conservation and Management Bill, please refer to Section 4.2.3.3 below (under *Statutory law with respect to the environment*).



Elephant walking through the bush in the Tsavo region of Kenya.

²¹⁹ Section 113, Wildlife (Conservation and Management) Act, Cap 376.

²²⁰ Section 112 Wildlife (Conservation and Management) Act, Cap 376.

4.1.3 Land classifications

Please refer to **Annex 5** for detailed descriptions of each category of tenure.

4.1.3.1 Overview

Chapter 5 of the Constitution of 2010 Article 62 states that “all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.”²²¹ Thus, land is classified as public land, private land and community land.²²²

The historical issues surrounding land were very important in framing the discourse leading up to the Constitution of 2010. Under Article 60, Land is to be held and used in accordance to principles of equitable access, security of land rights and elimination of gender discrimination in law, customs and practices related to land and property in Land. Article 61 provides that land belongs to the people of Kenya collectively as a nation, as communities and as individuals and classifies land into public land, community land or private land.

The definition of **Public Land** includes all minerals and mineral oils, government forests, game reserves rivers and lakes *inter alia*. Article 62 (2) vests public land in the County Government in trust for the people resident in the county and the land is to be administered by the National Land Commission. This provision removes the administration of public land from the powers of the President.

In regard to **Community Land**, Article 63 of the Constitution provides that it shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. The definition of community land includes land lawfully registered in the name of the group representatives, land declared to be community land by an Act of Parliament and community forests, grazing areas or shrines and ancestral lands and lands traditionally occupied by hunter-gatherer communities.

Private Land is defined under Article 64 of the Constitution as registered land held by any person under freehold or leasehold tenure.

Article 65 limits landholding by non citizens by providing that a person who is not a citizen may hold land on the basis of leasehold tenure only and any such lease shall not exceed ninety nine years.

²²¹ Constitution of Kenya 2010, Article 61(2).

²²² Constitution of Kenya 2010, Article 60(2).

Article 65 (2) provides that a body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens.

4.1.3.2 *Public land*

Public land is described by **Article 62 of the Constitution**:

- (1) Public land is—
 - (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;
 - (b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;
 - (c) land transferred to the State by way of sale, reversion or surrender;
 - (d) land in respect of which no individual or community ownership can be established by any legal process;
 - (e) land in respect of which no heir can be identified by any legal process;
 - (f) all minerals and mineral oils as defined by law;
 - (g) government forests other than forests to which Article 63 (2) (d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;
 - (h) all roads and thoroughfares provided for by an Act of Parliament;
 - (i) all rivers, lakes and other water bodies as defined by an Act of Parliament;
 - (j) the territorial sea, the exclusive economic zone and the sea bed;
 - (k) the continental shelf;
 - (l) all land between the high and low water marks;
 - (m) any land not classified as private or community land under this Constitution; and
 - (n) any other land declared to be public land by an Act of Parliament—
 - (i) in force at the effective date; or
 - (ii) enacted after the effective date.
- (2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under—
 - (a) clause (1) (a), (c), (d) or (e); and
 - (b) clause (1) (b), other than land held, used or occupied by a national State organ.
- (3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.
- (4) Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.

Read together, these provisions of the Constitution show that Public Land will either be held by the National Government or by the County Government on behalf of the people of the County and, in both instances, it is to be administered by the National Land Commission which is also authorized to devolve into County Land Commissions²²³ under Section 15(5) of the National Land Commission

²²³ Which shall in consultation and cooperation with the national and country governments establish County Land Management Boards for the purposes of managing such public land under section 8(1) of the National Land Commission Act.

Act. Considering the definitions of Land and unexhausted improvement, the National Land Commission will be expected to administer not only the land but also the fixtures and other features on the land.

Please refer to Annex 5 for detailed descriptions of each category of tenure.

4.1.3.3 Community land

Community land is described by **Article 63 of the Constitution**:

- (1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.
- (2) Community land consists of—
 - (a) land lawfully registered in the name of group representatives under the provisions of any law;
 - (b) land lawfully transferred to a specific community by any process of law;
 - (c) any other land declared to be community land by an Act of Parliament; and
 - (d) land that is—
 - (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
 - (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or
 - (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2).
- (3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.
- (4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.
- (5) Parliament shall enact legislation to give effect to this Article.

On 2nd May 2012, the Land Act, National Land Commission Act and Land Registration Act came into force. These new laws give effect to the aspirations set out in Part Five of the Constitution. The National Land Commission Act and the Land Registration Act define a community as a clearly defined group of users of land identified on the basis of ethnicity, culture or similar community of interest, holding a set of clearly defined rights and obligations over land and land-based resources.²²⁴

There are two types of community land:

- **Unregistered community land:** The National Land Commission is mandated under Section 5 of the National Land Commission Act to manage and administer all unregistered community land on behalf of the County Government.
- **Registered community land:** Registered community land is elaborately provided for under the Land (Group Representatives) Act. This Act derives its definition of “group” from the Land Adjudication Act: “a tribe, a clan, section, family or other group of persons, whose

²²⁴ Section 2(1) of the National Land Commission Act, and Section 2 of the Land Registration Act.

land under recognized customary law belongs communally to the persons who are for the time being members of the group, together with any person of whose land the group is determined to be the owner..” ²²⁵

- The Land (Group Representatives) Act provides for incorporation of Group Representatives in a procedure in which an identified group elects not more than ten and not less than three persons to be group representatives of the group. The said Group representatives are incorporated, they have perpetual succession with power to sue and be sued in their corporate name and to acquire, hold, charge and dispose of the group’s property.²²⁶ **Any money that needs to be distributed to the group members would need to be paid to the group representatives who would then distribute it to the group members.**
- Section 37 of the Land Act and Section 8 of the Land Registration Act envisage a new 'Community Land Act' to be enacted by Parliament. This Act has not yet been enacted. Section 8 of the Land Registration Act requires that a community land register be kept in each registration unit containing *inter alia* a cadastral map showing the extent of the community land and identified areas of common interest, the name of the community having an interest in the land, the name and identity of the members of the group and the group representatives. The Section further provides that any instrument purporting to dispose of rights or interest in community land must comply with the law relating to community land.

Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest and that Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

Please refer to **Annex 5** for detailed descriptions of each category of tenure.

²²⁵ Section 2 of the Land Adjudication Act.

²²⁶ Section 8 Land (Group Representatives) Act.

4.1.3.4 Private land

Private land is described by **Article 64 of the Constitution**:

Private land consists of —

- (a) registered land held by any person under any freehold tenure;
- (b) land held by any person under leasehold tenure; and
- (c) any other land declared private land under an Act of Parliament.

Section 2 of the Land Act defines **freehold tenure** as:

...the unlimited right to use and dispose of land in perpetuity subject to the rights of others and the regulatory powers of the national government, county government and other relevant state organs.

Freehold tenure is therefore the largest quantity of land rights which the state can grant to an individual as it confers unlimited rights of use, abuse and disposition subject to the above stated regulatory powers of the states and the rights of other persons (such as a wife).²²⁷

Section 2 of the Land Act defines a **Lease** as

...the grant, with or without consideration, by the proprietor of land of the right to the exclusive possession of his or her land, and includes the right so granted and the instrument granting it, and also includes as sublease but does not include an agreement for lease.

Hence, **leasehold tenure** is the right to use land for a defined period of time in exchange for the performance of certain obligations contained in the lease such as payment of rent. The duration of leases should not exceed 99 years for non-citizens.²²⁸

Any other land declared private under an Act of Parliament could include land converted from one category of land classification to private land.²²⁹ This is as per Section 9 (2 a) of the Land Act which states *inter alia* that public land may be converted to private land by alienation. Section 9 (2 d) further states that community land may be converted to either private or public land in accordance with the law relating to community land. It should however be noted that any substantial transaction involving the conversion of public land to private land shall require approval of the National Assembly or

²²⁷ See also the National Land Policy at page 23 available at http://www.lands.go.ke/index.php?option=com_docman&task=doc_download&gid=9&Itemid=46 accessed on 25.10.2013.

²²⁸ Article 65(1) of the Constitution of Kenya.

²²⁹ Article 61(2) of the Constitution classifies land as either public, private or community land.

County Assembly depending on whether the land is held in trust by county government for the people of the County or by the national government for the people of Kenya.²³⁰

Section 24 of the Land Registration Act provides that the registration of a person as the proprietor of the land shall vest in that person the absolute ownership of that land together with all associated rights and privileges. Section 25 provides that the rights of a proprietor whether acquired on a first registration or subsequently for valuable consideration or by an order of the Court shall be indefeasible (ie. cannot be annulled or voided). Nevertheless, these rights are subject to overriding interests which need not be noted on the register and the said overriding interests are set out in Section 28 of the Land Registration Act.

The Land Act and the Land Registration Act make specific provisions on administration and management of private land. Contracts over land must be in writing, signed and witnessed.²³¹ A land transfer is completed by the registration of the Transferee as proprietor of the land and a transfer takes effect immediately.

Please refer to **Annex 5** for detailed descriptions of each category of tenure.

4.1.3.5 Procedure to acquire private land

In practice, the procedure for acquiring an interest in private land is to enter into a contract for the sale and purchase of the land with a defined completion period. The process is subject to freedom of contract but there are also guidelines from the Law Society of Kenya (LSK), set out in the Law Society of Kenya Conditions of Sale, to guide legal practitioners facilitating land transactions. The key stages are as follows:

- 1) Payment of the deposit and signing of the sale agreement;
- 2) Preparation to complete;
- 3) Completion; and
- 4) Registration.

For further details regarding each of these stages, please refer to **Annex 4**.

²³⁰ See Article 62(2) and 62(3) of the Constitution of Kenya.

²³¹ Section 38.

4.1.3.6 Compulsory acquisition

Article 40 of the Constitution provides that every person has the right to acquire and own property anywhere in Kenya either individually or in association with others. Nevertheless, the State reserves the right to compulsorily acquire property subject to compensating the owner in accordance with the Constitution and the Land Act. The right of compulsory acquisition is an overriding interest under Section 28 of the Land Registration Act.

OVERVIEW OF KENYA'S LAND REGIME UNDER THE CONSTITUTION OF 2010

	PRIVATE LAND	PUBLIC LAND	COMMUNITY LAND
KEY LAWS APPLICABLE TO EACH CATEGORY OF LAND	Land Act (Act No.6 of 2012) Land Registration Act (Act No.3 of 2012) Land Control Act 1967 National Land Commission Act (Act No. 5 of 2012) 2012 Environmental Management and Coordination Act (Act No.8 of 1999)/Revised 2012 Forests Act (Act No. 7 of 2005)/Revised 2012: Section 2 of the Act provides that the Act shall apply to all forests and woodlands on private land.	Land Act (Act No.6 of 2012) Land Registration Act (Act No.3 of 2012) Land Control Act 1967/Revised 2010 National Land Commission Act (Act No. 5 of 2012) Environmental Management and Coordination Act (Act No.8 of 1999)/Revised 2012 Forests Act (No. 7 of 2005)/Revised 2012: Section 2 provides that this Act shall apply to all forests and woodlands on State and local authority land. Wildlife (Conservation and Management) Act 2013	New Community Land Act (TBC). In lieu of this new Act, existing law applies: <ul style="list-style-type: none"> • Land Act 2012 • Land Registration Act 2012 • Land Control Act 1967 • National Land Commission Act 2012 • Trust Lands Act, Chapter 288/Revised 2009 • Land (Group Representatives) Act, Chapter 287/Revised 2012. • Land Adjudication Act, Chapter 284/Revised 2010 • Land Consolidation Act, Chapter 283/Revised 2012 • Environmental Management and Coordination Act (Act No.8 of 1999)/Revised 2012.
	FOREST LAND Forests Act (No. 7 of 2005)/Revised 2012 Environmental Management and Coordination Act (No.8 of 1999)/Revised 2012 Wildlife (Conservation and Management) Act 2013		

4.1.3.7 Forest land

4.1.3.7a Forest regime

Kenya's forest management regime consists of:

- Forests Act 2005 (and new Forest Conservation and Management Bill 2014);
- Forest Charcoal Regulations;
- Timber Act 1972/Revised 2012; and
- Environmental Management and Coordination Act 1999.

4.1.3.7b Forest definition

The Forests Act, under section 3 (the interpretations section) does not define a forest in terms of its biological composition; instead, it defines a *forest area*:

“**forest area**” means any land declared to be a forest land under this Act.

A **gazetted forest** refers to an area which has qualified as a forest and been published in the Kenya Gazette to be a forest under the authority of the Minister in charge, and in accordance with the Forests Act. For example:

- Section 23 (regarding the creation of state forests) provides that the Minister may, on the recommendation of the Board, by notice in the *Gazette* declare a forest from un-alienated land or land which has been acquired by the Government. The procedure of publishing a gazette notice also happens in cases where the Minister is declaring a provisional forest upon recommendation by the board of the Kenya Forest Service²³²;
- The Minister declares a forest from a donation or bequests. In this regard, one may grant land to be a forest to the government or its institutions²³³;
- When a recommendation has been made to the Minister by the Kenya Forests Service to declare a forest area because such an area has a particular environmental, cultural, scientific, or other special significance and so it qualifies as a natural reserve. Following such a declaration, the Minister makes a notice by Gazette declaring a natural reserve.²³⁴

Types of forest (and forest products) identified by the Forests Act include:

²³² Section 26, Forests Act.

²³³ Section 31, Forests Act.

²³⁴ Section 32, Forests Act.

- **“indigenous forest”** means a forest which has come about by natural regeneration of trees primarily native to Kenya, and includes mangrove and bamboo forests;
- **“local authority forest”** means any forest situated on trust land which has been set aside as a forest by a local authority pursuant to the provisions of the Trust Land Act (Cap. 289); any arboretum, recreational park or mini-forest created under section 30 of this Act; any forest established as a local authority forest in accordance with the provisions of section 24;
- **“plantation forest”** means a forest that has been established through afforestation or reforestation for commercial purposes;
- **“private forest”** refers to any forest owned privately by an individual, institution or body corporate;
- **“provisional forest”** means any forest which has been declared a provisional forest by the Minister under section 26;
- **“state forest”** means any forest declared by the Minister to be a central forest, a forest area or nature reserve before the commencement of this Act and which has not ceased to be such a forest or nature reserve; or declared to be a state forest in accordance with the provisions of section 23;
- **“woodland”** means an open stand of trees less than ten metres tall which has come about by natural regeneration; and
- **“forest produce”** includes bark, animal droppings, beeswax, canes, charcoal, creepers, earth, fibre, firewood, frankincense, fruit, galls, grass, gum, honey, leaves, flowers, limestone, moss, murram, myrrh, peat, plants, reeds, resin, rushes, rubber, sap, seeds, spices, stones, timber, trees, water, wax, withies, and such other things as may be declared by the Minister to be forest produce for the purpose of this Act.

Forest areas can also be referred to according to their use or status under the Forests Act:

- **“concession”** means the right of use granted to an individual or organisation in respect of a specified forest area;
- **“forest conservancy area”** means an area established by the Board under section 13;
- **“nature reserve”** means an area of land declared to be a nature reserve under section 32;
- **“sacred grove”** means a grove with religious or cultural significance to a forest community; and
- **“protected tree”** means any tree or tree species which have been declared under section 34 to be protected.

For the purposes of REDD+, Kenya’s R-PP defines ‘forest’ in the following way:

At present, Kenya reports its forest land to FAO using a minimum crown cover of 10%, minimum height of 5 metres, and minimum area of 0.5 ha. Thus under this definition, bush lands would not be included even though large areas are converted to other uses each year. For a REDD+ mechanism, we propose to define forest at low cover and low height thresholds, e.g., 15% cover and 2 m height, because doing so will

ensure that practically all lands that contain trees will be classified as forest and thus will be eligible for REDD+ incentives either through reduced degradation, reduced deforestation, or enhancement of carbon stocks.²³⁵

4.1.3.7c Forest ownership and use

Ownership of forests is divided into the following categories:

- State forests – The Kenya Forest Service;
- Local Authority Forests – A local authority; and
- Private forests – An individual, association, institution or body corporate.

Several terms pertaining to forest use rights are found in the Article 3 of the Forests Act:

- **“concession”** means the right of use granted to an individual or organisation in respect of a specified forest area;
- **“non-consumptive use”** in relation to a forest, means non-extractive use of forest; and
- **“forest produce”** includes bark, animal droppings, beeswax, canes, charcoal, creepers, earth, fibre, firewood, frankincense, fruit, galls, grass, gum, honey, leaves, flowers, limestone, moss, murram, myrrh, peat, plants, reeds, resin, rushes, rubber, sap, seeds, spices, stones, timber, trees, water, wax, withies, and such other things as may be declared by the Minister to be forest produce for the purpose of this Act.



Inside Nairobi National Park.

²³⁵ See Kenya - Revised REDD Readiness Proposal ("R-PP"), August 2010.

4.1.3.7d Tree tenure

Tree ownership and use rights depend on the classification of land on which they stand and whether trees are indigenous²³⁶ or planted²³⁷. This is illustrated by Article 61(2) of the Constitution (which classifies land in Kenya as either public, private or communal) and Section 3 of the Forest Act²³⁸ which provides that a forest can either be owned by the State; a private individual, association, institution or body corporate; or, Local Authority. This therefore means that tree ownership can either be Private, Public or Communal.

A **preliminary analysis** of tree tenure is presented below – however, further investigation of this area of law is required.

Private Forest

Private land is defined by Article 64 of the Constitution as registered land held by any person under freehold or leasehold tenure. According to Section 24 of the Registered Land Act, the registered proprietor of land would be entitled to ownership and use of trees on the land subject to overriding interests.²³⁹ This is also in accordance with Section 3 of the Forest Act which defines a Private Forest as any forest owned privately by an individual, institution or body corporate.

Even though an individual owns the trees in his private land, the President under Section 34 of the Forest Act has the powers to declare tree, species or family of trees to be protected in the whole country or in specific areas, hence, a person is prevented from felling, damaging or removing any such trees so declared. It is important to note that this provision limits the rights of ownership of private trees.

It should be noted that Section 24 of the Forest Act states that any land under the jurisdiction of a local authority can be declared to be a local authority forest where the land is identified to be an important catchment area, a source of water springs, or is a fragile environment; the land is rich in biodiversity or contains rare, threatened or endangered species; the forest is of cultural or scientific

²³⁶ Section 3 of the Forest Act defines indigenous forest as a forest which has come about by the natural regeneration of trees primarily native to Kenya, and includes mangrove and bamboo forests.

²³⁷ Section 3 of the Forest Act defines Plantation Forest as a forest that has been established through Afforestation (the establishment of a tree crop on an area where such trees are absent) or reforestation for commercial purposes.

²³⁸ Chapter 385 of the Laws of Kenya.

²³⁹ Section 24 of the Land Registration Act (No.3 of 2012) vests the registered proprietor of a piece of land as the absolute owner of that land together with all rights and privileges belonging or appertaining thereto, subject to overriding interests set out under section 28 of the Land Registration Act.

significance; or, the forest supports an important industry and is a major source of livelihood for the local community. This therefore means that the state can deprive an owner the private property/forest provided Article 40(3) of the Constitution is respected, in particular, prompt payment in full of just compensation.

Public Land

Trees growing in public land belong to the State pursuant to Article 62(1)(g) of the Constitution.

Under Article 62(3) of the Constitution, public land shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.

Section 5 of the National Land Commission Act empowers the National Land Commission to manage public land on behalf of the national and county government.

Section 4 of the Forests Act establishes the Kenya Forest Service whose function under section 5(a) of the Forests Act is to manage all State forests.

Section 44 of the Environmental Management and Coordination Act empowers the National Environmental Management Authority, in consultation with the relevant lead agencies, to develop, issue and implement regulations, procedures, guidelines and measures for the sustainable use of forests and such regulations, guidelines, procedures and measures shall control the harvesting of forests and any natural resources located in or on a forest so as to protect water catchment areas, prevent soil erosion and regulate human settlement.

Trees situated in public land can either be a state forest or a local authority forest. Section 3 of the Forest Act defines a state forest as “any forest (a) declared by the Minister to be a central forest, a forest area or nature reserve before the commencement of this Act and which has not ceased to be such a forest or nature reserve, or (b) declared to be a state forest in accordance with the provisions of section 23.” A local authority forest is defined by Section 3 of the Forest Act as “(a) any forest situated on trust land which has been set aside as a forest by a local authority pursuant to the provisions of the Trust Land Act; (b) any arboretum, recreational park or mini-forest created under section 30 of this Act; (c) any forest established as a local authority forest in accordance with the provisions of section 24.”

Community Land

Under section 63(1) of the Constitution, community land²⁴⁰ shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. Article 63 (2) (d) further provides that community land is land that is lawfully held, managed and used by specific communities as community forests, grazing areas or shrines. Hence, the community would be entitled to ownership and use of trees on the land.

TREE TENURE IN KENYA	Indigenous trees	Planted Trees
Private land	Registered proprietor, subject to overriding interests.	Registered proprietor, subject to overriding interests
Public land	National Land Commission The Kenya Forest Service	National Land Commission The Kenya Forest Service
Community land	Community members The Kenya Forest Service is mandated to manage all provisional forests in consultation with the forest owners.	Community members The Kenya Forest Service is mandated to manage all provisional forests in consultation with the forest owners.
Designated 'forest area' under the Forests Act	The Kenya Forest Service	The Kenya Forest Service

²⁴⁰ Article 63(2) of the Constitution defines Community Land as Land lawfully registered in the name of group representatives under the provisions of any law; land lawfully registered to specific community under any process of law; or any other land declared to be Community Land by any Act of Parliament. Further, Article 63(3) provides that any unregistered Community Land shall be held in trust by a County Government on behalf of the communities for which it is held.

4.1.3.7e Soil tenure

Depending on the scope of permitted REDD+ activities, the ‘trapped’ carbon that will be rewarded under a REDD+ scheme could be sequestered in soil, rather than forest. Regarding the ownership of soil carbon, there are two possible ways under current Kenyan law to characterise it:

- a) that soil is part of the land (and so soil tenure runs with land tenure); or
- b) that the carbon in the soil has the components of a mineral that is found in the soil but not part of the soil (attracting different ownership rights).

Both possibilities are described below. For the purposes of REDD+, it is likely that soil carbon would be defined as *part of* the land, rather than as a separate mineral component to it (the latter definition would be better suited to minerals that would be extracted). **This issue pertains to the definition of carbon for the purposes of a REDD+ programme or project, and should be clarified in law.**

Carbon as part of the soil

If carbon is assumed to be *part of* the soil, then the guiding principle is that the rights of the land owner with respect to the soil extend to the carbon in the soil. Both the Constitution of 2010 and the general common law support this guiding principle.

Common Law principles are applicable in Kenya by virtue of the Judicature Act²⁴¹. In particular, a relevant maxim is *cuius est solum, eius est usque ad coelum et ad inferos*, which is a Latin phrase that means ‘whoever owns the soil is the owner all the way up to the heaven and down to hell.’ Kenyan Law, through the Constitution²⁴², allows this maxim to be applied in the interpretation of property rights and particularly those pertaining to land. Another relevant maxim in this regard is *quicquid plantatur solo, solo cedit* which is translated to mean that ‘whatever is attached to the land becomes part of the land.’

²⁴¹ Judicature Act, Section 3(1)(c), which states subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date ... provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject ...

²⁴² Section 260 of the Constitution of Kenya, the interpretations section, states the following: “land” includes—

- (a) the surface of the earth and the subsurface rock;
- (b) any body of water on or under the surface;
- (c) marine waters in the territorial sea and exclusive economic zone;
- (d) natural resources completely contained on or under the surface; and
- (e) the air space above the surface.

An absolute regard of the rights assured by the above maxims would mean that carbon found in the soil belongs to the landowner. The Constitution under Article 260²⁴³ gives further assistance on how to construe rights related to carbon, affirming the common law position as is in the above two Latin maxims²⁴⁴.

Carbon as a mineral component of the soil

Despite the fact that the wording of the Constitution in the definition of land and the applicable Latin maxims (described above) point to absolute ownership of soil carbon by the landholder, both statutes and judicial practice under Kenyan Law have shown certain limitations of rights as far as who owns the *components contained in* the soil strata. For instance, the Petroleum (Exploration and Production) Act²⁴⁵ states that ownership of all petroleum existing in its natural condition *in strata* lying within Kenya and the continental shelf is vested in the Government. This similar limitation exists with regard to a number of other Kenyan statutes²⁴⁶.

As far as judicial practice is concerned, in the case of *Oil Turkana Limited V National Oil Corporation Of Kenya* (2013)²⁴⁷, the court declined the company's claim of absolute ownership of drilling rights as far as the land whose strata oil was discovered was concerned.



Tsavo region. Carbon can be stored in the soil, as well as trees.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

²⁴⁵ Petroleum (Exploration and Production) Act, Cap 308, Laws of Kenya.

²⁴⁶ Mining Act, Cap 306; Trading in Unwrought Precious Metals Act, Cap.309; Diamond Industry Protection Act, Cap.310.

²⁴⁷ *Oil Turkana Limited (Previously Known As Turkana Drilling Consortium Limited) & 3 Others V National Oil Corporation Of Kenya & 4 Others* [2013] eKLR.

4.1.4 *Legal Treatment of Women in Kenyan land law*

Before the Constitution of 2010, discrimination on the basis of gender in matters of personal law was constitutionally sanctioned. Until the 1997 Inter-Parliamentary Parties Group (IPPG) reforms, gender was not a prohibited class of discrimination. In the constitutional reforms leading up to the 1997 general elections, gender was inserted into the Constitution as a prohibited class of discrimination. Nevertheless, the provision was diluted to allow sex discrimination in respect to adoption, marriage, divorce, burial, devolution of property on death and other matters of personal law.²⁴⁸ Article 27 of the Constitution eliminates the discrimination in the private sphere that was previously allowed in the old constitutional framework:

- Article 27(4) is explicit that women and men have the right to equal treatment, including the right to equal opportunities in political economic and social spheres.
- Article 27(8) provides that the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. This expands the political space to accommodate more women and the decision making bodies in which they were previously excluded such as Land Control Boards must now have a significant number of women. In addition, women must be represented at the National Land Commission and the County Land Boards which have oversight over public land.

Further, Article 60 of the Constitution sets out principles of land policy which includes principles that land shall be held, used and managed in a manner that is equitable and that ensures that gender discrimination in law, customs and practices related to land and property in land are eliminated.²⁴⁹

Article 45 provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. Article 68 mandates Parliament to enact legislation to regulate recognition and protection of matrimonial property and in particular the matrimonial home during and after the termination of marriage. Parliament is also mandated to enact legislation to protect the dependants of deceased persons holding interests in any land, including the interest of spouses in actual occupation of land.²⁵⁰ As part of its mandate under the Constitution, Parliament enacted the new Land Laws in 2012. Section 4 of the Land Act reiterates the guiding values and principles of land management and administration which is binding on all persons,

²⁴⁸ Section 82(4)(b) of the now repealed Constitution.

²⁴⁹ Constitution of Kenya Article 60 (1)(f).

²⁵⁰ Constitution of Kenya Article 68 (c)(vi).

including the elimination of gender discrimination in laws and practices related to land and property in land and non discrimination and protection of the marginalized.

Section 93 of the Land Registration Act provides that if a spouse obtains land for the co-ownership and use of both spouses (or all the spouses²⁵¹) there shall be a presumption that the spouses hold the land as joint tenants and the Registrar shall register the spouses as such. Section 93(2) provides that if land is held in the name of one spouse only but the other spouse (or spouses) contribute by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land (in the nature of an ownership in common in that land with the spouse who is the registered owner and the rights gained by contribution of the spouse, or spouses, shall be recognized in all cases as if they were registered).

Section 14 of the Matrimonial Property Act (2013) is similar to Section 93(2) of the Land Registration Act with regard to the presumption of joint ownership. Even where these rights are not registered, spousal rights over matrimonial property are protected as overriding interests over registered land which need not be noted on the register of the land.²⁵²

In further entrenchment of spousal rights, Section 2 of the Land Act defines matrimonial home as any property that is owned or leased by one or both spouses and occupied by the spouses as their family home.²⁵³ In addition, Section 12 of the Matrimonial Property Act addresses the rights of spouses to matrimonial property.

²⁵¹ Numerous references to spouses in the Act is a reflection of the recognition of polygamous marriages in Kenyan laws.

²⁵² Section 28 of the Land Registration Act.

²⁵³ In terms of decision making over matrimonial property, Section 78(3) of the Land Act provides that a Charge of a matrimonial home shall be valid only if signed or assented to by the spouse of the Chargor living in the matrimonial home. Section 93 of the Land Registration Act also mandates the Chargee or purchaser of land to inquire whether the spouse or spouses of the Chargor or transferee have consented to the disposition and if land is disposed without these consents, the said disposition will be void at the instance of the spouse who did not consent, even when the Chargee or transferee was deliberately mislead. Some people have tried to defeat these provisions by registering property in the name of companies, in which case spousal consent is unnecessary, but effectively this is only an escape if the couple does not reside on the property. Where the property registered in the name of a company is the family residence, it is nevertheless the matrimonial home and best practice would be to get the consent of both spouses to its disposition.

4.1.5 *Land administration*

4.1.5.1 *National Land Commission*

The National Land Commission is established by Article 67(1) of the Constitution. Its functions, according to Article 67(2) of the Constitution, are:

- a) to manage public land on behalf of the national and county governments;
- b) to recommend a national land policy to the national government;
- c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;
- d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
- e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
- f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;
- g) to assess tax on land and premiums on immovable property in any area designated by law; and
- h) to monitor and have oversight responsibilities over land use planning throughout the country.

The National Land Commission Act makes further provisions as to the functions and powers of the National Land Commission and gives effects to the objects and principles of devolved government in land management and administration. The additional functions of the commission are in Section 5(2) of the National Land Commission Act and include:

- a) Alienate public land on behalf of and with the consent of national and county government;
- b) Monitor the registration of all rights and interests in land ensure that public land and land under the management of designated state agencies is sustainably managed for their intended purpose and for future generations;
- c) Develop and maintain an effective land information management system at national and county levels;
- d) Manage and administer all unregistered trust land and unregistered community land on behalf of the county government;
- e) Develop and encourage alternative dispute resolution mechanisms in land dispute handling and management; and
- f) Ensure that all unregistered land is registered within ten years from the commencement of the Act (a term that can be extended by Parliament).

To enable the National Land Commission to carry out its functions effectively, it may establish offices in the Counties. In addition, the Commission, in consultation and cooperation with the national and county governments, is required to establish county land management boards for the purposes of managing public land.²⁵⁴ The main function of the board is to process applications for allocation of land, change and extension of user, subdivision of public land and renewal of leases subject to the physical planning and survey requirements.²⁵⁵

4.1.5.2 *Environment and Land Court*

Article 162 (2b) of the Constitution allows Parliament to establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. In this regard, the Environment and Land Court Act (No. 19 of 2011) was enacted to give effect to the above Article 162 (2b) of the Constitution. The Environment and Land Court has original and appellate jurisdiction to hear and determine all disputes relating to the environment and the use and occupation of, and title, to land. Hence, the court is mandated to hear and determine disputes relating to:²⁵⁶

- a) Environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- b) Compulsory acquisition of land;
- c) Land administration and management;
- d) Public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- e) Any other dispute relating to environment and land.

A party to the proceedings may act in person or be represented by a duly authorised representative.²⁵⁷

Some of the orders and relief that the court can give include:²⁵⁸

- a) Interim or permanent preservation orders including injunctions;
- b) Prerogative orders;
- c) Award of damages;

²⁵⁴ Section 18(1) of the National Land Commission Act (No.5 of 2012).

²⁵⁵ Section 19(1) National Land Commission Act (No.5 of 2012).

²⁵⁶ Section 13(2) of the Environment and Land Court Act (No. 19 of 2011).

²⁵⁷ Section 22 of the Environment and Land Court Act (No. 19 of 2011).

²⁵⁸ Section 13(7) of the Environment and Land Court Act (No. 19 of 2011).

- d) Compensation;
- e) Specific Performance;
- f) Restitution;
- g) Declaration; or
- h) Costs.

The Court may adopt and implement, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.²⁵⁹

To ensure that all citizens are able to access its services, the Court may sit at any place as it deems necessary.²⁶⁰

Appeals from the court lie with the Court of Appeal.²⁶¹

Under Section 31 of the Environment and Land Court Act (No. 19 of 2011), the Land Disputes Tribunal Act (No. 18 of 1990) is repealed.

4.1.5.3 *Land Control Board*

The Land Control Act (Cap 302 of the Laws of Kenya) controls dealings in agricultural land. Agricultural land is defined in Section 2 of the Act. Agricultural land is basically land that is not within an urban area, that is, a city, municipality or a town. The Cabinet Secretary in charge of Land, Housing and Urban Development may by a gazette notice declare a land that is in an urban area as agricultural land and hence the Act will apply to such land. Transactions that fall under the ambit of the Land Control Act include the sale, transfer, lease, mortgage and subdivision of agricultural land.²⁶² For any of the above transaction to proceed, the consent of the Land Control Board²⁶³ is required. In addition, if a private company or cooperative society owns agricultural land, it cannot issue, sale, transfer, mortgage or carry out any other disposal of or dealing with any of its shares without the consent of the Land Control Board of the area where the land is situated.

²⁵⁹ Section 20(1) of the Environment and Land Court Act (No. 19 of 2011).

²⁶⁰ Section 26 of the Environment and Land Court Act (No. 19 of 2011).

²⁶¹ Section 16 of the Environment and Land Court Act (No. 19 of 2011).

²⁶² Section 6(1) of the Land Control Act (Cap 302 of the laws of Kenya).

²⁶³ Established under Section 5 of the Land Control Act (Cap 302 of the laws of Kenya).

4.1.5.4 *Group representatives*

With regards to community land, section 5 of the Land (Group Representatives) Act (Cap. 287 of the Laws of Kenya) provides for incorporation of Group Representatives in a procedure in which an identified group²⁶⁴ elects not more than ten and not less than three persons to be group representatives of the group. Once the said Group Representatives are incorporated, they have perpetual succession with power to sue and be sued in their corporate name and to acquire, hold, charge and dispose of the group's property. It should be noted that some land in Kenya is owned under such groups and, as a consequence, governed by the Land (Group Representatives) Act.

Every group should maintain a register of its members. The register should contain the name of each member, the date he/she became a member, his/her qualifications for membership and, on his/her ceasing to be a member, the date on which and the circumstances in which he/she ceases to be a member.²⁶⁵

4.1.5.5 *Corrupt transactions*

Where public land grants or ownership certificates is obtained or induced through corruption linked to any government official or employee of the National Land Commission, the transaction will be void. Any land acquired through a process involving corruption will be forfeited to the Government. "Corruption" is defined by the Anti-Corruption and Economic Crimes Act 2003, including 'breach of trust' and 'abuse of office.'²⁶⁶

4.1.6 *Future challenges for Kenyan land law and governance*

Mona Doshi, a practising land lawyer in Kenya and expert in the field, notes the following challenges to Kenya's land governance moving forward:

- The new land laws envisage that there will be one land registration system; currently, Kenya has five registration systems and under each system there are different prescribed

²⁶⁴ A group is defined by section 2 of the Land Adjudication Act (Chapter 284 of the Laws of Kenya) as "a tribe, a clan, section, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being members of the group, together with any person of whose land the group is determined to be the owner..."

²⁶⁵ Section 17(1) of the Land Adjudication Act (Chapter 284 of the Laws of Kenya).

²⁶⁶ Article 2(1). See Coulson Harney – Advocates, "A Snapshot of the new land laws in Kenya" (May 31, 2012), page 9.

conveyancing forms to use. On the direction of the Commissioner for Lands, the prescribed forms are currently being modified by advocates so they conform with the new land laws. As yet, there is no indication when there will be one registration system in place;

- The National Land Commission has recently been constituted. The National Land Commission has a big role in formulating land policies and guidelines in line with the Constitution and they have recently embarked on this task. The National Land Commission will manage, administer and allot public land but as yet there are no policies and guidelines in place relating to how they will carry out their tasks;
- New regulations need to be drafted under the new land laws but this has not yet happened. Therefore, the regulations under the previous repealed Acts are still in force;
- Freehold land titles and leases with an existing term of over 99 years held by non-Kenyan citizens were deemed to become leases of 99 years from the date of the Constitution; however, there is no process for conversion in place so the title deed still reflects the freehold ownership or the 99+ year lease term. The National Land Commission has requested all non-Kenyan citizens to send them copies of title deeds in respect of property they own in Kenya which is freehold or with a leasehold current term of over 99+ years. It is not yet clear what the next steps in the conversion process will be; and
- A category of land classified as community land has been created but there is no new legislation as yet dealing with it. The existing legislation dealing with trust land and group representatives is quite old and thus does not reflect the needs of communities today.

In addition, Professor Kang'ara (Dean of Riara University, Nairobi) observes that

- There is often a disconnect between formal statute law and local practice. Communities might not be aware of formal statutes and caselaw and the gap might not be apparent until a dispute is litigated;
- The Constitution permits the use of customary law in dispute resolution, and it might be useful to review how Kenyan courts interpret, distil and apply customary law principles;
- In the formulation of the new community land statute, comparative examples of how other countries have defined and managed community land might be helpful; and
- With respect to devolution of authority, it is unclear whether this will have a positive or a negative effect on environmental and natural resource management.

Kameri-Mbote argues that “there is a need for innovative approaches in determining access to land and environmental resources for sustainable development,”²⁶⁷ arguing that

The roles that diverse actors play in land and environmental management should be the key in determining rights to be allocated. In this way the workers on the land and the de facto managers of the environment will be the holders of the rights.²⁶⁸

4.2 Environment laws and regulations

4.2.1 Environmental law and policy in Kenya

4.2.1.1 Introduction to environmental law in Kenya

Even before the enactment of the Constitution of 2010 (which contains an explicit provision regarding the right to environment), the ‘right to life’ was interpreted to protect the ‘right to environment’ by Kenyan courts.²⁶⁹ Kameri-Mbote has argued that ‘there is a need for innovative approaches in determining access to land and environmental resources for sustainable development.’²⁷⁰

Kameri-Mbote notes that statute law is the dominant source of Kenya’s environmental law, but both common law and criminal law are also important for environmental governance.²⁷¹

Judicial review, which assesses the legal validity of actions or decisions of public bodies when they result in injury, can be used to (a) quash a decision, (b) prohibit an unlawful action, (c) require a statutory duty to be performed, (d) declare the legal status of a litigant, (e) award monetary compensation, or (f) declare the existing state of affairs (status quo).²⁷² Common law can also be used to establish a cause of action in private law, including trespass, nuisance, negligence and strict

²⁶⁷ Patricia Kameri-Mbote, ‘Women, Land rights and the Environment: The Kenyan experience’ 49(3) *Development* (2006), page 47, paragraph 4.

²⁶⁸ *Ibid.*

²⁶⁹ Omondi Robert Owino, ‘Conceptual and theoretical aspects of the Right to Environment: An International Perspective’ 8(1) *Law Society of Kenya Journal* (2012), page 48, paragraph 4: author cites *Peter K Waweru v Republic*, Misc Civil Application No. 118 of 2004 [2006]; *Peter Kinuthia Mwaniki and 2 others v Peter Njuguna Gicheha and 3 others*, Nairobi HC, Civil Case No. 313 of 2000 [2006]; *Charles Lukeyen Nabori and 9 others v Attorney General and 3 others*, Nairobi High Court Petition 466 of 2006 [2007].

²⁷⁰ Patricia Kameri-Mbote, ‘Women, Land rights and the Environment: The Kenyan experience’ 49(3) *Development* (2006), page 47, paragraph 4.

²⁷¹ Patricia Kameri-Mbote, ‘Kenya’ - Chapter 14 in L.J Kotze & A.R. Paterson eds, *The Role of the Judiciary in Environmental Governance: Comparative perspectives* (Kluwer Law international: 2009), page 455, paragraph 1.

²⁷² *Ibid*, paragraph 4.

liability.²⁷³ Criminal law can be used to enforce environmental law in order to prevent environmental harm, protect public health and welfare, and punish violations.²⁷⁴ Criminal law can also be used to address the failure of civil/administrative law to deter violations, and criminal sanctions can be used when civil remedies are not suitable or to reflect moral outrage.²⁷⁵ Kenya's criminal law has been used to deal with environmental harms that also constitute criminal activities; in addition, the Environmental Management and Coordination Act provides for both substantive and administrative offences.²⁷⁶

International agreements also form part of the environmental regulatory regime in Kenya. Article 2(6) of the Constitution states that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.²⁷⁷ Kenya is party to several international and regional treaties related to environmental governance; in addition, Article 71 of the Constitution subjects agreements related to natural resources to further scrutiny by the government.

4.2.1.2 *Overview of environmental policies in Kenya*

Environmental policies are also significant as they establish a framework for implementing the relevant provisions of the Constitution and statutory law.

Some of the significant environmental policies are:

1. Vision 2030:

Vision 2030, Kenya's long-term national planning strategy, includes environmental considerations that inform environmental policies. Increasing forest cover is stated as a goal (consistent with the Constitution of 2010), in addition to the harmonisation of environment-related laws for better environmental planning and governance.²⁷⁸

2. The National Environmental Policy, 2013:

It provides the strategy for dealing with the country's ever-growing environmental issues and challenges such as environmental governance; loss of biodiversity; valuation of environmental and natural resources; rehabilitation and restoration of environmentally degraded areas;

²⁷³ Patricia Kameri-Mbote, 'Kenya' - Chapter 14 in L.J. Kotze & A.R. Paterson eds, *The Role of the Judiciary in Environmental Governance: Comparative perspectives* (Kluwer Law international: 2009), pp.455, paragraph 2.

²⁷⁴ *Ibid*, pp.455, paragraph 3.

²⁷⁵ *Ibid*, pp.455, paragraph 3.

²⁷⁶ *Ibid*, pp.455, paragraph 2.

²⁷⁷ See further on the section on international agreements, at 4.6.

²⁷⁸ Kenya Vision 2030 – the Popular Version, at 5.4.

urbanisation, waste management and pollution; climate change, energy, security and disaster management; public participation, environmental education and awareness; poverty; data and information; and, chemicals management.²⁷⁹

3. The Natural Resources Development and Management Policy, 2013:

The goal of this policy is to provide the framework for ensuring that the provisions of the Constitution with regard to natural resources are realised.²⁸⁰

4. The National Energy Policy, 2014:

It pre-supposes the review and amalgamation of the statutes in the energy sector following the adoption of Vision 2030 and the promulgation of the Constitution of 2010.²⁸¹

5. The Forest Policy, 2014²⁸²:

The Forest Policy 2014 aims to support “sustainable development, management, utilization and conservation of forest resources and equitable sharing of accrued benefits for the present and future generations of the people of Kenya.”²⁸³ It is designed to be consistent with the principles articulated in the Constitution of 2010, and will be implemented via a new forests act (at present, the Forest Conservation and Management Bill 2014 is under discussion for this purpose). This revised policy framework places emphasis on community participation in forestry management (including the recognition of user rights to support sustainable forest conservation and management), including strengthening community forestry associations and introducing benefit-sharing arrangements. It also emphasises the role of both State and non-State actors in the forest sector, and the role of the forest sector in contributing to economic growth and poverty alleviation goals (including the private sector).

4.2.2 Constitutional provisions relating to the environment

The sections of the Constitution that touch on the environment and its management include the following:

- Chapter 4 on Fundamental Rights and Freedoms;
- Chapter 5 on Land and the Environment; and

²⁷⁹ The policy is available at <http://www.environment.go.ke/wp-content/uploads/2013/06/13-NEP-No-trackch-3.pdf>, accessed on 18/11/13.

²⁸⁰ The policy is available at www.apsea.or.ke/.../61-the-natural-resources-dev-and-mgmt-policy-2013, accessed on 18/11/13.

²⁸¹ See <http://www.kengen.co.ke/documents/National%20Energy%20Policy%20-%20Third%20Draft%20-%20May%2011%202012.pdf>, accessed on 18/11/13.

²⁸² Ministry of Environment, Water and Natural Resources (Republic of Kenya), *Forest Policy 2014* (February 2014), @ 3.1.

²⁸³ *Ibid.*

- Chapter 10 on the Judiciary and Schedules 4 and 5.

Under Chapter 4, Article 42 of the Constitution states that all Kenyans have a right to a clean and healthy environment. The obligations of the State to ensure that environmental rights are realized are found under chapter 5 of the Constitution. Article 70 of this chapter also gives a right to redress for violation of legal rights. Article 69(b) of the Constitution provides that the State shall strive to ensure that at least 10% of its land surface consists of forest cover.

From the reading of the existing statutes relating to the environment, it is recognisable that there is still a lot to be done in order to come up with an all-encompassing legislation. Section 72 gives parliament the power to make legislation related to the environment within a time frame specified in the 5th Schedule to the Constitution. In particular, and as far as the environment is concerned, the Constitution states under the 5th Schedule that within five years of enactment of the Constitution, an Agreement related to natural resources shall be enacted by parliament. Another key provision related to the environment under the Constitution is Article 162, which states that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.

It is important to mention the Constitutional provision relating to the distribution of roles between the county and national government as it forms the basis of engagement in the course of implementing any environmental projects. The national government is charged with the protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including activities such as fishing, hunting and gathering, the protection of animals and wildlife, water and energy.²⁸⁴ The county governments are responsible for the implementation of specific national government policies on natural resources and environmental conservation, including soil and water conservation and forestry.²⁸⁵

4.2.3 *Statutory law with respect to the environment*

4.2.3.1 *Environmental Management and Coordination Act²⁸⁶ 1999/Revised 2012*

Please see above at 4.1.2.10.

²⁸⁴ Section 22, 4th Schedule, Constitution of Kenya.

²⁸⁵ Section 10, 4th Schedule, Constitution of Kenya.

²⁸⁶ 1999 (Revised 2012) Chapter 387.

4.2.3.2 *Environment and Land Court Act*²⁸⁷ 2011

Please see above at 4.1.5.2.

4.2.3.3 *Forests Act 2005*

4.2.3.3a General

The Forests Act brought a ‘paradigm shift in forest management’ by emphasising ‘the principles of public participation in natural resource management.’²⁸⁸ It was enacted by Parliament in 2005 to provide for the establishment, development, conservation and rational utilization of forests. The act is divided in four main parts: the preliminary section deals with the establishment section, then the creation and management of forests, community participation²⁸⁹, and enforcement sections.

According to the act, a forest is created by the State upon a declaration published in a Gazette notice. The government creates forests either from alienated land or land that is acquired by government through purchase or otherwise.²⁹⁰ The act contains provisions related to the ownership of forests and rights to forest produce.²⁹¹ The act is applied when the forest falls in government or in private land. The section on interpretation (section 3) defines a ‘forest area’ as any area declared as a forest under the act; such declarations follow in the schedule to the act, 10 of which were made in 2013.

Further, section 3, *inter alia*, defines various other terms including deforestation and afforestation.²⁹² Section 46 of the Environmental Management and Coordination Act also discusses the afforestation and reforestation of hill tops, hill slopes, and mountainous areas.

²⁸⁷ The Environment and Land Court Act, Act No 19 of 2011.

²⁸⁸ Tapani Oksanen, Michael Gachanja and Anni Blasten, *Strategy Note for Forest Governance Reform in Kenya (for the Miti Mingi Maisha Bora – Support to Forest Sector reform in Kenya [MMMB] Programme)* Helsinki, April 28, 2011; page 2.

²⁸⁹ Provisions include: Article 46(1) – establishment of Community Forest Associations (CFAs) under the Societies Act; Article 47 – functions of CFAs; and, Article 48 – forest user rights.

²⁹⁰ The Forests Act (Act Number 7 of 2005), Section 23.

²⁹¹ Per ownership of forest & rights to forest produce: Article 21 – Forests vest in the State except private local authority; Article 24 – Creation of local authority forest; Article 25 – Private forest; Article 32 – Declaration of a nature reserve; and, Article 33 – Special use of nature reserve.

²⁹² *Deforestation* means the negative reduction of forest cover from its original status, and *afforestation* means the establishment of a tree crop on an area where such trees are absent.

Under the section on administration, the Forests Act establishes the key management agency for forest areas – the Kenya Forests Service (KFS). The KFS is managed by a board that is created under section 6 of the act. The board consists of relevant Ministry officials and several experts. The act also establishes the management fund of the KFS, which is managed by a Financial Committee appointed by the board. The sources of funding are from government, revenue collected from forestry activities, and grants and donations. The Forests Act also contains a number of other subsidiary instruments besides those that create forests.²⁹³

4.2.3.3b Establishing a forest conservancy or nature reserve under the Forests Act

The Board of the Kenya Forest Service is mandated to establish forest conservancy areas for the proper and efficient management of forests and may divide such conservancy areas into forest divisions and stations.²⁹⁴ There is a forest conservation committee in each forest conservancy area whose function is to advise the Kenya Forest Service Board on all matters relating to the management and conservation of forests in that area.²⁹⁵

The Minister responsible for matters relating to the environment upon the recommendation of the Kenya Forest Service may declare any forest area, or woodland or any part thereof, which has a particular environmental, cultural, scientific, or other special significance, to be a nature reserve for the purpose of preserving its biodiversity and natural amenities.²⁹⁶

If any nature reserve occurs within a private forest, the Minister is required to make such arrangements for compensation to the owner of such forest as may be arrived at by an independent valuer appointed by the Kenya Forest Service Board on the recommendation of the relevant professional body.²⁹⁷

²⁹³ Some of these subsidiary regulations under the Forests Act include:

- The Forests (Participation in Sustainable Forest Management) Rules, 2009;
- The Forests (Harvesting) Rules, 2009;
- The Forest (Charcoal) Rules, 2009;
- Declaration of a Provisional Forest;
- Declaration of Likia Extension Forest; and
- Declaration of Amara Forest.

²⁹⁴ Section 13 Forests Act.

²⁹⁵ Section 13(3) Forests Act.

²⁹⁶ Section 32 Forests Act.

²⁹⁷ Section 32(2) Forests Act.

4.2.3.3c Forest Conservation and Management Bill 2014

It is important to note that the current Forest Conservation and Management Bill 2014 would, if passed into law, update the Forests Act. This bill is intended to be the implementing act of the Forestry Policy 20104.

With respect to community participation, the Bill authorises the formation of community forest associations (under the Societies Act), and proceeds to outline the user rights that can be granted to a community forest association by the Government by a Management Agreement.

The relationship between these user rights and REDD+ interventions should be clarified – for example, does section 50(2)(k) stating that forest user rights could include ‘other benefits which may from time to time be agreed upon between an association and the Service’ provide scope for a community forest association to manage a REDD+ intervention? Similarly, would 50(2)(j) allowing for the development of non-wood forest-based industries capture REDD+ projects? **The issue of whether use rights to carbon can be assigned through this mechanism requires attention.**

4.2.2.4 Forest (Charcoal) Regulations 2009²⁹⁸

The Forest (Charcoal) Regulations 2009 regulations were made under the Forests Act²⁹⁹, with the aim of legitimising sustainable charcoal production. The regulations are intended to limit excessive logging through management and regulation.

It is noteworthy that these regulations have received criticism owing to the sharply rising cost of charcoal due to the fact that only specific companies are granted licences³⁰⁰.



A truck on the Nairobi-Mombasa Highway carrying sacks of charcoal. This popular cooking fuel is a major driver of deforestation in Kenya.

²⁹⁸ Legal Notice Number 188 of 2009.

²⁹⁹ Forests Act, Act No. 7 of 2005.

³⁰⁰ Mbugua David, Forest Study Outlook in Africa (FOSA), page 28.



A charcoal store in Nairobi. A sack of charcoal costs approximately 1500-1600 Kenyan Shillings (less than \$US 20) and is a popular cooking fuel.

4.2.2.5 *Timber Act 1972/Revised 2012*

This is an Act of Parliament to provide for the more effective control of the sale and export of timber; for the grading, inspection and marking of timber; for control of the handling of timber in transit; and for matters incidental to and connected with the foregoing. It is contained in Chapter 386 of the Laws of Kenya.

The Act creates the office of Conservator who is the chief conservator of forests. The Conservator is empowered to authorize any person to be a grader of timber. Section 6 of the Act makes it an offence for any person who is not a grader to mark any timber with a prescribed mark.

Under section 7 of the Act, it is an offence for any person who sells or offers for sale any timber under any name, or colourable imitation which does not comply with the specifications of such grade as so prescribed.

Section 8 of the Act imposes a restriction on export of timber. It makes it an offence for any person to export or enter for export any timber of Kenya origin, except under and in accordance with the terms of an export permit issued by the Conservator or by a person authorized by him in writing.

Section 12 of the Act imposes a general penalty of six thousand shillings or to imprisonment for a term not exceeding six months, or to both a fine and imprisonment, for any person found guilty under the Act.

4.2.2.6 *Wildlife (Conservation and Management) Act 2013*³⁰¹

The Wildlife (Conservation and Management) Act No 47 of 2013 repeals the original law adopted in 1976, becoming operational on 10 January 2014. It provides for the protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes. The Act consolidates and amends the laws relating to the protection, conservation and management of wildlife in Kenya. It also emphasises the devolution of conservation and management of wildlife to landowners/managers by recognising that wildlife conservation is a form of land-use, and aims to provide better access to benefits from wildlife conservation.³⁰²

The Kenya Wildlife Service (KWS) is established under Section 3 of the Act. One of their functions under Section 3A is to formulate policies regarding the conservation, management and utilization of all types of fauna (excludes domestic animals) and flora. The service is managed by a Board of Trustees created under Section 3B(1) of the Act, one of whom is the Director of Forests.

The Kenya Wildlife Service Fund is created under Section 5A of the Act, which is managed by the Board of Trustees. Under Section 6(1) of the Act, the Minister (after consultations with the competent authority) may declare any area of land to be a national park. Section 7(1) allows a minister (after consultations) to declare that any National Park, National Reserve, Local Sanctuary or a specified part thereof ceases to be a National Park, National Reserve or Local Sanctuary.

The following provisions of the Act are noteworthy:

- Sections 18-20: governance of wildlife-related matters to be largely devolved to a Country level via the formation of County Wildlife Conservation & Compensation Committees;
- Sections 4(d) and 70: defines wildlife conservancies, and recognises wildlife conservation and management as a form of land-use that has equal status as other land-use types (such as agriculture);
- Sections 73–76: create guiding provisions for access, incentives and benefit sharing;

³⁰¹ Wildlife (Conservation and Management) Act, Cap 376.

³⁰² J King (Northern Rangelands Trust), 'Wildlife Conservation and Management Act 2013: Review for NRT Community Conservancies' January 2014, available online at <http://www.nrt-kenya.org/wp-content/uploads/2014/02/Wildlife-Act-2013-review-NRT-Jan14.pdf>

- Section 65–69: Conservation easements can be formed via a legally recognised agreement between the land-owner and another party. Pending the finalisation of the Community Land Bill, legally recognised easements cannot be applied on community land.³⁰³

4.2.2.7 *Protected Areas Act 1980/Revised 2012*

The Act defines a protected area as any area, place or premises which is necessary or expedient in the interests of public safety and public order that special precautions should be taken to prevent the entry of unauthorized persons, and no person is allowed to be in that area without the permission of the prescribed authority.³⁰⁴ It is contained in Chapter 204 of the Laws of Kenya.

Any person who is in a protected area without permission commits an offence and would be liable upon conviction to imprisonment for a term not exceeding two years or to a fine not exceeding five thousand shillings, or to both imprisonment and a fine.³⁰⁵

4.2.2.8 *Water Act 2003*³⁰⁶

The management of water was previously under the Ministry of Water and Irrigation, but is now managed under the Ministry of Environment, Water and Natural Resources³⁰⁷. The act provides for the management, conservation, use and control of water resources. An important yet controversial area in the act is the licensing of water services. The act further establishes the Water Resources Management Authority, providing the authority with powers to develop principles, guidelines and procedures for the allocation of water resources, and to protect and manage water catchment areas.³⁰⁸ The act supports the user-pay principle³⁰⁹ as proposed in the Forests Act. Kenya Forest Service can therefore work with water user groups (consumers), service providers, and water service boards to conserve catchment forests.

³⁰³ J King (Northern Rangelands Trust), 'Wildlife Conservation and Management Act 2013: Review for NRT Community Conservancies' January 2014, available online at <http://www.nrt-kenya.org/wp-content/uploads/2014/02/Wildlife-Act-2013-review-NRT-Jan14.pdf.pdf>

³⁰⁴ Section 3 Protected Areas Act (Cap 204).

³⁰⁵ Section 9 Protected Areas Act (Cap 204).

³⁰⁶ Water Act 2003, Cap 372.

³⁰⁷ Following cabinet restructuring after the change of President in 2013.

³⁰⁸ Water Act 2003, Section 7, 8.

³⁰⁹ This principle is based on payment of water services, based on who consumes the water and the amount that is consumed.

4.2.2.9 *Mining Act 1987/revised 2012*

In Kenya, mining is governed by the Mining Act (Cap.306). Section 3 of the Act excludes mineral oils from the provisions of the Act. Under the Act, all unextracted minerals (other than common minerals) under or upon any land are vested in the Government, subject to any rights which, by or under the Act or any other written law, have been or are granted, or recognized as being vested, in any other person.³¹⁰

It should be noted that a new Mining Bill is currently being discussed.³¹¹

4.2.2.10 *Agriculture laws*

4.2.2.10a *Agriculture, Fisheries and Food Authority Act 2013*

The Agriculture, Fisheries and Food Authority Act repealed the Agriculture Act Chapter 318. This new act provides guidelines for the promotion of soil and water conservation. It further gives policy guidelines on the development, preservation and utilization of agricultural land.³¹² This act also provides for consultation with farmers when it comes to major decisions or matters that could affect their access to and/or use of land within the agricultural sector.

4.2.2.10b *The Crops Act 2013*

The Act provides for the management and administration of agricultural land at national and county level in order to accelerate the growth and development of agriculture, enhance productivity and incomes of farmers and increase exports. Section 6 of the Act provides for the roles of national and county governments in the development of crops. Section 9(1) creates a commodities fund to be used to provide sustainable affordable credit and advances to farmers for farm improvement, operation and any other approved purpose.

Section 11 (1) of the Act gives authority to the Cabinet Secretary (with the advice of the Agriculture, Fisheries and Food Authority established under the Agriculture, Fisheries and Food Authority Act No. 13 of 2013) to develop rules for identifying agricultural land suitable for the production of the

³¹⁰ Section 4.

³¹¹ The Mining Bill's date of origination is 17 March 2014. The first reading of the bill in the National Assembly was on 22 April 2014. Amendments to the Bill were proposed.

³¹² Agriculture Fisheries and Food Authority Act, Act No 13 of 2013, Sections 21 and 22.

scheduled crops contained in the First Schedule of the Act.

4.2.2.10c Kenya Agricultural and Livestock Research Act 2013

The Kenya Agricultural and Livestock Research Act 2013 provides for the establishment and functions of the Kenya Agricultural and Livestock Research Organisation. The purpose of the organization is to streamline, coordinate and regulate research in crops, livestock, marine and fisheries, genetic resources and biotechnology in Kenya; promote, streamline coordinate and regulate research in crops and animal diseases; and expedite equitable access to research information, resources and technology and promote the application of research findings and technology in the field of agriculture.³¹³

The management of the organization is in a board.³¹⁴ To ensure effective coordination of agricultural research and development activities in Kenya by organizations and individuals carrying out agricultural research, the board is mandated by Section 27 (1) of the Act to establish operational units within the secretariat in various sectors such as natural resource management.

*Please refer to **Background Report 4** for details of the wider agricultural law regime in Kenya.*

4.2.2.11 National Museums and Heritage Act 2006

Under section 4 of the National Museums and Heritage Act, national museums shall serve as repositories for things that are of scientific, cultural, technological and human interest. The management and operations of national museums are overseen by a board of directors.

Under this act, certain elements of the environment including vegetation may be declared as objects requiring protection and application of these rules. Under section 25(1)(f), a geopark may be declared as a protected area falling under this act.

³¹³ See section 5 of the Kenya Agricultural and Livestock Research Act.

³¹⁴ Section 6 of the Kenya Agricultural and Livestock Research Act provides for membership to the board. The functions of the board are contained in Section 9 of the Act.

4.2.2.12 *Energy Act 2006 and subsidiary legislation*

4.2.2.12a Energy Act 2006

The Energy Act 2006 forms the regulatory framework for energy in Kenya. The act establishes the main body that is responsible for energy regulation, the Energy Regulatory Commission. The act also creates functions and powers for the Minister in charge of energy to promote the development and use of renewable energy technologies, including but not limited to biomass, biodiesel, bioethanol, charcoal, fuel, wood, solar, wind, tidal waves, and municipal waste.³¹⁵ The Minister is also empowered by the act to establish a national energy strategy and to enact regulations.

4.2.2.12b The Energy (Energy Management) Regulations 2012³¹⁶

The Energy (Energy Management) Regulations 2012 were enacted under the Energy Act 2006 to manage the auditing of energy reduction for purposes of carbon finance. In this pursuit, the regulations define terms of carbon finance,³¹⁷ energy auditing³¹⁸ and clean development mechanisms,³¹⁹ among others.

In accordance with the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC) to which Kenya is a party, these regulations are also intended to promote energy efficiency among owners or occupiers of industrial, commercial, and institutional facilities.

4.2.2.12c The Energy (Solar Photovoltaic Systems) Regulations 2012³²⁰

The Energy (Solar Photovoltaic Systems) Regulations 2012 were established under the Energy Act

³¹⁵ The Energy Act, Act no. 12 of 2006, Section 103(1).

³¹⁶ Legal Notice Number 102 of 2012.

³¹⁷ The Energy (Energy Management) Regulations 2012, Section 2: 'Carbon finance means a mechanism that facilitates the financial reward through carbon credits for the reduction of greenhouse gas emissions by emitters in developing countries.'

³¹⁸ The Energy (Energy Management) Regulations 2012, Section 2: 'Energy Audit means an inspection, survey and analysis of energy flows for energy conservation in a building, process, or system to reduce the amount of energy input into the system without negatively affecting the output.'

³¹⁹ The Energy (Energy Management) Regulations 2012, Section 2: 'Clean development mechanism means a mechanism that allows emission-reduction projects in developing countries to earn certified emission reduction (CER) credits, each equivalent to one tonne of CO₂, which can be traded and sold, and used by industrialized countries to meet a part of their emission reduction targets under the Kyoto Protocol.'

³²⁰ Legal Notice Number 103 of 2012.

2006. The main goal of these regulations is to regulate the photovoltaic (PV) system manufacturers, importers, vendors, technicians, contractors, and system owners. The act provides for the conditions for licensing for one to qualify to be PV system manufacturer or technician. The regulations also provide for inspection by the Energy Regulatory Commission established under the Energy Act.

4.2.2.12d The Energy (Solar water heating) Regulations 2012³²¹

Enacted pursuant to the Energy Act 2006, Energy (Solar water heating) Regulations 2012 are established to increase usage of solar water heating and reduce reliance on electrical sources. The regulations create mandatory obligations for use of installations of hot water heaters and create a punishable offence for those who do not install solar water heating appliances at the expiration of the grace period of 5 years after the establishment of these regulations. The regulations also define key terms such as carbon finance and clean development mechanisms.

4.2.2.12e Draft Energy (Improved Biomass Cook stoves) Regulations 2013³²²

Drafted pursuant to the Energy Act 2006, the proposed Energy (Improved Biomass Cook stoves) Regulations, 2013 (currently in draft form) are intended to regulate licensing, manufacturing, distribution, inspection of improved biomass cook stoves, as well as offences and penalties. There are currently a number of local companies that have been conducting useful sustainable development activities using such cook stoves,³²³ and it is hoped that the regulations could support such enterprises.

4.3 Key environmental governance institutions

4.3.1 *Ministry of Environment, Water and Natural Resources*

The Ministry of Environment, Water and Natural Resources was created after the 2013 General Election by a government restructuring process that culminated in merging the Ministry of Environment and Natural resources, Ministry of Water and irrigation, and Ministry of Forestry and Wildlife, all into the Ministry of Environment, Water and Natural Resources. The restructuring of the ministries now will see almost all functions that were carried out in the previous ministries merged into what will now be the Ministry of Environment, Water and Natural resources.

³²¹ Legal Notice Number 43 of 2012.

³²² Kenya Gazette, Vol cxv- No. 65, pp 2370-2375.

³²³ An example of this is a company called Climate Pal - further information available at www.climatepal.com.

4.3.2 Kenya Wildlife Service (KWS)

The Kenya Wildlife Service (KWS) is the key government institution tasked with the management of wildlife. This body is established under the Wildlife (Conservation and Management) Act 2013. The KWS becomes important as far as the environment is concerned due to indications that the conservation of wildlife also includes flora (vegetation). The areas that are managed by the KWS are also home to many indigenous forests and general vegetation cover. The management areas of the KWS include national parks, wildlife conservation areas and sanctuaries.



4.3.3 Kenya Forest Service (KFS)

The Kenya Forest Service (KFS) is established by section 4 of the Forests Act 2005, whose functions include the formulation of policies relating to forests, the management of forests in Kenya, creation of research partnerships, and the enforcement of the forest related rules. The management of the KFS is through a board that has the powers to approve and ratify policies³²⁴. The board is also the organ in charge of receiving funds on behalf of the KFS³²⁵. The rest of the management of this body is carried out through the appointed officers who work under the Director of the board³²⁶.

4.3.4 Kenya Forestry Research Institute (KEFRI)

The Kenya Forestry Research Institute (KEFRI) was established in 1986 under the Science and Technology Act (Chapter 250). The Science and Technology Act has since been repealed by the Science, Technology and Innovation Act³²⁷. KEFRI was established to carry out research in forestry and allied natural resources³²⁸. Among the key achievements of KEFRI was the provision of guidelines in community participation in forest management.³²⁹ This institute receives financial support mainly from the government of Kenya. Its partners include the KFS, universities and other

³²⁴ Forests Act, 2005, Section 5(a).

³²⁵ Forests Act, 2005, Section 8(1)(a).

³²⁶ Forests Act, 2005, Section 8(2).

³²⁷ Science, Technology and Innovation Act, Act No. 28 of 2013.

³²⁸ See www.kefri.org, last accessed on 27th August 2013.

³²⁹ See KEFRI, Strategic Plan 2008-2012.

State and non-State institutions. The management of KEFRI is made possible through a Board of Management, which is headed by a director and supported by various other departments including advisory committees³³⁰.

4.3.5 *National Museums of Kenya*

National museums are established under the National Museums and Heritage Act. Under section 4 of the National Museums and Heritage Act, national museums serve as repositories for things that are of scientific, cultural, technological, and human interest. The management and operations of national museums are overseen by a board of directors.

Under the National Museums and Heritage Act, certain elements of the environment, including vegetation, may be declared as objects requiring protection. For example, under section 25(1)(f), a geopark³³¹ may be declared as a protected area under the act.

4.3.6 *Institutions under the National Environmental Management and Coordination Act*

4.3.6.1 *The National Environmental Council (NEC)*

The National Environmental Council (NEC) is created under section 4(1) of the Environmental Management and Coordination Act (EMCA). The following is the mandate of the NEC:

- NEC is responsible for formulating policies and giving directions on the implementation of the Act;
- It sets national goals and objectives that are to be fulfilled by other institutions in the bid to protect and preserve the environment; and
- It brings together the public sector and the private sector and promotes cooperation between them in the environment management programs.

The NEC is chaired by the Minister in charge of the environment – currently housed within the Ministry of Environment and Natural Resources. The secretary of NEC is the Director General of the National Environment Management Authority.

³³⁰ Kenya Forestry Research Institute, Enterprise Profile, Available at www.kefri.org, last accessed on 27th August 2013.

³³¹ Although the Act does not define a geopark, some of the areas referred to as geoparks in the Kenyan lexicon seem to be areas which are carved out in a unique geographical manner, and which are also tourist attractions.

4.3.6.2 *The National Environment Management Authority (NEMA)*

The National Environment Management Authority (NEMA) is established under section 7 of the Environmental Management and Coordination Act. NEMA acts as the implementing organ for the coordination of the various activities that are proposed by the lead agencies. Some of the roles that are assigned to NEMA as an implementing organ include the creation of environmental management policies, the monitoring of natural resources in Kenya, the establishment and the review of land use guidelines, and research on environmental issues³³².

NEMA is also charged with initiating programs that will reduce environmental degradation³³³.

4.3.6.3 *Provincial and District Environment Management Committees.*

These committees are established under section 29(1) of EMCA. The section provides that the Minister responsible for environment is to appoint these committees through a gazette notice.

Just as the names indicate, the committees were to carry out their work at the provincial and district levels. This decentralizes major activities of environmental management and brings them to the local government. The following is the mandate for the Committees:

- Provide assistance in to NEMA in the preparation of annual program estimates;
- Build capacity in NEMA at the two levels;
- Engage in coordinating activities with other government and non-government organizations which deal with environment conservation issues;
- Carry out surveillance of gazetted forest;
- Protect water catchment areas in those under their administration;
- Campaign for agro-forestry in order to ease pressure on government forests;
- Spearhead reduction and prevention of water pollution;
- Promotion of modern water harvesting techniques especially in arid and semi arid areas;
- Promote better farming methods to reduce soil erosion and degradation;
- Create environmental awareness through training and public meetings;
- Promote afforestation; and
- Ensure environmental impact assessment of new industries.

³³² Environmental Management and Coordination Act (EMCA), Section 9(2)(c).

³³³ *Ibid*, Section 9(2)(k).

4.3.6.4 Public Complaints Committee (PCC)

The Public Complaints Committee (PCC) is established under section 31 of the Environmental Management and Coordination Act. The PCC is charged with the duty of investigating complaints relating to environmental damage and degradation. Upon investigation, this committee files its reports to NEC.

4.3.6.5 Standards and Enforcement Review Committee (SERC)

The Standards and Enforcement Review Committee (SERC) is a committee of NEMA and is established under section 70 of the Environmental Management and Coordination Act. This committee is responsible for the formulation of environmental standards, methods of analysis, inspection, monitoring, and technical advice on necessary mitigation measures.

4.3.6.6 National Environmental Tribunal (NET)

The National Environmental Tribunal (NET) is established under section 125 of the Environmental Management and Coordination Act. This tribunal is created to hear appeals arising from administrative decisions from the relevant organs charged with the duty of enforcement of environmental standards. It also receives points of environmental issues for clarification from NEMA. However, this body has no power to enforce its recommendations.

4.3.6.7 National Environment Action Plan Committee (NEAP)

The National Environment Action Plan (NEAP) Committee is established under section 37 of the Environmental Management and Coordination Act. The NEAP Committee is charged with developing five year national environmental action plans, taking into consideration the value and status of natural resources in the country. The Committee, to a large extent, forms a policy-making body for the country since the action plan that it adopts becomes binding upon all organs of government. Provincial and district environmental committees are also required to develop their own five year environmental action plans, which are incorporated in the NEAP.

4.3.7 Environment and Land Court

Please see above at 4.1.5.2

4.4 Gender issues in Kenyan law

The 2010 Constitution provides for equality and freedom from discrimination on any grounds; Article 27(3) provides that ‘*Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres*’. It further provides that ‘*every person has a right to acquire and own property*’ and prohibits Parliament from enacting any laws that would deprive someone of their right to own property or limit their right to enjoy that property³³⁴ (on the basis of the grounds specified in Article 27(4)). Further, Article 60 of the 2010 Constitution establishes principles of land policy which include ‘*the elimination of gender discrimination in law, customs and practices related to land and property in land*’³³⁵.

However, women are still disadvantaged when it comes to the ownership and use of land and other economic structures: current statistics show that 5% of land title deeds in Kenya are held by women jointly with men, and 1% of land titles in Kenya are held by women alone.³³⁶

The National Gender and Equality Commission Act 2011³³⁷ established the National Gender and Equality Commission (NGEC).³³⁸ The functions of the commission are stipulated in Section 8 of the Act which include, *inter alia*, promoting gender equality and freedom from discrimination. It inherits the status and powers of its parent Commission (the Kenya National Human Rights and Equality Commission) as outlined in Chapter 15 – Commissions and Independent Offices of the 2010 Constitution, Article 59 of Chapter 4. The NGEC is empowered by Article 252 to initiate investigations based on suspicions or claims of discrimination, and have the authority of a Court to summon a witness in the course of such investigations. At the time of writing, it appears that the NGEC is operational and in the process of developing a monitoring and evaluation tool that would enable the tracking of progress on various issues.

In order to comply with the provisions of the UNFCCC framework for REDD+, Kenya's national REDD+ programme needs to take note of both the constitutional and statutory requirements regarding

³³⁴ Article 40(1) and 40(2).

³³⁵ Ruth Aura (Chairperson, FIDA), “Thematic briefing on women’s land rights – Rural women and land/property rights” Submitted to the CEDAW Committee, February 20 2013; page 7-8, Section C.

³³⁶ *Ibid*, page 3.

³³⁷ Cap 5C

³³⁸ See Section 3(1) of the National Gender and Equality Commission Act 2011.

gender equality and seek to ensure that these principles are implemented. This will be particularly relevant when reviewing tenure and designing equitable benefit sharing arrangements.

4.5 Financial transparency

Kenya has a well-developed regulatory measures to address issues of corruption, which are supported by an institutional framework. Key aspects of this regulatory framework are outlined in this section; and more complete discussion is offered in **Background Report 2**. In the context of REDD+, existing anti-corruption frameworks can be considered for their application to REDD+ implementation.

Chapter 6 (Leadership and Integrity) and Chapter 15 (commissions and independent offices) of the 2010 Constitution are relevant to corruption. The Constitution provides for the creation of the Ethics and Anti-Corruption Commission (EACC), which is primarily constituted to implement the Chapter 6 provisions on leadership and integrity.³³⁹

Chapter 15 relates to the commissions and independent offices created under the Constitution.³⁴⁰ This chapter is referred to in section 79, which states that the EACC shall have the powers and mandate assigned to other commissions under Chapter 15. However, chapter 15 fails to outline the EACC as one of the Constitutional Commissions,³⁴¹ resulting in a legal debate on whether or not the EACC is entitled to the same powers as other Constitutional Commissions. While some legal discourse may conclude that the details of chapter 15 apply to the EACC, the lack of clarity may weaken the anti-corruption legal framework in Kenya and leave clarifying the mandate of the EACC to acts of Parliament.³⁴²

The Anti-Corruption and Economic Crimes Act (ACECA) replaced the Prevention of Corruption Act.³⁴³ ACECA aims at providing an investigative, preventive and punitive mechanism for corruption.³⁴⁴ ACECA is also indicative of the policies guiding the anti-corruption legal framework in

³³⁹ Constitution of Kenya 2010, Section 79 states that 'Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter 15, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.'

³⁴⁰ Constitution of Kenya, 2010, Section 248 (2, 3).

³⁴¹ Constitution of Kenya, 2010, Section 248 (1, 2).

³⁴² Constitution of Kenya, 2010, Art. 248.

³⁴³ Section 70 of the ACECA repealed the Prevention of Corruption Act (Cap. 65).

³⁴⁴ ACECA, preamble 'an Act of Parliament to provide for the prevention, investigation, and punishment of corruption, economic crimes and related offences and for matters incidental thereto and connected therewith.'

Kenya.³⁴⁵ Notably, ACECA brings in standards as recognised by key international legal instruments such as the United Nations Convention against Corruption (UNCAC)³⁴⁶ and the African Union (AU) Convention on Preventing and Combating Corruption.³⁴⁷ These standards include the creation of a varied category of offences, the establishment of special mechanisms for compensation and recovery of improper benefits,³⁴⁸ and the inclusion of economic crimes.³⁴⁹ This also incorporates steps towards the forfeiture of unexplained wealth³⁵⁰. ACECA, while criminalising all other corruption related offences, has not criminalised illicit enrichment as one of the offences under the Act.³⁵¹ The challenge to the crime of illicit enrichment is, however, subject to many constitutional challenges, as is the case in many jurisdictions.³⁵² Some of the specific crimes that are established by ACECA include bribing, secret inducement for advice, abuse of office, dealing with suspect property, and bid rigging.³⁵³ ACECA goes on to state that the penalty for committing an offence under this section is a fine of up to one million Kenya Shillings or imprisonment for a term not exceeding 10 years.³⁵⁴

ACECA goes over and above the offences created by the UNCAC and the AU Convention on Preventing and Combating Corruption, and creates the category of economic crimes.³⁵⁵ The Act defines economic crimes as acts or activities involving dishonesty under any written law providing for maintenance or protection of public revenue.³⁵⁶ ACECA previously created an institutional mechanism for the overall fight against corruption.³⁵⁷ However, this body was disbanded after the passing of the Ethics and Anti-Corruption Commission Act, which established the Ethics and Anti-Corruption Commission.³⁵⁸ It is important to note that even after the passing of the Ethics and Anti-Corruption Commission Act, the other provisions of the Anti-Corruption and Economic Crimes Act

³⁴⁵ John Tuta, 'Kenya's Anti-Corruption Legal Framework' in *Control of corruption in Kenya: Legal-Political Dimensions*, 2001-2004, p146.

³⁴⁶ United Nations Convention Against Corruption (hereinafter UNCAC), U.N.Doc A/58/422 (Oct. 7, 2003).

³⁴⁷ AU Convention on the Preventing and Combating Corruption, adopted on 11th July, 2003, 43 I.L.M. 5. This Convention was ratified by Kenya on 3rd February, 2007.

³⁴⁸ Anti-Corruption and Economic Crimes Act No. 3 of 2003, Part VI.

³⁴⁹ Anti-Corruption and Economic Crimes Act No. 3 of 2003, Art 2 & 45.

³⁵⁰ Anti-Corruption and Economic Crimes Act No. 3 of 2003, Section 55.

³⁵¹ Anti-Corruption and Economic Crimes Act No. 3 of 2003, Part V.

³⁵² Anti-Corruption and Economic Crimes Act No. 3 of 2003, Part VI.

³⁵³ Anti-Corruption and Economic Crimes Act No. 3 of 2003, Part V.

³⁵⁴ Anti-Corruption and Economic Crimes Act No. 3 of 2003, Section 48.

³⁵⁵ Anti-Corruption and Economic Crimes Act No. 3 of 2003, Section 2 & Section 45.

³⁵⁶ Anti-Corruption and Economic Crimes Act No. 3 of 2003, Section 2, Section 45.

³⁵⁷ Anti-Corruption and Economic Crimes Act No. 3 of 2003, Part 3A.

³⁵⁸ The Public Officer Ethics Act, Act No 4 of 2004.

remain as they were (with the exception of Chapter III, Part A, which addressed the defunct Kenya Anti-Corruption Commission (KACC)).

Prosecution remains one of the key challenges of implementing the anti-corruption legal framework. This issue arose in the case of *Gacheiengo*,³⁵⁹ which stated that the (now defunct) Kenya Anti-Corruption Commission was unconstitutional because it was only the Attorney-General under section 26 of the Constitution who could prosecute. This ruling still affects the present Ethics and Anti-Corruption Commission, as it still does not have inherent prosecutorial powers. Additionally, the Cabinet failed to allow the passing of a draft that would have provided the Commission with prosecutorial powers if the Director of Public Prosecutions (DPP) failed to take action in a corruption offence. The Anti-Corruption and Economic Crimes Act created special magistrates under the judiciary to specifically deal with issues relating to corruption.³⁶⁰ However, these courts only act as courts of first instance,³⁶¹ and appeals from them lie in the higher courts (High Court, Court of Appeal, and the Supreme Court).

Prosecution of corruption and corruption-related offences is conducted by the Director of Public Prosecutions (DPP).³⁶² This is also another consequence of the *Gachiengo Case*,³⁶³ which emphasized that prosecutorial powers are vested in the government through the office of the Attorney-General. In this regard, the Anti-Corruption and Economic Crimes Act requires that once the investigations have been conducted, the subsequent report shall be forwarded to the Attorney-General with a recommendation for any action to be taken (including prosecution).³⁶⁴

The Public Officer Ethics Act is aimed at advancing the ethics of public officers through steps such as requiring asset and financial declaration.³⁶⁵ This act contributes to the legal framework for anti-corruption by prohibiting some overt forms of corruption. These include nepotism and improper

³⁵⁹ *Stephen Mwai Gacheiengo and Albert Muthee Kahuria v Republic*, NRB HC MISC APP.NO. 302 of 2002.

³⁶⁰ The appointment of these special Magistrates by the Judicial Service Commission is stated under Section 3(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

³⁶¹ See *Raphael A. Aligana, Samuel Muhoro & Susan W. Maina* where the Chief Magistrate ruled that his court could not try an offence under Anti-Corruption and Economic Crimes because the court did not have the special jurisdiction of a Special Magistrate's Court.

³⁶² Section 37(1), Anti-Corruption and Economic Crimes Act No. 3 of 2003.

³⁶³ *Stephen Mwai Gacheiengo and Albert Muthee Kahuria v Republic*, NRB HC MISC APP.NO. 302 of 2002.

³⁶⁴ Anti-Corruption and Economic Crimes Act No. 3 of 2003, Section 35 and Section 36.

³⁶⁵ The Public Officer Ethics Act, Act No 4 of 2004, Preamble.

enrichment.³⁶⁶ The act also creates sanctions under Part III, which include investigations and recommendations for disciplinary, criminal or civil sanctions.³⁶⁷

The Ethics and Anti-Corruption Commission Act provides for the establishment of the key anti-corruption body in Kenya pursuant to Article 79 of the Constitution. It also provides for the powers, functions and the general management of the Ethics and Anti-Corruption Commission.³⁶⁸ This act states that, in addition to the powers granted to the Commission under Article 253 of the Constitution, the Commission shall be entitled to specific powers outlined in section 3 of the Ethics and Anti-Corruption Commission Act. These powers include the authorisation to do all that is required or necessary for the Commission to perform its functions, as long as such is authorised by an Act of Parliament and the Constitution.³⁶⁹

The Leadership and Integrity Act is created pursuant to the principles established under Chapter 6 of the Constitution. The Act and specifically Chapter 6 are important as they create a foundation for reducing corruption and incidences of abuse of office.³⁷⁰ In cases of breach of the provisions of the Act, one is subjected to disciplinary action.³⁷¹ However, if the conduct that breaches the code of conduct under the act, also gives rise to criminal or civil liability, a referral may be made to the relevant state entity for the institution of civil or criminal proceedings³⁷². One of the actions that could yield criminal sanctions under the Act is an instance when a public official opens and maintains foreign bank accounts.³⁷³

The Penal Code is the main law that establishes crimes under the Kenyan Law.³⁷⁴ With regard to corruption, the Penal Code creates the crime of abuse of office,³⁷⁵ the offence of stealing by persons in public office,³⁷⁶ fraudulent false accounting,³⁷⁷ and conspiracy to defraud, *inter alia*.³⁷⁸ Section 102 of the Penal Code defines ‘abuse of office’ and categorises it as a felony (although no penalty is given).

³⁶⁶ See Part III, Public Officer Ethics Act, Act No 4 of 2004.

³⁶⁷ See Part V, Public Officer Ethics Act, Act No 4 of 2004.

³⁶⁸ See Preamble, Ethics and Anti-corruption Commission Act, Act No. 22 of 2011.

³⁶⁹ Ethics and Anti-corruption Commission Act, Act No. 22 of 2011, Section 3.

³⁷⁰ See Constitution of Kenya 2010; Leadership and Integrity Act, Act No. 19 of 2012.

³⁷¹ Leadership and Integrity Act, Act No. 19 of 2012, Section 42.

³⁷² Leadership and Integrity Act, Act No. 19 of 2012, Section 43.

³⁷³ Leadership and Integrity Act, Act No. 19 of 2012, Section 19.

³⁷⁴ Penal Code, Chapter 63, Preamble.

³⁷⁵ Penal Code, Chapter 63, Section 101 (1).

³⁷⁶ Penal Code, Chapter 63, Section 280.

The procedure for the prosecution of crimes in Kenya is outlined in the Criminal Procedure Code.³⁷⁹ The statute complements the Penal Code, which outlines the principles of criminal prosecution and a number of crimes recognized in the Kenyan courts. Besides those crimes that are outlined in the Penal Code, the Criminal Procedure Code also caters for crimes that are created by other laws. This includes all of the crimes created by corruption and anti-corruption related offences created within Kenya's anti-corruption framework. It is important to note that the Constitution gives prosecutorial powers to the Director of Public Prosecutions (DPP), who has the power to direct the Inspector of the National Police Service to investigate any allegations of Criminal Conduct.³⁸⁰ This provision gives the government power to institute criminal proceedings on its motion. The ordinary course of proceedings in Kenya is that proceedings are commenced by a complainant and the State takes over to prosecute the case on their behalf.

The Proceeds of Crime and Anti-Money Laundering Act³⁸¹ provides for the offence of money laundering and measures to combat it. In part, the act is a response to instances where funds that are accumulated from corrupt activities are concealed in genuine businesses. Furthermore, the act is intended to provide for the identification, tracing and freezing, seizure and confiscation of the proceeds of crime and for connected purposes³⁸². Thus proceeds of corruption are a major target of this law. Additionally, failure to report the crime by someone who has knowledge of its commission is a crime in itself.³⁸³ This allows the act to combat corruption by discouraging people from being paid to keep quiet about corrupt activities. Following the provisions of Part XII of the act – International Assistance in investigations and Proceedings – a suspect may not escape the law by residing in another country.

The Public Finance Management Act was enacted by Parliament to provide for the effective management of public finances by both National and the newly formed county governments.³⁸⁴ This act provides for transparency in the management of public funds and recognises the devolution of

³⁷⁷ Penal Code, Chapter 63, Section 330.

³⁷⁸ Penal Code, Chapter 63, Section 317.

³⁷⁹ Criminal Procedure Code, Cap 75, preamble.

³⁸⁰ Constitution of Kenya, 2010, Article 157(2).

³⁸¹ Proceeds of Crime and Anti-Money Laundering, Act No 9 of 2009.

³⁸² Proceeds of Crime and Anti-Money Laundering, Act No 9 of 2009, Preamble.

³⁸³ Proceeds of Crime and Anti-Money Laundering, Act No 9 of 2009, Section 5.

³⁸⁴ Public Finance Management Act, No. 18 of 2012, Section 3.

national and county governments. With regard to devolution, it provides for the management of funds at both the national³⁸⁵ and county³⁸⁶ level.

The Public Procurement and Disposal Act³⁸⁷ establishes procedures for efficient public procurement, for the disposal of redundant and unusable assets and equipment by public entities, and other related matters.³⁸⁸ It contains penalties against persons who breach the regulations of the act.³⁸⁹ The act is relevant for corruption as the absence of a regulatory mechanism for procurement and disposal allowed for the un-procedural and irregular acquirement of government service and goods contracts. The act also creates the Public Procurement Oversight Authority (PPOA),³⁹⁰ which aims to ensure compliance with the provisions under the act. The act also creates other bodies, such as the Public Procurement Administration Review Board.³⁹¹

The Banking Act was enacted by Parliament to regulate the business of banking. Since banking involves the depositing, lending and withdrawal of public money, it is prudent that the banking business be carried out in a transparent manner. Consequently, section 4(3) of the act requires that any person proposed to manage or control banking institutions be both professionally and morally suitable. The Banking Act is also relevant when it comes to corruption, since some of the stages during the laundering process involve banks and banking transactions. This is particularly relevant, where launderers, in a bid to conceal their funds, engage in networks of bank deposits, withdrawals and transfers. In this regard, the Banking Act and other banking regulations in Kenya provide for suspicious transaction reporting (STR), among other mechanisms to monitor likelihood of laundering activities³⁹².

The principle of reciprocity under international law requires that countries cooperate with each other in the enforcement of judicial decisions. This act provides for enforcement by Kenyan authorities of judgments rendered by other countries on a reciprocal basis.³⁹³ For example, a person would not escape the enforcement of a judgment issued outside Kenya simply by establishing a residence within

³⁸⁵ Public Finance Management Act, No. 18 of 2012, Part III.

³⁸⁶ Public Finance Management Act, No. 18 of 2012, Part IV.

³⁸⁷ Public Procurement and Disposal Act, No. 3 of 2000.

³⁸⁸ Public Finance Management Act, No. 18 of 2012, Preamble.

³⁸⁹ Public Finance Management Act, No. 18 of 2012, Sections 135, 136.

³⁹⁰ Public Finance Management Act, No. 18 of 2012, Section 8.

³⁹¹ Public Finance Management Act, No. 18 of 2012, Section 25.

³⁹² See, for instance, regulations under the Central Bank of Kenya Act.

³⁹³ Foreign Judgment (Reciprocal Enforcement) Act, Cap 43, Preamble.

Kenya. This act is intended to ensure that there is assistance and cooperation in terms of enforcing cross-jurisdictional judgments relating to corruption and other incidental matters.³⁹⁴

The Civil Procedure Act 2010 (revised 2012)³⁹⁵ establishes the procedure to be followed in civil litigation. Coupled with the Civil Procedure Rules, it helps outline what is expected of litigants. As the act establishes the procedure to be observed for civil proceedings, it is relevant to anti-corruption measures that may give rise to civil proceedings, including asset recovery (for property that is declared to have been acquired corruptly) and abuse of office.

The Forests Act 2005 helps address corruption as it created harsh measures concerning the de-gazetting of forestland and increased penalties against illegal logging and other crimes.³⁹⁶ The Forest (Charcoal) rules 2009 supplement the Forests Act 2005 and regulate sustainable charcoal production, transportation and marketing.³⁹⁷ The penalty for breaking these regulations is KSh 10,000 and up to 3 months in prison³⁹⁸; in addition, Section 52(2) of the Forests Act imposes a higher penalty of KSh 50,000 or 6 months in prison (or both). The regulations do not, however, specifically address corruption offences related to logging. This is a problem as cartels often bribe forest guards and officials in order to gain unlicensed access to forests and illegally fell trees for economic gain. In 1999, Kenya temporarily banned all logging activities and only gave permission to four sawmill companies to log and replenish the forests through an afforestation programme. This policy was ended after criticism suggested that there was continued black-market logging activity. **At present, corruption related to felling or logging is prosecuted under the normal anti-corruption laws.**

4.6 Applicable international treaties

4.6.1 Records of signatory/ratification status in Kenya

Kenya does not have a substantive and exhaustive public record of all treaties. However, most international treaties are accessible through the office of the government spokesman³⁹⁹ and the

³⁹⁴ Foreign Judgment (Reciprocal Enforcement) Act, Cap 43, Preamble.

³⁹⁵ Cap 21, 2010, Revised 2012.

³⁹⁶ World Bank, 'Forest Strategy: Review of Implementation' (2007) at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTARD/EXTFORESTS/0,,contentMDK:21564626~pagePK:210058~piPK:210062~theSitePK:985785,00.html>, last accessed April 18 2013.

³⁹⁷ See the Forest (Charcoal) Regulations 2009, Legal Notice No. 186 of 24th December 2009.

³⁹⁸ See Regulation 20, *ibid*.

³⁹⁹ See www.communication.go.ke/kenya.asp?cat_id=49 (last accessed on 4th June 2013).

National Council for Law Reporting.⁴⁰⁰ The United Nations Treaty Series (UNTS) Database also provides signatory information.⁴⁰¹ Challenges can exist when getting public records, especially when it comes to bilateral treaties. Information is also available through official government keepers of the treaties, such as the Ministry of Foreign Affairs (Treaties Section and State Law office, Treaties Section). The newly established Treaty Making and Ratification Act creates the office of the Registrar of Treaties,⁴⁰² which is expected to enhance public records with respect to treaties.

4.6.2 *Relationship between Kenyan law and international treaties*

Prior to considering the substance of particular agreements, it is important to mention in brief key legal changes of the recent past that affect international treaties in Kenya.

The Constitution of Kenya that was promulgated on 27th August 2010 provides in Article 2(6) that any treaty signed by Kenya shall form part of the law of Kenya under the Constitution. This differs from the previous Constitution where every convention needed to be domesticated as an act of parliament or some other process before it was considered to be Kenyan Law.

Another recent legal change is the Treaty Making and Ratification Act,⁴⁰³ which came into force in December of 2012. This act is aimed at giving effect to Article 2(6) of the Constitution and provides procedure for treaty making and the ratification of treaties, recalling that Article 2(6) expresses a system where treaties that have been ratified by Kenya automatically become law without the need for special legislation to make them the law of the land. Importantly, the act only applies to treaties ratified after the act entered into force on the 14th of December 2012. The treaties that were ratified by Kenya prior to this date are not subject to any new changes that have come with the passing of the act.

4.6.3 *Overview of applicable environmental treaties*

The UNFCCC framework for REDD+ requires REDD+ implementation to be consistent with obligations arising from international treaties to which Kenya is a party. Key international and regional treaties are outlined in brief, below (please note that this is **not an exhaustive list**).

⁴⁰⁰ See www.kenyalaw.org, NCLR treaties database (last accessed on 4th June 2013).

⁴⁰¹ See treaties.un.org (last accessed on 4th June 2013).

⁴⁰² Article 13 and 14 of the Treaty Making and Ratification Act (Republic of Kenya), No 45 of 2012.

⁴⁰³ Treaty Making and Ratification Act (Republic of Kenya), No 45 of 2012.

4.6.3.1 *International treaties*

4.6.3.1a United Nations Framework Convention on Climate Change (UNFCCC)

The United Nations Framework Convention on Climate Change (UNFCCC)⁴⁰⁴ addresses the principles related to common but differentiated responsibilities in environmental conservation as well as precautionary action. This convention provides for the regulation of the concentration of greenhouse gases in the environment. Among other provisions, the convention outlines the duties of states as far as precautionary climate conservation measures are concerned, cooperation with other states in research and preventive action, and record keeping of anthropogenic emissions. The convention recognises the challenges of developing countries when it comes to implementation of the provisions, and hence provides that financial assistance shall be availed to them in order to ensure compliance. Kenya has also signed the Kyoto Protocol to the UNFCCC.⁴⁰⁵ The Protocol requires states to set and strive to reach specific emissions reduction targets.

The UNFCCC is relevant because Kenya, as a ratifying party, is required to report their emissions, including those from agriculture and land use, land use change and forestry (LULUCF), in national communications.⁴⁰⁶ Kenya is also required to adopt national programmes containing measures aimed at mitigating emissions from sources and removals from sinks.⁴⁰⁷ As a non-Annex I country, Kenya must fulfil these requirements according to the principle of Common but Differentiated Responsibility (CBDR) 'and their specific national and regional development priorities, objectives and circumstances.'⁴⁰⁸

The Kyoto Protocol is relevant because Kenya, as a ratifying Party, reinforced the commitment to report its agricultural and LULUCF emissions and removals as well as national programmes on mitigating climate change.⁴⁰⁹ Agriculture and forestry are included in the sectors that these programmes should cover.⁴¹⁰ The Kyoto Protocol also introduced the Clean Development Mechanism

⁴⁰⁴ United Nations Framework Convention on Climate Change (hereinafter UNFCCC), U.N.Doc A/AC.237/18 (Part II)/Add.1, Entry into force: 21st March, 1994, Kenya: 12th June, 1992 Signature, 30th August, 1994 Ratification.

⁴⁰⁵ Entered into force on 16th February 2005.

⁴⁰⁶ UNFCCC art 4 and 12.

⁴⁰⁷ UNFCCC art. 4.

⁴⁰⁸ UNFCCC art 4(1); Kyoto Protocol art 10.

⁴⁰⁹ Kyoto Protocol art 10.

⁴¹⁰ Kyoto Protocol art 10(b)(i).

(CDM), opening up the possibility for developed countries and private actors to pursue sustainable development projects in non-Annex I countries, such as Kenya).⁴¹¹ LULUCF projects have been limited since they are restricted to manure management and afforestation/reforestation projects.⁴¹²

4.6.3.1b Convention on Biological Diversity (CBD)

The Convention on Biological Diversity (CBD)⁴¹³ relates to the conservation of biological diversity, fair, equitable and sustainable use of genetic resources, and the transfer of related technology⁴¹⁴. The CBD also lists various ways that states can work towards these goals, such as through the identification, promotion and conservation of endangered species and the promotion of environmentally sound, sustainable development⁴¹⁵. The convention further urges State Parties to ensure that Environmental Impact Assessments are carried out prior to the commencement of any project that could have negative effects to the environment⁴¹⁶.

The CBD is relevant because Kenya, as a ratifying Party, is required to ‘develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity’, according to its particular conditions and capabilities.⁴¹⁷ Parties must also integrate biodiversity concerns into national decision making and adopt measures to avoid or reduce impacts.⁴¹⁸

4.6.3.1c Convention on Wetlands of International Importance Especially as Waterfowl Habitat

The Convention on Wetlands of International Importance Especially as Waterfowl Habitat (the Ramsar Convention)⁴¹⁹ outlines obligations relating to the establishment of structures, policies and plans to conserve wetlands. Among other measures, the Ramsar Convention directs states to do this

⁴¹¹ Kyoto Protocol art 12.

⁴¹² Decision 11/CP.7, Land use, land-use change and forestry, UN Doc. FCCC/CP/2001/13/Add.1, at 60-61, para 13-15.

⁴¹³ Convention on Biological Diversity, entry into force 29th December, 199, U.N.T.S, Vol. 1760. Kenya signed this convention on 11th June 1992, and ratified the same on 26th July 1994.

⁴¹⁴ Convention on Biological Diversity, Preamble.

⁴¹⁵ *Ibid*, Article 1.

⁴¹⁶ *Ibid*, Article 14.

⁴¹⁷ *Ibid*, Article 6.

⁴¹⁸ *Ibid*, Article 10.

⁴¹⁹ Convention on Wetlands of International Importance Especially as Waterfowl Habitat, entry into force on 21st December 1975. Kenya acceded to the convention on 5th June 1990.

through the designation of wetlands, the incorporation of international standards and responsibilities in the conservation of wetlands, research formulation and planning, and legislative frameworks.

4.6.3.1d The United Nations Convention to Combat Desertification (UNCCD)

The United Nations Convention to Combat Desertification (UNCCD)⁴²⁰ is relevant to Kenya because the country's land includes 'arid, semi-arid and/or dry sub-humid areas affected or threatened by desertification.'⁴²¹ Article 5 of the UNCCD states that affected country parties' sustainable development plans and policies should include measures to combat desertification or mitigate drought.⁴²² Kenya must also 'address the underlying causes of desertification and pay special attention to the socio-economic factors contributing to desertification processes.'⁴²³ Annex I is also titled 'Regional Implementation Annex for Africa', which contains poverty reduction measures that could help specifically reduce the desertification and land degradation occurring in countries like Kenya.⁴²⁴

4.6.3.1e Convention on International Trade in Endangered Species of Wild Fauna and Flora

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)⁴²⁵ concerns itself with the protection of endangered species. It categorises species in Appendixes 1, 2 and 3 and then provides, *inter alia*, regulations and obligations among state parties with regard to the prohibition of trade in specimens of endangered species, the maintenance of records, the creation of management authorities, and the penalisation of trade in certain specimens.

4.6.3.1f Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention)

The Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention)⁴²⁶ is aimed at the restoration of migratory species⁴²⁷. The convention has two categories of endangered

⁴²⁰ United Nations Convention to Combat Desertification (UNCCD), 1954 UNTS 3/(2000) ATS 18/33 ILM 1328 (1994).

⁴²¹ *Ibid*, art 1.

⁴²² *Ibid*, art 5.

⁴²³ *Ibid*, art 5(c).

⁴²⁴ *Ibid*, Annex I, art. 8(3).

⁴²⁵ Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 993 U.N.T.S 243 (No. 14537), entry into force on 1st July 1975. Kenya became a state party to this convention on 13th December 1978.

⁴²⁶ Convention for the Conservation of Migratory Species of Wild Animals (Bonn Convention). U.N.T.S.28395.

species, which include endangered migratory species and appendix two, which consists of the migratory species which have what is referred to as ‘unfavourable consideration status’ and require intervention⁴²⁸.

The convention urges state parties to conclude international agreements for effective conservation⁴²⁹.

4.6.3.1g United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and /or Desertification, Particularly in Africa⁴³⁰

The United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and /or Desertification, Particularly in Africa aims to combat desertification and contains a regionalised agreement relating to specific regions including Africa, Latin America, the Caribbean, Asia and the Northern-Mediterranean. The convention aims to achieve this through, among other provisions, a multi-pronged approach through physical and economic approaches to the eradication of desertification. The convention also looks at the eradication of underlying causes of desertification and the establishment of an Action Plan for the eradication of desertification.

4.6.3.2 *Regional treaties*

4.6.3.2a African Convention on the Conservation of Nature and Natural Resources⁴³¹

The African Convention on the Conservation of Nature and Natural Resources obligates states to treat the conservation of natural resources as an integral part of national and regional development, to regulate trade in endangered and non-endangered species, to ensure conservation of plant species by adopting scientifically based conservation techniques and management plans (including the control of bushfires, afforestation and the limitation of forest grazing). This convention has been modified and revised into the Revised African Convention on the Conservation of Nature and Natural Resources.⁴³²

⁴²⁷ *Ibid*, see preamble.

⁴²⁸ *Ibid*, Article 3 & 4.

⁴²⁹ *Ibid*, Article 4 & 5.

⁴³⁰ UNTS vol. 1954, No. 33480. Kenya signed and ratified on 14th October, 1994.

⁴³¹ African Convention on the Conservation of Nature and Natural Resources, entered into force on 16th June 1969. Kenya signed the Convention on the 15th of September 1968, and ratified it on 12th May 1969.

⁴³² Revised African Convention on the Conservation of Nature and Natural Resources, adopted in Maputo on 11th July, 2003. Kenya signed the convention on 17th December 2003.

4.6.3.2b Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (Nairobi Convention)⁴³³

The Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (Nairobi Convention) contains provisions relating to the protection, management and development of programmes that protect the environment of the East African Coast. The convention also includes provisions relating to the integration of international standards, incorporation of research and monitoring in projects, and cooperation.

This convention has two protocols:

- the Protocol Concerning Cooperation In Combating Marine Pollution In Cases Of Emergency In The Eastern African Region⁴³⁴, and
- the Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region.⁴³⁵

4.6.3.2c Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora (Lusaka Agreement)⁴³⁶

The Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora (Lusaka Agreement) is intended to reduce and eradicate illegal trade in wild flora and fauna and to establish a permanent task force towards this end. The convention obligates states to establish mechanisms for the prosecution of those who are engaged in illegal trade of wild flora and fauna, to develop, review and strengthen conservation measures, and to organise for the return of illegally confiscated flora and fauna.

⁴³³ Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (Nairobi Convention). Entered into force on 30th May 1996. Kenya acceded to the Convention on 11 September 1990.

⁴³⁴ Protocol Concerning Cooperation In Combating Marine Pollution In Cases Of Emergency In The Eastern African Region, adopted in Nairobi on 21st June 1985. It has not yet entered into force.

⁴³⁵ Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region, adopted in Nairobi on 21 June 1985; entered into force 30 June 1996.

⁴³⁶ Adopted at the Ministerial Meeting in Lusaka on 8th September, 1994. Kenya signed and ratified the Convention on 9th September 1994.

4.6.4 Overview of applicable human rights treaties

4.6.4.1 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Kenya is a party⁴³⁷ to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁴³⁸. This Convention defines and condemns discrimination, reaffirms the equal rights of men and women, and further establishes women's rights as they relate to: political and public life, representation, nationality, education, employment, health, economic and social benefits, law, and marriage and family life.

4.6.4.2 International Covenant on Economic, Social and Cultural Rights (ICESCR)

Kenya a party⁴³⁹ to International Covenant on Economic, Social and Cultural Rights⁴⁴⁰ (ICESCR), which recognises the right of all people to self-determination, to pursue their economic, social and cultural goals, and manage and dispose of their own resources (without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status). ICESCR provides for rights including the right to: work, social security, family life, an adequate standard of living, health, education and participation in cultural life.

4.6.4.3 African Charter on Human and Peoples' Rights

Kenya is a party⁴⁴¹ to the African Charter on Human and Peoples' Rights⁴⁴², which provides for civil and political rights including freedom from discrimination, slavery, cruel, inhuman or degrading treatment or punishment; the right to property equality, life, dignity, due process concerning arrest,

⁴³⁷ Ratified 9 March 1984. For the status of CEDAW, see United Nations Treaty Collection <https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=IV-8&chapter=4&lang=en#Participants>.

⁴³⁸ Convention on the Elimination of all forms of Discrimination against Women (18 December 1979 adopted, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

⁴³⁹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

⁴⁴⁰ Ratified 21 May 1996. For the status of the ICESCR, see the United Nations Treaty Collection <https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=1&mtdsg_no=IV-3&chapter=4&lang=en#Participants>.

⁴⁴¹ Ratified 23 January 1992. For the status of the African Charter, see the African Commission on Human and Peoples' Rights <<http://www.achpr.org/instruments/achpr/ratification/>>.

⁴⁴² African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (African Charter or Banjul Charter).

detention and trial; and freedom of religion, information, expression, association, assembly, movement and political participation.

4.6.4.4 *Protocol to the African Charter on the Rights of Women in Africa*

Kenya has signed, but not ratified,⁴⁴³ the Protocol to the African Charter on the Rights of Women in Africa.⁴⁴⁴ This Protocol establishes a bill of rights for women in Africa and provides for the elimination of discrimination and harmful practices, as well as rights including but not limited to the right to dignity, participation in the political and decision-making process, education, health, food security, adequate housing, positive cultural context and a healthy and sustainable environment. The Maputo Protocol additionally recognises the special needs of elderly women, women with disabilities, and women in distress.

4.6.4.5 *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*

Articles 1-40 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)⁴⁴⁵ provide for individual and collective rights of indigenous peoples including but not limited to freedom from discrimination, the right to self-determination, and the right to participate in decision-making matters. UNDRIP also establishes that indigenous peoples shall not be forcibly removed from their lands or territories, and that indigenous peoples have the right to the lands, territories and resources that they've traditionally owned or occupied. For many of the rights established, UNDRIP also recognises the state responsibilities required to ensure the realisation of these rights.

4.6.4.6 *Declaration on the Right to Development (DRD)*

The Declaration on the Right to Development (DRD)⁴⁴⁶ provides that every person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, which includes the right of peoples to self-determination. The DRD additionally establishes that states have a responsibility to facilitate and promote the full realisation of the right to development.

⁴⁴³ Signed 17 December 2003. For the status of the Maputo Protocol, see the African Commission on Human and Peoples' Rights <<http://www.achpr.org/instruments/women-protocol/ratification/>>.

⁴⁴⁴ Protocol on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) OAU Doc CAB/LEG/66.6 (Maputo Protocol).

⁴⁴⁵ United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA Session 61 Res 295 (UNDRIP).

⁴⁴⁶ Declaration on the Right to Development (adopted 4 December 1986) UNGA Session 41 Res 128.

4.6.5 *Overview of applicable international agreements pertaining to corruption*

The AU Convention on Preventing and Combating Corruption⁴⁴⁷ is the main legal mechanism for the prevention of corruption in the African Union. The following are the main objectives of the Convention⁴⁴⁸:

- promote and strengthen the development in Africa of mechanisms to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors;
- promote, facilitate and regulate cooperation among states of effective measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa;
- coordinate and harmonize the policies and legislation among African states that would prevent, detect, punish and eradicate corruption on the continent;
- promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights; and
- establish the necessary conditions to foster transparency and accountability in the management of public affairs.

The United Nations Convention Against Corruption (UNCAC)⁴⁴⁹ has been said to be a universal legal instrument that is more comprehensive than many of the other regional instruments.⁴⁵⁰ It introduces a number of measures, standards and rules that countries can enforce to fight and regulate corruption. However, Kenya has not criminalized in its domestic acts all the offences that are provided by UNCAC, including bribery in the private sector.⁴⁵¹

The African Charter on Democracy, Elections and Governance⁴⁵² addresses the issue of corruption by calling for the promotion of anti-corruption measures in conformity with the AU Convention on Preventing and Combating Corruption. State parties to this convention are obligated to commit themselves to political, economic, and social governance through improving effectiveness of social

⁴⁴⁷ AU Convention on the Preventing and Combating Corruption, adopted on 11th July, 2003, 43 I.L.M. 5. This Convention was ratified by Kenya on 3rd February 2007.

⁴⁴⁸ AU Convention on the Preventing and Combating Corruption, Article 2.

⁴⁴⁹ United Nations Convention Against Corruption (UNCAC), U.N.Doc A/58/422 (Oct. 7, 2003).

⁴⁵⁰ Snider T. & Kidane W., 'Combating Corruption through International Law in Africa: A comparative Analysis' *Cornell International Law Journal* (2006), at 706.

⁴⁵¹ See Anti-Corruption and Economic Crimes Act, No. 3 of 2003.

⁴⁵² African Charter on Democracy Elections and Governance, adopted on 30th January 2007.

services and combating corruption.⁴⁵³ Further, this convention obligates states to institutionalize good economic and corporate governance through preventing and combating corruption.⁴⁵⁴

A programme under the African Union, the New Partnership for African Development (NEPAD) has established an Anti-Corruption Plan⁴⁵⁵ that calls for the promotion of transparency and measures to address corruption across Africa. According to this Action Plan, NEPAD urges states to work towards the eradication of corruption through the ratification of the AU Convention on Preventing and Combating Corruption, judicial cooperation, effective and functioning anti-corruption boards, establishment of national anti-corruption commissions and through participatory processes in budget formulation⁴⁵⁶.

To help achieve these goals, NEPAD has created the African Peer Review Mechanism (APRM). The APRM is an instrument for fostering good political, economic and corporate good governance, improving the efficiency and effectiveness of governments in delivering goods and services to their citizens and creating confidence in target countries to attract and support investment.⁴⁵⁷ Corruption is one of the key priority areas expressed in the objectives, standards, criteria and indicators of the APRM.⁴⁵⁸

Another mechanism for preventing and combating corruption is the advisory body established under the African Charter on Democracy, Elections and Governance.⁴⁵⁹ This body is aimed at promoting anti-corruption work, collecting information on corruption and on the behaviour of multinational corporations operating in Africa, developing methodologies, advising governments, developing codes of conduct for public officials, and building partnerships. This body is required to submit a report to the Executive Council of the African Union on a regular basis on the progress made by each State Party in complying with the provisions of the AU Convention.⁴⁶⁰

⁴⁵³ *Ibid*, Article 27.

⁴⁵⁴ *Ibid*, Article 33(3).

⁴⁵⁵ NEPAD Anti-Corruption Plan, 10th Africa Partnership Forum (APF), Tokyo, Japan: 7 – 8 April 2008.

⁴⁵⁶ NEPAD Anti-Corruption Plan, page 9.

⁴⁵⁷ See W.L Nkuhlu, "The New Partnership for Africa's Development – The Journey So Far", NEPAD Secretariat, June 2005 - <http://www.nepad.org/2005/files/documents/journey.pdf>. Accessed July 03 2013.

⁴⁵⁸ NEPAD/HSGIC-03-2003/APRM/*Guideline*/OSCI 9 March 2003.

⁴⁵⁹ African Charter on Democracy Elections and Governance, Adopted on 30th January 2007. Article 2(9) available at <http://www.africa-union.org/root/AU/Documents/Treaties/text/Charter%20on%20Democracy.pdf> accessed July 01 2013 Art. 22.

⁴⁶⁰ *Ibid*, Article 49.

4.7 Dispute resolution

A 2011 report on forest governance in Kenya notes that disputes and conflicts regarding forest management and use are likely to increase because “the devolution process multiplies the number of stakeholders with a legitimate interest in forests,” requiring “special attention to conflict resolution” which accommodates power imbalances between stakeholders.⁴⁶¹

Court-based dispute resolution processes in Kenya are discussed below, both in the context of (i) environmental litigation pursuant to the Constitution, and (ii) private litigation that would be used in the event of a contractual dispute.

Alternative Dispute Resolution (ADR) processes, such as mediation and arbitration, could be explored as ways to address disputes between REDD+ stakeholders (but are not explored here). In this context, it is worth noting that Article 159(2)(c) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by **alternative forms of dispute resolution including traditional dispute resolution mechanisms** which shall subject to Article 159(3) and not contravene the Bill of Rights, not be repugnant to justice and morality or results in outcomes that are repugnant to justice or morality and not inconsistent with the Constitution or any written law.

4.7.1 Environmental litigation

Article 70 of the Constitution establishes a right for a person⁴⁶² to apply for redress (and any other available legal remedies) for violations of the right to a clean and healthy environment contained in Article 42 of the Constitution.⁴⁶³ Article 70(2) allows the court to order measures with respect to preventing or stopping any harmful act or omissions,⁴⁶⁴ compelling a public officer to take measures with respect to preventing or stopping any harmful act or omissions,⁴⁶⁵ and compensating the victim of a violation of the right to a clean and healthy environment.⁴⁶⁶

⁴⁶¹ Tapani Oksanen, Michael Gachanja and Anni Blasten, *Strategy Note for Forest Governance Reform in Kenya (for the Miti Mingi Maisha Bora – Support to Forest Sector reform in Kenya [MMMB] Programme)* Helsinki, April 28, 2011; page 3, paragraph 3.

⁴⁶² Article 260 of the Constitution defines a person to include a company, association or other body of persons whether incorporated or unincorporated.

⁴⁶³ Constitution of Kenya 2010, Article 70(1). Note that Article 70(3) provides that “an applicant does not have to demonstrate that any person has incurred loss or suffered injury.”

⁴⁶⁴ Constitution of Kenya 2010, Article 70(2)(a).

⁴⁶⁵ Constitution of Kenya 2010, Article 70(2)(b).

⁴⁶⁶ Constitution of Kenya 2010, Article 70(2)(c).

The right to a clean and healthy environment is one of the fundamental rights contained in the Bill of Rights. Every person has the right to institute court proceedings against the party that has infringed this right (could be a company, an individual or a state agent) claiming that their right to a clean and healthy environment has been denied, violated or infringed, or is threatened. In addition to a person acting in their own interest, court proceedings may be instituted by a person acting on behalf of another person who cannot act in their own name or a person acting as a member of or in the interest of a group, class of persons or a person acting in the public interest.⁴⁶⁷ Whereas the High Court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights, Parliament is mandated to enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.⁴⁶⁸

Disputes arising from infringement of the right to a clean and healthy environment may be instituted in the Environment and Land Court. This is one of the courts established under Art 162(2)(b) of the Constitution which provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. The Court is established under section 4 of the Environment and Land Court Act 2011 as a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction, functions and powers, and for connected purposes.

Section 13(2) of the Environment and Land Court Act 2011 provides that the Court shall have jurisdiction to deal with disputes relating to environmental planning and protection, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources, compulsory acquisition of land, land administration and management, public, private and community land and any other dispute relating to the environment and land.

4.7.2 Contractual disputes

In the context of commercial activities, the Civil Procedure Act (Cap.21) sets out the procedure and the rules governing civil proceedings in court. A contractual dispute is commenced by way of a

⁴⁶⁷ Constitution of Kenya 2010, Article 22.

⁴⁶⁸ Constitution of Kenya 2010, Article 23.

plaint⁴⁶⁹ or a petition if the dispute relates to infringement of any fundamental right provided under the Bill of Rights.

The procedure for commencing a suit in Kenya may be summarised as follows:

- (i) The claimant files his/her claim and serves the other party;
- (ii) The other party files their defence within fourteen (14) days of service of the claim and then they serve the defence on the claimant;
- (iii) The claimant has as opportunity to file a reply to the defence within fourteen (14) days of service of the defence;
- (iv) Parties then conduct a pre-trial conference to confirm that all procedures have been complied with;
- (v) The matter then proceeds for hearing and this is subject to adjournments whenever necessary;
- (vi) Once the hearing of the matter is completed, parties file their submissions which can be oral or written; and
- (vii) The Court will then make a determination and render its judgment accordingly.

5. WHERE CARBON RIGHTS AND BENEFIT SHARING SIT IN KENYA'S LEGAL FRAMEWORK

As indicated in **Part A** of this report, countries need to address many different questions and issues in order to develop a legal framework that is appropriate for REDD+ implementation. Two topics that are currently receiving a large amount of attention in many countries' REDD+ policy debates are carbon rights and benefit sharing. These two issues provide pertinent examples of how existing law forms the basis, and starting point, for developing REDD+ specific rules.

Below, both carbon rights and benefit sharing are discussed in the context of Kenya's REDD+ programme. *Please note that a more detailed conceptual discussion of carbon rights and benefit sharing can be found in **Part A**.*

5.1 Carbon rights

The term "carbon rights" is often used in a number of different ways - such as referring to carbon ownership, or the legal right to own the tonne of sequestered carbon (ie. the emissions reduction).

⁴⁶⁹ A plaint is a document filed in court setting out the grounds of a complaint made to the court and asking for redress of the grievance.

The ownership of the physical carbon can be treated as a separate issue to the ownership of the emissions reduction. It is the emissions reduction that will be ‘monetised’ or, put more simply, be paid for (via private transactions in a market setting, or via international transfers that are performance-based); however, it is likely that the emissions reduction will be created only with the cooperation of those holding land rights to the area in question. **It is therefore important for REDD+ policy to clearly define carbon rights**, in terms of both:

- the **physical carbon** – for example, one option is to recognise carbon as a new type of natural resource that is linked to existing land and tree tenure; and
- the legal character of an **emissions reduction** created by sequestering/storing the carbon (including the process that creates it, and whether it could be traded either domestically or internationally). It would also be helpful to specify whether any restrictions apply to the transfer of emissions reductions between parties (whether between private parties in a market setting, or between governments); for example, the Government might choose to reserve a percentage of the emissions reductions created through successful REDD+ implementation for itself, or place restrictions on how many emissions reductions can be transferred offshore.

5.1.1 Ownership/use rights of physical forest carbon

Determining ownership of the physical forest carbon is important for two reasons. First, in order to create the emissions reduction it will be necessary to control how the land/forest area in question is being used (noting that secure tenure arrangements are an important step towards controlling land use). Second, benefit claims can be based on land rights (either in whole or in part).

The Constitution of 2010 defines **property** to include “any vested or contingent right to, or interest in or arising from [...] land, or permanent fixtures on, or improvements to land,”⁴⁷⁰ defining **land** to include “the surface of the earth and the subsurface rock”⁴⁷¹ and also “natural resources completely contained on or under the surface.”⁴⁷² Section 2 of the Land Act and Section 2 of the Land Registration Act refer to this description in their definition of Land and also define “unexhausted improvements” to include fixtures on the land as well as trees, crops and growing produce. The Constitution of 2010 defines **natural resources** as “physical, non-human factors and components, whether renewable or non-renewable”⁴⁷³ **including forests** and biodiversity.⁴⁷⁴ **Therefore,**

⁴⁷⁰ Constitution of Kenya 2010, Article 260, “property”.

⁴⁷¹ *Ibid*, Article 260, “land” – subparagraph (a).

⁴⁷² *Ibid*, Article 260, “land” – subparagraph (d).

⁴⁷³ Constitution of Kenya 2010, Article 260, “natural resources”.

⁴⁷⁴ *Ibid*, “natural resources” – subparagraph (c).

sequestered forest carbon appears to be consistent with the Constitution's definition of both property and natural resources; if this was considered to be the case (and it needs to be clarified in law), it would mean that existing regimes regarding land and forests would apply to its management and use.

Depending on the scope of permitted REDD+ activities, the 'trapped' carbon that will be rewarded under a REDD+ scheme could be sequestered in soil, rather than forest. Regarding the ownership of **soil carbon**, it appears that there are two ways to characterise it under Kenyan law: a) that soil is part of the land (and so soil tenure runs with land tenure), or b) that the carbon in the soil has the components of a mineral that is found in the soil but not part of the soil (attracting different ownership rights). For the purposes of REDD+, it is likely (but not certain) that soil carbon would be defined as *part of* the land, rather than as a separate mineral component to it. **Again, this issue pertains to the definition of carbon for the purposes of a REDD+ programme or project, and should be clarified in law.**

In summary, *if* defined as part of the land and forest, and **assuming that the carbon attaches to the land in the absence of any legal authority to the contrary**, the ownership and use rights attaching to carbon would follow current forest tenure arrangements. In this case, the starting point for clarifying carbon rights would be to recognise that land in Kenya can be public land, private land or community land; *if* following the assumption that carbon is part of that land and owned by the landholders, then:

- Forest carbon could be owned by the State, local authorities or private owners. It could be possible to hold use rights to the carbon (for example, through a leasehold arrangement) without holding full ownership rights (discussed further in the paragraph below);
- Tree ownership depends on whether trees are indigenous or planted, and on the type of land on which the tree stands; and
- Ownership of soil carbon would be determined by its technical definition as either *part of* the land or as a *mineral component* of the land.

The current Forest Conservation and Management Bill 2014 would, if passed into law, update the Forests Act and provide a revised framework for assigning user rights to communities (amongst many other provisions). This Bill is intended to be the implementing Act of the Forestry Policy 2014. With respect to community participation, the Bill authorises the formation of Community Forest Associations (under the Societies Act), and proceeds to outline the user rights that can be granted to a Community Forest Association by the Government by a Management Agreement. The relationship between these user rights and REDD+ interventions should be clarified – for example:

- Does section 50(2)(k) stating that forest user rights could include ‘other benefits which may from time to time be agreed upon between an association and the [government]’ provide scope for a Community Forest Association to manage a REDD+ intervention?
- Similarly, would 50(2)(j) allowing for the development of non-wood forest-based industries capture REDD+ projects?

The issue of whether use rights to carbon could be assigned through this mechanism should be clarified.

Please refer to the table in Section *4.1.2 Key Laws Governing Land* (above) for an outline of the different types of land tenure and the laws that govern it.

5.1.2 Ownership of the emissions reductions

Ownership of the physical forest carbon is a **separate issue** to ownership of the emissions reduction created by protecting the sequestered carbon under a REDD+ scheme.

A REDD+ scheme (such as the Verified Carbon Standard (VCS) – please refer to **Annex 1**) could outline requirements for recognising an emissions reduction unit. Such requirements could specify that the process used to create emissions reductions should respect the Cancun safeguards (please refer to **Annex 9** for the UNFCCC text regarding the Cancun safeguards) and clearly define the 'legal character' of the end result, for example, an emissions reduction ‘unit’ or ‘credit’ could represent one tonne of sequestered carbon. Once they have been created, whether such emissions reductions could then be transferred to a third party should also be clarified (for example, a private buyer in a carbon market or sovereign State).

In order to transfer the emissions reduction created by successful REDD+ activities (whether to a private buyer to use as an offset, or to a sovereign nation to count towards their mitigation targets), it could be necessary to create a **separate right** to the emissions reduction, noting that this separate right is conditional on protecting the physical forest carbon and ensuring that it will be stored for a given period of time (ie. ‘permanence’ requirements). Such a separate right has no value if the sequestered carbon is released into the atmosphere, meaning that the use of the land area that stores the forest carbon must be carefully managed (which is likely to require the agreement and cooperation of those holding land rights to the area). Providing an example of separable carbon rights, Australia has used them within its land-based emissions reductions schemes (please refer to **Annex 7** for details).

In this context, it should be noted that Article 71 of the Constitution of 2010 provides that Parliament needs to approve a transaction if it “involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya.”⁴⁷⁵ Article 71 also provides for Parliament to enact legislation regarding the classes of transactions that are subject to such ratification.⁴⁷⁶ Whether transactions involving emissions reductions created through REDD+ activities falls into this category should be clarified.

It will be necessary for Kenya to make clear policy choices about how to manage the sale/transfer of emissions reductions generated from successful REDD+ interventions. These policy choices can then be translated into law, within the boundaries of the Constitution of 2010 and using current legal frameworks as a foundation for further development.

5.2 Benefit sharing

5.2.1 *Determining the basis for benefit claims*

5.2.1.1 *Approach to REDD+ implementation will affect the basis of benefit claims*

Within the voluntary carbon market, the holder of carbon rights (whether ownership or use rights) will most likely be the recipient of carbon-based payments which will then be shared between participants based on a pre-determined benefit sharing agreement (for example, the model used by Wildlife Works’ Kasigau Corridor REDD Project in the Tsavo region of Kenya).

However, under a national or sub-national programme (where both a national and sub-national programmes is a ‘jurisdictional’⁴⁷⁷ approach to REDD+ implementation, *as opposed to* a project-level approach), the stakeholders who participate in creating emissions reductions might not have any connection to the forested land where the emissions reductions are calculated. Various nation-wide strategies used to implement REDD+ could be used (as contemplated in Kenya’s R-PP), meaning that many stakeholders need to be engaged - not just landholders. **For a national programme, benefit distribution mechanisms might therefore need to base benefit claims on other criteria (not just land rights).** Nonetheless, tenure arrangements related to the land/forest storing the carbon need to be clear and those holding the rights to that area will be an important stakeholder in REDD+ implementation.

⁴⁷⁵ Constitution of Kenya 2010, Article 71(1)(a).

⁴⁷⁶ *Ibid*, Article 71(2).

⁴⁷⁷ As a point of terminology, this report uses the term ‘jurisdictional’ to refer to accounting boundaries drawn at either the national or sub-national level. This is different to measuring the emissions reductions achieved within the boundaries of a specific project-area.

At present, Kenya is preparing for a national REDD+ programme which is likely to include existing projects (and potentially future projects) ‘nested’ within it. **Therefore, a benefit distribution mechanism at the national level will need to be considered in addition to project-level arrangements.** Decisions about how to divide benefits between different stakeholders need to respect existing laws, including relevant constitutional provisions (for example, regarding how natural resources are managed, and to what extent funds will be managed by County governments under devolution).

5.2.1.2 *Obligations to share benefits from forests*

5.2.1.2a Principles relevant to benefit sharing for REDD+

Equitable benefit sharing and community engagement in natural resource management are emphasised as principles of both law and policy in Kenya.

The Constitution of 2010, under Article 69(1)(a), places the obligation to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources on the State. In addition, the State is obliged to ensure that there is **equitable sharing of the accruing benefits**.⁴⁷⁸ Under Article 69(1)(h) and (d), the State is also mandated to utilise the environment and natural resources for the benefit of the people of Kenya as well as to encourage public participation in the management, protection and conservation of the environment. In a broad sense, the Constitution therefore contains principles regarding benefit sharing (in terms of both equitable distribution and public participation) that should apply to REDD+.

The Forests Act defines monetary benefits⁴⁷⁹ and non-monetary benefits⁴⁸⁰, recognising that benefits from forest resources could be in the form of cash or ‘in kind’ benefits (such as social infrastructure).

⁴⁷⁸ See Article 69(1)(a) of the Constitution of Kenya.

⁴⁷⁹ The Forests Act, 2005. Monetary benefits are defined in §20(3): access fees or fee per sample collected or acquired; up-front payments; milestone payments; payment of royalties; licence fees in the case of genetic resources being utilised for commercial purposes; fees to be paid to trust funds supporting conservation and sustainable use of biodiversity; salaries and preferential terms where mutually agreed; research funding; joint ventures; joint ownership; and joint ownership of relevant intellectual property rights.

⁴⁸⁰ The Forests Act 2005. Non-monetary benefits are defined in §20(4) as ‘Sharing of research and development results; collaboration, co-operation and contribution in scientific research and development programmes; participation in product development, admittance to *ex situ* facilities of genetic resources and to databases by participating institutions; transfer to Kenya of genetic resources of knowledge and technology under fair and most favourable terms, including concessional and preferential terms; strengthening capacities for technology transfer to Kenya; institutional capacity building; human and material resources to strengthen capacities for administration and enforcement of access regulations; training related to genetic resources with the full participation of Kenya and where possible in Kenya; access to scientific information relevant to conservation and sustainable use of biological diversity, including biological inventories and taxonomic studies; institutional

Although the types of monetary and non-monetary benefits flowing from REDD+ could be different, this distinction is analogous to the distinction between carbon and non-carbon benefits within the UNFCCC context; a REDD+ benefit sharing scheme in Kenya could build upon this existing distinction in the Forests Act to define the ‘non-carbon benefits’ Kenya expects REDD+ to deliver.

In addition, the National Land Policy discusses benefit sharing⁴⁸¹ as a way of integrating the economic, social and environmental imperatives of land activities. The policy recommends that strategies should be developed to ensure that benefit sharing arrangements take into account the nature of the resources involved and **the contribution that diverse actors make to the management of the resources**. To protect community and individual interests over land-based resources and facilitate benefit sharing, the policy recommended that the Government should:

- (a) **Establish legal frameworks to recognise community and private rights over renewable and non-renewable land-based natural resources** and incorporate procedures for access to and sustainable use of these resources by communities and private entities;
- (b) Devise and implement participatory mechanisms for compensation for:
 - i. Loss of land and related non-renewable natural resources;
 - ii. Loss of land where this is deemed imperative in the public interest for the sustainable management of renewable natural resources; and
 - iii. Damage occasioned by wild animals;
- (c) Put in place **legislative and administrative mechanisms for determining and sharing of benefits emanating from land-based natural resources** by communities and individuals where applicable;
- (d) Make **benefit-sharing mandatory** where the land-based resources of communities and individuals are **managed by national authorities for posterity**; and
- (e) Ensure the management and utilization of land-based natural resources **involves all stakeholders**.⁴⁸²

Read together, the Constitution, Forests Act and Land Policy provide a **strong basis to promote ‘equitable’ sharing of REDD+ revenues**. However, the manner in which such broad principles should be implemented is not clearly specified and **how it will be applied in practice needs to be defined**.

and professional relationships that can arise from access and benefit sharing agreements and subsequent collaborative activities and joint ownership of relevant intellectual property rights’.

⁴⁸¹ Under clause 3.3.4.1.

⁴⁸² *Ibid.*

5.2.1.2b Implementing benefit sharing principles

The manner in which such broad principles regarding benefit sharing should be implemented is not clearly specified.

According to Section 6(1) of the County Government Act No. 17 of 2012, a County Government is a corporate body with perpetual succession. In this regard, it can enter into agreements with persons, institutions and/or entities for purposes of implementation of specific national government policies on natural resources and environmental conservation such as forestry, soil and water conservation. According to Section 21(1) of the County Government Act, the County Assembly has legislative powers, **which would appear it to make laws on benefit sharing on behalf of its County.**

Current models within Kenyan law for managing benefit sharing at the local level include:

- The Forest Policy 2014 contains broad policy guidance emphasising the importance of equitable benefit sharing in the forest sector, stating at 8.2 that the Government will “develop and implement an equitable benefits sharing scheme in the forests sector.”
- The Wildlife (Conservation and Management) Act 2013 Sections 73–76 create general principles applying to access, incentives and benefit sharing with respect to wildlife resources. In particular, Section 76 authorises the Cabinet Secretary, in consultation with the Commission on Revenue Allocation, to formulate guidelines regarding incentives and benefit sharing (including benefit distribution). The formulation of these guidelines is open to public scrutiny⁴⁸³ and it is specified that private investments in conservancies should benefit local communities with the option for investors to provide social infrastructure⁴⁸⁴ (eg. a non-monetary benefit).
- The Forests Act 2005 at 13(2)(e) creates a forest conservation committee and gives this committee and the Forest Board power to assist local communities to benefit from royalties and other rights derived from flora and fauna traditionally used or newly discovered by such communities.⁴⁸⁵
- The Forest Conservation and Management Bill 2014, Section 55 contains benefit sharing provisions. Section 55(1) states that Section 19 of the Land Act 2012 applies for benefit sharing at Section 55, including “measures to facilitate the access, use and co-management of forests,

⁴⁸³ Section 76(3).

⁴⁸⁴ Section 76(5).

⁴⁸⁵ The Forests Act 2005, Section 13(2)(e). This section creates a forest conversation committee and gives this committee and the Forest Board power to assist local communities to benefit from royalties and other rights derived from flora and fauna traditionally used or newly discovered by such communities.

water and other resources by communities who have customary rights to these resources.”⁴⁸⁶

Further, this section authorises the Cabinet Secretary to develop guidelines and regulations on payment for environmental services (including benefit flow mechanisms and funding mechanisms). *If* REDD+ is treated as a Payment for Ecosystem Services scheme (PES scheme), it is possible that Section 55 of the Forest Conservation and Management Bill 2014 could provide the authority for establishing benefit sharing mechanisms for REDD+. **This should be clarified.**

- The Natural Resources (County Royalties) Bill 2013 also speaks to benefit sharing issues. An Adhoc Committee on Legislation on Royalties accruing from natural resources was established by the Senate to draft this bill.⁴⁸⁷ It makes provisions for the sustainable exploitation of natural resources and the equitable apportionment of royalties and other accruing benefits to Counties. It defines benefit sharing as “the distribution of a portion of proceeds of and gains derived from mining and related activities to communities affected by mining operations and those in whose locality mining takes place. ‘Natural Resources’ is defined as “forests, biodiversity and genetic resources.”⁴⁸⁸

Options to share benefits equitably could include an obligation to redistribute revenues from projects or programmes, or an obligation for the State to invest in social infrastructure using REDD+ payments received by it (whether these are international transfers received at the national level, or taxes on carbon transactions). Financial benefits from REDD+ need to be shared in a way that encourage stakeholders to support REDD+ implementation (and/or provide compensation for the opportunity cost of changed land use), and what is considered to be ‘equitable’ (and motivational) could vary between communities. **A process for identifying stakeholder needs and allocating available revenue between participants could be outlined in regulations** (noting that these would need to be flexible enough to accommodate different regions and future learning about how REDD+ will work in Kenya). Voluntary standards such as the Climate, Community and Biodiversity Standards (CCB Standards) or Plan Vivo (see **Annex 1**) could provide some guidance about similar processes used at

⁴⁸⁶ Forest Conservation and Management Bill 2014, 55(1)(b)

⁴⁸⁷ In drafting the bill, the Senators were to collect all stakeholders' views and recommendations as required by the Constitution. At the time of writing, the Honourable Senator Agnes Zani is the Chairperson of the said committee.

⁴⁸⁸ The establishment of a National, County and Community Natural Resources Committee is proposed in Sections 4, 6 and 8 of the Bill respectively. The committee shall be responsible for, inter alia, the general supervision of the exploitation of natural resources, and the harmonization and coordination of the functions of all sub-sector policies and legislation for the proper and sustainable development and management of Kenya's natural resources.

the project-level. **The role of County governments in benefit sharing arrangements (including their possible status as a beneficiary of REDD+ revenue) should also be clarified.**⁴⁸⁹

5.2.1.3 Options for establishing benefit claims for REDD+ in Kenya

It will be necessary to clearly state the eligibility criteria for claiming benefits from REDD+. Irrespective of which options are chosen (discussed further below), the Constitutional requirements pertaining to land and equitable benefit-sharing must be respected. **The law has an important role to play in clarifying the basis of benefit claims** and such clarity is likely to encourage stakeholder confidence and participation. Benefit claims could be based upon one or a combination of the following:

- land rights (including use rights); and/or
- participation in REDD+ interventions, either via
 - direct contribution (such as providing labour or a service for the REDD+ intervention), or,
 - by omission (such as compensation for actions foregone).

For claims based on land rights, the ownership of the carbon is important. ***If carbon is defined as part of the land/forest, and assuming that the carbon attaches to the land in the absence of any legal authority to the contrary,*** the ownership and use rights attaching to carbon would follow current forest tenure arrangements. This means that carbon would be owned by the owners of the land/forest in Kenya: given that land can be public land, private land or community land, carbon would therefore be owned by the State, local authorities or private owners. It might be possible to assign (and subsequently claim) use rights to the carbon (for example, through a leasehold arrangement) without assigning full ownership rights. Specific issues regarding how existing land, forest and tree tenure is linked to carbon rights and benefit claims therefore needs to be clarified.

Ensuring that communities are remunerated under REDD+ is a priority for Kenya. **For Government Land or Community Land (yet to be fully defined under new legislation), the Government could choose to:**

- (i) retain ownership of the carbon, assume responsibility for ‘monetising’ it under a REDD+ scheme (whether through the multilateral UNFCCC process or via a carbon market), and then redistribute the

⁴⁸⁹ According to Section 6(1) of the County Government Act No. 17 of 2012, a County Government is a corporate body with perpetual succession. In this regard, it can enter into agreements with persons, institutions and/or entities for purposes of implementation of specific national government policies on natural resources and environmental conservation such as forestry, soil and water conservation. According to Section 21(1) of the County Government Act, the County Assembly has legislative powers, which would appear it to make laws on benefit sharing on behalf of its county.

carbon funds to other stakeholders, including communities, via another mechanism (such as a fund);
or

(ii) assign use rights to carbon directly to community participants (or other stakeholders), and give communities the responsibility for monetising carbon and redistributing the carbon payments.

Options for **distributing** carbon payments are discussed in the next section.

5.2.2 *Benefit distribution*

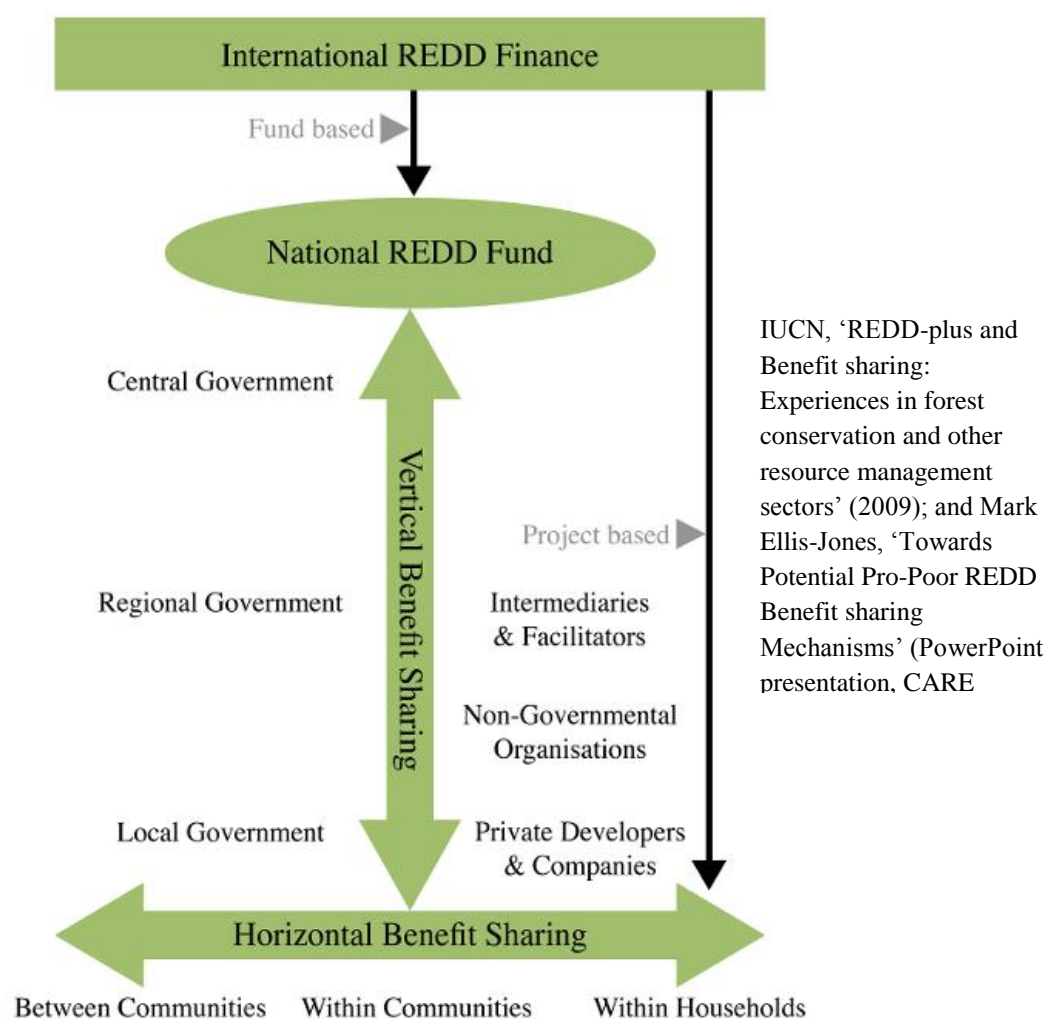
5.2.2.1 *Scales of benefit distribution*

The scale of REDD+ implementation will also affect the benefit **distribution** mechanisms used. At the project level, bespoke arrangements can be designed to engage and reward stakeholders. Within a national programme, mechanisms for distributing benefits to different stakeholders will be required. From a theoretical perspective, benefit sharing is often described as either ‘horizontal’ or ‘vertical’ and both might be needed for distributing REDD+ payments within a country:

- ‘Vertical’ distribution occurs between different institutional levels, such as a multilateral fund to a national government, and/or a national government to a sub-national government. **A fund structure could be used for this purpose; whether the Climate Fund contemplated by the current Climate Change Bill 2014 could be used to receive and disburse REDD+ finance should be clarified.**
- ‘Horizontal distribution’ refers to how benefits are distributed between participants at the local level, for example, between communities and/or between households. Options for legal vehicles to distribute money ‘horizontally’ could be **community trust funds or contracts** (and **MPESA** could also be considered as viable option to disburse monetary payments to community members who might not have any formal banking arrangements). Non-monetary ‘payments’ such as investments in social infrastructure should also be considered, with the option to outline a process for identifying community needs and managing such investments set out in relevant regulations.

Please refer to the diagram on the next page to see how the ‘vertical’ and ‘horizontal’ axes of benefit sharing are modelled.

DIFFERENT PATHWAYS FOR REDD+ FINANCIAL FLOWS



Both 'horizontal' and 'vertical' benefit sharing could occur simultaneously in a REDD+ programme⁴⁹⁰. For example, a national fund distributes REDD+ finance vertically between different levels of governments, and at the community level a 'horizontal' benefit sharing arrangement divides the allocated funds between households). Legal tools such as funds or contracts are used to structure this (combination of) horizontal or vertical distribution.

⁴⁹⁰ IUCN, *REDD-plus and benefit sharing* (December 2009), page 4, paragraph 1; John Costenbader (for UN REDD/FCPF), *REDD+ benefit sharing: a comparative assessment of three national policy approaches* (June 1, 2011), page 2, paragraph 2.

5.2.2.2 *Options for ‘vertical’ benefit distribution*

Under a national programme, REDD+ outcomes are likely to be rewarded at the national level. This means that the national government will receive REDD+ payments and then need to redistribute these funds between eligible stakeholders. The UN REDD programme has been exploring the development of such **Benefit Distribution Mechanisms (BDMs)** in several contexts and it is our understanding that this work will soon be prioritised in Kenya.

It is important to note that the laws regulating the management of public finance will apply to a BDM. These regulatory frameworks are discussed further in **Background Report 2**.

As already noted above, policy choices regarding the eligibility criteria for benefit claims will need to be made. The status of the County Governments as potential beneficiaries and fund managers needs to be clarified, in addition to the other bases for making benefit claims from a national BDM.

5.2.2.3 *Options for ‘horizontal’ benefit distribution*

In Kenya, mechanisms for ‘horizontal’ benefit distribution have already been explored in different contexts. For example:

- Existing law regarding **community land** could offer one model for distributing benefits between the members of a group. The Constitution creates a category of land known as ‘community land’⁴⁹¹ and Parliament is required to enact legislation with respect to it by 2015; however, until replaced or clarified by the new law on community land, existing laws apply to collective landholdings. At present, the Land (Group Representatives) Act (Chapter 287) deals with the rights of a group to land⁴⁹²; under the Constitution, land lawfully registered in the name of group representatives⁴⁹³ would constitute community land. The group representatives are under a duty to hold any property on behalf of and for the collective benefit of all group members, and to consult the other members of the group with respect to it. Group representatives can enter into a transaction/contract subject to the provisions of their

⁴⁹¹ Article 63.

⁴⁹² ‘Group’ is defined in the Land Adjudication Act (Chapter 284) to include a tribe, clan, section, family or other group of persons whose land under recognised customary law belongs communally to the members of that group, and the same definition applies to the Land (Group Representatives) Act.

⁴⁹³ Under the Land (Group Representatives) Act, not more than three and not less than ten members of a group are elected by a group to be the representatives of the group and the representatives would then apply to the Registrar of Group Representatives for their incorporation under the said Act.

constitutional document.⁴⁹⁴ Any money that needs to be distributed to the group members would need to be paid to the group representatives who would then distribute it to the group members (for example, through a trust fund);

- Tailored benefit sharing arrangements designed for the unique circumstances of numerous carbon projects around the country (including Wildlife Works' Kasigau Corridor REDD Project) offer lessons for benefit sharing between communities (please refer to the Table below at 5.2.2.4 - *Examples of benefit sharing in existing Kenyan forest carbon projects*); and
- MPESA could offer a viable mechanism to transfer cash payments to individuals and households and should be explored for this purpose.



An MPESA shop in Nairobi. MPESA is a mobile phone application that facilitates transactions through SMS, for example, a customer might pay for cooking fuel by texting the purchase amount to the vendor's mobile phone via MPESA.

It is possible that MPESA could also be used to distribute REDD+ funds to community members.

⁴⁹⁴ The constitution of the group would provide how the corporate body would execute documents, but execution would be under common seal in the presence of a minimum of three officers.

5.2.2.4 Examples of benefit sharing in existing Kenyan forest carbon projects

There are numerous forest carbon projects already in existence or under development in Kenya. Details regarding how benefit sharing is managed at each site are set out in the table below.

Project and details	
1	<p>The Kasigau Corridor REDD Project (Phase I Rukinga Sanctuary and Phase II the Community Ranches)</p> <ol style="list-style-type: none"> <u>Developer (Project Proponent):</u> Wildlife Works <u>Standard:</u> VCS, CCB <u>Location:</u> Taita Taveta (Phase I) and Coast Province (Phase II) <u>Benefit Distribution:</u>⁴⁹⁵ <ol style="list-style-type: none"> The Wildlife Works Carbon Trust (WWCT) has been established to distribute funds from the Kasigau Corridor REDD projects. The WWCT works in conjunction with several Locational Carbon Committees (LCCs) and Community Based Organizations (CBOs). There are 5 locations that the LCCs and CBOs work from. The LCCs are elected by community members and decide where the funds are spent according to a proposal/award system. Funds flow directly to CBOs who oversee implementation of the projects approved by the WWCT.
2	<p>The International Small group & Tree planting Programme (TIST) Programme in Kenya</p> <ol style="list-style-type: none"> <u>Developer (Project Proponent):</u> Clean Air Action Corporation (CAAC) <u>Standard:</u> VCS, CCB <u>Location:</u> Laikipia, Nyeri, Meru and Kirinyaga districts <u>Benefit Distribution:</u>⁴⁹⁶ <ol style="list-style-type: none"> Each project area is composed of a grove of trees planted by a Small Group – an assembly of farmers and the landowner who determine how tree products and carbon revenues are divided among themselves. Under the terms of the project participants’ contracts with their respective Small Group, they receive an annual advance on their potential carbon revenues. Participants are paid \$0.02 per tree per year, based on the number of live trees counted annually. The Small Groups own the trees that they plant and grant the rights to all carbon associated with TIST to the Clean Air Action Corporation (CAAC) under a ‘Carbon Credit Sale Agreement’. Ultimately, the Small Groups will receive 70% of the net carbon revenues.

⁴⁹⁵ See Jeremy T. Freund and Simon Bird, ‘The Kasigau Corridor REDD Project - Phase II The Community Ranches: 3rd Monitoring Report’ (Wildlife Works Carbon LLC 2013) <https://s3.amazonaws.com/CCBA/Projects/The_Kasigau_Corridor_REDD_Project_Phase_II-The_Community_Ranches/Kasigau+Corridor+Phase+II_VCS+CCB+Monitoring+%26+Implementation+Report+v1.15.pdf> accessed 6 July 2013.

⁴⁹⁶ See the ‘CCBA Project Description for TIST Program in Kenya CCB-004 for validation under the Climate, Community and Biodiversity Standard Second Edition’ (The International Small Group and Tree Planting Program 2013) <https://s3.amazonaws.com/CCBA/Projects/TIST_Program_in_Kenya_CCB-004/TIST+KE+PD-CCB-004a+PD+Text+130205.pdf> accessed 6 July 2013.

3	<p>Aberdare Range/Mt. Kenya Small Scale Reforestation Initiative</p> <ol style="list-style-type: none"> <u>Developer:</u> Green Belt Movement <u>Standard:</u> CCB (undergoing validation) <u>Location:</u> North Imenti, Lari, Kinangop, Kieni, Central Imenti Constituency <u>Benefit Distribution:</u>⁴⁹⁷ <ol style="list-style-type: none"> The project area is within Kenya Forest Reserve, and so owned by the Government of Kenya. The Kenya Forest Service has granted the Lari Community Forest Association (CFA), South Kinangop CFA and North Kinangop CFA licenses to manage the projects lands, which includes the rights to the carbon. The Lari CFA, South Kinangop CFA and North Kinangop CFA have granted the Green Belt Movement right to act on their behalf as AR project participant. This project proposes to have the Green Belt Movement act as an intermediary for the CFAs, and as such it would distribute finances obtained through the sale of carbon. The project design document notes that the legal agreement between the CFAs and GBM will be provided during project validation.
4	<p>Forest Again Kakamega Forest</p> <ol style="list-style-type: none"> <u>Developer:</u> Eco2librium <u>Standard:</u> CCB <u>Location:</u> Western Province, Kenya <u>Benefit Distribution:</u>⁴⁹⁸ <ol style="list-style-type: none"> A joint operation has been created between Eco2librium, the Kenya Forest Service, and Muleshi CFA to implement Forest Again. In this agreement, the Muleshi CFA assigned 40% of the carbon rights and resulting proceeds to Eco2librium to fund the project; 20% is assigned to the Kenya Forest Service; the remaining carbon credits are allocated to the Muleshi CFA (Eco2librium will sell carbon credits (at no charge) for the Muleshi CFA). The project proposes to contribute up to 20% of carbon offset revenues to community development projects such as the dissemination of energy efficient stoves, non-timber income projects, zero grazing, tree planting in livelihood zones, education and capacity building, and building of schools and orphanages.
5	<p>Project: Mikoko Pamoja, Mangrove Restoration</p> <ol style="list-style-type: none"> <u>Developer:</u> Earthwatch Institute <u>Standard:</u> Plan Vivo (validation underway) <u>Location:</u> Gazi Bay, Kwale District <u>Benefit Distribution:</u>⁴⁹⁹ <ol style="list-style-type: none"> All mangroves in Kenya are gazetted as government reserve forests, though the CFA in the Gazi area has community user rights. The project has established the Earthwatch/Gazi community committee, which consists of 10 local people (5 men and 5 women) who are responsible for (among other activities) setting community objectives for fundraising and spending.

⁴⁹⁷ 'Climate, Community and Biodiversity Standards Project Design Document Form for Small-Scale Afforestation and Reforestation Project Activities' (Green Belt Movement 2009) <<http://www.climate-standards.org/?s=Aberdare+Range>> accessed 6 July 2013.

⁴⁹⁸ 'Forest Again Compassionate Carbon Offsets Kakamega Forest' (CCBA Project Design Document, Eco2librium, Kenya Forest Service and Kakamega Environmental Education Programme 2009) <https://s3.amazonaws.com/CCBA/Projects/Forest_Again_Kakamega_Forest/Forest_Again_PDD.pdf> accessed 6 July 2013.

6	<p>Mount Elgon Regional Ecosystem Conservation Programme</p> <ul style="list-style-type: none"> a. <u>Developer</u>: Governments of Norway and Sweden b. <u>Standard</u>: None c. <u>Location</u>: Kenya and Uganda d. <u>Benefit Distribution</u>:⁵⁰⁰ <ul style="list-style-type: none"> i. As of 2011, a low percentage of project funds (less than 20%) appeared to be reaching the main beneficiaries (local communities). ii. Funds are requested by National Focal Point Ministries based on work plans of implementing protected area management institutions (PAMIs). Funds are then transferred from the Lake Victoria Basin Commission through the Treasury to the National Focal Point Ministries, who then disburse and monitor funds to the PAMIs. iii. In addition, direct funding was provided to Community Based Organisations (CBOs) through the establishment of Community Revolving Funds (CRFs). Funding of USD 10,000 was disbursed to each of the twenty CBOs early 2010. Each of the CBOs set their own criteria for lending to the CBO members as well as terms and conditions of repayment including interest rates.
7	<p>Project: Treeflights Kenya Planting Project</p> <ul style="list-style-type: none"> a. <u>Developer</u>: Treeflights b. <u>Standard</u>: None c. <u>Location</u>: Coastal Province d. <u>Benefit Distribution</u>:⁵⁰¹ <ul style="list-style-type: none"> i. Cashew trees are distributed to local farmers to plant on their own land. Once trees mature, participants can benefit from the sale of their cashew crop.
8	<p>Project: Enoosupukia Forest Trust Project</p> <ul style="list-style-type: none"> a. <u>Developer</u>: Clinton Climate Initiative b. <u>Standard</u>: None c. <u>Location</u>: Rift Valley Province d. <u>Benefit Distribution</u>:⁵⁰² <ul style="list-style-type: none"> i. Benefit distribution mechanisms are as of yet undeveloped, as this project has not yet been fully implemented.

⁴⁹⁹ 'Plan Vivo Project Idea Note: Mikoko Pamoja Mangrove restoration in Gazi Bay, Kenya' (Earthwatch Institute 2010) <http://www.planvivo.org/wp-content/uploads/gazi_pin_PlanVivo_Kenya.pdf> accessed 6 July 2014.

⁵⁰⁰ 'Mount Elgon Regional Ecosystem Conservation Programme, End Review Report' (LTS International 2011) <<http://www.norway.go.ug/Global/SiteFolders/webkamp/MERECp%20End%20Review%20-%20LTS%20Final%20Report%20-%202020November%202011.pdf>> accessed 6 July 2013.

⁵⁰¹ See the Treeflights website at <<http://www.treeflights.com/>> accessed 6 July 2013.

⁵⁰² See the Clinton Climate Initiative's overview of the project at http://www.clintonfoundation.org/assets/files/ccf/forestry/ccf_overview_kenya_2011.pdf > accessed 6 July 2013.

6 CONCLUSION

Kenya has made significant progress in planning for REDD+ implementation, although many issues remain to be resolved. Strategy options have been generated and an institutional framework for overseeing REDD+ implementation has been established, however, the details of the relationship between existing legal structures relevant to REDD+ implementation and REDD+-specific issues (such as carbon rights and benefit sharing) have not been clarified. The existing legal frameworks surrounding land, environment and anti-corruption could support Kenya's REDD+ implementation, noting that the application of these laws to Kenya's chosen REDD+ strategies needs to be further explored. For example, specific REDD+ interventions might be governed by a selection of the laws described in this section (for example, climate-smart agriculture would involve land and agricultural laws), but the effectiveness of these individual regimes would need to be considered in more detail before concluding whether they were fit for purpose.

At a minimum, outstanding land governance issues need attention – this is important for both controlling land use, and assigning benefits from REDD+. In terms of oversight of REDD+ activities, the devolution laws also need to be considered. If REDD+ activities are to be implemented at the county level, then the role and powers of the county governments with respect to REDD+ interventions needs to be clear (in addition to the role of the national government, and its relationship with the counties). Given that the emerging framework for REDD+ under the UNFCCC requires gender issues to be addressed, the existing challenges around gender equality need to be considered in the context of REDD+ implementation (for example, potentially relevant in the context of land rights and benefit sharing). The extent to which current dispute resolution processes in Kenya could be used to address grievances related to REDD+ implementation (for example, conflicts regarding land use or benefit sharing) in a manner accessible to all stakeholders, including vulnerable groups, should also be explored.

BACKGROUND REPORT 2:

MANAGING PUBLIC REDD+ INVESTMENTS IN KENYA



Rangers in Nairobi National Park, patrolling the borders of the park.

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- 6. **CONCLUSION**

1. INTRODUCTION

This report outlines the current regulatory framework for managing public finance in Kenya, focusing on **how international grants paid to the Government (whether bilateral or multilateral) are managed**. Given that risks related to corruption are present in Kenya, the regulatory framework established to deal with **transparency issues** in public financial management is also addressed.

International finance for REDD+ could potentially adopt the form of debt swaps or other mechanisms, however, this report focuses on grants. This is because current capacity-building work is being funded through grants, and future results-based payments are also likely to involve this kind of financing mechanism. For present purposes, ‘public finance’ is therefore understood to be:

- International donor funds provided for capacity building purposes or as future performance-based payments (from either bilateral or multilateral sources), to either the Government or civil society directly; and
- Internal funds allocated to REDD+-related activities through the national budget of Kenya (for example, existing forest governance programmes will be relevant for REDD+ implementation, and might have a pre-existing budget allocation).

This report provides the following:

- An overview of public investments in REDD+ in Kenya;
- An overview of how international grants are managed;
- An overview of how money from the national budget is allocated and disbursed;
- How grants made directly to civil society are regulated; and
- An outline of the regulatory framework for managing corruption risks.

2. OVERVIEW OF PUBLIC INVESTMENTS IN REDD+ IN KENYA

2.1 What is public REDD+ finance?

REDD+ finance from public sources is one subset of climate finance. It can come from international sources, or internal sources.

In Kenya, climate finance could be managed as either ‘revenue’ (channeled via the National Treasury) or ‘appropriations in aid’ (going directly to a Ministry).⁵⁰³ Kenya’s National Climate Change Action Plan (NCCAP) identifies three primary options for delivering public resources, and as a subset of climate finance it should be possible for REDD+ finance to utilise the same channels:

- 1) scale-up the current project-oriented, development partner-led approach;
- 2) enhance direct flows of international finance to the Government, to be disbursed using existing government structures and mechanisms; and
- 3) create a dedicated national fund for climate-related finance.⁵⁰⁴

It is important to note that climate change funding from international donors in Kenya is integrated into wider sectors such as energy, water, agriculture and forestry.⁵⁰⁵ The majority of climate-financed activities are implemented by the government and parastatals⁵⁰⁶ (in February 2012, approximately two thirds of government funding was utilized by parastatals).⁵⁰⁷ Given that REDD+ cuts across numerous sectors, it would be possible for REDD+ finance to be channeled through existing mechanisms.

REDD+ financing currently exists in Kenya through the engagement of both multilateral and bilateral donors, and could also be funded through the National Budget. These financing mechanisms are discussed below.

⁵⁰³ National Climate Change Action Plan, *Finance: Annex B – Development Partner Climate Change Activities in Kenya* (February 2012), page 10.

⁵⁰⁴ National Climate Change Action Plan, page 86, paragraph 2.

⁵⁰⁵ National Climate Change Action Plan, *Finance: Annex B – Development Partner Climate Change Activities in Kenya* (February 2012), page 6.

⁵⁰⁶ An agency or company owned, or controlled, wholly or partly by a government.

⁵⁰⁷ National Climate Change Action Plan, *Finance: Annex B – Development Partner Climate Change Activities in Kenya* (February 2012), page 10.

2.2 Multilateral investments by public agencies

2.2.1 UN-REDD Programme

The UN-REDD Programme was established in 2008 to assist developing countries build their capacity to participate in a future REDD+ mechanism. The UN-REDD Programme offers two categories of support: (1) financial support to sixteen partner countries who are building REDD National Programmes⁵⁰⁸, and (2) information, networking opportunities and preferences for future funding to another 30 countries.⁵⁰⁹

Kenya is one of several countries receiving non-national programme support, which includes opportunities to engage in unique knowledge-sharing opportunities, observer status at UN-REDD Programme meetings and invitations to submit funding requests for National REDD Programme support in the future.⁵¹⁰ The UN-REDD Programme has provided US \$180,000 to Kenya to carry out the following⁵¹¹:

- Undertake a comprehensive gap analysis of forest-related legal frameworks relevant to REDD+, and provide assistance for drafting REDD+ provisions to clarify and regulate major REDD+ legal issues prioritised by the R-PP (with a focus on land tenure issues);
- Advance the knowledge base and national dialogue on key governance issues for REDD+ in Kenya, particularly anti-corruption, carbon rights and benefit sharing arrangements; and
- Support to workshops and high-level panel discussions on green economy investments in forests.⁵¹²

⁵⁰⁸ Countries with national programmes include (in alphabetical order) Bolivia, Cambodia, Democratic Republic of the Congo (DRC), Ecuador, Indonesia, Nigeria, Panama, Papua New Guinea, Paraguay, the Philippines, Republic of Congo, Solomon Islands, Sri Lanka, Tanzania, Vietnam and Zambia.

⁵⁰⁹ Argentina, Bangladesh, Benin, Bhutan, Cameroon, Central Africa Republic, Chile, Colombia, Costa Rica, Ethiopia, Gabon, Ghana, Guatemala, Guyana, Honduras, Ivory Coast, Kenya, Lao PDR, Malaysia, Mexico, Mongolia, Morocco, Myanmar, Nepal, Pakistan, Peru, South Sudan, Sudan, Suriname and Uganda.

⁵¹⁰ UN-REDD Programme, 'Partner Countries' at http://www.un-redd.org/Partner_Countries/tabid/102663/Default.aspx#, last accessed June 23 2014.

⁵¹¹ Forest Carbon Partnership Facility, 'REDD Readiness Progress Fact Sheet: Country Kenya' at http://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/PDF/June2012/Kenya%20FCPF%20Readiness%20Progress%20Sheet_June%202012.pdf, last accessed March 20 2013.

⁵¹² Workshop was held in November 2012 with the sole objectives of advancing and promoting the role of forestry and REDD+ in overall national economy. A roadmap for implementing recommendations from the workshop has been developed and will be implemented through close collaboration with UNEP and other stakeholders.

UN-REDD funding is managed by the Multi-Partner Trust Fund of the United Nations Development Programme (UNDP), which acts as the administrative interface with donors. The UNDP is considered to be the Administrative Agent⁵¹³ and as such is responsible for:

- Receipt, administration and management of contributions from donors;
- Disbursements of funds to the Participating UN Organisation, in accordance with the instructions of the UN-REDD Programme Policy Board;
- Provide support to the UN-REDD Programme in their reporting functions; and
- Compilation of consolidated narrative and financial reports to the Policy Board through the REDD Secretariat, national steering committees and to donors.⁵¹⁴

Participating organisations of the UN-REDD Programme – the United Nations Food and Agricultural Organisation (FAO), UNDP and United Nations Environment Programme (UNEP) – participate in the design, ongoing programmatic implementation and oversight of UN-REDD National Programmes.⁵¹⁵ Each participating UN Organisation is required to establish a ledger account for the receipt and administration of funds disbursed to it by the UN-REDD Programme. It is envisaged that activities supported by the UN-REDD Programme will take the form of ‘Joint UN Programmes’, which will involve multiple UN organisations collaborating around a mutual goal. The UN Resident Coordinators (responsible for coordination, design overview, programmatic oversight and consolidation of reports) along with national governments, NGOs and non-resident UN agencies are entrusted with the design and implementation of National Programme activities. The UN-REDD Programme has identified seven work areas as country priorities, which also reflect the core technical, implementation and capacity-building competences of the FAO, UNDP and UNEP:

1. Improving guidance on measuring, reporting, verification and monitoring;
2. Increasing engagement of stakeholders in the REDD+ agenda;
3. Increasing transparency and effectiveness in national REDD+ governance;
4. Strengthening national systems for managing REDD+ funding;
5. Promoting the multiple benefits of forests and REDD+;
6. Catalysing shifts to a green economy; and

⁵¹³ The Administrative Agent is entitled to charge a fee of 1% for fund administration and fiduciary responsibilities. Multi-Partner Trust Fund Office Gateway at <http://mptf.undp.org/factsheet/fund/CCF00>, last accessed 12 June 2013.

⁵¹⁴ Multi-Partner Trust Fund Office Gateway at <http://mptf.undp.org/factsheet/fund/CCF00>, last accessed 12 June 2014.

⁵¹⁵ *Ibid*; further, participating UN Organisations are entitled to deduct their indirect costs on contributions received according to their own regulations and rules, taking into account the size and complexity of the particular programme.

7. Sharing knowledge to support REDD+ efforts at all levels.⁵¹⁶

2.2.2 Forest Carbon Partnership Facility (FCPF)

The Forest Carbon Partnership Facility (FCPF) focuses on building capacity for REDD+ activities in numerous developing countries and tests some pilot programs on performance-based incentive payments schemes.⁵¹⁷ The World Bank's FCPF supports REDD+ demonstration activities through two separate mechanisms: the Readiness Fund and the Carbon Fund.⁵¹⁸ Kenya is a *REDD+ Country Participant* of the FCPF, having entered into a Participation Agreement with FCPF to participate in the Readiness Fund. A FCPF Formulation Grant for \$200,000 was disbursed to Kenya in September 2010.⁵¹⁹ This money was given to assist Kenya in developing a Readiness Plan; the conditions of the grant agreement in Article 2 required the:

- a. Preparation of an assessment of land use and forest policies and governance in the forestry sector;
- b. Setting up of a multi-stakeholder national REDD working group responsible for following up on REDD activities;
- c. Preparation of a consultation and outreach plan to be implemented during the implementation phase of the Readiness Plan, including conduct of consultation among key stakeholders;
- d. Preparation of terms of reference for the development of national REDD strategy;
- e. Preparation of terms of reference for the design of a national REDD implementation framework;

⁵¹⁶ Multi-Partner Trust Fund Office Gateway at <http://mptf.undp.org/factsheet/fund/CCF00>, last accessed 12 June 2014.

⁵¹⁷ Forest Carbon Partnership Facility (FCPF), *Information Memorandum 2008* at http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/FCPF_Info_Memo_06-13-08.pdf, last accessed 10 January 2013.

⁵¹⁸ Forest Carbon Partnership Facility (FCPF), *Information Memorandum 2008* at http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/FCPF_Info_Memo_06-13-08.pdf, last accessed 10 January 2013, states that, 'Under the [readiness] mechanism, the [FCPF] intends to assist developing tropical and sub-tropical countries to prepare themselves to participate in a future, large-scale system of positive incentives for REDD. This will include, but is not limited to: (i) determining a national reference scenario based on historical emissions from deforestation and degradation and, where needed and feasible, an assessment of how these emissions would evolve in the future; (ii) preparing a national REDD strategy; and (iii) establishing a monitoring system for emissions from deforestation and forest degradation.'

⁵¹⁹ A copy of the grant agreement is available on the FCPF website. See, Forest Carbon Partnership Facility (FCPF), Copy of the 'Grant Agreement for Readiness Plan: Readiness Fund of the FCPF, Grant No. TF094485 Confirmation Receipt' at https://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/PDF/Nov2009/Kenya_a_FCPF_R-PP_Formulation_Grant_Agreement.pdf, last accessed April 5 2013.

- f. Preparation of a social and environmental analysis methodology and terms of reference for carrying out the analysis;
- g. Assessment of the investment and capacity building needs for the implementation of the national REDD strategy;
- h. Preparation of terms of reference for the development of the reference scenario for emissions from deforestation and forest degradation; and
- i. Preparation of terms of reference for establishing a monitoring, reporting and verification system for changes in forest cover and changes in carbon stocks at the national level.

The Formulation Grant was entered into between the International Bank for Reconstruction and Development (IBRD) and the Kenyan Office of Deputy Prime Minister and Ministry of Finance. The grant agreement in Article 1 stipulates that the ‘Standard Conditions for Grants Made by the World Bank Out of Various Funds dated July 1, 2008’ (hereafter, the “Standard Conditions”)⁵²⁰ constitute part of this agreement. The Standard Conditions require that the project is carried out with due diligence and efficiency in conformity with appropriate administrative, technical, financial, economic, environmental social standards and practices.⁵²¹ Article 2 also sets out a number of requirements concerning record maintenance⁵²², project monitoring⁵²³ and financial management⁵²⁴. The Formulation Grant requires the delivery of a project report and completion report in accordance with Article 2 Standard Conditions.

Currently, Kenya is in the process of preparing a FCPF Readiness Grant. The Kenyan Readiness Preparation Proposal (R-PP) identifies the following four activities as prioritised REDD+ initiatives:

1. Reducing pressure to clear forests for agriculture and other uses;
2. Promoting sustainable utilisation of forests;
3. improving governance in the forest sector; and

⁵²⁰ The World Bank, ‘Standard Conditions for Grants Made by the World Bank Out of Various Funds’ (July 2010), available at <http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/STDGC-English-08.pdf>, last accessed April 01 2013.

⁵²¹ *Ibid.*

⁵²² *Ibid.* §2.05 allows for the World Bank to request a copy of any project document up to 2 years after the closing date of the agreement.

⁵²³ *Ibid.* §2.06 creates an obligation for the recipient to maintain policies and procedures adequate to monitor and evaluate the project.

⁵²⁴ *Ibid.* §2.07 requires for a financial management system to be maintained and financial statements be prepared in accordance with accounting standards acceptable to the World Bank, both in a manner adequate to reflect the operations, resources and expenditures related to the Project.

4. and enhancement of carbon stocks.⁵²⁵

This ‘readiness’ work in Kenya will start with a Strategic Environmental and Social Assessment (SESA) in response to existing tensions and conflicts between the Government and Kenya Forest Service (KFS) and Indigenous Groups.

According to Kenya’s June 2013 progress update to the FCPF, the REDD+ readiness work in Kenya is also linked closely to the Natural Resources Management Project (NRMP).⁵²⁶ The World Bank has funded the NRMP US \$78 million,⁵²⁷ of which \$1.8 million has been targeted for priority REDD+ Readiness activities.⁵²⁸ The development objective of the NRMP is to enhance the institutional capacity to manage water and forest resources, reduce the incidence and severity of water shocks (such as drought, floods and water shortage in river catchments), and improve the livelihoods of communities in the co-management of water and forest resources.⁵²⁹ The NRMP project has made start up funding available to the Ministry of Forestry and Wildlife (MoFW)⁵³⁰ to launch the aforementioned SESA process.⁵³¹

2.3 Bilateral investments by public agencies

A number of significant forest conservation and restoration programmes in Kenya are financed through bilateral agreements. These include:

- The Miti Mingi Maisha Bora Programme, financed through a bilateral agreement between the Government of Finland and the Government of Kenya;

⁵²⁵ Kenya Forest Service, *REDD+ Readiness Preparation Proposal Forest Carbon Revised REDD Readiness Preparation Proposal Kenya: Submitted to Forest Carbon Partnership Facility* (August 2010), page 6.

⁵²⁶ Kenya REDD+ Readiness Progress Fact Sheet June 2013, <http://www.forestcarbonpartnership.org/sites/fcp/files/2013/june2013/Kenya%20progress%20Sheet%20June%20clean%202013_1.pdf> accessed 30 June 2013.

⁵²⁷ See the World Bank’s overview of the project at <<http://www.worldbank.org/projects/P095050/kenya-natural-resource-management-project?lang=en>>.

⁵²⁸ Kenya REDD+ Readiness Progress Fact Sheet June 2013, <http://www.forestcarbonpartnership.org/sites/fcp/files/2013/june2013/Kenya%20progress%20Sheet%20June%20clean%202013_1.pdf> accessed 30 June 2013.

⁵²⁹ The World Bank, ‘Kenya-Natural Resource Management Project’ (May 2006) at <http://www.worldbank.org/projects/P095050/kenya-natural-resource-management-project?lang=en>, last accessed April 28 2013.

⁵³⁰ Due to the reorganisation of many Kenyan ministries, the MoFW is now known as the Ministry of Environment, Water and Natural Resources.

⁵³¹ Kenya REDD+ Readiness Progress Fact Sheet June 2013, <http://www.forestcarbonpartnership.org/sites/fcp/files/2013/june2013/Kenya%20progress%20Sheet%20June%20clean%202013_1.pdf> accessed 30 June 2013.

- The Forest Preservation Programme, financed through a bilateral agreement between the Government of Japan and Government of Kenya;
- The Laikipia Natural Resource Management and Biodiversity Conservation Program, the International Small Group Tree Planting Program, and ProMara, financed by the United States Agency for International Development and Government of Kenya; and
- The rehabilitation of Meru National Park and Marsabit National Park, financed by the French Development Agency and Government of Kenya.

2.3.1 *Governments of Finland and Kenya*

The bilaterally funded *Miti Mingi Maisha Bora*⁵³² Programme is set to span the 2009 to 2014 period and has a budget of €22.7 million. The programme aims to:

- (1) provide support to forest sector policy, regulation and coordination processes;
- (2) provide support to implementation of Kenya Forest Service institutional change processes;
- (3) provide support to management and utilisation of gazetted forest reserves; and
- (4) improve livelihoods in arid and semi-arid lands through sustainable production and trade in bioenergy and other forest products.⁵³³

Kenya's Ministry of Forestry and Wildlife⁵³⁴ is primarily responsible for the implementation of the first objective listed above; the second and third are primarily implemented by the Kenya Forest Service; and the fourth is jointly implemented by the Kenya Forest Service and Kenya Forestry Research Institute (KEFRI).⁵³⁵

⁵³² The translation of this phrase is 'many trees, good life.'

⁵³³ The Government of Finland is contributing €18.6 million, and the Government of Kenya is contributing €4.1 million. Embassy of Finland - Nairobi, 'Miti Mingi Maisha Bora (MMMB) – Support to the Forest Sector Reform in Kenya' <<http://www.finland.or.ke/public/default.aspx?nodeid=46392&contentlan=2&culture=en-US>> accessed 30 June 2013.

⁵³⁴ Due to the reorganisation of many Kenyan ministries, the MoFW is now known as the Ministry of Environment, Water and Natural Resources.

⁵³⁵ The Government of Finland is contributing €18.6 million, and the Government of Kenya is contributing €4.1 million. Embassy of Finland - Nairobi, 'Miti Mingi Maisha Bora (MMMB) – Support to the Forest Sector Reform in Kenya' <<http://www.finland.or.ke/public/default.aspx?nodeid=46392&contentlan=2&culture=en-US>> accessed 30 June 2013.

2.3.2 *Governments of Japan and Kenya*

As a part of Japan's 'Fast-start Finance'⁵³⁶ funding to developing countries, the Japanese International Cooperation Agency (JICA) financed the Forest Preservation Programme in Kenya through a contribution of \$9.57 million (USD).⁵³⁷ This programme provides 'infrastructural support' to enable the Kenya Forest Service to 'tackle both forest destruction and climate change',⁵³⁸ and seeks to 'enhance capability within the forestry sector in Kenya to carry out forest resource assessment and monitoring in support of REDD+ efforts'.⁵³⁹

2.3.3 *Governments of United States and Kenya*

The United States Agency for International Development (USAID) has partnered with the Government of Kenya to provide funds for a number of environment projects in the country.⁵⁴⁰ In 2012, the USAID/Kenya budget for environment projects totaled \$12 million (USD).⁵⁴¹ Projects relevant to REDD+, forest management, conservation and restoration in Kenya include:

- Laikipia Natural Resource Management and Biodiversity Conservation Program: This program commits \$US 2.4 million to efforts like the Forest Management Program – a program implemented by the Laikipia Wildlife Forum⁵⁴² that 'builds capacity among forest users to actively participate in the management of their land through development of community organizations that design and implement forest management plans'.⁵⁴³

⁵³⁶ See more about Fast-Start Finance at http://unfccc.int/cooperation_support/financial_mechanism/fast_start_finance/items/5646.php.

⁵³⁷ As of 31 December 2012. See UNFCCC, 'Projects/Programs of Japan's Fast-Start Finance for Developing Countries up to 2012' http://unfccc.int/files/documentation/submissions_from_parties/application/pdf/cop_fsf_japan_annex_2013.pdf accessed 21 July 2013.

⁵³⁸ Kenya Forest Service, Annual Report 2010/2011, at 53, <http://www.kenyaforestservice.org/documents/2012%20annual%20report%20final%20email-%2025th%20Oct%202012.pdf> accessed 21 July 2013.

⁵³⁹ Forest Carbon Partnership Facility, 'REDD Readiness Project Fact Sheet: Kenya, March 2012' 3 http://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/Kenya%20FCPF%20REDD%20Readiness%20Progress%20Sheet_March%202012.pdf accessed 21 July 2013.

⁵⁴⁰ To see a list of current environment projects between USAID and Kenya, see USAID, 'Environment Projects' <http://kenya.usaid.gov/programs/environment/projects> accessed 19 July 2013. See past environment projects at USAID, 'Archived Environment Projects' <http://kenya.usaid.gov/programs/environment/projects/archive> accessed 19 July 2013.

⁵⁴¹ USAID supplied roughly \$221 million (USD) in total in 2012. USAID, 'Budget for USAID Kenya' <http://kenya.usaid.gov/budget-usaid-kenya> accessed 19 July 2013.

⁵⁴² Learn more about the Kenyan-based Laikipia Wildlife Forum at <http://www.laikipia.org/>.

⁵⁴³ USAID, 'Laikipia Natural Resource Management and Biodiversity Conservation Program' <http://kenya.usaid.gov/programs/environment/1229> accessed 19 July 2013.

- TIST: The International Small Group Tree Planting Program: Spanning the 2006-2014 period and implemented by the Institute for Environmental Innovation,⁵⁴⁴ \$US 7.52 million has been dedicated to this program to support a Participatory Forest Management Plan and provide farmers with an annual stipend for each live tree they plant as well access to profits resulting from the sale of carbon credits.⁵⁴⁵
- ProMara: Focused on the Mau Forest Complex in Kenya, this approximately \$US 7 million project seeks to improve the livelihoods of local people in an environmentally-friendly manner, raise public awareness around land rights, sustainable forestry and agriculture, and 'serve as a test-case for applying the National Land Policy.'⁵⁴⁶

2.3.4 *Governments of France and Kenya*

Over the past 10 years, the *Agence Française de Développement's* (AFD, or French Development Agency) financing has reached approximately €800 million in Kenya. In partnership with the *Fonds Français pour l'Environnement Mondial* (FFEM, or French Global Environment Facility),⁵⁴⁷ AFD provided an €8.2 million loan, complimented by an €1.86 million grant from the FFEM to the Kenya Wildlife Service, to aid in the rehabilitation of the Meru National Park.⁵⁴⁸ A similar rehabilitation is now underway in the Marsabit National Park,⁵⁴⁹ which is jointly funded by the AFD (€8 million) and Government of Kenya, with the project costing an estimated one billion shillings.⁵⁵⁰ The funds will be predominantly used for ecosystem conservation, natural resource management and supporting local development.⁵⁵¹

⁵⁴⁴ Learn more about the Institute for Environmental Innovation at <<http://www.i4ei.org/>>.

⁵⁴⁵ USAID, 'TIST: The International Small Group Tree Planting Program' <<http://kenya.usaid.gov/programs/environment/1573>> accessed 19 July 2013.

⁵⁴⁶ USAID, 'PROMARA: USAID's Mau Forest Initiative' <<http://kenya.usaid.gov/programs/environment/395>> accessed 19 July 2013.

⁵⁴⁷ The FFEM was established by the French Government in 1994. See FFEM, 'The FFEM' <<http://www.ffem.fr/lang/en/accueil>> accessed 19 July 2013.

⁵⁴⁸ AFD, 'Sustainable Tourism in Meru National Park' <http://www.afd.fr/webdav/site/afd/shared/ELEMENTS_COMMUNS/infos-projets/Telechargements/Parc-national-Meru-Kenya-en.pdf> accessed 19 July 2013.

⁵⁴⁹ AFD, 'AFD in Kenya: Promoting Strong and Sustainable Growth' <<http://www.afd.fr/lang/en/home/pays/afrique/geo-afr/kenya/afd-kenya>> accessed 19 July 2013.

⁵⁵⁰ Kenya Ministry of Forestry and Wildlife, 'One Billion for Marsabit Wildlife Project' <<http://www.forestryandwildlife.go.ke/?p=1619>> accessed 19 July 2013.

⁵⁵¹ *Ibid.*

2.4 Funding from the national budget

The National Climate Change Action Plan (NCCAP) estimates that as of February 2012 the Government of Kenya finances a variety of climate change activities using domestic resources (amounting to KSh 36.9 billion) because climate-related funding from the public sector is integrated into wider sectors, such as water, agriculture and forestry.⁵⁵² For example, 55.4 billion shillings were allocated from the national budget for environment, water, irrigation and housing (during the 2013-2014 period).⁵⁵³ Different counties allocated different sums of money to the environment and natural resources.

Moving forward, it is unclear what has been or will be allocated for environmental issues linked to REDD+ (such as forestry and climate change),⁵⁵⁴ or whether specific REDD+ interventions will be supported by the national budget.

One option for the Government of Kenya to **consider is the possibility of co-funding REDD+ initiatives with international donors**, similar to the initiative in the Marsabit National Park jointly funded by the AFD (French Development Agency) and the Government of Kenya [as discussed at 2.3.4 above]. Given that REDD+ implementation will cut across several sectors and is expected to have flow-on effects for natural resource management more generally, supplementing donor investments with internal revenue in this manner could provide a productive public investment strategy.



Public access road joining villages to a main highway (Great Rift Valley region).

⁵⁵² National Climate Change Action Plan, *Finance – Annex C: Government of Kenya Climate Change Activities* (February 2012), page 3.

⁵⁵³ The summary of the budget as well as the full text can be found at www.treasury.go.ke.

⁵⁵⁴ Please see County budgets 2013/2014 available at the Commission on Revenue Allocation website or at www.icj-kenya.org.

3. MANAGING PUBLIC FINANCE FOR REDD+ IN KENYA

3.1 Managing grants paid to the Government of Kenya

All public funding in Kenya is managed and regulated under the Consolidated Fund. All money raised or received by or on behalf of the national government is paid into this fund, except money that has been set aside by an Act of Parliament and will be paid into another public fund established for a ‘special purpose’ or is to be used to cover specified State expenses.⁵⁵⁵ For REDD+ implementation, it might be necessary to disburse REDD+ finance to the County Governments (given the Constitutional requirement for equitable division of revenue within Kenya’s devolved government structure) via a formal mechanism. In addition, general rules regarding financial management and administration apply.

These issues are discussed, in turn, below.

3.1.1 *Key laws applicable to the management of grants*

3.1.1.1 *Constitution*

3.1.1.1a Consolidated Fund

Under Article 296, a **Consolidated Fund** is established into which all money that is raised by the government is remitted; it is also important to note that the Constitution allows for the creation of another type of fund for a special purpose⁵⁵⁶ (discussed next). The funds that are taken to the consolidated fund include grants from donors. The Constitution also states that withdrawals from the Consolidated Fund requires an Appropriation Act except in exceptional circumstances where the Appropriation Act for a financial year has not been assented to by the beginning of the relevant financial year (and is not likely to be assented to). In such a situation, the National Assembly may authorise the withdrawal of money from the Consolidated Fund.⁵⁵⁷

⁵⁵⁵ See Article 206 (1)(a) and (b) of the Constitution. See also Section 17 of the Public Finance Management Act, No. 18 of 2012.

⁵⁵⁶ Article 208 of the Constitution establishes a Contingencies Fund. The fund caters for urgent and unforeseen expenditure for which there is no authority. Section 22 of the Public Finance Management Act No. 18 of 2012 gives examples of urgent and unforeseen circumstances.

⁵⁵⁷ Article 222(1), Constitution of Kenya.

When it comes to specific funds that have been allocated for projects, some of which may coincide with REDD+ implementation activities, the government through the relevant Ministry may allocate funds. These funds, however, have to be approved by Parliament.

The general principles of public financing can be said to indirectly apply to donor funding. This is because, by implication, the principles and provisions of the Constitution apply to all money collected and/or received by the Government. This means that the following principles should apply to the management of donor funds:

- openness and accountability;
- equitable sharing of finances between county and national governments;
- the use of public money in a prudent and responsible way; and
- ensuring that fiscal reporting is clear.⁵⁵⁸

3.1.1.1b Other ‘special purpose’ funds

As noted above, the Constitution allows for the creation of ‘special purpose’ funds [see Article 206 (1)(a) and (b)]. All money raised or received by or on behalf of the national government is paid into the Consolidated Fund, however, an Act of Parliament can exclude some money from being paid into the Consolidated Fund and, instead, direct it to ‘special purpose’ funds.

An example of a ‘special purpose’ fund could be a dedicated REDD+ fund resembling the prospective ‘Kenya Climate Fund’ envisaged in the National Climate Change Action Plan⁵⁵⁹ (NCCAP). The NCCAP states that a ‘Kenya Climate Fund’⁵⁶⁰ would have a number of advantages⁵⁶¹ (including clarity of purpose, facilitation of the development of Kenyan expertise and transparency on climate financing, and opportunities for alignment with national priorities, to a greater extent than the current project-based, donor-led approach).⁵⁶²

⁵⁵⁸ Article 201 of the Constitution of Kenya 2010.

⁵⁵⁹ National Climate Change Action Plan, page 84.

⁵⁶⁰ National Climate Change Action Plan, page 86: paragraph 3: The National Climate Change Action Plan suggests that a robust “Kenya Climate Fund” would have a number of key features: a focus on both mitigation and adaptation activities; a structure that would evolve in phases, beginning with grant financing and moving to a wider range of financial instruments; and, an aim to catalyse private sector investment by interacting with other financial intermediaries (such as commercial banks); and, a governance structure that would allow broad and equal representation from the government, civil society and the private sector (which would lead to improved capacity of the Government to absorb international public climate finance).

⁵⁶¹ National Climate Change Action Plan, page 86: paragraph 4.

⁵⁶² Absorptive capacity is identified as a key issue for public financing and this is provided as a justification for establishing a dedicated climate fund. National Climate Change Action Plan, page 87 @7.2.3.

3.1.1.2 *The Public Finance Management Act*

This is an Act of Parliament that provides for the effective management of public finances by both the national and county governments⁵⁶³. The Act defines key elements such as development partner, grants, public money, grant recipient, receivers and collectors of National Government Revenue and National Treasury⁵⁶⁴.

Public money is defined to include all money that comes into possession of, or is distributed by, a national government entity; money raised by a private body by virtue of a statutory authority; money held by national government entities in trust for third parties; and, any money that can generate liabilities for the Government. This Act establishes the National Treasury to administer such public funds.⁵⁶⁵ It does so through formulation, implementation and monitoring of micro-economic policies involving expenditure and revenue, as well as other relevant economic and financial policies.⁵⁶⁶ In addition, it designs and prescribes an efficient financial management system for the national and county governments to ensure transparent financial management and standard financial reporting as contemplated by Article 226 of the Constitution.⁵⁶⁷

A **development partner** means a foreign government, international organisations of States, or others that are prescribed by regulations under the Act.⁵⁶⁸ By implication, this means that development partners can constitute both multilateral and bilateral donors. Section 47 and 48 stipulate the conditions for receiving grants and donations by the national government as well as regulations on grant administration. Article 47 (a) of the Act defines a donation as a gift or a contribution, and a grant is defined as:

“...financial or other assistance by a development partner which is not repayable and –

- (i) under which public money is paid to or used by a grant recipient;
- (ii) which is intended to finance or facilitate the development of projects or delivery of services or otherwise assist the grant recipient to achieve goals that are consistent with the policy objectives of the national government; and

⁵⁶³ Section 1 of the Public Finance Management Act No. 18 of 2012.

⁵⁶⁴ Section 2 of the Public Finance Management Act No. 18 of 2012.

⁵⁶⁵ Section 11 of the Public Finance Management Act No. 18 of 2012.

⁵⁶⁶ Section 12(a) and (b) Public Finance Management Act No. 18 of 2012.

⁵⁶⁷ Section 12(e) and (f) Public Finance Management Act No. 18 of 2012.

⁵⁶⁸ Section 2 of the Public Finance Management Act No. 18 of 2012.

- (iii) under which the grant recipient is required to act in accordance with any terms or conditions specified in a grant agreement".⁵⁶⁹

The National Government or a National Government Entity can receive a grant or donation from a development partner⁵⁷⁰ with the approval of the Cabinet Secretary in charge of Finance, therefore, as soon as the recipient receives the funds, the Cabinet Secretary must be notified.⁵⁷¹ The recipient of the grant or donation should thereafter record the amount or value of the grant or donation in its accounts.⁵⁷²

Section 48 (1) of the Public Finance Management Act No. 18 of 2012 provides for the development of regulations on grant administration which shall be approved by Parliament. The said regulations shall provide for the administration, control and management of grants, including:

- "(a) procedures to ensure that grants are spent on the basis of the integrated national development plan;
- (b) procedures for the allocation and disbursement of the grants;
- (c) requiring that grants be used only to finance programmes within the integrated development plan;
- (d) the publication of transparent criteria for the allocation of grants;
- (e) requiring specific terms and conditions in agreements to which grant recipients are subjected;
- (f) procedures for the budgeting, financial management, accounting and reporting of grants by grants recipients;
- (g) procedures under which a third party may be authorised to receive, control or pay public money as a grant; and
- (h) measures to ensure that a third party authorised to receive, control or pay public money as a grant, or responsible for any other aspect of administration of a grant, is subject to the same obligations as a public officer under this Act."⁵⁷³

In addition, the said regulations shall include measures to ensure public disclosure, accountability and participation in relation to the grants, including:

- "(a) timely public disclosure to intended beneficiaries of the allocation and disbursement of grants to grant recipients;
- (b) timely public disclosure by grant recipients to intended beneficiaries of expenditure and performance achieved in relation to the grant;
- (c) measures to facilitate intended beneficiaries to participate in the design and management of projects or public services financed by the grant;
- (d) measures allowing intended beneficiaries to report instances of non-compliance with the regulations or grant agreement;
- (e) sanctions to be imposed on grant recipients for non-compliance with grant conditions by any grant recipient; and
- (f) obligations of a public officer or third party authorised to receive, control or pay public money as grants."⁵⁷⁴

⁵⁶⁹ Section 47 (1)(b) of the Public Finance Management Act No. 18 of 2012.

⁵⁷⁰ Section 2 of the Public Finance Management Act No. 18 of 2012 defines a development partner as "a foreign government, an international organisation of states or any other organization prescribed by regulations for the purpose of this Act."

⁵⁷¹ See section 47(4) and (5) of the Public Finance Management Act, No. 18 of 2012.

⁵⁷² See section 47(8) of the Public Finance Management Act, No. 18 of 2012.

⁵⁷³ Section 48(1) of the Public Finance Management Act, No. 18 of 2012.

3.1.1.3 *The County Government Public Finance Management Transition Act 2003*⁵⁷⁵

The County Government Public Finance Management Transition Act was created pursuant to Section 15, Schedule 6 of the Constitution to establish Transition County Authority treasuries as the key management bodies for county revenues in the devolved government.

The act also provides for the modalities of the county budgets.

3.1.2 *Allocating public monies between the national and county governments*

Article 201 of the Constitution outlines the principles that guide all aspects of public finance. One of these principles is that any revenue raised nationally is to be shared equitably among national and county governments.⁵⁷⁶ Article 215(1) of the Constitution establishes the Commission on Revenue Allocation. The main function of this commission is to make recommendations concerning the basis for the equitable sharing of revenue raised by the national government between the national and county governments as well as among the county governments.⁵⁷⁷

At least two months before the end of each financial year, the Division of Revenue Bill and the County Allocation of Revenue Bill are introduced in Parliament. The Division of Revenue Bill divides revenue raised by national government among the national and county levels of government while the County Allocation of Revenue Bill divides among the counties the revenue allocated to the counties.⁵⁷⁸ If there is any deviation from the recommendations of the Commission on Revenue Allocation, an explanation for each deviation should accompany the Bill(s).⁵⁷⁹ In addition, the Cabinet Secretary responsible for finance submits to the National Assembly estimates of the revenue and expenditure of the national government for the next financial year to be tabled in the National Assembly.⁵⁸⁰ The estimates are first discussed by a committee of the Assembly who make necessary

⁵⁷⁴ Section 48(2) of the Public Finance Management Act, No. 18 of 2012. The said regulations are yet to be developed.

⁵⁷⁵ The County Governments Public Finance Management Transition Act, No 8 of 2013.

⁵⁷⁶ Article 201(b)(i) and Article 202(1).

⁵⁷⁷ See Article 216(1) of the Constitution.

⁵⁷⁸ Article 218. The revenue raised by the national government in respect of the financial year 2013/2014 is divided among the national and county governments in accordance with the Division of Revenue Act, No. 31 of 2013.

⁵⁷⁹ See Article 218(2)(c).

⁵⁸⁰ Article 221 of the Constitution.

recommendations to the Assembly.⁵⁸¹ The committee is required to get representations from the public and consider the same in making its recommendations.⁵⁸² Once Parliament approves the estimates, they are included in an Appropriation Bill. The said Bill is thereafter introduced into the National Assembly to authorize the withdrawal from the Consolidated Fund.⁵⁸³

Devolved public funding mechanisms, or ‘sub-sovereign finance schemes’ have been established by both Acts of Parliament or presidential/ministerial executive orders and gazette notices.⁵⁸⁴ Devolved public funding mechanisms include the (i) Community Development Trust Fund, (ii) Poverty Alleviation Fund, (iii) Youth Enterprise Development Fund, (iv) Women Enterprise Development Fund, and the (v) Water Services Trust Fund.

How REDD+ revenue (whether in the form of grants or future performance-based payments) will be divided between the national government and the county governments involved in REDD+ implementation needs to be clarified, particularly where responsibilities for natural resource management have been devolved. **County governments will be an important stakeholder in REDD+ implementation, and choices regarding what is ‘equitable’ in this context (per Article 201 of the Constitution) will need to be made.**

3.1.3 Oversight of fund management

The Controller of Budget and the Auditor-General provide oversight of public funds. A person appointed to the Office of the Controller of Budget shall hold Office for a period of eight years and shall not be eligible for re-appointment.⁵⁸⁵ The function of the Controller of Budget is to oversee the implementation of the budgets of the national and county governments by authorising withdrawals from public funds.⁵⁸⁶

A person appointed to the Office of the Auditor-General shall hold office for a period of 8 years and shall not be eligible for re-appointment.⁵⁸⁷ The Auditor-General carries out an audit of the accounts of

⁵⁸¹ Article 221(4) of the Constitution.

⁵⁸² Article 221(5) of the Constitution.

⁵⁸³ Article 221(6) of the Constitution. For purposes of the 2013/2014 financial year, the Appropriation Act 2013 No.33 of 2013 authorises the issue of a sum of money out of the Consolidated Fund.

⁵⁸⁴ National Climate Change Action Plan, *Finance: Annex C – Government of Kenya Climate Change Activities* February 2012), page 10.

⁵⁸⁵ Article 228(3) of the Constitution.

⁵⁸⁶ Article 228(4) of the Constitution.

⁵⁸⁷ Article 229(3) of the Constitution.

national and county governments; commissions and independent offices established by the Constitution; National Assembly, Senate and county assemblies; political parties funded from public funds; and any entity funded from public funds 6 months after the end of each financial year. The purpose of the audit is to confirm whether or not public money has been applied lawfully and in an effective way.⁵⁸⁸ The audit reports are thereafter submitted to Parliament or relevant County Assembly for debate and appropriate action.⁵⁸⁹

3.2 Allocating money to REDD+ from Kenya's national budget

3.2.1 *How funds are allocated from the national budget*

It is possible and usual for the Government of Kenya to allocate funds for activities that serve various national interests, and these are paid from the Consolidated Fund. While funding agreements related to REDD+ activities (such as an agreement specifying the activities to be funded and funding modalities⁵⁹⁰) could be entered into with range of government bodies (for example, with the Ministry of Finance or Environment), all funds must first pass through the Consolidated Fund and then be disbursed to the relevant Ministry by an Appropriation Act.

The Government Contracts Act Chapter 25 states in Section 2 that although the Constitution outlines that appropriation occurs during the Annual Appropriation Bill,⁵⁹¹ it is recognised that some expenditure may be authorised before the annual budget is passed⁵⁹² or that some supplementary appropriation⁵⁹³ may be necessary in certain instances. Supplementary appropriation may be used to inform Parliament of the authorisation by the Cabinet Secretary.⁵⁹⁴ The recipient of the grant must record the amount or value of the grant in its books of account and must administer the grant or donation using the government financial accounting and auditing law and administrative practices.⁵⁹⁵ The Act foresees the creation of regulation outlining the procedures to ensure that grants are

⁵⁸⁸ Article 229(6) of the Constitution.

⁵⁸⁹ Article 229(7) and (8) of the Constitution.

⁵⁹⁰ Regarding capacity to enter into a contract, the Government Contracts Act (Chapter 25 of the Laws of Kenya) states that the contract can be signed by the Accounting Officer, the Receiver of the Revenue of the Ministry for the Department of the Government concerned, or by such Public Officer duly authorised in writing by an Accounting Officer. Sections 47 and 76 of the Public Finance Management Act also speak to this point.

⁵⁹¹ Constitution of Kenya 2010, s221.

⁵⁹² Constitution of Kenya 2010, s222.

⁵⁹³ Constitution of Kenya 2010, s223.

⁵⁹⁴ The Public Finance Management Act, 2012 s47(7).

⁵⁹⁵ Section 47 (8) and (9) of the Public Finance Management Act, No. 18 of 2012.

integrated into national development plans and procedures or the allocation and disbursement of grants.⁵⁹⁶

3.2.2 *Financial management in the forest sector*

The National Environment Policy⁵⁹⁷ outlines funding arrangements in objective 17, which aim to:

1. Provide adequate resources for forest management and conservation and tree planting through the annual Government budgetary allocation;
2. Broaden the revenue and funding base to ensure the financial sustainability of forest management and conservation of all types of forests;
3. Increase revenue from the improved management of gazetted plantations;
4. Promote the participation of the private sector and enhance revenue flows from the forest concessions, timber licences and other contractual agreements based on management agreements and performance and compliance indicators;
5. Mobilise resources from multilateral development agencies, development partners, private sector and foundation to support forest conservation; and
6. Negotiate climate change, watershed protection and biodiversity conservation funding agreements at the regional and international level.

The Forests Act⁵⁹⁸ provides guidance on forest financial management. Section 6-8 of this Forests Act create the Forest Board which is responsible for managing, controlling and administering the assets of Kenya Forest Service ('KFS').⁵⁹⁹ The Forest Board is composed of a number of persons: the Permanent Secretary from the Ministries responsible for Forestry, Water and Finance; Local Authorities; the Director of Kenyan Wildlife Service; the Director-General of the National Environmental Management Authority; the Director of Kenyan Forestry Research Institute; the Director of Kenya Forest Service and eight other persons appointed by the Minister of the Act.⁶⁰⁰ Section 14 defines the funds of KFS as consisting of all money or assets accruing in or vesting in the KFS by an act or approval of parliament. The Forests Act requires the KFS to produce an annual

⁵⁹⁶ Section 48 (1(a) and (b) of the Public Finance Management Act, No. 18 of 2012.

⁵⁹⁷ Ministry of Environment and Natural Resources, *The National Environment Policy: Revised Draft 4* April 2012). Available at http://www.thereddesk.org/sites/default/files/national-environment-policy-may-2012_1.pdf, accessed April 19 2013.

⁵⁹⁸ Forests Act 2005.

⁵⁹⁹ Forests Act 2005, s8 (1)(b).

⁶⁰⁰ Forests Act 2005, s6.

statement of income and expenditure and an annual statement of assets and liabilities on the last day of the year.⁶⁰¹

There is a National Forestry (Conservation and Management) Bill 2014 currently in development. This Bill creates a new administrative body referred to as the Department for Responsible Forestry which would be given a legislative and policy mandate for a range of issues connected with sustainable forest management.⁶⁰² The Bill intends to preserve the existing KFS and the Board functions as outlined in the Forests Act.

4 MANAGING GRANTS PAID TO CIVIL SOCIETY

Donors may wish to pay a civil society organisation (such as a non-governmental organisation, or NGO) directly for the purpose of implementing REDD+ activities. This section addresses the following issues:

- 1) The legal structure of recipient;
- 2) The issue of government oversight of payments made by development partners/donors directly to civil society/individuals;
- 3) Integrity of recipient deposit account; and
- 4) Rights to reclaim funds in the event that donor-recipient contract has been breached.

4.1 Legal structure of recipient

There is no specified legal structure of the recipient. Since the beginning of donor funding in Kenya, grants have been made to various organisations which include research institutions, universities, NGOs and so on. Examples of the legal structures used for these institutions include:

- Establishment under the NGO Act;
- Charitable organisation;
- Companies limited by guarantee under the Companies Act; or
- an Act establishing an organisation (such as the Kenyatta University Act).

The key regulations governing the relationship between the donor and the recipient are the agreement between them, and the terms of the agreement. In many instances, donors will specify the terms of operations, accounting and auditing structures. Any commission or omission which ordinarily

⁶⁰¹ Forests Act 2005, s17.

⁶⁰² National Forestry (Conservation and Management) Bill 2014, s11.

qualifies as a civil offence or crime under Kenyan jurisdiction must, however, be subjected to the Kenyan legal system for redress. In the event of a dispute, the parties might have chosen the applicable law (such as the law of the United Kingdom); if they have not, Kenyan law will automatically be used.

4.2 Government oversight of payments made by development partners/donors paid directly to civil society or individuals

There is currently no government oversight donor funds paid to civil society under the subsisting NGO Coordination Act⁶⁰³. Traditionally, the management and operationalization of funds was only subject to the agreement between the donor and the recipient (as stated above). The recourse by the donor in case of mismanagement was withdrawal of the funding as per the terms of the agreement. The NGO Coordination Act, however, makes it mandatory for NGOs to make annual reports, including annual returns, to the management body under the Act (the NGO Board).

There is also the NGO council which plays a key supervisory role over NGOs. Upon breach of the code of conduct for NGOs, an NGO may face deregistration. Owing to various cases of mismanagement and corruption, there is currently a dialogue regarding subjecting the payments by development partners to some form of government scrutiny. This is mainly through the new Act, namely, the Public Benefits Organisations Act 2013⁶⁰⁴. This Act has already been passed by Parliament, but is yet to come into operation pending the notification of the commencement date by the Minister in charge. The Act is an attempt, especially when it comes to funding, to provide auditing standards to NGOs and subject their operation to some government scrutiny.

4.3 Regulation of deposit accounts

There are several banks that offer services to NGOs and other organisations when it comes to the custody of grant money. Once again, the agreements between the funding organisation/development partner is key. Some donors specify which bank would be most convenient and what currency/banking system would be most convenient. As far as regulation of local banks is concerned, the key statutes are the Banking Act (Chapter 488 of the Laws of Kenya) and the Central Bank of Kenya Act (Chapter 491 of the Laws of Kenya).

⁶⁰³ NGO Coordination Act 1990.

⁶⁰⁴ Public Benefits Organizations Act, No. 18 of 2013.

4.4 Rights to reclaim funds in the event that the donor-recipient contract has been breached

Besides the instances when the breach of contract and incidental acts amount to offences under the Kenyan Law, e.g. corruption, bribery etc., the contract is discharged depending on its terms. There have been instances when donors have terminated projects after they have commenced on the grounds that the recipient had breached the terms of the contract, indicating the importance of the funding agreement's terms. Where possible, the general rules of Contract Law under the Law of Contract Act (Chapter 23 of the Laws of Kenya) and English Common Law of Contract apply.⁶⁰⁵

5. TRANSPARENCY LAWS

5.1 REDD+ and corruption

Many of the countries that REDD+ targets because of their high volumes of deforestation are also those with some of the poorest World Bank governance indicator scores (which can indicate a vulnerability to corruption).⁶⁰⁶ To address this risk, which threatens the success of REDD+ and may contribute to deforestation,⁶⁰⁷ the UNDP is coordinating anti-corruption measures for REDD+ globally.⁶⁰⁸ The UNDP defines corruption as the 'misuse of entrusted power for private gain,'⁶⁰⁹ and recognises a number of different forms of corruption.⁶¹⁰ During the readiness phase of funding, the

⁶⁰⁵ The English Common Law of Contract is applicable in Kenya by virtue of the reception clause contained in Section 3(1)(c) of the Judicature Act (Chapter 8 of the Laws of Kenya) and Section 2(1) of the Law of Contract Act (Chapter 23 of the Laws of Kenya).

⁶⁰⁶ See especially page 6, Table 1. Peter Bofin and others, 'REDD Integrity: Addressing governance and corruption challenges in schemes for Reducing Emissions from Deforestation and Forest Degradation' (U4 Report No. 1, U4 Anti-Corruption Resource Center and CMI 2011).

⁶⁰⁷ See especially page 10, Table 2. Peter Bofin and others, 'REDD Integrity: Addressing governance and corruption challenges in schemes for Reducing Emissions from Deforestation and Forest Degradation' (U4 Report No. 1, U4 Anti-Corruption Resource Center and CMI 2011).

⁶⁰⁸ Fach, E. and Timilsina, A. (eds.), *Staying on Track: Tackling Corruption Risks in Climate Change* (United Nations Development Program, Nairobi, Kenya 2011), page 11.

⁶⁰⁹ *Ibid*, page 27.

⁶¹⁰ *Ibid*: "Bribery refers to the act of offering someone money, services or other inducement to persuade him or her to do something in return. Bribes can also be referred to as kickbacks, hush money or protection money. Cronyism refers to the favourable treatment of friends and associates in the distribution of resources and positions, regardless of their objective qualification. Embezzlement is the misappropriation of property of funds legally entrusted to someone in their formal position as an agent or guardian. Extortion is the unlawful demand or receipt of property, money or sensitive information to induce cooperation through the use of force or threat. Fraud refers to an intentional misrepresentation, which is done to obtain an unfair advantage by giving or receiving false or misleading information. Grand corruption involves bribery or the embezzlement of huge sums of money by those at the highest levels of government. Nepotism is a form of favouritism that involves family relationships. Its most usual form is when a person exploits his or her own power and authority to procure jobs

UNDP predicts ‘state capture effected through grand corruption and political corruption in which powerful individuals and groups, such as politicians, logging companies, agribusiness and possibly the military might seek to influence the design of a country’s national REDD+ framework in order to benefit their private interests or to entrench their political power.’⁶¹¹ During the implementation phase of REDD+, the UNDP predicts that grand and political corruption will continue, with the additional risks of embezzlement of funds meant for local stakeholders and petty corruption ‘in which low level public officials who are responsible for implementing REDD+ are bribed to ignore routine breaches of REDD+ laws (e.g. illegal logging), or are bribed to create fraudulent titles or carbon rights.’⁶¹²

Other analyses of REDD+ echo concerns of multi-level corruption, as summarized below.⁶¹³

- At the national level, corruption risks include:
 - Agricultural or timber conglomerates bribe national politicians to undermine establishment of national REDD mechanism;
 - REDD project developers bribe national politicians or senior officials to promote fraudulent REDD schemes;
 - Public officials or politicians bribe technical staff to skew national baseline data;
 - Politicians and senior officials extract rents from REDD revenues;
 - Officials responsible for reconciling REDD projects with national accounting take bribes from project developers to double-count projects; and
 - Agricultural or timber conglomerates bribe national officials responsible for forest protection to ignore violations of conservation laws.
- At the sub-national level, corruption risks include:
 - Agricultural or timber conglomerates bribe sub-national politicians and public officials to opt-out of REDD implementation, or weaken REDD policies, in their areas; and

or other favours for relatives. Patronage refers to the support or sponsorship by a patron (a wealthy or influential guardian) to make appointments to government, jobs or to distribute contracts for work. Petty corruption also called bureaucratic corruption involves low-level contracts between citizens, businesses and officials and generally takes place where public policies are being implemented. It is common in service delivery, such as in health care, where people use public services. Political corruption is the misuse of political power for private gain for preserving or strengthening power for personal enrichment, or both. State capture is where the states is held captive to the actions of individuals, groups or firms who influence the formation of laws, rules and regulations to serve their own private interests. This is a way of ‘legalising’ corruption.”

⁶¹¹ Fach, E. and Timilsina, A. (eds.), *Staying on Track: Tackling Corruption Risks in Climate Change* (United Nations Development Program, Nairobi, Kenya 2011), page. 31.

⁶¹² *Ibid.*

⁶¹³ This list is adopted from page 12, Table 3 of Peter Bofin and others, ‘REDD Integrity: Addressing governance and corruption challenges in schemes for Reducing Emissions from Deforestation and Forest Degradation’ (U4 Report No. 1, U4 Anti-Corruption Resource Center and CMI 2011).

- Agricultural or timber conglomerates bribe sub-national officials responsible for forest protection to ignore violations of conservation laws.
- At the local or project level, corruption risks include:
 - REDD project host bribes official monitors either to overstate avoided emissions or understate problems of permanence/additionality of the project;
 - REDD project host intentionally increases emissions in lead-up to implementation in order to benefit from higher credits; and
 - Local administrators extract rents from environmental service schemes aimed at benefiting local communities.

5.2 Corruption Risks for REDD+ in Kenya

Overt forms of corruption in Kenya fall predominantly into two categories: inducement and fraud.⁶¹⁴ An inducement is a reward that is irregularly offered to a public servant to attract him or her to perform an irregular or an illegal act for the benefit or advantage of the giver of the reward.⁶¹⁵ Fraud relates to the irregular transaction in money, assets or services that in most cases targets public resources.⁶¹⁶ Manifestations of such corruption may include the manipulation of tenders, payment of 'ghost' goods and services, or the irregular acquisition of public resources. In addition, the recently concluded Truth, Justice and Reconciliation Commission Report stated that corruption falls namely into the categories of grand corruption, petty corruption, or systemic corruption.⁶¹⁷

Some categories of corruption found to exist in Kenya are included in the table below⁶¹⁸:

⁶¹⁴ Ludeki Chweya, 'Kenya government's anti-Corruption Programmes, 2001-2004' in *Control of corruption in Kenya: Legal-Political Dimensions 2001-2004* (Claripress 2005), page 3.

⁶¹⁵ *Ibid.*

⁶¹⁶ *Ibid.*, page 4.

⁶¹⁷ Truth, Justice and Reconciliation Commission Report, Volume 2B, 346-7. The term **grand corruption** is used to describe cases where massive personal wealth is acquired from States by senior public officials using corrupt means. Systemic corruption or institutional or entrenched corruption is defined as 'corruption brought about, encouraged or promoted by the system itself. It occurs where bribery is routine on a large scale. The causes are usually brought about by inefficiency, inadequacy, or undue laxity in the system.' **Petty corruption** 'may involve small amounts and junior officials but it also has a huge impact on people's enjoyment of their basic rights like the rights to water, health, food, clothing and shelter.'

⁶¹⁸ Cited and compiled by S. Kichamu Akivaga, *Anti-Corruption in Post-KANU Era*, from Data from *Anatomy of Corruption in Kenya*, Nairobi: Claripress, 1996, Chapter 8, in *Control of corruption in Kenya: Legal-Political Dimensions, 2001-2004*, pages 250-252.

CATEGORIES OF CORRUPTION

Nature of Corruption	The form the corruption takes
Extortionate	This is the type of corruption where a person is compelled to pay illegal or irregular fees in order to prevent harm to self, friends or relatives. It normally takes place in the public sector, where operators are compelled to pay irregular fees to cartels, who in turn offer protection.
Defensive	This form of corruption normally impacts people who run small-scale business such as kiosks. This form of corruption means that a person is compelled to perform a corrupt act in order to avoid harm to his or her interests.
Transactive	This form of corruption is arrived at by mutual agreement of those involved. Both the giver and the recipient benefit at the expense of the public. This is common in government offices, especially during tender awards and procurement processes, and the procedures that are supposed to be followed are ignored.
Investive corruption	This is a form of corruption where an individual constantly favours someone in power in hope of future assistance preference from that person. For example, giving gifts to someone in a position of power such as a judge.
Nepotistic Corruption	This is where an individual grants irregular and unmerited favourable advantages to relatives and friends.
Autogenic Corruption	This involves making fraudulent claims, especially in accounting. An example could be where one takes funds from a place of work to attend a function that s/he she does not attend but is given allowances for it.
Supportive Corruption	This involves activities that do not necessarily directly involve money, but support other corruption practices. An instance of this would be where an individual is allowed to not pay a rate that s/he is supposed to, either by a relative or a friend who is in a position to assist (eg. at Kenya Revenue Authority or at the Lands Office).
Grand corruption	This form of corruption is undertaken by the government or sanctioned by officials in power. For example, the sale of houses or land below market rates. This is also simply defined as a situation where public officials confiscate wealth through corrupt means. ⁶¹⁹
Looting	Involves the payment of monies for services or goods that do not exist. This is the equivalent of what is called 'air supply' in Uganda.

⁶¹⁹ Report of the Anti-Corruption Working Group of the Society for Advanced Legal Studies *Banking on Corruption, The Legal Responsibilities of Those Who Handle the Proceeds of Corruption*, February 2002.

5.3 National legal framework for corruption

5.3.1 *Constitution*

Chapter 6 (Leadership and Integrity) and Chapter 15 (Commissions and Independent Offices) of the Constitution are relevant to corruption. The Constitution provides for the creation of the Ethics and Anti-Corruption Commission (EACC), which is primarily constituted to implement the Chapter 6 provisions on Leadership and Integrity.⁶²⁰

Chapter 15 relates to the commissions and independent offices created under the Constitution.⁶²¹ This chapter is referred to in section 79, which states that the EACC shall have the powers and mandate assigned to other commissions under Chapter 15. However, chapter 15 fails to outline the EACC as one of the Constitutional Commissions,⁶²² resulting in a legal debate on whether or not the EACC is entitled to the same powers as other Constitutional Commissions. While some legal discourse may conclude that the details of chapter 15 apply to the EACC, the lack of clarity may weaken the anti-corruption framework in Kenya and leave the clarification the mandate of the EACC to future acts of parliament.⁶²³

5.3.2 *Anti-Corruption and Economic Crimes Act*

The Anti-Corruption and Economic Crimes Act⁶²⁴ (ACECA) replaced the Prevention of Corruption Act.⁶²⁵ ACECA aims at providing an investigative, preventive and punitive mechanism for corruption.⁶²⁶ ACECA is also indicative of the policies guiding the anti-corruption legal framework in Kenya.⁶²⁷ Notably, ACECA brings in standards as recognised by key international legal instruments

⁶²⁰ Constitution of Kenya 2010, Section 79. This section states, 'Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter 15, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.'

⁶²¹ Constitution of Kenya 2010, Section 248 (2, 3).

⁶²² Constitution of Kenya 2010, Section 248 (1, 2).

⁶²³ Constitution of Kenya 2010, Art. 248.

⁶²⁴ The Anti-Corruption and Economic Crimes Act (hereinafter ACECA), Act No. 3 of 2003.

⁶²⁵ Section 70 of the ACECA repealed the Prevention of Corruption Act (Cap. 65).

⁶²⁶ ACECA, preamble 'an Act of parliament to provide for the prevention, investigation, and punishment of corruption, economic crimes and related offences and for matters incidental thereto and connected therewith.'

⁶²⁷ John Tuta, 'Kenya's Anti-Corruption Legal Framework' in Control of corruption in Kenya: Legal-Political Dimensions, 2001-2004, page 146.

such as the United Nations Convention against Corruption (UNCAC)⁶²⁸ and the African Union (AU) Convention on Preventing and Combating Corruption.⁶²⁹ These standards include the creation of a varied category of offences, the establishment of special mechanisms for compensation and recovery of improper benefits,⁶³⁰ and the inclusion of economic crimes.⁶³¹ This also incorporates steps towards the forfeiture of unexplained wealth⁶³². ACECA, while criminalising all other corruption related offences, has not criminalised illicit enrichment as one of the offences under the Act.⁶³³ The challenge to the crime of illicit enrichment is, however, subject to many constitutional challenges.⁶³⁴ Some of the specific crimes that are established by ACECA include bribing, secret inducement for advice, abuse of office, dealing with suspect property, and bid rigging.⁶³⁵ The ACECA goes on to state that the penalty for committing an offence under this section is a fine of up to one Million Kenya Shillings or imprisonment for a term not exceeding 10 years.⁶³⁶

ACECA goes over and above the offences created by the UNCAC and the AU Convention on Preventing and Combating Corruption, and creates the category of economic crimes.⁶³⁷ The act defines economic crimes as crime involving dishonesty under any written law providing for maintenance or protection of public revenue.⁶³⁸

ACECA previously created an institutional mechanism for the overall fight against corruption.⁶³⁹ However, this body was disbanded after the passing of the Ethics and Anti-Corruption Commission Act, which established the Ethics and Anti-Corruption Commission.⁶⁴⁰ It is important to note that even after the passing of the Ethics and Anti-Corruption Commission Act, the other provisions of the Anti-Corruption and Economic Crimes Act remain as they were (with the exception of Chapter III, Part A, which addressed the defunct Kenya Anti-Corruption Commission (KACC)).

⁶²⁸ United Nations Convention Against Corruption (UNCAC), U.N.Doc A/58/422 (Oct. 7, 2003).

⁶²⁹ AU Convention on the Preventing and Combating Corruption Adopted on 11th July, 2003, 43 I.L.M. 5. This Convention was ratified by Kenya on 3rd February, 2007.

⁶³⁰ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Part VI.

⁶³¹ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Art 2 & 45.

⁶³² Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Section 55.

⁶³³ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Part V.

⁶³⁴ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Part VI.

⁶³⁵ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Part V.

⁶³⁶ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Section 48.

⁶³⁷ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Section 2 & Section 45.

⁶³⁸ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Section 2, Section 45.

⁶³⁹ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Part 3A.

⁶⁴⁰ The Public Officer Ethics Act, No 4 of 2004.

Prosecution remains one of the key challenges of implementing the anti-corruption legal framework. This issue arose in the case of *Gacheiengo*,⁶⁴¹ which stated that the (now defunct) Kenya Anti-Corruption Commission was unconstitutional because only the Attorney-General under section 26 of the Constitution could prosecute. This ruling still affects the present Ethics and Anti-Corruption Commission, as it still does not have inherent prosecutorial powers. Additionally, the Cabinet failed to allow the passing of a draft that would have provided the Commission with prosecutorial powers if the Director of Public Prosecutions (DPP) failed to take action in a corruption offence. The Anti-Corruption and Economic Crimes Act created special magistrates under the judiciary to specifically deal with issues relating to corruption.⁶⁴² However, these courts only act as courts of first instance,⁶⁴³ and appeals from them lie in the higher courts (High Court, Court of Appeal, and the Supreme Court).

Prosecution of corruption and corruption related offences is conducted by the Director of Public Prosecutions (DPP).⁶⁴⁴ This is also another consequence of the *Gachiengo Case*,⁶⁴⁵ which emphasized that prosecutorial powers are vested in the government through the office of the Attorney-General. In this regard, the Anti-Corruption and Economic Crimes Act requires that once the investigations have been conducted, the subsequent report shall be forwarded to the Attorney-General with a recommendation for any action to be taken (including prosecution).⁶⁴⁶

5.3.3 *The Public Officer Ethics Act*

The Public Officer Ethics Act⁶⁴⁷ is aimed at advancing the ethics of public officers through steps such as requiring asset and financial declaration.⁶⁴⁸ This act contributes to the legal system of anti-corruption by prohibiting some overt forms of corruption. These include inducement through

⁶⁴¹ *Stephen Mwai Gacheiengo and Albert Muthee Kahuria v Republic*, NRB HC MISC APP.NO. 302 of 2002.

⁶⁴² The appointment of these special Magistrates by the Judicial Service Commission is stated under Section 3(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003.

⁶⁴³ See *Raphael A. Aligana, Samuel Muhoro & Susan W. Maina* where the Chief Magistrate ruled that his court could not try an offence under the Anti-Corruption and Economic Crimes Act because the court did not have the special jurisdiction of a Special Magistrate's Court.

⁶⁴⁴ Section 37(1), Anti-Corruption and Economic Crimes Act, No. 3 of 2003.

⁶⁴⁵ *Stephen Mwai Gacheiengo and Albert Muthee Kahuria v Republic*, NRB HC MISC APP.NO. 302 of 2002.

⁶⁴⁶ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Sections 35 and 36.

⁶⁴⁷ The Public Officer Ethics Act, Act No 4 of 2004.

⁶⁴⁸ The Public Officer Ethics Act, Act No 4 of 2004, Preamble.

nepotism and improper enrichment.⁶⁴⁹ The act also creates sanctions under Part III, which include investigations and recommendations for disciplinary, criminal or civil sanctions.⁶⁵⁰

5.3.4 *Ethics and Anti-Corruption Commission Act*

The Ethics and Anti-Corruption Commission Act⁶⁵¹ provides for the establishment of the key anti-corruption body in Kenya pursuant to Article 79 of the Constitution. It also provides for the powers, functions and the general management of the Ethics and Anti-Corruption Commission.⁶⁵² This act states that, in addition to the powers granted to the Commission under Article 253 of the Constitution, the Commission shall be entitled to specific powers outlined in section 3 of the Ethics and Anti-Corruption Commission Act. These powers include the authorisation to do all that is required or necessary for the Commission to perform its functions, as long as such is authorised by an Act of Parliament and the Constitution.⁶⁵³

5.3.5 *Leadership and Integrity Act*

The Leadership and Integrity Act⁶⁵⁴ is created pursuant to the principles established under Chapter 6 of the Constitution. The Act and specifically Chapter 6 are important as they create a foundation for reducing corruption and incidences of abuse of office.⁶⁵⁵ If the Act is breached, disciplinary action could follow.⁶⁵⁶ However, if the conduct that breaches the code of conduct under the act also gives rise to criminal or civil liability, a referral may be made to the relevant state entity for the commencement of civil or criminal proceedings⁶⁵⁷. One of the actions that could yield criminal sanctions under the Act is an instance when a public official opens and maintains foreign bank accounts.⁶⁵⁸

⁶⁴⁹ See Part III, The Public Officer Ethics Act, No 4 of 2004.

⁶⁵⁰ See Part V, The Public Officer Ethics Act, No 4 of 2004.

⁶⁵¹ The Ethics and Anti-corruption Commission Act, No. 22 of 2011.

⁶⁵² See Preamble, The Ethics and Anti-corruption Commission Act, No. 22 of 2011.

⁶⁵³ The Ethics and Anti-corruption Commission Act, No. 22 of 2011, Section 3.

⁶⁵⁴ Leadership and Integrity Act, No. 19 of 2012.

⁶⁵⁵ See Constitution of Kenya 2010; and, Leadership and Integrity Act, No. 19 of 2012.

⁶⁵⁶ Leadership and Integrity Act, No. 19 of 2012, Section 42.

⁶⁵⁷ Leadership and Integrity Act, No. 19 of 2012, Section 43.

⁶⁵⁸ Leadership and Integrity Act, No. 19 of 2012, Section 19.

5.3.6 *The Penal Code*

The Penal Code⁶⁵⁹ is the main law that establishes crimes under the Kenyan Law.⁶⁶⁰ With regard to corruption, the Penal Code creates the crime of abuse of office,⁶⁶¹ the offence of stealing by persons in public office,⁶⁶² fraudulent false accounting,⁶⁶³ and conspiracy to defraud, *inter alia*.⁶⁶⁴ Section 102 of the Penal Code defines abuse of office and categorise it as a felony, although no penalty is given.

5.3.7 *The Criminal Procedure Code*

The procedure for the prosecution of crimes in Kenya is outlined in the Criminal Procedure Code.⁶⁶⁵ The statute complements the Penal Code, which outlines the principles of criminal prosecution and a number of crimes recognized in the Kenyan Courts. Besides those crimes that are outlined in the Penal Code, the Criminal Procedure Code also caters for crimes that are created by other laws. This includes all of the crimes created by corruption and anti-corruption related offences in the corruption-related acts noted above. It is important to note that the Constitution gives prosecutorial powers to the Director of Public Prosecutions (DPP), who has the power to direct the Inspector of the National Police Service to investigate any allegations of Criminal Conduct.⁶⁶⁶ This provision gives the government power to institute criminal proceedings. The ordinary course of proceedings in Kenya is that proceedings will be commenced by a complainant and the State takes over to prosecute the case on their behalf.

5.3.8 *Proceeds of Crime and Ant-Money Laundering Act*

The Proceeds of Crime and Ant-Money Laundering Act⁶⁶⁷ provides for the offence of money laundering and measures to combat it. In part, the act is a response to instances where funds that are accumulated from corrupt activities are concealed in genuine businesses. Furthermore, the act is intended to provide for the identification, tracing and freezing, seizure and confiscation of the

⁶⁵⁹ Penal Code, Chapter 63.

⁶⁶⁰ Penal Code, Chapter 63, Preamble.

⁶⁶¹ Penal Code, Chapter 63, Section 101(1).

⁶⁶² Penal Code, Chapter 63, Section 280.

⁶⁶³ Penal Code, Chapter 63, Section 330.

⁶⁶⁴ Penal Code, Chapter 63, Section 317.

⁶⁶⁵ The Criminal Procedure Code, Cap 75.

⁶⁶⁶ Constitution of Kenya 2010, Article 157(2).

⁶⁶⁷ Proceeds of Crime and Anti-Money Laundering Act, No 9 of 2009.

proceeds of crime and for connected purposes⁶⁶⁸. Thus, proceeds of corruption are a major target of this law. Additionally, failure to report the crime by someone who has knowledge of its commission is a crime in itself.⁶⁶⁹ This allows the act to combat corruption by discouraging people from being paid to keep quiet about corrupt activities. Following the provisions of part XII of the act – International Assistance in Investigations and Proceedings – a suspect may not escape the law by residing in another country.

5.3.9 *The Public Finance Management Act*

The Public Finance Management Act⁶⁷⁰ was enacted by Parliament to provide for the effective management of public finances by both the national and the newly formed county governments.⁶⁷¹ This act provides for transparency in the management of public funds and recognises the devolution of national and county governments. With regard to devolution, it provides for the management of funds at both the national⁶⁷² and county⁶⁷³ level.

5.3.10 *Public Procurement and Disposal Act*

The Public Procurement and Disposal Act 2005⁶⁷⁴ establishes procedures for efficient public procurement, for the disposal of redundant and unusable assets and equipment by public entities, and other related matters.⁶⁷⁵ It contains penalties against persons who breach the regulations of the act.⁶⁷⁶ The act is relevant for corruption as the absence of a regulatory mechanism for procurement and disposal allowed for the un-procedural and irregular acquirement of government service and goods contracts. The act also creates the Public Procurement Oversight Authority (PPOA),⁶⁷⁷ which aims to ensure compliance with the provisions under the act. The act also creates other bodies, such as the Public Procurement Administration Review Board.⁶⁷⁸

⁶⁶⁸ Proceeds of Crime and Anti-Money Laundering Act, No 9 of 2009, Preamble.

⁶⁶⁹ Proceeds of Crime and Anti-Money Laundering Act, No 9 of 2009, Section 5.

⁶⁷⁰ Public Finance Management Act, No. 18 of 2012.

⁶⁷¹ Public Finance Management Act, No. 18 of 2012, Section 3.

⁶⁷² Public Finance Management Act, No. 18 of 2012, Part III.

⁶⁷³ Public Finance Management Act, No. 18 of 2012, Part IV.

⁶⁷⁴ Public Procurement and Disposal Act, no. 3 of 2005.

⁶⁷⁵ Public Finance Management Act no. 18 of 2012, Preamble.

⁶⁷⁶ Public Finance Management Act no. 18 of 2012, Sections 135, 136.

⁶⁷⁷ Public Finance Management Act no. 18 of 2012, Section 8.

⁶⁷⁸ Public Finance Management Act no. 18 of 2012, Section 25.

5.3.11 *The Banking Act*

The Banking Act⁶⁷⁹ was enacted by Parliament to regulate the business of banking. Since banking involves the depositing, lending and withdrawal of public money, it is prudent that the banking business be carried out in a transparent manner. Consequently, section 4(3) of the act requires that any person proposed to manage or control banking institutions be both professionally and morally suitable. The Banking Act is also relevant when it comes to corruption, since some of the stages during the laundering process involve banks and banking transactions. This is particularly relevant, where launderers in a bid to conceal their funds, engage in networks of bank deposits, withdrawals and transfers. In this regard, the Banking Act and other banking regulations in Kenya provide for suspicious transaction reporting (STR) among other mechanisms to monitor the likelihood of laundering activities⁶⁸⁰.

5.3.12 *The Foreign Judgment (Reciprocal Enforcement) Act*

The principle of reciprocity under international law requires that countries cooperate with each other in the enforcement of judicial decisions. The Foreign Judgment (Reciprocal Enforcement) Act⁶⁸¹ provides for enforcement by Kenyan authorities of judgments rendered by other countries on a reciprocal basis.⁶⁸² For example, a person would not escape the enforcement of a judgment issued outside of Kenya simply by establishing a residence within Kenya. This act is intended to ensure that there is assistance and cooperation in terms of enforcing cross-jurisdictional judgments relating to corruption and other incidental matters.⁶⁸³

5.3.13 *The Civil Procedure Act*

The Civil Procedure Act⁶⁸⁴ establishes the procedure to be followed in civil litigation. Coupled with the Civil Procedure Rules, it helps outline what is expected of litigants. As the act establishes the procedure to be observed for civil proceedings, it is relevant to anti-corruption measures that may give

⁶⁷⁹ Banking Act, Cap 488.

⁶⁸⁰ See for instance Regulations under the Central Bank of Kenya Act.

⁶⁸¹ Foreign Judgment (Reciprocal Enforcement) Act, Cap 43.

⁶⁸² Foreign Judgment (Reciprocal Enforcement) Act, Cap 43, Preamble.

⁶⁸³ Foreign Judgment (Reciprocal Enforcement) Act, Cap 43, Preamble.

⁶⁸⁴ Civil Procedure Act, Cap 21.

rise to civil proceedings, including asset recovery (for property that is declared to have been acquired corruptly) and abuse of office.

5.3.14 *Anti-corruption in the forest sector*

The Forests Act 2005 helps address corruption as it created harsh measures concerning the de-gazetting of forestland and increased penalties against illegal logging and other crimes.⁶⁸⁵ The Forest (Charcoal) Rules 2009 supplement the Forests Act and regulate sustainable charcoal production, transportation and marketing.⁶⁸⁶ The penalty for breaking these regulations is a fine of ten thousand shillings or up to three months in prison⁶⁸⁷, although the Forests Act imposes a higher penalty.⁶⁸⁸ The regulations do not, however, specifically address corruption offences related to logging. This is a problem as cartels often bribe forest guards and officials in order to gain unlicensed access to forests and illegally fell trees for economic gain. In 1999, Kenya temporarily banned all logging activities and only gave permission to 4 sawmill companies to log and replenish the forests through an afforestation programme. This policy was ended after suggestions that there was continued black-market logging activity. At present, corruption related to felling or logging is prosecuted under the normal anti-corruption laws (discussed above).

5.4 International legal framework for corruption

Under the Constitution, international treaties ratified by Kenya become part of Kenyan Law. When considering anti-corruption regulation, it is therefore important to take note of the key international legal instruments in this area.

5.4.1 *The AU Convention on Preventing and Combating Corruption*

The AU Convention on Preventing and Combating Corruption⁶⁸⁹ is the main legal mechanism for the prevention of corruption in the African Union. The main objectives of the Convention are to⁶⁹⁰:

⁶⁸⁵ World Bank, 'Forest Strategy: Review of Implementation' (2007) at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTARD/EXTFORESTS/0,,contentMDK:21564626~pagePK:210058~piPK:210062~theSitePK:985785,00.html>, last accessed April 18 2013.

⁶⁸⁶ See the Forest (Charcoal) Regulations 2009, Legal Notice No. 186 of 24th December 2009.

⁶⁸⁷ *Ibid.*

⁶⁸⁸ Section 52(2) imposes a penalty of 50,000 Ksh or up to 6 months in prison.

⁶⁸⁹ AU Convention on Preventing and Combating Corruption, Adopted on 11th July, 2003, 43 I.L.M. 5. This Convention was ratified by Kenya on 3rd February, 2007.

⁶⁹⁰ AU Convention on Preventing and Combating Corruption, Article 2.

- promote and strengthen the development in Africa of mechanisms to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors;
- promote, facilitate and regulate cooperation among states of effective measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa;
- coordinate and harmonize the policies and legislation among African states that would prevent, detect, punish and eradicate corruption on the continent;
- promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights; and
- establish the necessary conditions to foster transparency and accountability in the management of public affairs.

5.4.2 *United Nations Convention Against Corruption (UNCAC)*

The United Nations Convention Against Corruption (UNCAC)⁶⁹¹ has been said to be a universal legal instrument that is more comprehensive than many of the other regional instruments,⁶⁹² and introduces a number of measures, standards and rules that countries can enforce to fight and regulate corruption. However, in its domestic law, Kenya has not criminalized all the offences that are provided by UNCAC, including bribery in the private sector.⁶⁹³

5.4.3 *The African Charter on Democracy, Elections and Governance*

The African Charter on Democracy, Elections and Governance⁶⁹⁴ addresses the issue of corruption by calling for the promotion of anti-corruption measures in conformity with the AU Convention on Preventing and Combating Corruption.⁶⁹⁵ State parties to this convention are obligated to commit themselves to political, economic, and social governance through improving effectiveness of social services and combating corruption.⁶⁹⁶ Further, this convention obligates states to institutionalize good economic and corporate governance through preventing and combating corruption.⁶⁹⁷

⁶⁹¹ United Nations Convention against Corruption (UNCAC), U.N.Doc A/58/422 (Oct. 7, 2003).

⁶⁹² Snider T. & Kidane W., 'Combating Corruption through International Law in Africa: A comparative Analysis' *Cornell International Law Journal* (2006), at 706.

⁶⁹³ See Anti-Corruption and Economic Crimes Act, No. 3 of 2003.

⁶⁹⁴ African Charter on Democracy Elections and Governance, adopted on 30th January 2007.

⁶⁹⁵ *Ibid*, Article 2(9).

⁶⁹⁶ *Ibid*, Article 27.

⁶⁹⁷ *Ibid*, Article 33(3).

5.4.4 *International Policy and Structural Mechanisms*

A programme under the African Union, the New Partnership for African Development (NEPAD) has established an Anti-Corruption Plan⁶⁹⁸ that calls for the promotion of transparency and measures to address corruption across Africa. According to this Action Plan, NEPAD urges states to work towards the eradication of corruption through the ratification of the AU Convention on Preventing and Combating Corruption, judicial cooperation, effective and functioning anti-corruption boards, establishment of national anti-corruption commissions and through participatory processes in budget formulation⁶⁹⁹.

To help achieve these goals, NEPAD has created the African Peer Review Mechanism (APRM). The APRM is an instrument for fostering good political, economic and corporate governance, improving the efficiency and effectiveness of governments in delivering goods and services to their citizens and creating confidence in target countries to attract support and investment.⁷⁰⁰ Corruption is one of the key priority areas expressed in the objectives, standards, criteria and indicators of the APRM.⁷⁰¹

Another mechanism for preventing and combating corruption is the advisory body established under the African Charter on Democracy, Elections and Governance.⁷⁰² This body is aimed at promoting anti-corruption work, collecting information on corruption and on the behaviour of multinational corporations operating in Africa, developing methodologies, advising governments, developing codes of conduct for public officials, and building partnerships. This body is required to submit a report to the Executive Council of the African Union on a regular basis on the progress made by each State Party in complying with the provisions of the AU Convention.⁷⁰³

⁶⁹⁸ NEPAD Anti-Corruption Plan, 10th Africa Partnership Forum (APF), Tokyo, Japan: 7 – 8 April 2008.

⁶⁹⁹ NEPAD Anti-Corruption Plan, page 19.

⁷⁰⁰ See W.L Nkuhlu, "The New Partnership for Africa's Development – The Journey So Far", NEPAD Secretariat, June 2005 - <http://www.nepad.org/2005/files/documents/journey.pdf>, accessed July 03 2013.

⁷⁰¹ NEPAD/HSGIC-03-2003/APRM/*Guideline*/OSCI 9 March 2003.

⁷⁰² African Charter on Democracy Elections and Governance, Adopted on 30th January 2007, Art. 22.

⁷⁰³ African Charter on Democracy Elections and Governance, Adopted on 30th January 2007, Article 49.

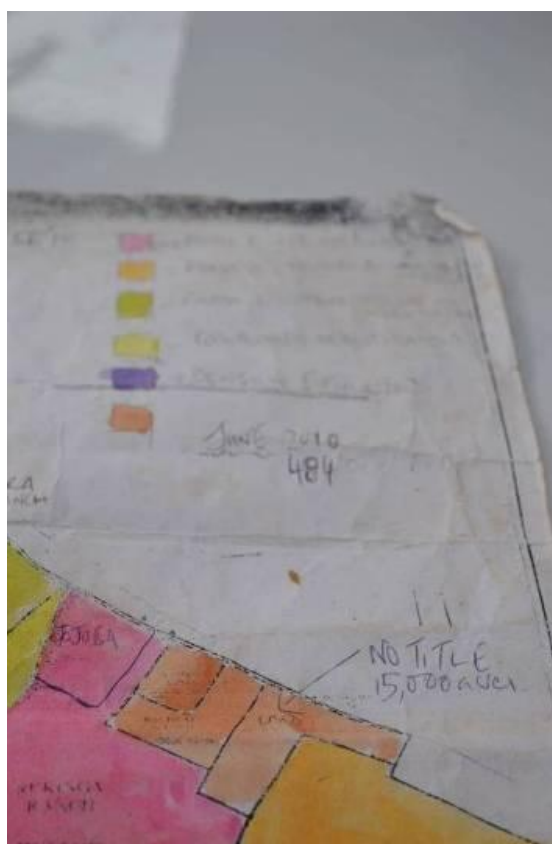
6. CONCLUSION

REDD+ finance from public sources (multilateral and bilateral) is already flowing into Kenya, mainly for capacity-building purposes. In order to attract and manage further grants, and also to prepare for future performance-based payments for REDD+ outcomes, it is important to clarify how funds will be managed. Given acknowledged risks regarding corruption, transparency safeguards should form part of this preparation. In order to comply with the requirements of the UNFCCC framework (discussed in Part A), understanding the relationship between existing anti-corruption measures and REDD+ will be essential.

Kenya already has well-developed public finance and transparency laws which could serve as a foundation for any explicit policy regarding the management of REDD+ finance. Nonetheless, several issues need to be clarified. Rules regarding the equitable distribution of public revenue between the national and county governments could apply to international REDD+ payments, and if such disbursements were to be made, the management obligations (and capacities) of the county governments in question should be considered. The possibility of establishing a ‘special purpose’ fund for REDD+ (or, a REDD+ revenue stream within a national climate change fund), could provide a centralised vehicle for managing and disbursing REDD+ funds received at the national level, and should be explored. Further, whether greater oversight over grants paid directly to civil society should be considered – even if only to create a centralised database of REDD+ implementation activities and development partners in order to ensure efficiency in the use of REDD+ funds and coordination between different initiatives.

BACKGROUND REPORT 3:

ENGAGING THE PRIVATE SECTOR IN REDD+ IMPLEMENTATION IN KENYA



Tenure map of Wildlife Works REDD Project, Kenya.

This map shows the different tenure arrangements across the Wildlife Works REDD Project in Kenya – the photograph shows a division of untitled land. Determining ownership rights is important for both controlling activity in the project area, and also for assigning carbon rights.

Courtesy of Wildlife Works 2012.

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1. INTRODUCTION

The finance required to halve emissions from the forest sector to 2030 is expected to be substantial, with a role for both the public and private sectors. In addition, developing countries will need substantial support for capacity building in order to develop the governance structures required to attract and regulate private investment in the forest sector (including, potentially, investments for REDD+). Commentators have therefore argued that private sector engagement and investment is critical for the launch, growth, and maintenance of REDD+; some believe that private investment must be ‘mobilised if the targets for REDD+ are to be achieved.’⁷⁰⁴

Early involvement by the private sector has largely been in the role as offset buyers in the voluntary market for forest carbon credits. However, with no certainty that a future REDD+ market will be established, alternative ways for the private sector to participate in REDD+ are being contemplated. Given that REDD+ is increasingly being framed as a sustainable development opportunity that supports ‘green growth,’ the role of the private sector in the REDD+ value chain and ‘green economy’ are being explored at a high level in many countries, including Kenya.

This report provides a discussion of

- the role of the private sector in REDD+ implementation;
- lessons from early commercial projects, including details about Wildlife Works REDD project in Kenya;
- the potential role of the private sector in the REDD+ value chain; and
- key commercial laws that would apply to any commercial REDD+-related activities in Kenya.

⁷⁰⁴ 'Forest Investment Review' (Forum for the Future 2009), page 14, para 5
<<http://www.forumforthefuture.org/sites/default/files/project/downloads/forestinvestmentreviewfull.pdf>>
accessed 10 November 2012.

2. OVERVIEW OF PRIVATE SECTOR ENGAGEMENT IN REDD+

The finance required to halve emissions from the forest sector to 2030 could be around \$17-33 billion per year,⁷⁰⁵ with a role for both the public and private sectors.⁷⁰⁶ In addition, developing countries will need substantial support for capacity building⁷⁰⁷ in forest governance. Commentators have therefore argued that private sector engagement and investment is critical for the launch, growth, and maintenance of REDD+⁷⁰⁸; some believe that private investment must be ‘mobilised if the targets for REDD+ are to be achieved.’⁷⁰⁹ The *State of the Voluntary Carbon Markets 2013* found that the private sector drove demand for 90% of carbon offsets, motivated primarily by corporate social responsibility and industry leadership.⁷¹⁰

Historically, the private sector have been important actors in the forestry sector and the development of market-based forest carbon initiative. For example, in 2004 the main investment sources in the forestry sector were private (93%) and ‘represented about 1.5% of global direct investment in 2004 (valued at US \$63 billion)’⁷¹¹; in 2011, a number of private REDD+ investment funds were

⁷⁰⁵ Eliasch Review, *Climate Change: Financing Global Forests*, at xvi, para. 4 (2008), <http://www.official-documents.gov.uk/document/other/9780108507632/9780108507632.pdf>. The range here is dependent upon the level of rent received by forest nations.

⁷⁰⁶ *Ibid.* at xix, para. 1.

⁷⁰⁷ *Ibid.* at xiii, para. 4.

⁷⁰⁸ See, for example, Florence Bernard et al., *The Private Sector in the REDD+ Supply Chain: Trends, Challenges and Opportunities*, IISD Policy Brief, at 1, 3 (2012), http://www.iisd.org/pdf/2012/redd_private_sector_report.pdf; Eliasch Review, *Climate Change: Financing Global Forests*, at 1 (2008); Forum for the Future, *Forest Investment Review*, at 13-16, 79-94 (July 2009), <http://www.forumforthefuture.org/sites/default/files/project/downloads/forestinvestmentreviewfull.pdf>; Mark Lambert, *Mitigating Risk to Catalyze Private Investment in REDD*, Terra Global Capital, Presentation (2011), http://www.gcftaskforce.org/meeting/documents/Mark_Lambert_Terra_Global_Capital.pdf; Meridian Inst., *Fostering Carbon Markets: Investment in REDD*, at 2 (2012); R. O’Sullivan et al., Climate Focus, *Engaging the Private Sector in the Potential Generation of Carbon Credits from REDD+: An Analysis of Issues*, Report to the UK Dept. for Int’l Dev. (DFID), at 18, 51 (2010), <http://www.conservationfinance.org/upload/library/arquivo20100806090349.pdf>; Phil Ovitt, *Private Sector Opportunities Under Various REDD Scenarios*, C-Quest Capital, Presentation to the Organization for Tropical Studies—International Forest Carbon for U.S. Decision Makers Course (2009), http://nicholasinstitute.duke.edu/ecosystem/redd-policy-options-courses-and-conversations-ots/Private_Sector_Opportunities_Under_Various_REDD_Scenarios.pdf; The Forest Dialogue, *Investing in REDD-plus: Consensus Recommendations on Frameworks for the Financing and Implementation of REDD-plus*, at 50 (2010).

⁷⁰⁹ Forum for the Future, *Forest Investment Review* (July 2009), at 14, para. 5.

⁷¹⁰ Molly Peters-Stanley and Daphne Yin, *Manoeuvring the Mosaic: State of the Voluntary Carbon Markets 2013* (Ecosystem Marketplace & Bloomberg New Energy Finance: 2013), Executive Summary, v.

⁷¹¹ R. O’Sullivan et al., Climate Focus, *Engaging the Private Sector in the Potential Generation of Carbon Credits from REDD+: An Analysis of Issues*, Report to the UK Department of International Development, 2010, at 51.

established, including Althelia (US \$275 million target capitalization), Macquarie-International Finance Corporation (US \$25 million) and Terra Global Capital (US \$50 million).⁷¹²

The UN REDD programme has noted that “REDD+ is a critical part of the green economy, and the engagement and involvement of the private sector is a pre-condition for REDD+ to succeed. If comprehensive engagement is not prioritized, there is a high probability that social, financial, economic and political mechanism designed to reduce forest loss will be ineffective, wasting valuable time along with scarce human, political and financial capital.”⁷¹³ UN-REDD has noted that “private sector actors have a fundamental role to play as designers, developers, operators and enablers of ‘forest-friendly’ initiatives ... although private sector actors are significant agents of change, engagement with the private sector on REDD+ has been limited to date.”⁷¹⁴ Two general groups of private sector actors are identified as relevant to REDD+:

- Actors involved in the production and sale of VERs (including project developers, technical service providers, financiers and VER buyers); and
- Actors associated with the drivers of deforestation and forest degradation (such as those involved in the supply chains of agricultural commodities, such as producers of raw materials, suppliers, manufacturers, retailers, traders, financiers, consumers and technical service providers).⁷¹⁵

There are therefore several **entry points** for private sector engagement in REDD+. The private sector’s role could involve innovation, investment and implementation⁷¹⁶; financial intermediaries have a role to play in facilitating private sector activity by enabling financial transactions.⁷¹⁷ There is potential for the private sector to engage with REDD+ as:

- financiers through project investment;
- producers through project development and implementation;
- brokers through carbon credit trading and retailing;
- advisors through technical expertise and capacity building;
- auditors through validation and certification; and

⁷¹² Toby Janson-Smith & H. Marsh, *A Corporate Primer on Reducing Emissions from Deforestation and Forest Degradation (REDD): The Context, Key Technical and Policy Issues, and Private Sector Involvement*, Conservation International (2012).

⁷¹³ UN-REDD Policy Brief Issue #04, *The Role of the Private Sector in REDD+: the Case for Engagement and Options for Intervention* (2013), page 10.

⁷¹⁴ *Ibid*, page 2, paragraph 3.

⁷¹⁵ *Ibid*, page 3, paragraph 3.

⁷¹⁶ *Ibid*, page 4, paragraph 4.

⁷¹⁷ *Ibid*, page 8, paragraph 2.

- end buyers through carbon credit purchasing.⁷¹⁸

The National Climate Change Action Plan identifies a number of barriers to private sector engagement in climate finance, a subset of which would be financing for REDD+. These are:

- Project development processes can be lengthy and difficult;
- Policy interventions and incentives could be improved or are poorly implemented;
- Difficulties in accessing finance, from both banks and equity funds (the latter being scarce in Kenya); and
- Limited capacity in Kenyan enterprise.⁷¹⁹

Noting these challenges, public sector interventions (which could target either demand-side or supply-side factors⁷²⁰) could be used influence private sector engagement in REDD+ through:

- Incentives;
- Risk mitigation instruments;
- Minimum standards of behaviour; and
- Enabling conditions.⁷²¹

3. REGULATORY ISSUES RELATED TO COMMERCIAL REDD+ PROJECTS

3.1 Overview

Alongside developments within the UNFCCC, the voluntary market⁷²² has facilitated the development of numerous REDD+ projects and acted as a major driver of REDD+ investment to date. Forest carbon projects have also been developed under the Clean Development Mechanism (CDM)⁷²³ and

⁷¹⁸ Florence Bernard et al., *The Private Sector in the REDD+ Supply Chain: Trends, Challenges and Opportunities*, IISD Policy Brief, at 1, 3 (2012).

⁷¹⁹ National Climate Change Action Plan, page 88, paragraph 3.

⁷²⁰ UN-REDD Policy Brief Issues #04, *The Role of the Private Sector in REDD+: the Case for Engagement and Options for Intervention* (2013), pages 7-8.

⁷²¹ *Ibid*, pages 6-7.

⁷²² The voluntary Over-The-Counter (OTC) offset market refers to all voluntary sales and purchases of carbon credits (mostly project-based emissions reductions credits) outside of the Chicago Climate Exchange. See ICE, "Chicago Climate Exchange," 2013, available at <<https://www.theice.com/ccx.jhtml>> (last accessed on 24 April 2013). For more information, see Ecosystem Marketplace, "Voluntary OTC Offset Market", 2010, available at <http://www.ecosystemmarketplace.com/pages/dynamic/web.page.php?section=carbon_market&page_name=otc_market> (last accessed on 24 April 2013).

⁷²³ The market-based CDM is an international regime established under the Kyoto Protocol to the UNFCCC, implemented at the national level (largely by the private sector). See Art.12, Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, Japan, 10 December 1997, in force 16 February 2005, 37 *International Legal Materials* (1998) 22.

domestic schemes such as the New South Wales Greenhouse Gas Reduction Scheme (NSW GGAS).⁷²⁴

REDD+ projects around the world have faced common challenges within what are nonetheless unique, country-specific legal and political systems. These early forest carbon projects can therefore provide insight into the practical challenges for REDD+ implementation with respect to defining rights to carbon, ensuring the permanence of REDD+ areas, and creating ‘investment-grade’ carbon commodities⁷²⁵ which are capable of attracting private sector finance. Given that private sector finance will be necessary to scale-up REDD+ implementation⁷²⁶, insight regarding the legal frameworks required to support private sector investment is valuable. This section is therefore written from a project-level, private sector perspective drawing on practical experience working on early forest carbon projects and transactions (in the voluntary market, under the CDM and also under domestic trading schemes).

3.2 General issues for commercially viable REDD+ project design

3.2.1 *Baselines and additionality*

Emissions reductions must be ‘additional’ to those which would have occurred in the absence of the project. In order to determine whether and to what extent emissions reductions are ‘additional,’ it is usually necessary to set a ‘baseline’ for the project (ie., a hypothetical reference case which represents the volume of GHGs that would have been emitted if the project were not implemented).⁷²⁷

⁷²⁴ The New South Wales Greenhouse Gas Reduction Scheme (NSW GGAS) commenced operating on January 1, 2003 as a state-level initiative in Australia. It was one of the first mandatory greenhouse gas emissions trading schemes in the world, aiming to reduce greenhouse gas emissions associated with the production and use of electricity by using project-based activities to offset the production of greenhouse gas emissions. See <http://www.greenhousegas.nsw.gov.au/>.

⁷²⁵ The term ‘carbon commodities’ is used in this context to denote a legal or tradable instrument that is created from sequestering a tonne of greenhouse gases emissions. Carbon commodities might be referred to as a carbon right, a carbon credit, or emissions reduction; they must reflect certain criteria as set out in the requirements of a scheme, such as a Voluntary Carbon Unit (VCU) under the Verified Carbon Standard (VCS).

⁷²⁶ See Florence Bernard et al., *The Private Sector in the REDD+ Supply Chain: Trends, Challenges and Opportunities*, IISD Policy Brief, (2012), at 1 and 3; Johan Eliasch (Prime Minister’s Special Representative on Deforestation and Clean Energy), *Climate Change: Financing Global Forests*, (2008), at 1; Forum for the Future, *Forest Investment Review* (July 2009), at 13-16&79-94 Meridian Institute, *Fostering Carbon Markets: Investment in REDD* (2012), at 2; R. O’Sullivan et al., Climate Focus, *Engaging the Private Sector in the Potential Generation of Carbon Credits from REDD+: An Analysis of Issues*, Report to the UK Department for International Development (2010), at 18 and 51; The Forest Dialogue, *Investing in REDD-plus: Consensus Recommendations on Frameworks for the Financing and Implementation of REDD-plus* (2010), at 50.

⁷²⁷ Martijn Wilder and Jennifer Crittenden, *Bringing the Forest to Market: Structuring Avoided Deforestation Projects*, Baker and McKenzie Issues Paper, at 7-8 (2010) (republished in 2008 in the *Carbon and Climate Law Review*).

3.2.2 *Community and biodiversity benefits*

In addition to climate change mitigation, project developers often seek to support regional governments and local communities with the skills, technology and financial resources to sustainably protect their natural environments and improve livelihoods through the sale of carbon and other ecosystem products. Investing an appropriate share of the project revenue in capacity building programs and enabling community participation in the ongoing maintenance of the project can help to ensure that carbon retention is both long-term and sustainable.⁷²⁸

3.2.3 *Leakage*

In determining the project's baseline, project participants are generally required to take into account any 'leakage' that may be caused - that is, whether preventing emissions from the relevant landscape will simply cause another landscape to be used in an emissions-intensive activity. A project developer's approach to managing leakage will be guided by the requirements of the standard adopted.⁷²⁹

3.2.4 *Permanence*

For any carbon transaction to succeed, the buyer will want assurance that the carbon stock they are purchasing will remain in place. Thus, 'permanence' refers to the extent to which a carbon sequestration project is able to achieve an absolute and irreversible reduction in the volume of carbon dioxide in the atmosphere. For a 'permanent' forestry credit to be created, there must be some kind of guarantee that the carbon sequestered will continue to be stored by the relevant landscape. Noting the many natural risks faced by landscapes, strategies to achieve this could include:

- imposing a period of mandatory maintenance and introducing legal tools through which to ensure that this is achieved;
- providing incentives for the activity proponent to ensure permanence (which could be through a phased release of carbon rights, or preventing additional carbon rights from being generated if permanence is not maintained); or,

⁷²⁸ *Ibid.* at 11.

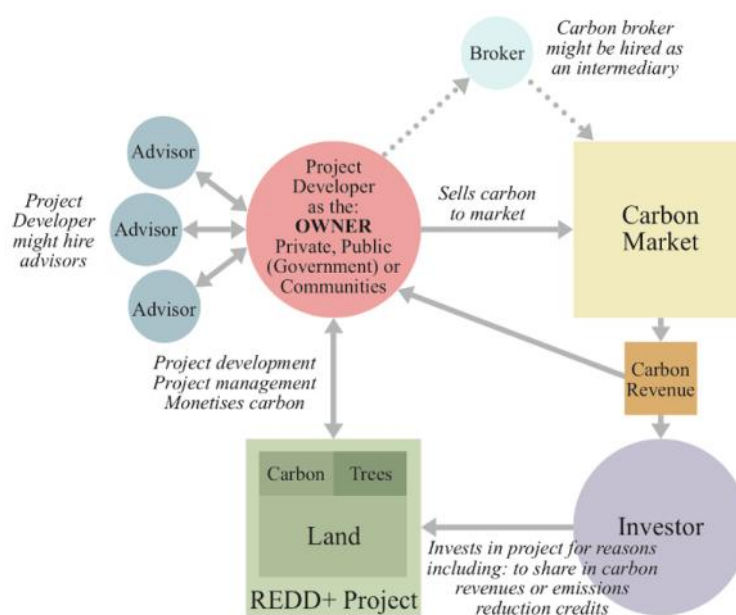
⁷²⁹ *Ibid.* at 8-9.

- ensuring that in the event there is a permanence failure, the system allows for rectification of that permanence failure through sourcing replacement credits or cancelling issued credits.⁷³⁰

3.2.5 Structuring of the project

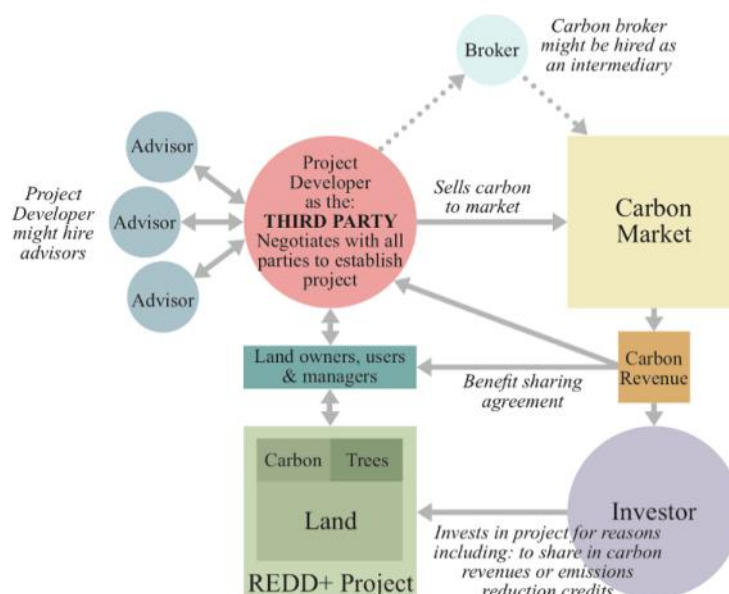
The diagrams below demonstrate possible REDD+ project structures (please note that these are **not the only possible models**). These examples have been modelled on actual projects from the voluntary carbon market:

PROJECT DEVELOPER AS OWNER



⁷³⁰ *Ibid.* at 9-10.

PROJECT DEVELOPER AS A THIRD PARTY



3.3 Project-level lessons from early market experience⁷³¹

From a project-level perspective, a project developer needs to ensure that, to the greatest extent possible, the project is based on strong legal foundations so that any risk of it being compromised in the future is minimised. This requires a careful assessment of the national law and sub-national law that applies to the land being used, to the finance structure and to the ongoing management of the project activity; from the perspective of a buyer of carbon credits, the likely requirements for participating in future national trading schemes (i.e., the legal requirements for creating carbon credits that can be used to offset legal liabilities) needs to be considered carefully. While there are some indications of what such requirements will be (such as in the case of California), the historical approach to generating carbon credits from forestry activities under the CDM and trading regimes (such as those in Australia and New Zealand) provides significant assistance.

The major legal challenges faced by early forest carbon projects are described below.

⁷³¹ Sophie Chapman and Martijn Wilder, "Fostering investment through effective legal frameworks: lessons from the development of early forest carbon projects" 1 *Carbon and Climate Law Review* 2013, pages 43-53.

3.3.1 *Importance of Strong Legal Frameworks for REDD+ Projects*

As an international response to climate change, REDD+ contributes to the mitigation of carbon emissions by providing a policy framework for national avoidance of deforestation, forest degradation, conservation, sustainable management of forests, and increasing forest carbon stocks.⁷³² The forests targeted for REDD+ project implementation often have local forest communities heavily dependent upon them for their livelihoods (i.e., agricultural production), access to non-timber forest products for home use, traditional and cultural use, and residence. Involvement of communities in the projects developed under REDD+ aims to further the broader goals of sustainable development - such as poverty reduction, robust ecosystems and biodiversity conservation, access to and sustainable use of natural resources, improved livelihoods, indigenous rights, gender equality, technology transfer and adaptability to changing climate conditions.⁷³³

A lack of legal clarity surrounding REDD+ can lead to numerous problems. With respect to market-based financing models, the International Union for Conservation of Nature (IUCN) has noted that ‘markets are not perfect and thus require well designed legal and policy frameworks to guide them properly.’⁷³⁴ The Chief Executive Officer (CEO) of the Verified Carbon Standard (VCS) has stated that government regulation which clarifies the underlying uncertainties and conflicts that currently surround REDD+ rights has the power to ‘send a clear signal that will drive investment in and ultimately demand for carbon reductions.’⁷³⁵

3.3.2 *Regulatory Processes*

3.3.2.1 *Formal Approval Processes for REDD+ Projects*

In some countries, REDD+ projects are already subject to specific national regulatory frameworks that either in part or directly address some of these issues, and are likely in future to become subject to international REDD+ frameworks that enable the generation of REDD+ credits. Once an international REDD+ framework has been agreed, REDD+ projects seeking to generate REDD+ credits will need to comply with its requirements, which may address project structuring and implementation as well as

⁷³² REDD+ activities are defined in Paragraph 70 of the Cancun Decisions (Decision 1/COP.16/2010).

⁷³³ Deborah Murphy, "Safeguards and Multiple Benefits in a REDD+ Mechanism", IISD, May 2011, at iii.

⁷³⁴ International Union for Conservation of Nature (IUCN), "Ownership of Land, Forest, Carbon," in John Constenbader (ed.), *Legal Frameworks for REDD: Design and Implementation at the National Level* (Bonn: IUCN, 2009), at 8-9.

⁷³⁵ CEO David Antonioli quoted in Marcelo Teixeira, *Point Carbon* (23 March 2012).

environmental and social issues such as additionality and community benefit-sharing. REDD+ projects will also need to comply with general domestic law requirements that apply in the jurisdictions in which they are located. Types of host country laws that will need to be considered include: laws regulating forestry activities; corporations and securities laws; investment and taxation laws; environment and planning laws; and, constitutional laws relating to governmental powers, personal and proprietary rights and the rights of traditional landowners or communities.

If local laws regarding land use and carbon ownership are unclear, project developers nonetheless need to demonstrate *evidence of right of use* under the VCS (please refer to **Annex 1** for a discussion of VCS requirements). Without clear formal approval processes, projects developers need to apply existing regulations as a 'proxy' REDD+ regime. This process can be time-consuming, expensive and potentially unreliable. Future changes in law and policy regarding REDD+ could overrule the 'proxy' provisions used to demonstrate this requirement, creating a level of regulatory risk that could discourage private sector investors. Thus, even with the advent of voluntary initiatives to guide the development of REDD+ projects, strong regulatory frameworks are still required to create firm legal foundations for REDD+ projects.

3.3.2.2 *Compliance with Voluntary Standards*

In the absence of any formal domestic legal frameworks, most REDD+ projects trading credits in the voluntary market have been verified by the VCS with the anticipation that in future they can become formal REDD+ projects under domestic schemes. The VCS was designed as an interim measure that was not intended to replace formal REDD+ regulation, aiming to create a framework to facilitate the creation of carbon credits (and incentives for private sector investors) during the transitional period towards compliance markets. In addition, some projects have also sought additional accreditation under the Climate, Community and Biodiversity Alliance Standards (CCB Standards). Other voluntary standards that can be used for REDD+ project development include Plan Vivo⁷³⁶ and the CDM Gold Standard.⁷³⁷ Standards such the CCB Standard create an additional 'layer' of certification to verify that projects have particular attributes. *Please refer to Annex 1 for further information regarding the voluntary standards.*

⁷³⁶ See Plan Vivo, "Plan Vivo: Improving livelihoods, restoring ecosystems," available on the Internet at <<http://www.planvivo.org/>> (last accessed 26 April 2014).

⁷³⁷ See The Gold Standard, "The Gold Standard: Premium Quality Carbon Credits," available on the Internet at <<http://www.cdmgoldstandard.org/>> (last accessed on 26 April 2014).

3.4 Issues specific to commercial REDD+ projects in Kenya

3.4.1 *Government approval required to transact carbon credits?*

Article 71 of the Constitution of 2010 provides that Parliament needs to approve a transaction if it “involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya.”⁷³⁸ Article 71 also provides for Parliament to enact legislation regarding the classes of transactions that are subject to such ratification.⁷³⁹ It is possible that carbon credits could become a such a transaction class; if not, the Government should still clarify this point in order to avoid regulatory uncertainty.

3.4.2 *Treatment of REDD+ projects (or other activities) within a national programme?*

There is currently some uncertainty regarding how REDD+ projects will be treated within a future national REDD+ programme (the issue of *scale of REDD+ implementation*). Within REDD+ policy generally, there is a debate regarding whether REDD+ projects could be successfully ‘nested’ within a wider jurisdictional programme (ie. projects generate credits from a local baseline, rather than a national or sub-national baseline), and also whether REDD+ credits (representing emissions reductions) generated by projects can be transferred to private buyers, or be sold offshore. These are bigger policy questions that need to be clarified to reduce investment risks in commercial REDD+ projects.



Inside the clothing factory at Rukinga Ranch, part of Wildlife Works' Kasigau Corridor REDD Project in the Tsavo region of Kenya. Courtesy of Wildlife Works 2012.

⁷³⁸ Constitution of Kenya 2010, Article 71(1)(a).

⁷³⁹ Constitution of Kenya 2010, Article 71(2).

IMAGES FROM WILDLIFE WORKS' KASIGAU CORRIDOR REDD PROJECT IN THE TSAVO REGION OF KENYA



An elephant at a waterhole on Rukinga Ranch. One activity of the project created a transit corridor for wildlife to safely travel along migration routes.

Courtesy of Wildlife Works 2012.



A list of the different community groups affected by the Wildlife Works REDD project.

Courtesy of Wildlife Works 2012.



Printed clothing drying at the Rukinga Ranch T-Shirt Factory, part of the Wildlife Works REDD Project, Kenya.

Courtesy of Wildlife Works 2012.



A school for Wildlife Works' employees, located at Rukinga Ranch, with teachers Colleta (right) and Monica (left).

Courtesy of Wildlife Works 2012.

4 PRIVATE INVESTMENT IN THE GREEN ECONOMY

4.1 Business opportunities in the green economy

4.1.1 General points

A recent high-level dialogue regarding the development of a green economy in Kenya noted that “*unless significant investments are made to conserve and sustainably manage critical ecosystems, including forests and water towers, Kenya’s Green Economy aspirations will be difficult to achieve.*”⁷⁴⁰ A UNEP-sponsored conference regarding Water Towers, Forest and Green Economy noted the need to engage the private sector ‘to ensure an enabling environment for investments in sustainable forest management and utilization.’⁷⁴¹ The value of forest ecosystem services was noted by both the Government of Kenya and the United Nations Environment Programme (UNEP), with the need to reduce deforestation framed as an opportunity to drive investment into sustainable growth.⁷⁴²

The establishment of Payments for Ecosystem Services (PES) schemes to conserve and restore forests and inland waters was recommended, in addition to the development of a multi-source investment portfolio (as a public-private partnership) to support the sustainable management and utilization of forest ecosystems; it was noted that such an initiative would require barriers to private sector investment to be addressed, together with measures for transparency and accountability.⁷⁴³

It was noted that the enabling conditions for private sector investment include a clear legal framework for land tenure, natural resource governance, equitable benefit-sharing and law enforcement.⁷⁴⁴

4.1.2 Payment for Ecosystem Services schemes

Payment for Ecosystem Services (PES) schemes could be used to pay for carbon sequestration as an ecosystem service, and this could also be applied to other co-benefits of avoided deforestation (such as water services and habitat conservation). The voluntary market for forest carbon offsets is an

⁷⁴⁰ UNEP/Republic of Kenya, *Water Towers, Forests and Green Economy: Outcomes of the First High Level National Dialogue in Kenya (Nairobi, 5-7 November, 2012)*, Courtesy of the (then) Ministry of Forestry and Wildlife, Office of the REDD+ Focal Point.

⁷⁴¹ *Ibid.*

⁷⁴² *Ibid.*

⁷⁴³ *Ibid.*

⁷⁴⁴ *Ibid.*

example of a scheme that facilitates private PES transactions.⁷⁴⁵ PES arrangements usually involve a contractual relationship between an entity that pays for an ecosystem service and the provider(s) of that service; buyers of the service can be public or private (or both). PES schemes can be self-organised private deals (with private buyers), public payment schemes (where the Government is buyer) or trading of credits within a market setting (see **Annex 10** for further details regarding PES). Therefore, PES schemes for both carbon and non-carbon benefits could provide a variety of policy options for implementing different REDD+ interventions at different scales (ie. at local, jurisdictional or national levels).

One example, and possible model, of a PES scheme is offered by Costa Rica. Forest Law No. 7575 (1996) established a payment for ecosystem services program (the Programa de Pago por Servicios Ambientales, or PPSA), for the services of carbon mitigation, hydrological services, biodiversity and natural beauty.⁷⁴⁶ The Forest Law No. 7575 additionally ‘provides the regulatory basis to contract landowners for the services provided by their lands, and establishes the National Fund for Forest Financing (Fondo Nacional de Financiamiento Forestal, FONAFIFO)’⁷⁴⁷ in order to distribute payments and incentives. **The FCPF Carbon Fund has recently signed a Letter of Intent with FONAFIFO to buy emissions reduction generated through this program.**

4.1.3 *Climate-smart agriculture in the ‘green economy’*

The Intergovernmental Panel on Climate Change (IPCC) predicts that agricultural production in many African countries could be “severely compromised” by climate change,⁷⁴⁸ and that vulnerable areas such as sub-Saharan Africa could see agricultural yields decrease by as much as 50%⁷⁴⁹.

One example of business opportunities along the REDD+ supply chain could be investments in ‘climate-smart’ agriculture. The FAO defines ‘climate-smart agriculture’ as “*agriculture that sustainably increases productivity, resilience (adaptation), reduces/removes GHGs (mitigation),*

⁷⁴⁵ ‘The global markets for offsets from agriculture, forestry, and other land-use projects transacted 28 MtCO₂e ... Market value reached \$216 million in 2012.’ Ecosystem Marketplace, *Covering New Ground: State of the Forest Carbon Markets 2013 – Executive Summary* (2013), page V, Box 1 <<http://www.forest-trends.org/documents/files/FCM2013print.pdf>> last accessed 12 January 2013.

⁷⁴⁶ Freedom Kai Phillips, ‘Legal Brief on Legal Preparedness for Achieving the Aichi Biodiversity Targets’ (Centre for International Sustainable Development Law); see also Stefano Pagiola, ‘Payments for Environmental Services in Costa Rica’ (Environment Department, World Bank 2006).

⁷⁴⁷ Stefano Pagiola, ‘Payments for Environmental Services in Costa Rica’ (Environment Department, World Bank 2006), page 2, para 3.

⁷⁴⁸ IPCC, AP4 Synthesis Report 2007, section 3 citing Working Group II SPM examples in Table SPM.2.

⁷⁴⁹ *Ibid.*

and enhances achievement of national food security and development goals.”⁷⁵⁰ For example, this could involve ‘conservation agriculture’ (reducing soil erosion, crop varieties that are drought-resistant or leave soil less exposed), or increasing the number of plants on agricultural land (to reduce the need for fertilizers and increase soil carbon sequestration). Farmers could be reluctant to adopt new forms of ‘climate-smart’ agriculture due to lack of technical knowledge or capacity, lack of access to new information sharing technologies, or lack of financing (particularly up-front financing to aid capital investments).⁷⁵¹

The African Union’s *Comprehensive Africa Agriculture Development Programme*⁷⁵² notes the importance of increasing agricultural growth and investment into the sector in order to achieve food security and poverty alleviation targets in its member States (including Kenya). *Vision 2030*, Kenya’s economic development strategy for 2008-2030, highlights the importance of agriculture⁷⁵³ which generates 24% of Kenya’s GDP (with a further ‘informal’ contribution of 27%)⁷⁵⁴; more than 65% of informal employment in rural areas is in the agricultural sector.⁷⁵⁵ The *Agricultural Sector Development Strategy* for 2010-2020 recognizes that both the public and private sectors are needed to reduce poverty and increase food security⁷⁵⁶; in addition, Kenya’s *National Climate Change Action Plan* seeks to encourage investment into climate change mitigation and adaptation.

The potential for climate-smart agriculture to support Kenya’s existing policy goals is under-explored. Given the potential contribution of climate-smart agricultural initiatives to mitigation, adaptation, poverty alleviation and food security, exploring how to enable a transition from current agricultural techniques and preferences to newer ‘climate-smart’ practices is a valuable exercise. **It is possible that the current consideration of REDD+ strategy options in Kenya could provide an opportunity to consider how climate-smart agriculture could be incorporated into REDD+ planning.** Please refer to *Background Report 4* for a fuller discussion of climate-smart agriculture.

⁷⁵⁰ Lipper, L. et al., “Climate-Smart” Agriculture: Policies, Practices and Financing for Food Security, Adaptation and Mitigation (FAO 2010), at ii, n.1.

⁷⁵¹ Meybeck, A. and Gitz, V. (2013) “Module 1: Why Climate-Smart Agriculture, Forestry and Fisheries” in FAO, *Climate-Smart Agriculture Sourcebook*, at 26; Campbell, B. et al., *Agriculture and Climate Change: A Scoping Report*, Meridian Institute (2011), at 23.

⁷⁵² See African Union - New Partnership for Africa’s Development (NEPAD), *Comprehensive Africa Agriculture Development Programme* (2003). Available at <http://www.nepad.org/nepad-programmes>.

⁷⁵³ Government of Kenya, *Vision 2030* (2007), at 1.

⁷⁵⁴ Government of Kenya, *National Climate Change Action Plan 2013-2017* (2013), at 4.

⁷⁵⁵ *Ibid.*

⁷⁵⁶ Government of Kenya, *Agricultural Sector Development Strategy 2010-2020* (2010), at 7-8.

4.2 Investment climate in Kenya

The capacity of any country to attract foreign investment will rely in part on its investment climate. A general overview of Kenya's investment climate is given below.

Kenya has a liberalized economy, with no foreign exchange and price controls. The private sector has been described as 'vibrant and market-driven',⁷⁵⁷ with the Government aiming to have 'minimal interference in business' and adopting 'the role of regulator rather than an active participant.'⁷⁵⁸ The United Nations Conference on Trade and Development (UNCTAD) states that "by East African standards, Kenya has a very substantial private sector, including a significant number of foreign investors."⁷⁵⁹ Groups representing the private sector include the⁷⁶⁰:

- Kenya Private Sector Alliance (KEPSA);
- Federation of Kenya Employers (FKE);
- Kenya Association of Manufacturers (KAM);
- Eastern Africa Association (EAA);
- Kenya Flower Council (KFC); and
- Fresh Produce Exporters Association of Kenya (FPEAK).

It has been noted that there are limited foreign investment incentives available in Kenya.⁷⁶¹ Poor infrastructure and complex administrative procedures have been identified as major barriers for foreign investors.⁷⁶² The World Trade Organisation reports that Australia, China, Germany, India and the United Kingdom are the main sources of foreign direct investment (FDI) for Kenya.⁷⁶³ The Foreign Investments Protection Act (Cap 158) provides for certain approved investments and incidental matters.

⁷⁵⁷ Kaplan and Stratton (Advocates), *Kenyan Business Environment*, <http://www.kaplanstratton.com/resources/> (last accessed June 14 2013).

⁷⁵⁸ Akash Devani (Partner, Anjarwalla & Khanna Advocates), *Investing in Kenya: An overview of existing regulatory environment and framework for investors* (January 14, 2009).

⁷⁵⁹ United Nations Conference on Trade and Development (UNCTAD), *An investment guide to Kenya: Opportunities and Conditions* (2012), p.20, paragraph 3.

⁷⁶⁰ *Ibid*, pages 20-21.

⁷⁶¹ Kaplan and Stratton (Advocates), *Kenyan Business Environment*, <http://www.kaplanstratton.com/resources/> (last accessed June 14 2014).

⁷⁶² World Trade Organisation (Trade Policy Review Body), *Trade Policy Review – East African Community (Report by the Secretariat): Annex 2 – Kenya* Doc. WT/TPR/271, 17 October 2012; page A2-181 at paragraph 26.

⁷⁶³ *Ibid*, page A2-181 at paragraph 28.

Kenya is a member of the East African Community (EAC) together with Burundi, Rwanda, Tanzania and Uganda. Kenya is also a member of the Common Market for East and Central African States (COMESA).

Kenya's financial and capital markets have been described as 'among the most sophisticated in the East African region.'⁷⁶⁴ The Central Bank of Kenya, in conjunction with the Treasury, is responsible for Kenya's financial and banking system⁷⁶⁵; the banking industry in Kenya has been described as 'extensive.'⁷⁶⁶ There are more than 40 licensed banks and numerous other financial institutions such as building societies, foreign exchange bureaus and credit reference agencies in Kenya, and banking supervision is described as 'a high standard.'⁷⁶⁷

The capital markets (including the Nairobi Stock Exchange) are regulated and supervised by the Capital Markets Authority.⁷⁶⁸ Corporate bonds have been issued by institutions such as the East African Development Bank, local financial institutions and other companies working in different sectors of the economy.⁷⁶⁹

There are over 40 licensed insurance companies in Kenya (with 2 reinsurance companies); the governing law is the Insurance Act and the regulatory authority is the Insurance Regulatory Authority.⁷⁷⁰

Kenya is a member of the Multilateral Investment Guarantee Agency (MIGA); the Africa Trade Insurance Agency (ATIA), which insures investors against non-commercial risks; and the International Centre for Settlement of Investment Disputes (ICSID).⁷⁷¹

⁷⁶⁴ Kaplan and Stratton (Advocates), *Kenyan Business Environment*, <http://www.kaplanstratton.com/resources/> (last accessed June 14 2013).

⁷⁶⁵ *Ibid.*

⁷⁶⁶ United Nations Conference on Trade and Development (UNCTAD), *An investment guide to Kenya: Opportunities and Conditions* (2012); p.18, paragraph 9.

⁷⁶⁷ Kaplan and Stratton (Advocates), *Kenyan Business Environment*, <http://www.kaplanstratton.com/resources/> (last accessed June 14 2013).

⁷⁶⁸ *Ibid.*

⁷⁶⁹ *Ibid.*

⁷⁷⁰ United Nations Conference on Trade and Development (UNCTAD), *An investment guide to Kenya: Opportunities and Conditions* (2012); p.19, paragraph 3-4.

⁷⁷¹ World Trade Organisation (Trade Policy Review Body), *Trade Policy Review – East African Community - Report by the Secretariat* WT/TPR/S/271 (17 October 2012); Annex 2 – Kenya; @ paragraph 58/page A2-192.

The Export Processing Zones Act (Chapter 517) can provide incentives to certain types of businesses. For example, the Ecofactory at Rukinga Ranch (part of Wildlife Works' Kasigau Corridor REDD Project) is situated within an Export Processing Zone (EPZ).



The clothing factory at Rukinga Ranch, part of the Wildlife Works Kasigau Corridor REDD Project.

Courtesy of Wildlife Works 2012.

In 2014, security concerns have prompted travel warnings and affected the level of tourism. It is unclear how security concerns have affected or will affect foreign investment in Kenya's natural resource sectors (such as forestry).



A large road-side sign acknowledging the peaceful elections in 2013.

The preceding 2007 election sparked civil unrest in some parts of the country.

5. COMMERCIAL LAWS IN KENYA

Both REDD+ projects and investments along the REDD+ value chain will be regulated by various laws related to commerce. Key Kenyan laws and provisions are identified below.

5.1 Business structures

The type of business structure used for a REDD+ project or activity will depend on the purpose for which it is to be used, and the number of stakeholders involved. Both not-for-profit and profit-making structures can be formed in Kenya. A summary of the various forms of association are set out in the table below⁷⁷² (and further details regarding business structures, including joint ventures, are given in **Annex 6**).

Not-for-Profit Associations	Profit-making Associations
Common Law Trust	Common Law Trust
Corporate Trust	Corporate Trust
Company Limited by Guarantee	Company Limited by Guarantee
Non Governmental Organization (NGO)	Partnership
Public Benefits Organization (PBO) (note: no commencement date has been given for the Public Benefits Organization Act).	Limited Liability Partnership
	Sole Proprietorship
	Company Limited by Shares

⁷⁷² Before forming a company, a lawyer will seek the following information:

- The intended name of the entity. In the case of a company, three names are ordinarily requested. This is especially important for association where organization's name requires prior approval;
- The nature of the activities that the intended association is intended to undertake. In the case of a corporate trust these activities must relate to advancement of religion, advancement of education or the alleviation of poverty only. The nature of activities is a critical matter that needs to be well captured so as to avoid challenges on the basis of "*ultra vires*" i.e. that the entity is not entitled to engage in certain activities since they are not stated;
- If the intended association is a company, the lawyer will need to know whether such a company will be limited by shares or guarantee. The guarantee company is the not-for-profit while the company limited by shares is for-profit association; and
- The full names of the founding members together with their addresses, nationalities and occupations should be provided.

5.2 Taxation

Income tax applies to gains or income received from investments (including projects) in Kenya. There are taxes applying to income generated from land and property ownership activities in Kenya. The Income Tax Act in section 3 provides that all income derived and accrued from Kenya is subject to tax in Kenya.⁷⁷³

The tax rates depend on whether the foreigners have incorporated a company or whether they are operating through a branch of a foreign company. The rate of tax is 30% in the case of a resident company and 37.5% in the case of a branch, having deducted all expenses incurred wholly and exclusively in the generation of that income.

Value-added Tax (VAT) of 16% of purchase price/value has been introduced on the sale of immovable property, exempting the sale of residential properties and (arguably) vacant undeveloped land.⁷⁷⁴

There are no taxes applicable on the capital amount invested at the inception stage of the project.

Stamp duty applies on purchase of land at the rate of 2% in non-municipal areas and 4% in all other areas.

Currently, there are no export taxes applicable to goods leaving Kenya. VAT is zero-rated in respect of goods manufactured and exported out of Kenya. Similarly, VAT is zero-rated in respect of services exported out of Kenya. However, the income generated from all activities (whether carried on fully in Kenya or partly in Kenya and partly outside of Kenya) will give rise to income tax in the hands of the entity in Kenya.

Currently, the sale of shares on the stock exchange is exempted from transfer taxes. Kenya does not yet have a commodities exchange on which carbon credits are transferred and therefore would not be within the scope of the exemption granted to shares transferred on the stock exchange. That said, the Kenyan stamp duty legislation has not developed to a stage where the sale of a carbon credit is deemed subject of stamp duty. Notwithstanding these points, a carbon credit which is generated in Kenya if sold would give rise to a profit in the hands of the seller of the carbon credit. Accordingly,

⁷⁷³ Accordingly, rental income is subject to tax in Kenya. In the case of a non-resident owner of rental property, the tax applicable is 30% on the gross amount of the rent receivable by the non-resident owner.

⁷⁷⁴ Opinion of Kenyan advisors.

such a seller would be considered to have made a “gain” which is subject to tax in Kenya, in the same way as a seller of other goods would be subject to income taxes on income generated in Kenya.

5.3 Employment

REDD+ projects or other related activities could require staff, and labour laws will apply. The rights and responsibilities of employees and employers in Kenya is governed by:

- Employment Act 2007;
- Occupational Safety and Health Act 2007;
- Work Injury Benefits Act 2007;
- Labour Relations Act 2007; and
- Labour Institutions Act 2007.

5.4 Insurance

REDD+ projects or other related activities might use insurance to reduce possible liabilities. Commercial insurance is governed by the Insurance Act (Chapter 487). As noted above, there are over 40 licensed insurance companies in Kenya (with 2 reinsurance companies); the regulatory authority is the Insurance Regulatory Authority.⁷⁷⁵

5.5 Contract

The Law of Contracts Act (Chapter 28) is the law governing contracts in Kenya.

5.5.1 Enforceability

Although legal contracts are enforceable in Kenya, Kenyan courts have significant delays in the hearing and determination of suits.

5.5.2 Capacity to contract

For public owners: Pursuant to the Constitution, government forests, government game reserves, national parks, government animal sanctuaries and any land not classified as private or community

⁷⁷⁵ United Nations Conference on Trade and Development (UNCTAD), *An Investment Guide to Kenya: Opportunities and Conditions* (2012); p.19, paragraph 3-4.

land shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission. As the land laws enacted pursuant to the Constitution are relatively new and the National Land Commission has only recently been constituted, it is difficult to determine who would enter the contract on behalf of the Government and who would receive money from a transaction. One option would be for the National Land Commission to enter into the contract on behalf of the Government, or another option would be that the National Land Commission manages the land but directs the Cabinet Secretary responsible for land matters to execute the contract. Subsidiary legislation or guidelines could have a role in regulating these issues.

For community owners: There are two types of community land:

- **Unregistered community land:** The National Land Commission is mandated under Section 5 of the National Land Commission Act to manage and administer all unregistered community land on behalf of the County Government.
- **Registered community land:** Registered community land is elaborately provided for under the Land (Group Representatives) Act. This Act derives its definition of “group” from the Land Adjudication Act: *“a tribe, a clan, section, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being members of the group, together with any person of whose land the group is determined to be the owner..”*
 - The Land (Group Representatives) Act provides for incorporation of Group Representatives in a procedure in which an identified group elects not more than ten and not less than three persons to be group representatives of the Group. The said Group representatives are incorporated, they have perpetual succession with power to sue and be sued in their corporate name and to acquire, hold, charge and dispose of the group’s property.⁷⁷⁶ **Any money that needs to be distributed to the group members would need to be paid to the group representatives who would then distribute it to the group members.**

Group representatives can enter into a transaction/contract subject to the provisions of their constitutional document. The constitution of the group would provide how the corporate body would execute documents, but execution would be under common seal in the presence of a minimum of three officers. The group representatives would manage the division of revenues amongst the group members.

⁷⁷⁶ S. 8 Land (Group Representatives) Act.

According to section 46(1) of the Forests Act, a member of a forest community may together with other members or persons resident in the same area register a Community Forest Association under the Societies Act (Chapter 108). Therefore, a CFA is a society, and has the capacity to contract. The rules of any registered society would set out how the society could enter into a contract and who could execute the contract on its behalf. It is a requirement under section 19 of the Societies Act (Cap 108) that the constitution of every society should set out the matters specified in the Schedule to the Act which include the trustees of the society, the custody and investment of funds of the society, the property of the society, and the designation of persons responsible for it.

For private owners: For private owners, the governing law is the Law of Contract Act (Cap. 23).

5.6 Land and carbon rights

Please refer to **Background Report 1**, Section 4.1 (land law) and Section 5 (carbon rights).

6. CONCLUSION

The private sector will be an important player in REDD+ implementation – however, the role of the private sector in Kenya’s national programme is uncertain. Two key entry points for private sector involvement can be identified – as project proponents in commercial REDD+ projects (noting that several forest carbon projects are already operational in Kenya), and as actors in the wider green economy.

Regarding commercial projects, the current lack of demand for carbon credits in the voluntary market should be noted (ie. private buyers for carbon credits cannot be guaranteed), and it is uncertain whether a future international compliance market for REDD+ credits will be created. Alternatively, it might be possible (although not guaranteed) to secure bilateral support for credits generated from projects or establish a national scheme for their purchase (such as a PES scheme). Two important issues need to be clarified with regard to commercial projects:

- i) will they be permitted under a future national programme, and
- ii) is the sale of carbon credits subject to special approval.

More broadly, the private sector’s role in developing a ‘green economy’ can be explored for opportunities to support the reduction of emissions from REDD+ activities (such as providing low-emission alternatives to charcoal and fertilisers). It is our understanding the UNEP is leading this

dialogue in Kenya and it has not been explored in detail here; however, the possibility that Payment for Ecosystem Services schemes and climate-smart agriculture could be included in plans to develop a green economy has been identified in this report, and it is recommended that both of these options be explored.

Irrespective of whether the private sector will be involved in either projects or business opportunities in the green economy (or both), existing legal frameworks regulating commercial activity in Kenya will apply. These include the laws regarding business associations, taxation, employment, contracts and (more generally) land rights. Notwithstanding possible issues regarding implementation processes and enforcement of these laws, Kenya's commercial frameworks are well developed and include measures to attract foreign investment. **Current policy dialogues in Kenya offer an opportunity to explore how existing legal structures can support different entry points for private sector participation in REDD+ and the green economy.**

BACKGROUND REPORT 4:

CLIMATE-SMART AGRICULTURE AND REDD+ IMPLEMENTATION IN KENYA



Pastureland between Nairobi and Lake Naivasha.

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GLOSSARY

agribusiness – the business of agriculture, involving crop production; seed development, manufacture, and supply; chemical manufacture of fertilisers and pesticides; equipment; food processing, marketing and retail.

agroforestry – woody perennials (trees, bushes, shrubs, bamboo, palm trees) are grown on the same plot of land with other crops or animals.

biotechnology – using living organisms or cells to improve other animals or plants, develop products, or manipulate biological processes.

carbon sequestration – uptake of carbon from the atmosphere and storage in a terrestrial sink, such as soils or forests.

composting – using organic material, such as animal or plant waste, and allowing it to decompose through exposure to the air and controlled methods, such as mechanical mixing and aerating.

conservation tillage (ie. conservation agriculture) – farming method that allows plants to grow and for weed control yet the ground is covered throughout the year and the soil is disturbed as little as possible. “The aim is to reduce soil loss and energy use while maintaining crop yields and quality. No-till is the most restrictive (soil-conserving) form of conservation tillage. Other practices include ridge-till, strip-till, and mulch-till.”⁷⁷⁷

co-operative – an organisation formed by farmers (in the agricultural context) in order to produce and market goods or products collectively for more bargaining power. Each member receives a share of the benefits gained from the collective sale of the product.

cover cropping – planting crops to grow during the period between harvest and replanting of the main crops in order to protect the soil from erosion and contribute to soil health by adding nutrients.

crop residue – organic matter remaining in the field after a crop is harvested (eg. stalks, roots, leaves), which is managed so that it provides cover for the soil against erosion and is ploughed into the soil for the next round of planting.

crop rotation – different crops are planted in consecutive seasons in order to contribute different nutrients to the soil.

⁷⁷⁷ United States Department of Agriculture (USDA), *Agriculture Fact Book*, at <http://agclass.nal.usda.gov/mtwdk.exe?k=glossary&l=60&w=1883&n=1&s=5&t=2>, last accessed 28 June 2013.

extension services – educational information and training for farmers usually provided by an extension agent, a farming expert employed by the government at the local level, or through pamphlets, brochures, or similar materials (including information communication technology (ICT)).

fodder – crops grown to feed livestock or the remaining plant parts from crops grown for human consumption on which livestock graze.

industrialised agriculture – term commonly used to refer to modern methods of production that employ machinery, non-organic fertilisers, and biotechnology typically on a large scale.

inputs – the materials a farmer has to purchase or put into his operation in order to produce crops (eg. varieties of seeds, fertilisers, pesticides, irrigation systems, seedlings for agroforestry).

integrated pest management – “A pest management strategy using a systematic approach in which pest populations are monitored to determine if and when control methods are required. Integrated pest management (IPM) uses biological, chemical, physical, cultural and/or genetic control methods in order to minimize pesticide use, reduce production costs, and protect the environment.”⁷⁷⁸

intensification – increasing the amount of crops or livestock grown on the same piece of land through planting or stocking more animals in the same area or achieving higher yields (eg. new seed varieties, more fertiliser application, irrigation).

intercropping – planting two or more different crops simultaneously in the same field (eg. in alternating rows or among the rows).

irrigation – applying water to the soil in order to assist with plant production.

leaching – biological process by which nutrients in the soil are lost through rain or irrigation and ‘leach’ or seep into the groundwater.

litter – leaves from the agroforestry trees that have fallen onto the soil below or plant materials remaining where crops will be produced. This extra organic material becomes integrated into the soil and adds to the soil organic matter.

monoculture plantations – term referring to large-scale production of a single crop, in the case of forestry usually fast-growing or non-native tree species. These systems are potentially lacking in biodiversity and may degrade the soil (eg. if the non-native tree species require more water or nutrients).

⁷⁷⁸ *Ibid.*

mulching – applying a layer of organic material to the top of the soil in order to cover and protect the soil, add nutrients, retain moisture and increase soil fertility.

nitrogen-fixing legumes – plant that may be intercropped in order to contribute nitrogen to the soil and substitute for applying chemical nitrogen fertilisers.

perennial crop – crops that do not need to be replanted every year; they reduce the need for inputs, and they reduce soil erosion by providing soil cover.

permanent crop – plants that remain in the soil for many seasons even after they are harvested. Examples include coffee, citrus, olives, nuts, grapes, and other trees, shrubs or vines producing food or fibre (rubber), not timber.

plough – farming device that cultivates the soil in preparation for planting by loosening or turning the soil over. Also, refers to the act of ploughing or using the piece of equipment to turn the soil.

precision irrigation – applying water very specifically to the root or location where the plant will receive as much of the water as possible to reduce excess water usage. Technical systems have been developed (labelled ‘drip systems’) which release small droplets of water at the base of the crop at slow intervals.

runoff – where precipitation or irrigation water does not actually soak into the soil and instead runs off into streams or other water bodies. The concern with this is what the water takes with it (eg. chemical fertilisers or excessive manure), which may pollute the water bodies.

salinisation – high salt content in soil, which can be built up from excessive irrigation, causing reduced soil health and fertility.

silage – “Any crop that is harvested green and preserved in a succulent condition by partial fermentation in a more-or-less airtight container such as a silo.”⁷⁷⁹ This technique is useful for preserving livestock feed for periods between harvests or in times of crop losses.

soil degradation – negative change in soil nutrient content or soil structure leading to lower fertility.

soil disturbance – where the surface of the soil is broken (eg. ploughing).

soil erosion – loss of soil or land surface by water, wind, ice, or other agents.

soil functionality – processes and benefits provided by soil at varying degrees based upon soil health, such as food and biomass production, environmental processes, biological habitat, raw materials, physical and cultural heritage, and a platform for construction.

⁷⁷⁹ *Ibid.*

soil organic carbon – “That portion of non-living organic compounds in the top one meter of soil, eg. humus, which is important to soil quality and plant nutrition and is replenished by the decomposition of plant material.”⁷⁸⁰

soil organic matter – organic matter within the soil composed of living microorganisms, fresh or partially decomposed residues, and well-decomposed/highly stable organic matter.⁷⁸¹

subdivision – dividing a plot of land into smaller pieces (in the Kenyan context, often for inheritance purposes).

subsistence agriculture – farmers focus on growing enough to feed themselves and their families rather than selling crops and using the income to purchase food.

tillage – the act of ploughing or turning over the soil in preparation for planting.

terracing – natural or man-made landforms that allow for planting on a slope by running perpendicular to the slope. This avoids soil erosion down the hillside.

yield – refers to both the crop output for a certain area of land, as well as the generation of a plant itself (eg. a wheat plant may produce three seeds for each grain).

⁷⁸⁰ *Ibid.*

⁷⁸¹ USDA, Natural Resources Conservation Service, *Glossary of Terms: Soil Quality/Soil Health Terms*, at <http://soils.usda.gov/sqi/concepts/glossary.html>, last accessed 28 June 2013.

1. INTRODUCTION

The agricultural sector is a key sector of both the global economy and many national economies. It provides livelihoods and basic subsistence needs for millions of people, and contributes to the achievement of food security in both developing and developed countries.

The relationship of agriculture to climate change is a topic of increasing interest. Worldwide agricultural production is expected to decrease under climate change projections, posing a threat to global food security.⁷⁸² However, it is also important to note that agriculture contributes a significant amount of global emissions annually, which would increase with the intensification or expansion of production to meet higher demand.⁷⁸³ In addition, estimates attribute as much as 80% of global deforestation to agriculture⁷⁸⁴ - a fact that is very relevant in the context of designing national strategies to implement the United Nations Framework Convention on Climate Change (UNFCCC) policy framework for reducing emissions from deforestation and forest degradation plus conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries (REDD+).⁷⁸⁵

'Climate-smart' agriculture might have the potential to offer 'triple-win' benefits from increased adaptation, productivity, and mitigation⁷⁸⁶, providing a possible strategy to address both climate change and food security concerns. Climate-smart agriculture involves the use of different 'climate-smart' farming techniques to produce crops or livestock, which could help reduce pressure on forests for agricultural use as well as potentially maintain or enhance productivity, build resilience to climate change and mitigate the sector's high emissions.⁷⁸⁷

The agricultural sector is significant to Kenya's economy, providing employment and basic subsistence needs for a large percentage of the population.⁷⁸⁸ Possible reductions in agricultural productivity due to climate change impacts could have a negative affect on the livelihoods and food

⁷⁸² Intergovernmental Panel on Climate Change (IPCC), *Assessment Report 4 Synthesis Report* (2007), Sect. 3.

⁷⁸³ *Ibid.*

⁷⁸⁴ Kissinger, G., Herold, M., and de Sy, V., *Drivers of Deforestation and Forest Degradation: A Synthesis Report for REDD+ Policymakers*, Lexeme Consulting (2012), at 5; Steinfeld, H. et al., *Livestock's Long Shadow: Environmental Issues and Options*, The Livestock, Environment and Development (LEAD) Initiative (FAO 2006), at xxi; and Smith, P. et al., 'Competition for land' (2010) 365(1554) *Philosophical Transactions of the Royal Society B: Biological Sciences*, pp.2941-2957, at 2945.

⁷⁸⁵ Cancun Decisions (Decision 1/CP.16/2010), at 68-79.

⁷⁸⁶ Lipper, L. et al., *"Climate-Smart" Agriculture: Policies, Practices and Financing for Food Security, Adaptation and Mitigation*, Report for the FAO (2010), at ii, n.1.

⁷⁸⁷ Meybeck, A. and Gitz, V., 'Module 1: Why Climate-Smart Agriculture, Forestry and Fisheries', in FAO, *Climate-Smart Agriculture Sourcebook* (2013), at 27.

⁷⁸⁸ Government of Kenya, *Agricultural Sector Development Strategy 2010-2020* (2010), at 4.

security of millions of Kenyans.⁷⁸⁹ Agriculture is emphasised as an important part of Kenya's REDD+ planning, which proposes strategy options to address agriculture's role as a driver of deforestation.⁷⁹⁰ However, this REDD+ planning must balance the need for continued agricultural productivity to combat food insecurity.

Given the interaction between Kenya's agricultural sector and REDD+ implementation, the potential role for climate-smart agriculture could be considered in more depth. For example, climate-smart agriculture could be included as part of Kenya's REDD+ strategy in terms of (i) on-farm actions that indirectly reduce emissions from deforestation and forest degradation; and (ii) policy, legal, and institutional actions at national, regional, and local levels that support investment in and adoption of climate-smart agricultural practices. To provide some context to a possible policy dialogue about the role of climate-smart agriculture in Kenya's REDD+ implementation, this Background Paper presents:

- Background information regarding climate-smart agriculture;
- The potential to include climate-smart agricultural practices in Kenya's agricultural sector;
- The role of Kenya's agricultural sector in REDD+ planning and implementation i) at the policy level and ii) for carbon farming projects; and
- Whether the regulatory framework in Kenya currently supports climate-smart agriculture.

2. BACKGROUND TO CLIMATE-SMART AGRICULTURE

2.1 The relationship between agriculture, climate change and food security

Many international agreements and declarations⁷⁹¹ recognise agriculture as a major concern for reasons independent of climate change - such as sustainability and conservation of biodiversity,

⁷⁸⁹ Bryan, E. et al., *Agricultural Management for Climate Change Adaptation, Greenhouse Gas Mitigation, and Agricultural Productivity: Insights from Kenya*, International Food Policy Research Institute (IFPRI), Discussion Paper 01098 (2011), at 1.

⁷⁹⁰ Government of Kenya, *Revised REDD Readiness Preparation Proposal Kenya*, Submitted to the Forest Carbon Partnership Facility (August 2010), at 37-41.

⁷⁹¹ The Convention on Biological Diversity (CBD) has an Agricultural Biodiversity Thematic Programme: refer to CBD, *Agricultural Biodiversity*, <http://www.cbd.int/agro>. The 10-Year Strategy of the United Nations Convention to Combat Desertification (UNCCD) lists sustainable agriculture as one of its indicators for successful implementation: refer to UNCCD, *The 10-year strategic plan and framework to enhance the implementation of the Convention*, Decision 3/COP.8, Strategic Objective 3, at 10. **Agenda 21** promotes Sustainable Agriculture and Rural Development (SARD) macroeconomic conditions in developed and developing countries for increased uptake: refer to *Agenda 21*, United Nations Conference on Environment and Development, Rio de Janeiro, Brazil (3-14 June 1992), Section 14.2. **Rio+20**, United Nations Conference on Sustainable Development, *Food Security and Sustainable Agriculture*, Rio 2012 Issues Brief No. 9 (2011) [citing Rome Declaration on World Food Security, Preamble, 32(a), 35(i), 36(k), 53 (1996); Johannesburg Plan of Implementation, 20 (2002); Millennium Development Goals 1 (2000); and Commission on Sustainable

natural resources, wildlife habitat, as well as economic development.⁷⁹² For example, the recent Rio+20 Summit recognised the need to increase sustainable agricultural production, particularly in developing countries.⁷⁹³ These international commitments are intended to support national-level actions to improve the sustainability and reduce the environmental impact of agricultural production.

In this context, it is important to realise that climate change impacts could have a negative impact on agricultural production, and agricultural production is also a major source of emissions. Policy strategies to balance the need for both food security (via productive and climate-resilient food production techniques) and climate change mitigation from the agricultural sector are therefore required.

If, as projected, the global population increases to over 9 billion by the year 2050, the demand for food products will rise.⁷⁹⁴ Global agricultural production might need to grow by 60-70% by 2050 in order to meet future demand.⁷⁹⁵ However, during the same time period, it is likely that climate change will have a negative impact on agricultural production.⁷⁹⁶ The IPCC 4th Assessment Report predicts that climate change could cause yields to decrease by as much as 50% in some highly vulnerable areas⁷⁹⁷, including sub-Saharan Africa.⁷⁹⁸ In addition, changes to the climate could contribute to land degradation and reduce the amount of suitable land for agricultural production.⁷⁹⁹ It is likely that

Development 17th Sess., Decision, *Agriculture*, E/CN.17/2009/3 (4-15 May 2009)); UN General Assembly Resolution, *Agriculture development and food security*, A/RES/65/178, 65th Session (24 Mar. 2011)].

⁷⁹² Dubois, K.M. et al., *Incorporating Climate Change Considerations into Agricultural Investment Programmes: A Guidance Document*, FAO Investment Centre Division (2012), at 8.

⁷⁹³ Rio+20, United Nations Conference on Sustainable Development, *The Future We Want*, UN General Assembly 66th Sess., A/RES/66/288 (11 Sept. 2012), at 20, para. 111.

⁷⁹⁴ United Nations (UN) Department of Economic & Social Affairs, *World Population to 2300*, ST/ESA/SER.A/236 (2004), at 4.

⁷⁹⁵ Bruinsma, J., *The Resource Outlook to 2050*, in Expert Meeting on 'How to Feed the World in 2050' (FAO 2009), at 4.

⁷⁹⁶ IPCC, *Assessment Report 4 Synthesis Report* (2007), Section 3, citing Working Group II SPM examples in Table SPM.2.

⁷⁹⁷ *Ibid.* Changes in warming, precipitation, and frequency and intensity of extreme weather events will stress agricultural and natural systems. Branca, G. et al., *Identifying Opportunities for Climate-Smart Agriculture Investments in Africa*, Report for the FAO (2012), at 7 (citing the IPCC 4th Assessment Report 2007).

⁷⁹⁸ Potsdam Institute for Climate Impact Research and Climate Analytics, *Turn Down the Heat: Why a 4°C Warmer World Must be Avoided*, Report for the World Bank (2012), at 62.

⁷⁹⁹ Boko, M. et al., 'Africa', in *Climate Change 2007: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Fourth Assessment Report of the IPCC*, Ch. 9 (Parry, M.L. et al. eds., 2007), Section 9.4.4. See also Brown, O. et al., 'Climate change as the "new" security threat: implications for Africa' (2007) 83(6) *International Affairs*, pp.1141-1154, at 1141. Land degradation may be furthered by unsustainable management in addition to climate variations, such as exploitation of the soil without fertiliser, shortened fallow periods in shifting cultivation systems, or lack of irrigation. FAO, *World agriculture: towards 2015/2030* (2002), at 39-44.

developing countries, including Kenya, will be more vulnerable to these negative effects of climate change if they do not have appropriate adaptation strategies.⁸⁰⁰

One strategy to address food security issues is the intensification of agricultural production, which aims to increase the amount of food produced from the same piece of land by using different or enhanced agricultural management practices.⁸⁰¹ This has the potential to avoid emissions from land-use change (such as the conversion of forests to agricultural land),⁸⁰² however, intensification could also increase emissions if high-emission farming techniques are used to achieve this, such as using more fertiliser.⁸⁰³ Agriculture is already a major contributor to annual global emissions,⁸⁰⁴ contributing approximately 12-14% of the total.⁸⁰⁵ Therefore, methods to increase food production while simultaneously lowering emissions need to be explored.⁸⁰⁶

Agriculture is a politically sensitive sector for many reasons, including the global population's need for the agricultural sector to provide an adequate food supply in the face of rising demand.⁸⁰⁷ Strategies designed to mitigate emissions from the agricultural sector but decrease food security would not be politically popular in either national or international fora given that millions of poor people in rural areas depend on agriculture for their subsistence and livelihoods, whilst urban populations rely on a predictable supply of agricultural products in local food markets to meet their

⁸⁰⁰ Bryan, E. et al., 'Adapting agriculture to climate change in Kenya: Household strategies and determinants' (2013) 114 *Journal of Environmental Management*, pp.26-35, at 26.

⁸⁰¹ International Union for the Conservation of Nature (IUCN), *IUCN Definitions: Agricultural Intensification*, at http://cmsdata.iucn.org/downloads/en_iucn__glossary_definitions.pdf, last accessed 28 August 2013.

⁸⁰² DeFries, R. and Rosenzweig, C., 'Toward a whole-landscape approach for sustainable land use in the tropics' (2010) 107 *Proceedings of the National Academy of Sciences in the United States of America*, pp.19627-19632, at 19627.

⁸⁰³ Valin, H. et al., 'Agricultural productivity and greenhouse gas emissions: trade-offs or synergies between mitigation and food security?' (2013) 8 *Environmental Research Letters* 035019, at 2.

⁸⁰⁴ Agricultural sector emissions are due to soil disturbance when crops are planted (releasing carbon dioxide (CO₂)), application of chemical fertiliser, use of fossil fuels to power equipment, and production, storage and spreading of livestock manure. Smith, P. et al., 'Agriculture', in *Climate Change 2007: Mitigation, Contribution of Working III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, Ch. 8 (B. Metz et al. eds., 2007), at 503.

⁸⁰⁵ *Ibid.* Including N₂O emissions from agricultural soils, CH₄ from enteric fermentation, biomass burning, rice production, and manure management). Emissions from manufacture of chemical fertilisers is included under another category of global emissions, but nitrous oxide (N₂O) emissions result from the soil on which nitrogen fertiliser and/or manure is applied.

⁸⁰⁶ This elimination of forest and land sinks that absorb carbon dioxide from the atmosphere pushes the Agriculture, Forestry, and Other Land Use (AFOLU) total contribution to around 30%. Tubiello, F. et al., 'The FAOSTAT database of greenhouse gas emissions from agriculture' (2013) 8 *Environmental Research Letters* (FAO), at 2.

⁸⁰⁷ See Negra, C. and Wollenberg, E., *Lessons from REDD+ for Agriculture*, Research Programme on Climate Change, Agriculture and Food Security (CCAFS) of the Consultative Group on International Agricultural Research (CGIAR), Report No. 4 (2011), at 28.

nutritional needs.⁸⁰⁸ Nonetheless, the high level emissions from the agricultural sector cannot be ignored, including the 74% of the worldwide total that originate in developing countries.⁸⁰⁹ Despite agriculture's contribution to global emissions, the UNFCCC has largely excluded agriculture from the climate negotiations to date.⁸¹⁰ Mandatory emission reductions from the agricultural sector have been avoided for a number of reasons⁸¹¹, but in particular there has been concern that mitigation targets could reduce agricultural productivity levels and have a negative impact on both livelihoods and food security in developing countries.⁸¹²

In order to meet rising demand, estimates indicate that around 9.2 trillion USD should be invested in developing countries' primary agriculture and downstream industries from 2007-2050.⁸¹³ The sub-Saharan African agricultural sector alone is projected to require 940 billion USD over the same 40-year period in order to meet long-term demand for agricultural products, translating into around 21 billion USD annually.⁸¹⁴ Aside from the question of how such large funds will become available (ie.

⁸⁰⁸ FAO, *World agriculture: towards 2015/2030* (2002), at 2.

⁸⁰⁹ Smith, P. et al., 'Agriculture', in *Climate Change 2007: Mitigation, Contribution of Working III to the Fourth Assessment Report of the IPCC*, Ch. 8 (B. Metz et al. eds., 2007), at 503. See also IPCC, Assessment Report 4 Working Group III, Figure 8.2, *Estimated historical and projected N₂O and CH₄ emissions in the agricultural sector of the ten world regions during the period 1990-2020* (showing a breakdown of agricultural emissions by region, GHG, and specific source). In contrast, comparing per capita emissions from agriculture on individual .5 to 1 hectare plots differs drastically from those of Annex I countries' populations: IPCC, *Per Capita Emissions figure*, at http://www.ipcc.ch/publications_and_data/ar4/wg3/en/figure-ts-4.html, last accessed 17 April 2013.

⁸¹⁰ Pye-Smith, C., *Farming's Climate-Smart Future: Placing Agriculture at the Heart of Climate-Change Policy*, The Technical Centre for Agricultural and Rural Cooperation (CTA) and the Research Program on Climate Change, Agriculture and Food Security of the CGIAR (CCAFS) (2011), at 23. Although agriculture sector emissions must be reported under the United Nations Framework Convention on Climate Change (UNFCCC), but as Land Use, Land Use Change and Forestry (LULUCF) emissions contributing to the Kyoto Protocol's reduction targets, they are mostly voluntary (except deforestation, afforestation and reforestation emissions and removals).

⁸¹¹ For example, it is difficult to mandate mitigation from the agricultural sector under the climate change regime since it is difficult to measure and monitor the sector's emissions. Agriculture's emissions are spread over large amounts of land managed by many different producers using many different practices. It is different from other emitting industries, such as the energy sector – the latter has a certain number of installations that produce CO₂ emissions above a high threshold, technological updates can make predictable emission reductions in a linear fashion, and those reductions can be permanently cancelled. Although emission reductions have been shown from different agricultural practices, they are not predictable in amount, annual total, or permanence since natural systems may not show results for a number of years or the carbon stock may not be secure due to disturbances (eg. extreme weather events). For a discussion of uncertainties involved with livestock production and carbon sequestration potential, see Booker, K. et al., 'What can ecological science tell us about opportunities for carbon sequestration on arid rangelands in the United States?' (2013) 23(1) *Global Environmental Change*, pp.240-251.

⁸¹² FAO, *Food Security and Agricultural Mitigation in Developing Countries: Options for Capturing Synergies* (2009), at 10-11.

⁸¹³ Schmidhuber, J., Bruinsma, J., and Boedeker, G., *Capital Requirements for Agriculture in Developing Countries to 2050*, FAO Expert Meeting on 'How to Feed the World in 2050' (2009), at 7-8.

⁸¹⁴ Much of this investment "will need to be frontloaded in the earlier years and decades" to support those stakeholders without the capital means to make the transition. Gledhill, R. et al., *Agricultural carbon markets:*

public and/or private investment), the way in which agricultural investment resources should be allocated needs to be considered. Investments could flow towards current methods of agricultural production or different methods, eg. which aim to increase sustainability or are more climate-friendly.

2.2 What is 'climate-smart' agriculture?

The FAO defines 'climate-smart agriculture' as "agriculture that sustainably increases productivity, resilience (adaptation), reduces/removes GHGs (mitigation), and enhances achievement of national food security and development goals."⁸¹⁵ This simply means that different, more climate-friendly farming techniques could be used to grow agricultural products (including food crops, livestock, fuel, fibre, and raw materials).⁸¹⁶ Another way of understanding climate-smart agriculture as "an approach to developing the technical, policy and investment conditions to achieve sustainable agricultural development for food security under climate change."⁸¹⁷

Climate-smart agriculture is being discussed as a strategy to respond to climate change on the global level⁸¹⁸ because climate-smart agricultural practices do not focus on providing mitigation or adaptation benefits in isolation. These types of practices are said to have the potential to provide 'triple wins': 1) increased resilience to climate change, 2) reduced GHG emissions, and 3) improved food security.⁸¹⁹ Individually, these benefits are important for the following reasons:

- Agriculture is projected to be negatively affected by climate change, so adaptation is necessary⁸²⁰;

Opportunities and challenges for Sub-Saharan Africa, PwC report prepared with support from the Rockefeller Foundation (2011), at 6.

⁸¹⁵ Lipper, L. et al., "Climate-Smart" Agriculture: Policies, Practices and Financing for Food Security, Adaptation and Mitigation, Report for the FAO (2010), at ii, n.1.

⁸¹⁶ Climate-smart Agriculture, *Climate-Smart Practices*, at <http://www.climatesmartagriculture.org/72612/en/>, last accessed 24 June 2013.

⁸¹⁷ FAO, *Climate-Smart Agricultural Sourcebook*, Executive Summary (2013), at ix.

⁸¹⁸ See FAO, *Climate-smart agriculture for development*, <http://www.fao.org/climatechange/climatesmart/en/>, last accessed 27 July 2013; PwC, *Climate-Smart Agriculture*, <http://www.pwc.co.uk/sustainability-climate-change/issues/climate-smart-agriculture.jhtml>, last accessed 27 July 2013; Thünen-Institut, *Institute of Climate-Smart Agriculture*, <http://www.ti.bund.de/en/startseite/institutes/climate-smart-agriculture.html>, last accessed 27 July 2013; World Bank, *Climate-smart Agriculture and the World Bank: The Facts*, <http://climatechange.worldbank.org/content/climatesmart-agriculture-and-world-bank-facts>, last accessed 27 July 2013.

⁸¹⁹ Wollenberg, E. et al., *Actions Needed to Halt Deforestation and Promote Climate-Smart Agriculture*, CCAFS Policy Brief No. 4 (June 2011), at 4.

⁸²⁰ IPCC, *Assessment Report 4 Synthesis Report* (2007), Section 3, citing Working Group II SPM examples in Table SPM.2.

- Agriculture is a major contributor to annual global emissions, requiring mitigation of emissions⁸²¹; and
- Agriculture is also important to the issue of global food security, which could be threatened if productivity levels are affected by climate change.⁸²²

Therefore, a strategy that could simultaneously provide adaptation, mitigation, and food security benefits to agricultural production would be preferable to other strategies, eg. which cause trade-offs such as crop yield reductions in exchange for reduced emissions. Climate-smart agriculture could potentially help address the following issues:

- **Need for increased global food production:** Climate-smart agricultural practices' suggested potential to improve productivity and provide adaptation so that crops are more resilient to climate change could contribute to meeting the rising global demand for food products.
- **Need to manage the land wisely:** Climate-smart agriculture could potentially reduce the pressure to convert land (eg. forests) for agricultural use.
- **Political sensitivity of the agricultural sector:** Climate-smart agriculture would potentially be less controversial than other suggestions for reducing emissions from global agriculture given that one of the 'pillars' of climate-smart agriculture is improved food security.
- **Global support for sustainable agriculture:** Climate-smart agriculture can potentially contribute to global political commitments to increase sustainable agriculture whilst simultaneously presenting a strategy to address climate change.

Different techniques are available for ploughing the soil, fertilising crops, feeding livestock, storing and spreading manure, managing the land, and/or changing the way land is used.⁸²³ Some of these different farming techniques may be better or worse than farmers' current practices in terms of their GHG emissions, resilience to climate change, or productivity levels. Examples of some climate-smart agricultural practices potentially relevant to Kenya's agricultural context are:

⁸²¹ Smith, P. et al., 'Agriculture', in *Climate Change 2007: Mitigation, Contribution of Working III to the Fourth Assessment Report of the IPCC*, Ch. 8 (B. Metz et al. eds., 2007), at 503.

⁸²² Meybeck, A. and Gitz, V., 'Module 1: Why Climate-Smart Agriculture, Forestry and Fisheries', in FAO, *Climate-Smart Agriculture Sourcebook* (2013), at 6.

⁸²³ For a discussion on various farming techniques that can contribute to sustainable intensification, climate change resilience, and mitigate agriculture's effect on climate change, see Meybeck, A. and Gitz, V., 'Module 1: Why Climate-Smart Agriculture, Forestry and Fisheries', in FAO, *Climate-Smart Agriculture Sourcebook* (2013).

- Conservation agriculture, involving altered ploughing methods that reduce how much the soil is disturbed or turned over by the plough as well as leaving crop residue in the field, which can reduce soil erosion⁸²⁴;
- Planting more resilient varieties of crops or practicing crop rotations, which could increase productivity and adaptation to climate change (drought or flood-resistance)⁸²⁵;
- Agroforestry, intercropping with nitrogen-fixing legumes, and cover cropping enhances soil nutrients and leaves less soil exposed to wind and water erosion, which could increase productivity and adaptation to climate change⁸²⁶; and
- Fertilisation with livestock manure as well as increasing above and below-ground biomass can lead to more soil carbon sequestration, improve water retention, as well as replenish soil nutrients.⁸²⁷ In turn, this can improve soil functionality and yields and reduce the need for high levels of chemical fertilisers, which could result in environmental trade-offs and cause emissions in their manufacture and application.⁸²⁸

Researchers in the global agricultural field have conducted field trials and experiments to determine the ‘climate-smart’ potential of many different farming techniques.⁸²⁹ It has been determined that not every technique is appropriate for every soil, climate, landscape, or socio-economic situation.⁸³⁰

⁸²⁴ Pye-Smith, C., *Farming’s Climate-Smart Future: Placing Agriculture at the Heart of Climate-Change Policy*, CTA and the CCAFS (2011), at 16-18. Soils contain an enormous amount of organic carbon (about 1500 [Gt]) – triple the amount contained in vegetation and double the amount in the atmosphere. Smith, P., ‘Soils and climate change’ (2012) 4 *Current Opinion in Environmental Sustainability*, pp.539-544, at 539. Conservation agriculture, or ‘no-till’ or ‘reduced-till’, means a method of planting where the plow does not turn over the soil as much to create a place where the seed will be dropped and therefore does not release as much carbon stored in the soil. Iowa State Extension, *Transition to No-till*, Iowa Learning Farms (September 2010). Available at http://www.extension.iastate.edu/NR/rdonlyres/82093D1A-557E-43D3-AE12-8CAF62C36985/135605/Transition_to_notill.pdf, accessed 17 June 2013.

⁸²⁵ Azzu, N. and Redfern, S., ‘Module 7: Climate-smart crop production system’, in FAO, *Climate-Smart Agriculture Sourcebook* (2013), at 197.

⁸²⁶ Pye-Smith, C., *Farming’s Climate-Smart Future: Placing Agriculture at the Heart of Climate-Change Policy*, CTA and the CCAFS (2011), at 18.

⁸²⁷ Bryan, E. et al., *Agricultural Management for Climate Change Adaptation, Greenhouse Gas Mitigation, and Agricultural Productivity: Insights from Kenya*, IFPRI Discussion Paper 01098 (2011), at 3, Table 1.1.

⁸²⁸ *Ibid.* at 6-7. See also Smith, P., ‘Soils and climate change’ (2012) 4 *Current Opinion in Environmental Sustainability*, pp.539-544, at 541.

⁸²⁹ See Smith, P. et al., ‘Greenhouse gas mitigation in agriculture’ (2008) 363 *Philosophical Transactions of the Royal Society*, pp.789-813, 791, Table 1. FAO, *Food Security and Agricultural Mitigation in Developing Countries: Options for Capturing Synergies* (2009), at 17-22; and, Kenya Agricultural Research Institute (KARI), *Crops for the Future*, Project Video, at <http://www.youtube.com/watch?v=9tCwKQ0Q9k>, last accessed 30 August 2013.

⁸³⁰ Bryan, E. et al., *Agricultural Management for Climate Change Adaptation, Greenhouse Gas Mitigation, and Agricultural Productivity: Insights from Kenya*, IFPRI Discussion Paper 01098 (2011), at 7. See Smith, P. et al., ‘Greenhouse gas mitigation in agriculture’ (2008) 363 *Philosophical Transactions of the Royal Society*,

Therefore, decisions need to be 'location-specific' regarding which climate-smart agricultural practices are suitable. The Kenya Agricultural Research Institute (KARI) is one example of a potentially important actor in the process of determining which climate-smart agricultural practices are appropriate within Kenya.⁸³¹

2.3 Climate-smart agriculture and REDD+

Expansion and exploitation of agricultural land threatens trade-offs in the form of deforestation, destruction of grasslands and wetlands, and loss of biodiversity.⁸³² The UNFCCC calls for action to reduce human pressure on forests through development and implementation of national strategies or action plans for 'reducing emissions from deforestation and forest degradation plus conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries' (REDD+).⁸³³ Climate-smart agriculture could be incorporated into a country's REDD+ planning as one strategy to address agriculture's role as a driver of deforestation.

REDD+ finance could potentially reach local stakeholders implementing on-the-ground actions (eg. climate-smart agricultural practices) that contribute to REDD+ outcomes,⁸³⁴ or it could be used to support national-level actions aimed at combating deforestation (eg. creating an enabling environment for climate-smart agriculture).⁸³⁵ In addition, climate-smart agriculture could be encouraged through bilateral public funding. Developed countries could provide assistance for pilot projects, technological or institutional capacity building, research, extension services, or subsidisation of inputs (eg. new varieties of seeds, irrigation systems, seedlings for

pp.789-813, at 795, Table 2. Non-livestock mitigation options are broken down by mitigation potential for various climate zones.

⁸³¹ KARI, at <http://www.kari.org/homepage>, last accessed 28 June 2013.

⁸³² The Prince's Charities, International Sustainability Unit, *What Price Resilience? Towards Sustainable and Secure Food Systems* (2011), at 16.

⁸³³ *Cancun Agreements* (Decision 1/CP.16), 2010; Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, UN Doc. FCCC/CP/2010/7/Add.1, at 12-14, paras. 68-79, Appendix I. See also Robles, F.F., *Legal analysis of cross-cutting issues for REDD+ implementation: Lessons learned from Mexico, Viet Nam and Zambia*. Report prepared under the UN-REDD Programme (FAO 2013), at 10.

⁸³⁴ For a discussion of PES schemes that contribute to halting deforestation in line with REDD+ implementation objectives, see Graham, K. (ODI) and Vignola, R. (CATIE), *REDD+ and agriculture: a cross-sectoral approach to REDD+ and implications for the poor*, Report for the REDD-net programme (2011), at 9-10. For a discussion of different options for distribution of REDD+ financing, see generally Angelsen, A. et al., *What is the Right Scale for REDD? The implications of national, subnational and nested approaches*, Centre for International Forestry Research (CIFOR) Brief No. 15 (2008).

⁸³⁵ Graham, K. (ODI) and Vignola, R. (CATIE), *REDD+ and agriculture: a cross-sectoral approach to REDD+ and implications for the poor*, Report for the REDD-net programme (2011), at 5-14.

agroforestry), which may reduce pressure on forests from agriculture and thereby contribute to REDD+ implementation.⁸³⁶

2.4 Lessons regarding climate-smart agriculture from existing carbon farming projects

In addition to contributing to REDD+ implementation by reducing agriculture's role as a driver of deforestation, carbon farming projects using climate-smart agricultural practices can also generate emissions reductions directly from the land on which they are implemented. The emissions reductions can be verified and receive carbon credits, which can be sold on the voluntary carbon market (in the absence of a global trading scheme or compliance market acceptance of land use, land use change and forestry (LULUCF) credits).⁸³⁷

At present, carbon farming projects can be developed under various standards with verified methodologies. Some examples are the Verified Carbon Standard, Plan Vivo Standard, American Carbon Registry Standard, and The Gold Standard.⁸³⁸ Non-governmental organisations (NGOs), private developers, intergovernmental organisations and funders, and companies are some of the actors involved in the different stages of the project, including: funding, design, development, training, verification, marketing, and evaluation.⁸³⁹ For present purposes, it is worth noting the lessons learned from the various projects with respect to (1) uptake of climate-smart agricultural practices by local stakeholders, and (2) project design issues that could impede successful implementation.

2.4.1 Uptake of climate-smart agricultural practices by local stakeholders

Despite the benefits that climate-smart agricultural practices can provide⁸⁴⁰, barriers to uptake could make farmers reluctant to adopt them, such as:

- lack of financing (particularly up-front financing to aid capital investments in the farm),
- lack of technical knowledge or capacity,

⁸³⁶ For an overview of development, funding (including from developed country donors), issues, and recommendations for carbon offset projects, see Peskett, L., Brown, J., and Schreckenberg, K., *Carbon Offsets for Forestry and Bioenergy: Researching Opportunities for Poor Rural Communities*, Overseas Development Institute (ODI), Final Report (May 2010).

⁸³⁷ *Ibid.* at 3-4.

⁸³⁸ Peters-Stanley, M. and Yin, D., *Manoeuvring the Mosaic: State of the Voluntary Carbon Markets 2013*, Report by Forest Trends' Ecosystem Marketplace and Bloomberg New Energy Finance (2013), at 83-86.

⁸³⁹ *Ibid.* at 6-7.

⁸⁴⁰ Smith, P. et al., 'Greenhouse gas mitigation in agriculture' (2008) 363 *Philosophical Transactions of the Royal Society*, pp.789-813, at 801-802, Table 5 (showing the estimated costs per tonne of CO₂-equivalent in USD for different mitigation options based on different agro-climatic zones and their mitigation benefits in Mt CO₂-eq per year).

- discouragement resulting from possible short-term yield reductions,
- lack of risk management options (eg. insurance),
- tenure insecurity,
- social customs, and
- lack of access to, or difficulty with, new information dissemination technologies.⁸⁴¹

Lessons about climate-smart agriculture have been identified from implementation of projects in Malawi, Viet Nam, and Zambia by the FAO-Economics and Policy Innovations for Climate-Smart Agriculture Programme (FAO-EPIC) and the European Commission.⁸⁴²

A practical issue which could prevent farmers from implementing climate-smart agricultural practices is the need to use materials on the farm for other purposes.⁸⁴³ For example, conservation agriculture involves maintaining crop residue from former harvests on top of the soil to provide cover and enrich the soil's nutrients; however, farmers may need to use crop residues as livestock feed instead.⁸⁴⁴

Additionally, poor farmers might choose not to implement or maintain some climate-smart agricultural practices on their farms due to the delay between implementation of the practice and materialisation of the benefits.⁸⁴⁵

2.4.2 Project design issues that could impede successful implementation

The experience of various operational carbon farming projects (such as the Kenya Agricultural Carbon Project developed by the Swedish NGO Vi Agroforestry with support from the World Bank BioCarbon Fund) provides lessons about implementing climate-smart agriculture successfully⁸⁴⁶:

- ***What are farmers' priorities and which climate-smart agricultural practices will help accomplish those priorities?*** As noted by Johannes Woelcke of the World Bank's Agriculture

⁸⁴¹ Meybeck, A. and Gitz, V., 'Module 1: Why Climate-Smart Agriculture, Forestry and Fisheries', in FAO, *Climate-Smart Agriculture Sourcebook* (2013), at 26. Campbell, B. et al., *Agriculture and Climate Change: A Scoping Report*, Meridian Institute (2011), at 23.

⁸⁴² FAO, *Farmers struggle to adopt climate-smart methods*, News Article (14 August 2013), at <http://www.fao.org/news/story/en/item/181017/icode/>, last accessed 30 August 2013.

⁸⁴³ *Ibid.*

⁸⁴⁴ *Ibid.*

⁸⁴⁵ *Ibid.*

⁸⁴⁶ World Bank Carbon Finance Unit, *Kenya: Agricultural Carbon Project*, at <https://wbcarbonfinance.org/Router.cfm?Page=BioCF&FID=9708&ItemID=9708&ft=Projects&ProjID=58099>, last accessed 29 August 2013. Project lessons generally discussed by Andersson, Arne, Mutua, Rachel Wangu, and Wekesa, Amos (Vi Agroforestry). Interviewed 10 April 2013 at Vi Agroforestry offices (Nairobi, Kenya).

and Rural Development Unit in the Africa Region, “Farmers will only adopt and maintain practices if they realize increases in productivity and incomes.”⁸⁴⁷ To encourage farmers to adopt climate-smart agricultural practices, it is therefore important to consider what farmers need and/or want that current agricultural production is not delivering. Based on the responses (eg. higher crop yields, more income, resilience against crop losses), suitable climate-smart agricultural practices which could be selected.⁸⁴⁸

- ***How can existing structures be utilised to cut transaction costs?*** Carbon farming projects could be developed within existing structures for measurement, reporting and verification (MRV), extension services and training systems, and farmer organisations (eg. co-operatives or self-help groups).⁸⁴⁹ Using existing structures could lower transaction costs in project development rather than creating new systems for every project.⁸⁵⁰ By lowering transaction costs, the project could potentially benefit farmers with more carbon revenues and increase the likelihood they will continue using the climate-smart agricultural practices.⁸⁵¹
- ***How can farmers be organised and supported to assist with successful implementation?*** Aggregating farmers into groups could aid successful uptake of climate-smart agricultural practices. Project developers could provide coordinated extension services and training on new farming techniques, which could increase farmer uptake if recommendations are delivered by a familiar, trusted source.⁸⁵² Additionally, group members can support each other in the implementation of climate-smart agricultural practices and hold each other accountable for contributing to the carbon farming project goals.⁸⁵³

⁸⁴⁷ Woelcke, J., *More Than Just Hot Air: Carbon Market Access and Climate-Smart Agriculture for Smallholder Farmers*, SmartLessons (January 2012), at 2. Available at http://wbcarbonfinance.org/docs/Mor_ThanHotAir.pdf, accessed 2 April 2013.

⁸⁴⁸ *Ibid.*

⁸⁴⁹ *Ibid.* at 3.

⁸⁵⁰ *Ibid.*

⁸⁵¹ *Ibid.*

⁸⁵² Andersson, Arne, Mutua, Rachel Wangu, and Wekesa, Amos (Vi Agroforestry). Interviewed 10 April 2013 at Vi Agroforestry offices (Nairobi, Kenya). Woelcke, J., *More Than Just Hot Air: Carbon Market Access and Climate-Smart Agriculture for Smallholder Farmers*, SmartLessons (January 2012), at 3. Available at http://wbcarbonfinance.org/docs/Mor_ThanHotAir.pdf, accessed 2 April 2013.

⁸⁵³ Andersson, Arne, Mutua, Rachel Wangu, and Wekesa, Amos (Vi Agroforestry). Interviewed 10 April 2013 at Vi Agroforestry offices (Nairobi, Kenya).

3. AGRICULTURE AND REDD+ IN KENYA

3.1 Kenya's agricultural sector

Agriculture is a key component of Kenya's economy. Production of "industrial crops, food crops, horticulture, livestock, fisheries and forestry"⁸⁵⁴ directly comprises 24% of the gross domestic product (GDP) and indirectly another 27%.⁸⁵⁵ More than 65% of informal employment in rural areas is in the agricultural sector⁸⁵⁶, and "women are responsible for 80 percent of paid and unpaid labour in food production, including staple crops."⁸⁵⁷ *Vision 2030*, Kenya's economic development strategy for 2008-2030, highlights the importance of agriculture within Kenya.⁸⁵⁸ It is targeted as one of the six key sectors that will help the Kenyan economy achieve a 10% GDP growth rate per year.⁸⁵⁹

The sector declined for many years due to low investment, mismanagement, collapse of agricultural institutions, and reduced emphasis on agricultural extension and research.⁸⁶⁰ Addressing these issues, the *Strategy for Revitalizing Agriculture* prioritised the development of the sector in 2004.⁸⁶¹ The policy framework aimed to "improve agricultural productivity and farm incomes, while conserving the land resource base and the environment."⁸⁶² The current *Agricultural Sector Development*

⁸⁵⁴ Government of Kenya, *Agricultural Sector Development Strategy 2010-2020* (2010), at 1. Industrial crops include tea, coffee, sugar cane, cotton, among others. *Ibid.* at 13. The main food crops in Kenya are "maize, rice, wheat, sorghum, potato, cassava, vegetables and beans." *Ibid.* at 12. Horticulture is growing rapidly in Kenya's agricultural sector, including "cut flowers, vegetables, fruits, nuts, herbs and spices." *Ibid.* at 13. Livestock production focuses primarily on "beef, dairy, sheep, goats, camel, poultry," swine and emerging livestock. *Ibid.* at 14.

⁸⁵⁵ Government of Kenya, *National Climate Change Action Plan 2013-2017* (27 March 2013), at 4.

⁸⁵⁶ *Ibid.*

⁸⁵⁷ United States Agency for International Development (USAID), *Kenya: FY 2011-2015 Multi-Year Strategy* (2011), at 8: "Although all parts of Kenya are facing significant challenges, poverty density, food production, and density of malnourished children vary significantly across Kenya's agro-ecological zones and within the urban areas. The high rainfall zones – 11 percent of Kenya's land – produce 70 percent of its agricultural output. These high potential zones have attracted large populations, resulting in sub-division of land, decreasing productivity, and high densities of impoverished and malnourished Kenyans. Semi-arid regions produce 20 percent of Kenya's agricultural output. Traditionally these areas received less rainfall than high potential areas. Climate change is already evident in the increasingly erratic rainfall patterns. Yet this region offers significant potential for increases in agricultural output, if water management and harvesting, irrigation, and crop varieties can be improved. Lastly, Kenya's arid regions take up 68 percent of the land area, and produce 10 percent of Kenya's agricultural output, largely livestock. Although poverty and malnutrition rates are high in the arid regions, the population density is low, meaning that the total number of poor and malnourished Kenyans is relatively low in absolute terms when compared to high rainfall and semi-arid regions."

⁸⁵⁸ Government of Kenya, *Vision 2030: The Popular Version* (2007), at 1.

⁸⁵⁹ *Ibid.*

⁸⁶⁰ Government of Kenya, *Agricultural Sector Development Strategy 2010-2020* (2010), at 2.

⁸⁶¹ *Ibid.* at 3.

⁸⁶² Government of Kenya, *Agricultural Sector Development Strategy 2010-2020* (2010), at 3.

Strategy (ASDS) for 2010-2020 recognises that public and private efforts are necessary to address the sector's development challenges, reduce poverty and increase food security.⁸⁶³

3.2 Kenyan agriculture and climate-smart agriculture

Given the negative projections of climate change impacts on agricultural productivity in Sub-Saharan Africa⁸⁶⁴, climate-smart agricultural practices could potentially benefit the Kenyan agricultural sector. Kenya's crops are mostly rain-fed⁸⁶⁵, so the higher temperatures, reduced water availability and more erratic rainfall projected to result from climate change could reduce productivity levels.⁸⁶⁶ Additionally, climate change threatens to increase the frequency and intensity of natural disasters, which could cause significant crop losses.⁸⁶⁷

Interventions seeking to introduce 'climate-smart' agricultural practices could be used to target vulnerabilities in Kenya's agricultural sector, such as low crop productivity and land/environmental degradation (which could be worsened by climate change impacts)⁸⁶⁸. For example:

- Smallholder farmers (particularly those producing food crops for subsistence) could be highly vulnerable to natural disasters, projected to increase due to climate change, if their crop yields are lower than what is technically feasible⁸⁶⁹ and additional crop losses occur.⁸⁷⁰ Climate-smart agriculture could potentially provide adaptation and improve productivity through practices such as conservation agriculture, mulching/composting, manure fertilisation, and agroforestry, which help increase soil productivity, retain soil moisture and prevent soil erosion so that soil organic matter is not lost.⁸⁷¹

⁸⁶³ *Ibid.* at 7-8. Despite the high economic importance and national plans dedicated to agriculture in Kenya, food insecurity still affects a large proportion of the population.

⁸⁶⁴ Boko, M. et al., 'Africa', in *Climate Change 2007: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Fourth Assessment Report of the IPCC*, Ch. 9 (Parry, M.L. et al. eds., 2007), Section 9.4.4.

⁸⁶⁵ Government of Kenya, *Agricultural Sector Development Strategy 2010-2020* (2010), at 10.

⁸⁶⁶ IPCC, *Assessment Report 4 Synthesis Report* (2007), Section 3.

⁸⁶⁷ *Ibid.*

⁸⁶⁸ Government of Kenya, *Agricultural Sector Development Strategy 2010-2020* (2010), at 7, 9.

⁸⁶⁹ *Ibid.* at 7. Low yields are identified as an issue on the regional scale (Africa) as well as for smallholders in developing countries worldwide in Godfray, H.C.J. et al., 'Food Security: The Challenge of Feeding 9 Billion People' (2010) 327 *Science*, pp.812-818, at 813.

⁸⁷⁰ FAO, *Climate Change Adaptation and Mitigation in the Food and Agriculture Sector*, Technical Background Document from the Expert Consultation held on 5-7 March 2008, Rome, Italy, at 2. Total crop loss is a concern with regard to smallholder farmers' food security, additionally because they would most likely lack crop insurance or some form of safety net that would provide access to food or income lost through the crop failure. *Ibid.* at 4, 10.

⁸⁷¹ Lal, R., 'Soil Carbon Sequestration Impacts on Global Climate Change and Food Security', 304 *Science* (2004), pp.1623-1627, at 1624.

- Climate change is projected to increase the frequency and intensity of droughts⁸⁷², potentially increasing the risk that agricultural production on drylands could lead to more degradation and desertification.⁸⁷³ Kenya's drylands, or arid and semi-arid lands (ASALs), constitute over 80% of the country.⁸⁷⁴ Most high potential areas for agricultural production in Kenya are already fully exploited⁸⁷⁵, so the Government has proposed extensive increases in irrigation to bring ASALs into production.⁸⁷⁶ However, water resources may become increasingly scarce under climate change scenarios⁸⁷⁷, and poor implementation of extensive irrigation can cause salinization which, in turn, reduces soil productivity.⁸⁷⁸ Climate-smart agriculture could potentially contribute to long-term sustainable use of the land and environment through practices which can enhance: natural water retention (reducing the need for irrigation), soil organic matter (improving soil health and potentially productivity), and land cover (decreasing the risk of soil erosion).⁸⁷⁹ Possible climate-smart interventions include conservation agriculture, agroforestry, intercropping with nitrogen-fixing legumes, crop rotations and switching to hardier crops/varieties, and improved grazing land management.⁸⁸⁰ In addition, innovative water harvesting and management techniques⁸⁸¹ in conjunction with

⁸⁷² IPCC, *Assessment Report 4 Synthesis Report* (2007), Section 3. Available at http://www.ipcc.ch/publications_and_data/ar4/syr/en/spms3.html, accessed 28 April 2013.

⁸⁷³ Government of Kenya, *National Action Programme: A Framework for Combating Desertification in Kenya in the Context of the United Nations Convention to Combat Desertification*, National Environment Secretariat (2002), at 11-12.

⁸⁷⁴ *Ibid.* at 11.

⁸⁷⁵ Government of Kenya, *Revised REDD Readiness Preparation Proposal Kenya*, Submitted to the Forest Carbon Partnership Facility (August 2010), at 28.

⁸⁷⁶ Government of Kenya, *Agricultural Sector Development Strategy 2010-2020* (2010), at 11, 33-34, 54-59.

⁸⁷⁷ Boko, M. et al., 'Africa', in *Climate Change 2007: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Fourth Assessment Report of the IPCC*, Ch. 9 (Parry, M.L. et al. eds., 2007), Section 9.4.4.

⁸⁷⁸ Thomas, R. and Morini, S., *Management of Irrigation-Induced Salt-Affected Soils*, Joint brochure by the Centre virtuel de l'eau agricole et ses usages (CISEAU), IPTRID, and FAO, at ftp://ftp.fao.org/agl/agll/docs/salinity_brochure_eng.pdf, last accessed 28 June 2013. Please note that the term 'salinisation' could be spelled differently – 'salinization', 'salinisation', 'salinity' or 'salination'. All terms describe excessive build-up of salt in the soil, which could have a negative effect on soil health and productivity. *Ibid.*

⁸⁷⁹ Lal, R., 'Soil Carbon Sequestration Impacts on Global Climate Change and Food Security', 304 *Science* (2004), pp.1623-1627, 1624-1625.

⁸⁸⁰ Campbell, B. et al., *Agriculture and Climate Change: A Scoping Report*, Meridian Institute (2011), at 18-19. For examples of Kenya-specific changes in agricultural management techniques, see KARI, *Policy Learning Tour to FAO-KARI, SIDA and IFAD Funded Projects in Western Kenya*, Project Video by KARI and FAO-Kenya, at <http://www.youtube.com/watch?v=xZPqShzXF2c&feature=youtu.be>, last accessed 11 August 2013.

⁸⁸¹ For example, innovative water harvesting has been undertaken through the KARI project in Western Kenya, such as plastic-lined man-made ponds (also used for fish harvesting) and bunds or ditches to direct water flow and prevent soil erosion. *Ibid.*

capacity building and training could help provide resources for irrigation (as proposed in the ASDS⁸⁸²) and reduce negative unintended consequences from implementation.⁸⁸³

3.3 Agriculture in Kenya's REDD+ implementation

As it is currently structured, the R-PP contains strategy options which are compatible, or in some respects interchangeable, with climate-smart agricultural practices. For example, cover cropping, agroforestry, conservation tillage, crop residue and manure management all contribute to increasing soil fertility – a strategy option under the priority area of reducing pressure to clear forests for agriculture.⁸⁸⁴ This policy-level focus on agriculture's relationship to Kenya's REDD+ implementation can be complemented by lessons learned from project-level examples, both discussed in this section.

3.3.1 Overview of Kenya's REDD+ 'strategy options'

Kenya's Readiness Preparation Proposal (R-PP)⁸⁸⁵ identifies agriculture as an historical driver of deforestation in different forms:

- *Policy drivers related to agriculture:* allowing grazing in forest reserves during droughts, and encouraging cash crop production for export.⁸⁸⁶
- *Economic drivers related to agriculture:* conversion of woodland to agricultural use for large-scale commercial production of biofuel crops or other agricultural crops, clearing for agricultural expansion due to population pressure, rising agricultural product prices, subsidised inputs (fertilisers) and other incentives (tax exemptions for equipment).⁸⁸⁷

⁸⁸² Government of Kenya, *Agricultural Sector Development Strategy 2010-2020* (2010), at 54-59.

⁸⁸³ An unintended consequence of irrigation implementation could be salinisation of the soil. This occurs in "irrigated areas where low rainfall, high evapotranspiration rates or soil textural characteristics impede the washing out of the salts which subsequently build-up in the soil surface layers" and may severely affect soil fertility. European Commission Joint Research Centre, *Soil Themes: Soil Salinisation*, European Soil Portal – Soil Data and Information Systems, at <http://eusoils.jrc.ec.europa.eu/library/themes/salinization/>, last accessed 25 July 2013.

⁸⁸⁴ *Ibid.* at 38.

⁸⁸⁵ Government of Kenya, *Revised REDD Readiness Preparation Proposal Kenya*, Submitted to the Forest Carbon Partnership Facility (August 2010), at 1. Under the Kenyan R-PP, "the scope for REDD+ activities will be on reducing further deforestation and degradation in the remaining forests and thereby reducing carbon emissions from these forests, but also, perhaps to a larger extent, on the 'plus' aspects of REDD+ including improving management of remaining forest resources and enhancing carbon stocks on degraded forest land as well as through reforestation and afforestation programs. All activities will be designed with a focus on co-benefits such as improving biodiversity and livelihoods of forest dependent peoples."

⁸⁸⁶ *Ibid.* at 29.

⁸⁸⁷ *Ibid.*

- *Other drivers related to agriculture:* clearing land for agriculture with fire.⁸⁸⁸

Kenya's REDD+ programme and future implementation will be developed through '**strategy options**' outlined in the R-PP, which refer to "various policies, measures and actions taken by public and private actors that are developed for the purpose of reducing emissions and increasing removals of carbon dioxide (CO₂) in the land use sector."⁸⁸⁹ The proposed strategy options are intended as 'early action' to test institutional, economic and legal actions and structures to include in the final National REDD+ Strategy.⁸⁹⁰ Kenya's current strategy options are categorised under four 'priority areas':

- 1) Reducing pressure to clear forests for agriculture and other uses,
- 2) Promoting sustainable utilisation of forests,
- 3) Improving forest law enforcement and governance; and
- 4) Enhancement of carbon stocks.⁸⁹¹

Below, possible entry points for climate-smart agricultural practices within relevant strategy options are identified.

3.3.1.1 *Strategy options in the first priority area*

The first priority area seeks to address agriculture as a driver of deforestation by "**reducing pressure to clear forests for agriculture**,"⁸⁹² proposing different strategy options to achieve this. At the institutional level, these measures are generally focused on increasing awareness about the effects of forest clearance, capacity building for Local Authorities on forest management, community forest management, and assisting the Kenya Forest Service to create and test a benefit-sharing system.⁸⁹³ In addition, these measures also focus on fostering changes at the farm level, mainly in terms of agricultural management practices. The farm-level actions are aimed at increasing farm productivity and rural incomes⁸⁹⁴.

⁸⁸⁸ *Ibid.* at 30.

⁸⁸⁹ *Ibid.* at 35.

⁸⁹⁰ *Ibid.* at 4-5, 37-41, 46.

⁸⁹¹ *Ibid.* at 37-41.

⁸⁹² *Ibid.* at 37-38.

⁸⁹³ *Ibid.*

⁸⁹⁴ They include: "encouraging farmers to take up intensive farming practices and soil fertility management that will enable them to produce more on existing farmland"; "encouraging commercial on-farm tree growing"; "encouraging livestock keepers to improve the quality of their livestock, reduce numbers, and implement increased management of grazing lands"; and "providing agricultural inputs to poor and vulnerable forest adjacent communities in line with the government's National Accelerated Agricultural Inputs Access Program (NAAIAR)." *Ibid.* at 38.

Details of the different strategy options discussed in the first priority area are discussed below.

*1) Encouraging farmers to take up intensive farming practices and soil fertility management that will enable them to produce more on existing farmland*⁸⁹⁵

Intensification increases the amount of crops or livestock grown on the same piece of land by planting more crops (eg. intercropping between rows with other plants) or achieving higher yields from individual crops (eg. from using new seed varieties, more fertiliser application or irrigation).⁸⁹⁶ Increasing production on existing farmland could reduce pressure to expand production into forest areas. However, intensified practices can cause negative environmental and soil impacts⁸⁹⁷ (eg. from increased fertiliser use) if they are not implemented in a sustainable way.

Two examples of climate-smart agricultural practices which could contribute to sustainable intensification and could be classified under this proposed strategy option are: 1) intercropping with nitrogen-fixing legumes⁸⁹⁸ and 2) composting.⁸⁹⁹ Both are “intensive farming practices” which support “soil fertility management” and could help Kenyan farmers “to produce more on existing farmland.”⁹⁰⁰ The potential adaptation, food security, and mitigation benefits of both intercropping and composting are listed here:

⁸⁹⁵ Government of Kenya, *Revised REDD Readiness Preparation Proposal Kenya*, Submitted to the Forest Carbon Partnership Facility, at 38 (August 2010).

⁸⁹⁶ Intensification is achieved by increasing cropping intensity or yield improvements. The former may involve shortening fallow periods or repeating crops year upon year that need to undergo crop rotations, which can cause soil degradation by continuously stripping nutrients. Graham, K. (ODI) and Vignola, R. (CATIE), *REDD+ and agriculture: a cross-sectoral approach to REDD+ and implications for the poor*, Report for the REDD-net programme (2011), at 3. Additionally, intensification through increasing cropping intensity is projected to only offer 16% of potential production increases for developing countries. FAO, *Food Security and Agricultural Mitigation in Developing Countries: Options for Capturing Synergies* (2009), at 15. The negative extension of intensification is that higher yields could perhaps entice people to expand into forests anyway to gain those higher yields on even more land. *Ibid*.

⁸⁹⁷ For a good discussion of the environmental trade-offs that could occur from agricultural intensification, see Phelps, J. et al., *Agricultural intensification escalates future conservation costs*, Proceedings of the National Academy of Sciences of the United States of America, 110: 7601-7606.

⁸⁹⁸ Planting two or more different crops simultaneously in the same field (eg. in alternating rows or among the rows), and with nitrogen-fixing legumes as one crop, the management technique is meant to replenish the nutrient balance of the soil. Bunning, S., Corsi, S., and Vargas, R., ‘Module 4: Soils and Their Management for Climate-Smart Agriculture’, in FAO, *Climate-Smart Agriculture Sourcebook* (2013), at 133.

⁸⁹⁹ Using organic material, such as animal or plant waste, and allowing it to decompose through exposure to the air and controlled methods, such as mechanical mixing and aerating. *Ibid* at 120.

⁹⁰⁰ See Lal, R., *World Soils and the Carbon Cycle in Relation to Climate Change and Food Security*, The Ohio State University (2012), at 16-17.

- **Adaptation benefits:** Adaptation to storms with heavy rainfall, which are projected to increase in frequency and intensity under climate change⁹⁰¹, could result from more soil cover and roots to prevent erosion. Drought resistance could be increased through building up soil organic matter⁹⁰² and soil cover for moisture retention.⁹⁰³
- **Food security benefits:** Intercropping could provide more food from the same plot (legumes are useful for livestock feed as well), whilst both composting and intercropping could increase crop yields via improved soil fertility.⁹⁰⁴
- **Mitigation benefits:** The amount of chemical fertilisers needed could be reduced since composting and legumes contribute nutrients to the soil, which could reduce GHG emissions from application and manufacture of the fertilisers.⁹⁰⁵ Additionally, intercropping and composting can increase biomass both above and below the ground, supporting soil carbon sequestration.⁹⁰⁶

2) *Encouraging commercial on-farm tree growing*⁹⁰⁷

This proposed strategy option under the R-PP involves growing trees for commercial purposes (timber, firewood or charcoal production⁹⁰⁸), which could potentially reduce the pressure on forests for these reasons.⁹⁰⁹ ‘Commercial on-farm tree growing’ is similar to ‘agroforestry,’ which is a

⁹⁰¹ Boko, M. et al., ‘Africa’, in *Climate Change 2007: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Fourth Assessment Report of the IPCC*, Ch. 9 (Parry, M.L. et al. eds., 2007), Section 9.4.4.

⁹⁰² Organic matter within the soil composed of living microorganisms, fresh or partially decomposed residues, and well-decomposed/highly stable organic matter. United States Department of Agriculture (USDA), *Glossary of Terms: Soil Quality/Soil Health Terms*, Natural Resources Conservation Service, at <http://soils.usda.gov/sqi/concepts/glossary.html>, last accessed 30 August 2013.

⁹⁰³ Lal, R., *World Soils and the Carbon Cycle in Relation to Climate Change and Food Security*, The Ohio State University (2012), at 16-17.

⁹⁰⁴ Lipper, L. et al., “*Climate-Smart*” *Agriculture: Policies, Practices and Financing for Food Security, Adaptation and Mitigation*, Report for the FAO (2010), at 1.

⁹⁰⁵ Pimental, D. et al., ‘Environmental, Energetic, and Economic Comparisons of Organic and Conventional Farming Systems’ (2005) 55(7) *BioScience*, pp. 573-582, at 573. See also Smith, P. et al., ‘Greenhouse gas mitigation in agriculture’ (2008) 363 *Philosophical Transactions of the Royal Society*, pp.789-813, at 790-791.

⁹⁰⁶ Campbell, B. et al., *Agriculture and Climate Change: A Scoping Report*, Meridian Institute (2011), 82-83.

⁹⁰⁷ Government of Kenya, *Revised REDD Readiness Preparation Proposal Kenya*, Submitted to the Forest Carbon Partnership Facility (August 2010), at 38.

⁹⁰⁸ Mugo, F. and Ong, C., *Lessons from eastern Africa’s unsustainable charcoal trade*, World Agroforestry Centre, Working Paper No. 20 (2006), at 6-7.

⁹⁰⁹ Commercial tree growing could possibly generate additional income as well so that the need to expand agricultural production into forestland is reduced. World Bank, *Climate-Smart Agriculture: A Call to Action*, Joint Brochure, at http://www.worldbank.org/content/dam/Worldbank/document/CSA_Brochure_web_WB.pdf, last accessed 30 August 2013 (discussing growing trees on farms at p.4).

climate-smart agricultural practice.⁹¹⁰ Agroforestry is the act of growing trees, or woody perennials⁹¹¹, on farms at different times and spatial relationships to the crops or livestock grown on the same land.⁹¹² The World Agroforestry Centre maintains that there should be ecological and/or economic interaction between the different components in an agroforestry system.⁹¹³ Trees grown for agroforestry could also provide commercial benefits (timber, firewood, and wood for charcoal production⁹¹⁴), but because they are planted specifically to interact with the other crops grown on the land, the commercial reason for growing trees is not the sole focus.

Agroforestry could also provide adaptation, food security, and mitigation benefits as outlined below.

- **Adaptation benefits:** Agroforestry can improve soils' water retention and moisture, which can improve resilience to droughts as well as floods – retained moisture can reduce the extent of negative impacts on the soil and crops from droughts, and it can also slow the rush of flood waters (through improved soil infiltration) that can cause soil erosion.⁹¹⁵
- **Food security benefits:** Agroforestry can increase soil organic matter, which could potentially improve soil fertility and crop yields.⁹¹⁶
- **Mitigation benefits:** Agroforestry can lead to increased above- and below-ground biomass for carbon sequestration, leaf litter which contributes to increased soil organic carbon, and improved water retention and soil moisture for reduced erosion during droughts as well as floods.⁹¹⁷

⁹¹⁰ Lal, R., *World Soils and the Carbon Cycle in Relation to Climate Change and Food Security*, The Ohio State University (2012), at 17. FAO, *Climate-Smart Agriculture: Agroforestry*, at <http://www.climatesmartagriculture.org/82058/en/>, accessed 28 July 2013.

⁹¹¹ Plants that continue growing and producing over the course of more than one year. For a good discussion of the development of the modern 'agroforestry' concept, see Ramachandran Nair, P.K., *An Introduction to Agroforestry*, World Agroforestry Centre (1993), Ch. 2.

⁹¹² *Ibid.*

⁹¹³ *Ibid.*

⁹¹⁴ *Ibid.*

⁹¹⁵ Meybeck, A. and Gitz, V., 'Module 1: Why Climate-Smart Agriculture, Forestry and Fisheries', in FAO, *Climate-Smart Agriculture Sourcebook* (2013), at 14. See also Campbell, B. et al., *Agriculture and Climate Change: A Scoping Report*, Meridian Institute (2011), at 11, 16.

⁹¹⁶ Meybeck, A. and Gitz, V., 'Module 1: Why Climate-Smart Agriculture, Forestry and Fisheries', in FAO, *Climate-Smart Agriculture Sourcebook* (2013), at 14.

⁹¹⁷ Smith, P. et al., 'Greenhouse gas mitigation in agriculture' (2008) 363 *Philosophical Transactions of the Royal Society*, pp.789-813, at 791, Table 1.

3) *Encouraging livestock keepers to improve the quality of their livestock, reduce numbers, and implement increased management of grazing lands*⁹¹⁸

The proposed strategy option to implement increased management of grazing lands seeks to reduce pressure for agricultural expansion into forest areas due to land degradation from over-grazing and over-exploitation. Increased grazing land management is a climate-smart agricultural practice that involves reducing grazing pressure with smaller herds and/or rotational grazing, where the frequency and timing of grazing matches with pasture growth rates.⁹¹⁹

Grazing land management can potentially result in adaptation, food security and mitigation benefits as outlined below.

- **Adaptation benefits:** Grazing land management can allow grass and plants to regenerate, which would increase soil cover and help reduce soil erosion during the droughts and floods projected to increase with climate change. Increasing grazing land cover could help ensure food is available for livestock under climate change scenarios.⁹²⁰
- **Food security benefits:** Improved grazing land management could ensure continued food resources for the livestock and potentially lower herd losses, which could help reduce food insecurity for humans dependent on the livestock.⁹²¹
- **Mitigation benefits:** In addition to fewer methane emissions if herd sizes are reduced, mitigation benefits could be obtained through improved grazing land management that allows grass and other plants to regenerate.⁹²² Grazing lands that are over-exploited are at higher risk of degradation and soil erosion because there are fewer roots to hold the soil in place, and soil loss can cause emissions as soil organic carbon is simultaneously lost.⁹²³

⁹¹⁸ Government of Kenya, *Revised REDD Readiness Preparation Proposal Kenya*, Submitted to the Forest Carbon Partnership Facility (August 2010), at 38.

⁹¹⁹ Gerber, P. et al., 'Module 8: Climate-Smart Livestock', in FAO, *Climate-Smart Agriculture Sourcebook* (2013), at 220.

⁹²⁰ Steinfeld, H. et al., *Livestock's Long Shadow: Environmental Issues and Options*, The Livestock, Environment and Development (LEAD) Initiative (FAO 2006), at xxi. Available at <ftp://ftp.fao.org/docrep/fao/010/a0701e/a0701e00.pdf>, accessed 27 June 2013.

⁹²¹ *Ibid.*

⁹²² Smith, P. et al., 'Greenhouse gas mitigation in agriculture' (2008) 363 *Philosophical Transactions of the Royal Society*, pp.789-813, at 793-794.

⁹²³ Tapio-Bistrom, M.L., Bogdanski, A., and Runsten, L., 'Module 2: Managing Landscapes for Climate-Smart Agricultural Ecosystems', in FAO, *Climate-Smart Agricultural Sourcebook* (2013), at 58-59, Case Study 2.1.

4) *Providing agricultural inputs to poor and vulnerable forest adjacent communities in line with the government's National Accelerated Agricultural Inputs Access Program (NAAIAR)*⁹²⁴

One of the reasons forest-adjacent communities might expand agricultural production into forests is due to low yields on existing agricultural land caused by lack of sufficient inputs.⁹²⁵ This proposed strategy option is aimed at combating the problem of lack of access to inputs and low productivity in order to reduce pressure on forests for agricultural expansion. However, some inputs that can increase crop productivity on existing agricultural land may simultaneously cause emissions and environmental trade-offs.⁹²⁶ Chemical fertilisers are one example. Therefore, there are climate-smart agricultural practices which can change or substitute for a portion of agricultural inputs to potentially reduce negative environmental trade-offs whilst still maximising productivity.⁹²⁷

The inputs which could contribute to the adaptation, food security, and mitigation goals of climate-smart agriculture and reduce pressure on forests as part of Kenya's REDD+ implementation are:

- **Adaptation benefits:** Providing access to inputs, such as resilient seed varieties or different crops, chemical fertilisers (with corresponding training and extension services for proper application), and irrigation systems that could provide yield stabilisation or even increases under climate change conditions.⁹²⁸
- **Food security benefits:** Inputs, such as manure, mulch, compost, resilient seed varieties, intercropping of nitrogen-fixing legumes, and water harvesting for irrigation, may increase crop yields.⁹²⁹ This can help ensure more food for subsistence or farm income from marketing and sales of surplus agricultural products, as well as contribute to fewer emissions from deforestation (relieving pressure to expand into forests to produce more crops).⁹³⁰
- **Mitigation benefits:** Providing inputs, such as seeds for intercropping legumes or agroforestry seedlings for on-farm trees, would allow for increased above- and below-ground

⁹²⁴ Government of Kenya, *Revised REDD Readiness Preparation Proposal Kenya*, Submitted to the Forest Carbon Partnership Facility (August 2010), at 38.

⁹²⁵ Scherr, S.J. and McNeely, J.A., 'Biodiversity conservation and agricultural sustainability: towards a new paradigm of "ecoagriculture" landscapes' (2008) 363 *Philosophical Transactions of the Royal Society*, pp.477-494, at 478.

⁹²⁶ *Ibid.*

⁹²⁷ Smith, P. et al., 'Greenhouse gas mitigation in agriculture' (2008) 363 *Philosophical Transactions of the Royal Society* (2008), pp.789-813, at 790-791.

⁹²⁸ FAO, *Food Security and Agricultural Mitigation in Developing Countries: Options for Capturing Synergies* (2009), at 18, Table 2.2.

⁹²⁹ *Ibid.*

⁹³⁰ Meybeck, A. and Gitz, V., 'Module 1: Why Climate-Smart Agriculture, Forestry and Fisheries,' in FAO, *Climate-Smart Agriculture Sourcebook* (2013), at 29.

biomass on agricultural land, which could potentially contribute to soil carbon sinks.⁹³¹ Additionally, household use or sales of firewood, charcoal, and timber from a farmer's land could reduce deforestation emissions from existing forests.⁹³²

3.3.1.2 Strategy options in the second priority area

The second priority area of REDD+ strategy options relevant to agriculture is “**promoting sustainable utilisation of forests**.”⁹³³ Higher demand for biomass or fuelwood for energy purposes could put pressure on forests and result in their unsustainable use.⁹³⁴ Agroforestry, a climate-smart agricultural practice, is proposed as a REDD+ strategy option under Kenya's R-PP to address this issue of unsustainable use of forests.⁹³⁵ Farmers could grow and extract wood from the farm for firewood, charcoal, and timber (both for household use or for sale), which could decrease pressure on forests for these purposes and thereby increase sustainable utilisation of forests.⁹³⁶ Agroforestry as a strategy option could therefore contribute to REDD+ implementation by potentially reducing emissions from deforestation and forest degradation.

3.3.1.3 Strategy options in the third priority area

The third priority area of REDD+ strategy options relevant to agriculture is “**enhancement of carbon stocks**,” which proposes “to increase carbon stock in existing forests and to encourage new forest establishment, reforestation of degraded and deforested areas, and expansion of trees on farms.”⁹³⁷ Specific REDD+ strategy options within this priority area that relate directly to farms include:⁹³⁸

- Tree planting campaigns and support to provision of high quality germplasm to farmholdings,
- Farm forestry extension, and

⁹³¹ FAO, *Food Security and Agricultural Mitigation in Developing Countries: Options for Capturing Synergies* (2009), at 21.

⁹³² Graham, K. (ODI) and Vignola, R. (CATIE), *REDD+ and agriculture: a cross-sectoral approach to REDD+ and implications for the poor*, Report for the REDD-net programme (2011), at 15.

⁹³³ Government of Kenya, *Revised REDD Readiness Preparation Proposal Kenya*, Submitted to the Forest Carbon Partnership Facility (August 2010), at 39.

⁹³⁴ *Ibid.*

⁹³⁵ *Ibid.*

⁹³⁶ Meybeck, A. and Gitz, V., ‘Module 1: Why Climate-Smart Agriculture, Forestry and Fisheries’, in FAO, *Climate-Smart Agriculture Sourcebook* (2013), at 14.

⁹³⁷ Government of Kenya, *Revised REDD Readiness Preparation Proposal Kenya*, Submitted to the Forest Carbon Partnership Facility (August 2010), at 41.

⁹³⁸ *Ibid.*

- Support to the Government of Kenya (GoK) target to plant 10% of land with trees . . . in line with the Vision 2030 objectives and the Agriculture [Farm Forestry] rules that require a minimum of 10% of agriculture land to be under trees (note: repealed by the Crops Act 2013).

These strategy options are aimed at increasing woody biomass resources on farms in order to reduce the pressure on forests for fuel, construction materials, and income-generating actions. Decreased deforestation and forest degradation could contribute to the priority area's objective of "enhancement of (forest) carbon stocks."⁹³⁹

3.3.2 *Project-level examples of agriculture's potential role in REDD+ implementation*

The actions carried out under carbon farming projects have the potential to improve farms' food production, natural resources (land, water, biodiversity), resilience to adverse climate conditions (drought, flood), and economic viability.⁹⁴⁰ These improvements in farming operations may reduce the pressure to expand agricultural operations into forests and undermine REDD+ implementation. Therefore, REDD+ implementation could benefit from carbon farming projects that reduce agriculture's role as a driver of deforestation. Mitigation of agricultural emissions and the potential for project participants to gain additional income from carbon credit sales would be co-benefits.

There are already several carbon farming initiatives in Kenya (please refer to **Annex 8** for a list of forest carbon projects in Kenya). They provide examples of various types of agricultural actions which could contribute to REDD+ implementation - for example:

- carbon farming projects developed by NGOs and/or the private sector;
- agricultural development projects by international and national organisations and funders;
- capacity-building or demonstration projects by collective organisations (eg. farmer co-operatives) on altered farming techniques; and
- public-private partnerships testing schemes that could aid agricultural development.

Lessons drawn from each type of action are discussed below.

⁹³⁹ *Ibid.*

⁹⁴⁰ For multiple examples of benefits resulting from carbon projects involving land, water and forestry, see Lipper, L. et al., "*Climate-Smart" Agriculture: Policies, Practices and Financing for Food Security, Adaptation and Mitigation*, Report for the FAO (2010).

3.3.2.1 Carbon farming project developed by a NGO

Carbon farming projects could benefit REDD+ implementation – the different agricultural management practices (provided under the project methodology) could result in improved productivity and climate change adaptation, which could reduce pressure to clear forests for agriculture. One example of a carbon farming project is implemented by Vi Agroforestry, a Swedish NGO, that is working with farmers in Western Kenya, on the *Kenya Agricultural Carbon Project*.⁹⁴¹ Vi Agroforestry has a 30 year history of working to increase local farmers' awareness, capacity, and extension services pertaining to tree planting, environmental work, organisational development, market-oriented production, financial services, and climate actions.⁹⁴² The World Bank's BioCarbon Fund is the designated buyer for the carbon credits generated from the Kenya Agricultural Carbon Project's measured and verified emission reductions.⁹⁴³

In collaboration with the World Bank, Vi Agroforestry developed the first soil carbon methodology for the Kenya Agriculture Carbon Project, which was verified and validated by the Verified Carbon Standard (VCS).⁹⁴⁴ The "Sustainable Agriculture Land Use Management" (SALM) methodology is designed to measure the carbon storage potential on agricultural land from SALM practices compared to a business as usual (BAU) scenario.⁹⁴⁵ Vi Agroforestry representatives stated that caution was exercised in developing the soil carbon methodology.⁹⁴⁶ Prior to the carbon project, the organisation provided awareness raising, training, and extension services focused on SALM practices to the local farmers, which were aimed at contributing to increased agricultural productivity, farmer income, and sustainability of natural resource use.⁹⁴⁷ Therefore, the extensive farmer network collaborating with Vi Agroforestry on this project (approximately 60,000 farmers) was familiar with the organisation's extension services and suggested changes in agricultural management.⁹⁴⁸ In line with the farmers'

⁹⁴¹ Vi Agroforestry, *What we do: Carbon Offsetting*, <http://www.viagroforestry.org/what-we-do/carbon-credit/>, last accessed 26 June 2013.

⁹⁴² Vi Agroforestry at <http://www.viagroforestry.org/>, last accessed 26 June 2013.

⁹⁴³ Vi Agroforestry, *What we do: Carbon Offsetting*, at <http://www.viagroforestry.org/what-we-do/carbon-credit/> (last accessed 26 June 2013).

⁹⁴⁴ *Ibid.*; see further, World Bank, *Projects & Operations: Kenya Agricultural Carbon Project*, <http://www.worldbank.org/projects/P107798/kenya-agricultural-carbon-project?lang=en>, last accessed 26 June 2013.

⁹⁴⁵ Verified Carbon Standard (VCS), *VM0017 Adoption of Sustainable Agricultural Land Management, v1.0*, at <http://v-c-s.org/methodologies/VM0017>, last accessed 26 June 2013.

⁹⁴⁶ Andersson, Arne, Mutua, Rachel Wangu, and Wekesa, Amos (Vi Agroforestry). Interviewed 10 April 2013 at Vi Agroforestry offices (Nairobi, Kenya).

⁹⁴⁷ *Ibid.*

⁹⁴⁸ *Ibid.*

priorities, economic, food security, and resource sustainability improvements were the primary, long-term benefits intended to result from the SALM practices.

Many SALM practices can also be considered climate-smart agricultural practices (eg. conservation agriculture, agroforestry, terracing, cover crops, water harvesting and precision irrigation).⁹⁴⁹ SALM practices used at the project-level not only contribute to increased crop productivity and climate adaptation, but also lower emissions from agricultural production.⁹⁵⁰ Therefore, Vi Agroforestry was able to develop a carbon farming project around the practices farmers were already implementing, which presented the potential for carbon market financing as an additional benefit from the SALM practices.⁹⁵¹

Vi Agroforestry wanted to avoid setting unrealistic expectations regarding additional income flow to farmers from the sale of carbon credits generated by the project.⁹⁵² Therefore, the connection between SALM practices and carbon payments was introduced only when the initial carbon credit sale proceeds materialised.⁹⁵³ Vi Agroforestry representatives stressed that it was important to manage expectations in this way to avoid discouragement and abandonment of practices (which are additionally beneficial to the farmers for food security and adaptation) if no extra funds are received.⁹⁵⁴ Carbon project proceeds could fail to materialise if, for example, carbon prices drop or a buyer cannot be found.⁹⁵⁵

3.3.2.2 *Agricultural development projects by international and national organisations and funders*

On-the-ground projects aimed at agricultural development and improving rural households through sustainable land and water management, increased food production, and environmental conservation

⁹⁴⁹ Lipper, L. et al., “*Climate-Smart Agriculture: Policies, Practices and Financing for Food Security, Adaptation and Mitigation*,” Report for the FAO (2010), at 3 (highlighting “high production, intensified, resilient, sustainable, and low-emission” agricultural practices which farmers can transition into using for their farming operations).

⁹⁵⁰ Andersson, Arne, Mutua, Rachel Wangu, and Wekesa, Amos (Vi Agroforestry). Interviewed 10 April 2013 at Vi Agroforestry offices (Nairobi, Kenya).

⁹⁵¹ *Ibid.*

⁹⁵² *Ibid.*

⁹⁵³ *Ibid.*

⁹⁵⁴ *Ibid.*

⁹⁵⁵ For a discussion of lessons learned from carbon project implementation regarding private sector financing, see Peters-Stanley, M., *REDD+ Finance: Private Lessons for the Public Sphere*, Ecosystem Marketplace, at http://www.ecosystemmarketplace.com/pages/dynamic/article.page.php?page_id=9912§ion=news_articles&eod=1, last accessed 30 August 2013.

have the potential to contribute to REDD+ implementation in Kenya. Improving food security and adaptation capacity on existing farmland could reduce pressure to clear forests for agricultural use.

International and national organisations and funders have established projects in Kenya which are aimed at agricultural development.⁹⁵⁶ Partnering with KARI, the FAO and SIDA-funded pilot project called *Strengthening capacity for climate change adaptation on sustainable land and water management in Kenya* provides rural agricultural actors with capacity building and training on agricultural adaptation practices, such as water harvesting and agroforestry.⁹⁵⁷ Harvesting of rainwater and run-off into constructed ponds enables fish farming and crop irrigation.⁹⁵⁸ Sustainable land and water management (SLWM) practices (eg. conservation agriculture with crop residue management), and agroforestry on cropland and along field borders, can provide higher soil nutrient content, less soil erosion, and increased water retention and infiltration.⁹⁵⁹ These practices can cut costs for farmers and provide tree resources (for construction materials, firewood, food, and fodder) that can contribute to positive ‘crop-tree-livestock integration.’⁹⁶⁰

IFAD and other partners of FAO are assisting communities in Western Kenya with food and horticultural crop irrigation through projects, such as the “Sidindi Watershed Project” and the “Anyiko Rice Irrigation Scheme.”⁹⁶¹ Projects are aimed at increasing food security as well as improving food value chains through local processing and packaging of farm products, rather than farmers simply selling raw materials for less value.⁹⁶² The irrigation strategies under the projects are intended to increase soil and land productivity, enhance resilience to climate change, and reduce downstream flooding and damage to agricultural activities.⁹⁶³ Water harvesting through constructed ponds as well as mulching for improved soil moisture are two strategies described by one of the

⁹⁵⁶ KARI, *Policy Learning Tour to FAO-KARI, SIDA and IFAD Funded Projects in Western Kenya*, Project Video by KARI and FAO-Kenya, at <http://www.youtube.com/watch?v=xZPqShzXF2c&feature=youtu.be>, last accessed 24 June 2014.

⁹⁵⁷ *Ibid.*

⁹⁵⁸ *Ibid.*

⁹⁵⁹ *Ibid.*

⁹⁶⁰ Statement by Barrack O. Okoba, Coordinator, Soil and Water Management and Conservation Agriculture Research – KARI, in KARI, *Policy Learning Tour to FAO-KARI, SIDA and IFAD Funded Projects in Western Kenya*, Project Video by KARI and FAO-Kenya, at <http://www.youtube.com/watch?v=xZPqShzXF2c&feature=youtu.be>, last accessed 24 June 2014.

⁹⁶¹ KARI, *Policy Learning Tour to FAO-KARI, SIDA and IFAD Funded Projects in Western Kenya*, Project Video by KARI and FAO-Kenya, at <http://www.youtube.com/watch?v=xZPqShzXF2c&feature=youtu.be>, last accessed 24 June 2014.

⁹⁶² *Ibid.*

⁹⁶³ *Ibid.*

project's beneficiaries.⁹⁶⁴ These practices can potentially increase agricultural production from existing farmland and/or provide additional income to farmers from value-added processing and packaging; both could potentially reduce the need to expand agricultural production into forests.

3.3.2.3 Collective organisation providing capacity building and demonstration actions for its members

REDD+ implementation could benefit from farmers' organisations assisting their members with climate adaptation and improved crop or livestock production strategies, as well as potentially securing higher prices for their agricultural products. An example of a collective organisation that is providing capacity building and demonstration actions for its members on climate change adaptation and livestock productivity is Mukurwe-Ini Wakulima Dairy Limited (Wakulima). Wakulima is a 100% farmer-owned company structured and operated similarly to a farmer co-operative.⁹⁶⁵ Between 6,000 active to 20,000 overall members have shares in Wakulima, so the dairy collects and sells around 40,000 litres of milk per day⁹⁶⁶ (in contrast, each member has an average of two cows that produce two litres each per day).⁹⁶⁷ Coordinator Gerald Warui emphasised the difference in bargaining power between individuals with low quantities of milk to offer and collective farmer organisations with pooled milk resources, noting that the latter can command higher prices from buyers.⁹⁶⁸

In discussing the general issues faced by Wakulima's farmers, Mr. Warui pointed to the large downturn in milk productivity experienced in 2009-2010.⁹⁶⁹ Kenya suffered an extreme drought that year resulting in less fodder for the dairy cows, to which the dairy attributed the steep decline in milk production by its members' livestock.⁹⁷⁰ The dairy recognises that climate change may increasingly affect production; therefore, Wakulima participates in field days with county extension services to communicate adaptation strategies to its members.⁹⁷¹ Wakulima also organises demonstration farms, with external financial assistance, to educate its members (eg. how different feeding methods could

⁹⁶⁴ Statement by George Ouma, Farmer, Sidindi Watershed Project, in KARI, *Policy Learning Tour to FAO-KARI, SIDA and IFAD Funded Projects in Western Kenya*, Project Video by KARI and FAO-Kenya, at <http://www.youtube.com/watch?v=xZPqShzXF2c&feature=youtu.be>, last accessed 24 June 2014.

⁹⁶⁵ Mukurwe-Ini Wakulima Dairy Limited, at <http://mukurwe-iniwakulima.kbo.co.ke/home>, last accessed 27 June 2013.

⁹⁶⁶ Warui, Gerald (Mukurwe-ini Wakulima Dairy Ltd). Interviewed 12 April 2013 at Wakulima Dairy offices (Mukurwe-ini, Kenya).

⁹⁶⁷ *Ibid.*

⁹⁶⁸ *Ibid.*

⁹⁶⁹ *Ibid.*

⁹⁷⁰ *Ibid.*

⁹⁷¹ *Ibid.*

improve dairy production as well as help with adaptation, such as drying and storing coriander leaves and making silage for future drought periods).⁹⁷²

Co-operatives have established communication networks (eg. notice boards at the dairy, posters on pick-up and delivery trucks) and access to large groups of producers; therefore, these collective organisations could facilitate dissemination of recommendations for agricultural management. Adaptation or climate resilience strategies aimed at ensuring livestock feed is available even during extreme weather events could simultaneously decrease the incentive to clear forests for grazing.⁹⁷³ Therefore, this adaptation strategy for livestock production could also benefit REDD+ implementation. In addition, farmer co-operatives can potentially secure higher prices for their members.⁹⁷⁴ Adequate market prices can reduce the need to expand into forests to compensate for non-economically viable production from existing farmland.

3.3.2.4 *Public-private partnership testing a strategy that could aid agricultural development*

Agricultural development strategies, such as risk management schemes, can help small-scale farmers cope with climate change impacts and reduce the need to expand agricultural production into forests, thereby benefiting REDD+ implementation. The Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH (GIZ – the German International Development Agency) works on adaptation awareness raising and training for on-the-ground actors as well as governmental capacity building and policy support in Kenya.⁹⁷⁵ One of GIZ's projects is to develop a training manual for smallholder farmers on small-scale insurance; the manual is intended to support the work of the public-private partnership (PPP) between Syngenta's foundation, the Kenyan Ministry of Agriculture and the German Independent Labour Party (UAP).⁹⁷⁶ The PPP is developing a small-scale index insurance scheme based on measured rainfall and area-specific crop models.⁹⁷⁷

⁹⁷² *Ibid.*

⁹⁷³ Calvosa, C. et al., *Livestock and Climate Change*, IFAD Livestock Thematic Papers: Tools for project design (2009), at 6.

⁹⁷⁴ FAO, *Agricultural Cooperatives: Key to feeding the world*, Publication for World Food Day, 16 October 2012, at http://www.fao.org/fileadmin/templates/getinvolved/images/WFD2012_leaflet_en_low.pdf, last accessed 28 August 2013.

⁹⁷⁵ Jacobi, Petra (GIZ – Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH). Interviewed 11 April 2013 at GIZ offices (Nairobi, Kenya).

⁹⁷⁶ *Ibid.*

⁹⁷⁷ *Ibid.*

Small-scale insurance schemes offer potential adaptation benefits to farmers. Crop insurance provides a safety net for major crop losses resulting from extreme weather conditions⁹⁷⁸, which are projected to increase under climate change scenarios.⁹⁷⁹ Small-scale crop insurance could also benefit REDD+ implementation. Having a safety net against food insecurity and income loss could reduce pressure for smallholder farmers to expand agricultural production into forests to compensate for losses on existing farmland. Private (product development) and public (government-backed schemes) investment in innovative schemes for agricultural development could help reduce agriculture's role as a driver of deforestation, but it should be noted that designing small-scale insurance for Kenyan smallholder farmers has been complicated to date (due to small plot sizes and weather variability within very short distances of the weather monitoring stations).⁹⁸⁰



A crop on land between Nairobi and Naivaisha (Great Rift Valley region).

⁹⁷⁸ Commodity Risk Management, Agriculture and Rural Development, and World Bank, Lilongwe, *Index-Based Weather Insurance for Smallholder Farmer Credit in Malawi*, Background Reading for Stakeholder Planning Meeting, 28-29 January 2007, at <http://capacity4dev.ec.europa.eu>, last accessed 28 August 2013.

⁹⁷⁹ Boko, M. et al., 'Africa', in *Climate Change 2007: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC)*, Ch. 9 (Parry, M.L. et al. eds., 2007), Section 9.4.4.

⁹⁸⁰ Twomlow, Stephen (International Fund for Agricultural Development). Interviewed 11 April 2013 at United Nations Campus Recreation Annex (Nairobi, Kenya).

4. REGULATORY FRAMEWORK APPLICABLE TO CLIMATE-SMART AGRICULTURE IN KENYA

4.1 Importance of understanding how policies, laws and regulations could apply

Farms implementing climate-smart agricultural practices in Kenya would need to comply with the basic rules applicable to all other forms of agricultural practices. For example, the Environmental Management and Co-ordination Act requires hillside management to prevent soil erosion and loss of biodiversity⁹⁸¹, and the National Environment Management Authority (NEMA) issued rules on soil erosion prevention and management to avoid soil fertility loss (ie. salinisation from over-irrigation).⁹⁸² Additionally, it is important to assess how requirements may overlap with other rules or result in unintended consequences without additional policy or regulatory support. For example, the Water Resources Management Rules, under the Water Act, prioritise water allocation to subsistence irrigation.⁹⁸³ This could affect compliance with the NEMA rules on soil management to avoid soil fertility loss if users are not aware of how to manage irrigation (eg. due to inadequate extension support) and/or permit limitations are not enforced.

4.2 Policy support for climate-smart agriculture

Several existing policies support the principles of climate-smart agriculture; namely, the *Agricultural Sector Development Strategy*, *National Food and Nutrition Security Policy*, *Vision 2030*, *National Climate Change Response Strategy*, and *National Climate Change Action Plan*. Outlined below are the different ways in which some of Kenya's policies support food security, adaptation, and mitigation actions from the agricultural sector.

4.2.1 Food Security

The *Agricultural Sector Development Strategy* (ASDS) points to the challenges facing the agricultural sector – low productivity levels, declining forest cover, unused land for crop production, lack of market efficiency or access for agricultural products, and lack of value addition to gain better prices for products.⁹⁸⁴ Numerous challenges were also identified in the *National Food and Nutrition Security Policy* (FNSP) as concerns for Kenya's future food security, including: smallholder farmers'

⁹⁸¹ *Environmental Management and Co-ordination Act* 1999/Revised 2012, arts. 47, 50.

⁹⁸² *Agriculture, Fisheries and Food Act* 2013 (Government of Kenya), art. 23.

⁹⁸³ *Water Resources Management Rules* 2007 (Government of Kenya), art. 53.

⁹⁸⁴ Government of Kenya, *Agricultural Sector Development Strategy 2010-2020* (2010), at 7.

lack of access to fertilisers, which could reduce crop yields; reductions of food stocks; high global food prices; and rising rates of diet-related diseases.⁹⁸⁵ Climate change is noted as a primary concern due to its projected negative effects on crops and livestock.⁹⁸⁶

In response to potential climate change impacts, the FNSP calls for “[a]daptation interventions that enhance farming communities’ resilience to climate change induced effects” in order to achieve the policy’s food security objectives.⁹⁸⁷ The ASDS also targets these challenges by emphasising the importance of: increased production (through expansion of irrigation); higher yields; better environmental management; and focused tree planting on farms.⁹⁸⁸ Kenya’s development strategy, *Vision 2030*, emphasises the agricultural sector’s role in Kenya’s economic development and food security,⁹⁸⁹ implementing the flagship project “Fertiliser Cost-Reduction Initiative” to increase farmers’ access to fertiliser inputs.⁹⁹⁰ By aiming to increase access to fertilisers, the project’s objective is to increase agricultural production and enhance food security.⁹⁹¹

4.2.2 Mitigation and adaptation

The *National Climate Change Response Strategy* (NCCRS) lays out the objectives for adaptation and mitigation action in Kenya as a framework for the *National Climate Change Action Plan*. The NCCRS recognises the importance and vulnerability of the agricultural sector and prioritises it “for quick and immediate action, while simultaneously providing explicit measures for addressing climate change in Kenya and defining criteria to track effectiveness of such measures.”⁹⁹² Separate sections in the NCCRS propose adaptation and mitigation actions, which relate to climate-smart agriculture. For example, the adaptation section for ‘Agriculture, Horticulture and Food Security’ calls for:

- community-based adaptation strategies, such as enhanced dissemination of early warning system projections and information;

⁹⁸⁵ Government of Kenya, *National Food and Nutrition Security Policy* (2011), at 3-4.

⁹⁸⁶ *Ibid.* at 3.

⁹⁸⁷ *Ibid.*

⁹⁸⁸ Government of Kenya, *Agricultural Sector Development Strategy 2010-2020* (2010), at 16, 27-28 (referencing the internationally accepted standard of 10% nation-wide tree cover).

⁹⁸⁹ Office of the Prime Minister, Ministry of State for Planning, *National Development and Vision 2030, Sessional Paper on Vision 2030* (2012), at 123, 126.

⁹⁹⁰ Kenya Vision 2030, *Flagship Projects: Fertiliser Cost-Reduction Initiative*, at <http://www.vision2030.go.ke/index.php/pillars/project/Economics/33>, last accessed 28 August 2013.

⁹⁹¹ *Ibid.*

⁹⁹² Government of Kenya, *National Climate Change Response Strategy* (2010), at 44.

- financial and technical support to reintroduce indigenous and drought-tolerant crops into production⁹⁹³;
- promotion of irrigated agriculture;
- land degradation avoidance through better soil management techniques;
- conservation agriculture;
- diversification of rural livelihoods;
- creation of linkages with development partners for enhanced technology transfer;
- agricultural research into climate change resilient crop varieties;
- an innovative small-scale insurance scheme;
- enhanced agricultural extension services;
- integrated pest management methods to respond to shifting diseases and pests; and
- improved post-harvest storage to prevent food losses.⁹⁹⁴

The mitigation section of the NCCRS explicitly recognises that “[a]lthough emissions from the agricultural sector in Kenya are quite low and are considered to be ‘survival emissions’⁹⁹⁵, some mitigation actions in this sector are also adaptation measures and should be promoted as a matter of priority.”⁹⁹⁶ The five mitigation measures the NCCRS suggests for adoption in the agricultural sector are:

- 1) agricultural technology for increased production and reduced emissions;
- 2) waste management (eg. manure digesters for energy production);
- 3) reduced tillage for lower methane from termites and mulching to control weeds;
- 4) intercropping on private land with crops and agroforestry (specifically avoiding encroachment into natural and reserve forests); and
- 5) organic farming with manure and crop residue as fertilisers.⁹⁹⁷

The NCCRS prioritises agricultural research to determine locally appropriate strategies for adaptation and mitigation actions, of which biotechnology and use of indigenous knowledge in conventional

⁹⁹³ Labelled the Orphan Crops Programme, this includes food crops such as cassava, millet, sorghum, and sweet potatoes. *Ibid.* at 50.

⁹⁹⁴ *Ibid.* at 50-51.

⁹⁹⁵ Also referred to as ‘necessary’ emissions, the term ‘survival emissions’ here refers to the necessity of agricultural actions for food production even though they produce GHG emissions. See Banuri, T. et al., ‘Setting the Stage: Climate Change and Sustainable Development’, in *Climate Change 2001: Contribution of Working Group III to the Third Assessment Report of the Intergovernmental Panel on Climate Change (IPCC)*, Ch. 1 (Opschoor, H. and Parikh, K. eds., 2001), Section 1.3.1.

⁹⁹⁶ Government of Kenya, *National Climate Change Response Strategy* (2010), at 62.

⁹⁹⁷ *Ibid.* at 62-63.

production are mentioned.⁹⁹⁸ Renewable energy production using agricultural waste products is also included as a research priority, including coffee husks and used tea leaves, to reduce dependence on other forms of energy production.⁹⁹⁹

The *National Climate Change Action Plan* (NCCAP) was developed to continue implementation of the NCCRS, with information and recommendations to “inform national development and policy decisions in all sectors of the economy” updated on a five-year basis aligning with national planning and budgetary processes.¹⁰⁰⁰ The NCCAP was developed through a consultative process led by an inter-ministerial Task Force under the Ministry of Environment and Mineral Resources (MEMR), and Seven Thematic Working Groups contributed expertise to the different sections of the NCCAP.¹⁰⁰¹ The NCCAP identifies national “policies, plans, strategies and initiatives that provide a supportive framework for implementing climate change responses” – some of which have direct implications for agriculture.¹⁰⁰²

The NCCAP provides direct support for climate-smart agriculture as part of national adaptation. Table 5.1 on Priority Adaptation Actions per Sector explicitly includes the promotion of climate-

⁹⁹⁸ *Ibid.* at 78-79.

⁹⁹⁹ *Ibid.* at 79.

¹⁰⁰⁰ Government of Kenya, *National Climate Change Action Plan* (2013), at 7.

¹⁰⁰¹ *Ibid.* at 21.

¹⁰⁰² *Ibid.* at 10-11.

1) *The National Policy for the Sustainable Development of Northern Kenya and other Arid Lands*: This policy was created by the former Ministry of State for the Development of Northern Kenya and Other Arid Lands (ministerial consolidation followed the recent presidential election in March 2013). It recognized the importance of pastoralism in Northern Kenya and emphasizes investment for development of the ASALs (ie. infrastructure, economy, human capital).

2) *The National Disaster Management Policy 2009*: Provides a framework for disaster management, disaster risk reduction and reduction of vulnerability for communities and ASALs, which would benefit agriculture as a sector dependent upon the natural environment.

3) *The Kenya Forestry Master Plan 1995-2020*: The Plan led to development of the Forests Act of 2005 and the Forest Policy of 2007 (noting that the Forest Policy 2014 updates the 2007 version, and the Forests Act is likely to be revised).

4) *The National Environment Action Plan Framework (2009-2013)*: The challenges identified in this policy for agriculture and its effect on the environment are an “early warning system on drought, development of a national land use policy, control pollution from agricultural practices, regulation on introduction of Genetically Modified Organisms (GMOs), and appropriate land management” (p.14). The Biosafety Act is aimed at addressing the GMO challenge (Article 18(1)), but the early warning systems, national land use policy, and land management are still being formulated, as seen in the recent NCCAP (2013) call for “promotion of drought tolerant crops, water harvesting, integrated soil fertility management, insurance schemes . . . providing farmers and pastoralists with climate change-related information, and mainstreaming climate change into agricultural extension services” (p.32).

smart agriculture in Kenya as objective, and allocates 15 billion KSh to its implementation.¹⁰⁰³ The NCCAP also includes condensed results from the Adaptation Technical Analysis Report (ATAR) for the agricultural sector, involving development of inputs and geographically specific climate resilience strategies.¹⁰⁰⁴ In particular, two of the ATAR's proposed actions should be noted:

- Explore alternative financial instruments for promoting adaptation, eg. Payment for Environmental Services, carbon finance; and
- Mainstream climate resilience into agricultural finance and financial mechanisms for adaptation eg. credit, grants, subsidies, import duty, support up-scaling of successful mechanisms.¹⁰⁰⁵

4.2.3 Policy options to address agriculture's impact on the environment

The 2012 *National Environment Policy* specifically mentions the “need for harmonization of sectoral policy instruments with the EMCA [Environment Management and Coordination Act] and the Constitution” and lists agriculture as one of the policies needing to be harmonized.¹⁰⁰⁶ The *National Environment Policy* also describes agriculture's role as a threat to ASALs ecosystems, as well as Kenya's land and soil.¹⁰⁰⁷

The *National Environment Policy* proposes actions to combat degradation of the ASALs, including: creation and implementation of an Integrated Land Use Master (Development) Plan; flood and river water harvesting; promotion of integrated natural resource management; and efficient adaptation measures for resource management.¹⁰⁰⁸ In response to the land and soil issues, the *National Environment Policy* outlines that the government needs to implement the Constitution and *National Land Policy* in a sustainable way, ensure sustainable agricultural use, and develop a *National Soil Conservation Action Plan* to maintain soil fertility.¹⁰⁰⁹ These responses to identified environmental impacts from agricultural production in Kenya demonstrate support for adaptation and increased food security strategies, eg. the proposed adaptation measures for resource management, water harvesting, and sustainable agricultural use of land and soil.¹⁰¹⁰

¹⁰⁰³ Government of Kenya, *National Climate Change Action Plan* (2013), at 60.

¹⁰⁰⁴ *Ibid.* at 58.

¹⁰⁰⁵ *Ibid.* at 58-59.

¹⁰⁰⁶ Government of Kenya, *National Environment Policy* (2012), at 9.

¹⁰⁰⁷ *Ibid.* at 16.

¹⁰⁰⁸ *Ibid.*

¹⁰⁰⁹ *Ibid.* at 16-17.

¹⁰¹⁰ *Ibid.* at 13-14, 16-18.

4.3 Legislative framework applicable to climate-smart agriculture in Kenya

Numerous laws apply to the Kenyan agricultural sector. The first subsection presents agriculture-specific laws, and the second subsection discusses other sectoral laws generally applicable to agricultural actions, which could potentially apply to climate-smart agricultural actions.

4.3.1 Agriculture-specific legislation

4.3.1.1 Crops Act 2013

The Crops Act 2013 is an important piece of new legislation for the agricultural crops sector in Kenya, establishing sustainable and environmentally friendly production as the standard for all land cultivation.¹⁰¹¹ It outlines the role of County governments in implementing national policies and laws, including the responsibility for soil and water conservation¹⁰¹², as well as the duties of the Agriculture, Fisheries and Food Authority (the Authority).¹⁰¹³ The provisions requiring farmland users to cultivate and make the land economically productive in a “sustainable and environmentally friendly manner” could support uptake of climate-smart agriculture because climate-smart agricultural practices are intended to increase productivity whilst supporting sustainable agriculture.¹⁰¹⁴ County governments’ responsibility for soil and water conservation would be applicable to climate-smart agriculture in the same way it would apply to other forms of agricultural production, but climate-smart agricultural practices could make it easier for farmers to meet established soil and water conservation standards because climate-smart agricultural practices are intended to reduce impacts on natural resources.

The Commodities Fund provides financial support to growers for farm inputs and operations, which could apply to climate-smart agriculture because the adoption of some climate-smart agricultural

¹⁰¹¹ *Crops Act* 2013 (Government of Kenya), art. 4.

¹⁰¹² *Ibid.* at art. 6: “(1) Pursuant to the Fourth schedule of the Constitution—(a) the Authority, on behalf of the national government, shall be responsible for licensing and charging of levies and breeder royalties on all scheduled crops on condition that the total sum of the levies charged by the Authority shall not exceed ten per centum of the gate value of the produce; (b) the county governments will implement the national government policies to the, extent that the policies relate to the county and in particular shall be responsible for—(i) development of crops grown within the county; (ii) plant disease control; (iii) markets; (iv) cooperative societies within the county; (v) soil and water conservation. (2) In order to achieve the objects and purposes of this Act, it is the duty of the national and county governments to provide an enabling environment for the development of the crop subsector. (3) The national and county governments shall determine and promote the implementation of agricultural policies and measures in a manner designed to promote, support and enhance productivity in the crop subsector”).

¹⁰¹³ *Ibid.* at art. 8.

¹⁰¹⁴ *Ibid.* at art. 4(b).

practices involves new or different inputs.¹⁰¹⁵ The Authority can establish programmes that provide growers with incentives, such as “affordable farm-inputs including quality seeds, planting materials and market linkage.”¹⁰¹⁶ This type of programme could be particularly relevant to climate-smart agriculture because it refers to quality seeds and planting materials, which some climate-smart agricultural techniques use for implementation.

Below are some of the key provisions that relate to the Kenyan agricultural sector and that could be relevant to climate-smart agriculture:

- Art. 3 – The Act aims to increase the growth and development of agriculture with a focus on improving productivity, farmer and rural incomes, harnessing investments, agribusiness efficiency, and exports.¹⁰¹⁷ To accomplish this, the Act aims at reducing regulation and bureaucracy, taxes, institutional overlap, as well as increasing competitiveness, diversification of crops and agricultural markets, and private investment in crop agriculture.¹⁰¹⁸
- Art. 4 – Land administration is to be guided by principles, such as that “land owners and lessees of agricultural land, being stewards, have the obligation to cultivate the lands they own or lease and make the land economically productive in a sustainable and environmentally friendly manner.”¹⁰¹⁹
- Art. 6(1)(b)(v) – County governments are responsible for implementing national policies, and for soil and water conservation, within their areas.¹⁰²⁰
- Art. 8 – This provision broadly encompasses the different functions of the Authority¹⁰²¹ that aim to develop the multiple different crops grown in Kenya with policies, market support, transportation, research, biodiversity collaboration on genetically modified organisms, farmer training programs, product inspection and grading, food security, value addition, industry agreements and payment stipulations.¹⁰²²
- Arts. 9 and 10 – A Commodities Fund is established “to provide sustainable, affordable credit and advances to farmers” for “a) farm improvement; b) farm inputs; c) farm operations; d) price stabilization; and e) any other lawful purpose approved by the Authority.”¹⁰²³

¹⁰¹⁵ *Ibid.* at art. 10.

¹⁰¹⁶ *Ibid.* at art. 12.

¹⁰¹⁷ *Ibid.* at art. 3.

¹⁰¹⁸ *Ibid.*

¹⁰¹⁹ *Ibid.* at art. 4.

¹⁰²⁰ *Ibid.* at art. 6.

¹⁰²¹ Created under the *Agriculture, Fisheries and Food Act 2013*.

¹⁰²² *Crops Act 2013* (Government of Kenya), art. 8.

¹⁰²³ *Ibid.* at art. 10.

- Art. 11 – This provision sets forth the process for the Cabinet Secretary and the Agriculture, Fisheries and Food Authority to determine areas of the country suitable for particular crop production.¹⁰²⁴ It includes public participation and the devolved control of the County governments to identify crops suitable for their areas. However, the development of a structured agricultural land use plan for the Country is limited by the final sub-clause in stating that “(6) Despite the provisions of this section, a person may grow any scheduled crop on any part of Kenya.”
- Art. 12 – Provides for the Agriculture, Fisheries and Food Authority to establish rules and programmes to ensure incentives and facilities in the areas of credit assistance and guarantee, affordable farm inputs, technical and infrastructure support, fertiliser cost-reduction investment, pest and disease control, post-harvest facilities and technologies, and tax exemptions.¹⁰²⁵

4.3.1.2 *Farm Forestry Rules 2009*

The Farm Forestry Rules were established under the Agriculture Act (repealed¹⁰²⁶) for the purpose of “promoting and maintaining farm forest cover of at least 10 per cent of every agricultural land holding and to preserve and sustain the environment in combating climate change and global warming.”¹⁰²⁷ The Rules specifically require all farms to comply with the 10% minimum tree cover¹⁰²⁸, and inspectors are authorised to enter farms and determine whether this amount has been met.¹⁰²⁹ This mandatory forestation on farms would have an effect on and potentially support implementation of climate-smart agriculture, particularly agroforestry. Implementing agroforestry in order to fulfil the 10% minimum requirement could also contribute to the farm’s soil health for potentially improved agricultural productivity.

The Farm Forestry Rules were highlighted as being potentially problematic for the development of carbon projects on “The International Small Group Tree Planting Program” (TIST) project website.¹⁰³⁰ TIST is a forest carbon project developed by the United States Agency for International

¹⁰²⁴ *Ibid.* at art. 11.

¹⁰²⁵ *Ibid.* at art. 12.

¹⁰²⁶ *Agriculture, Fisheries and Food Authority Act 2013* (Government of Kenya), art. 45.

¹⁰²⁷ *Farm Forestry Rules 2009* (Government of Kenya), art. 2.

¹⁰²⁸ *Ibid.* at art. 5.

¹⁰²⁹ *Ibid.* at art. 6.

¹⁰³⁰ USAID-Kenya, *TIST: The International Small Group Tree Planting Program*, at <http://kenya.usaid.gov/programs/environment/1573>, last accessed 29 August 2013.

Development (USAID) in conjunction with the Clean Air Action Corporation and the Institute for Environmental Innovation.¹⁰³¹ The project has been certified by the VCS.¹⁰³² Farmers are encouraged to plant trees on their farms, for which GHG emission reductions are measured, verified and validated, and carbon credits are issued for sale on the voluntary carbon market.¹⁰³³ The project website referred to the Rules as posing “potential future hurdles for carbon validation and verification” and undermining any “reforestation effort that tries to use carbon credits as a financial tool.”¹⁰³⁴ The concern is that the 10% minimum tree cover required under the Farm Forestry Rules could complicate the establishment of project baselines (ie. BAU scenarios) as well as exclude farmers from participating in carbon projects if the tree cover on their land is below the 10% minimum.¹⁰³⁵ More information and analysis is needed regarding potential issues with project-level validation and verification in relation to the provisions of the Farm Forestry Rules.

4.3.1.3 *Agriculture, Fisheries and Food Authority Act 2013*

This Act established the Agriculture, Fisheries and Food Authority with advisory, oversight and regulatory power.¹⁰³⁶ The Cabinet Secretary for agriculture was delegated the authority to prescribe rules for good management of agricultural land and the crops which may be grown on different lands.¹⁰³⁷ The Cabinet Secretary may prescribe national guidelines for certain actions as well in order to conserve the soil or prevent soil erosion.¹⁰³⁸ For example, guidelines may be issued “requiring, regulating or controlling – (i) afforestation or re-afforestation of land; (ii) the drainage of land, including the construction, maintenance or repair of drains, gullies, contour banks, terraces and diversion ditches; (iii) salination, acidification and saltification of soil.”¹⁰³⁹ Such guidelines could apply to climate-smart agriculture because:

¹⁰³¹ *Ibid.*

¹⁰³² VCS, *The VCS Project Database*, at <https://vcsprojectdatabase2.apx.com/myModule/Interactive.asp?Tab=Projects&a=1&t=1>, last accessed 30 August 2013.

¹⁰³³ USAID-Kenya, *TIST: The International Small Group Tree Planting Program*, at <http://kenya.usaid.gov/programs/environment/1573>, last accessed 29 August 2013.

¹⁰³⁴ *Ibid.*

¹⁰³⁵ By setting a minimum tree cover percentage for each plot of farmland, those farmers below the 10% are legally required to increase to a higher amount. Reforestation and emissions reductions on land below the 10% minimum would therefore not be able to demonstrate ‘additionality’, ie. reductions that would not have happened in the absence of the project. Remote interview (via email) with Charlie Williams of the Clean Air Action Corporation, 6 September 2013.

¹⁰³⁶ *Agriculture, Fisheries and Food Authority Act 2013* (Government of Kenya), art. 3.

¹⁰³⁷ *Ibid.* at art. 22.

¹⁰³⁸ *Ibid.* at art. 23(1)(b).

¹⁰³⁹ *Ibid.*

- afforestation of land could be implemented using the climate-smart agricultural practice of agroforestry;
- land management practices, such as terracing and water harvesting, to prevent soil erosion can be defined as climate-smart agricultural practices because they provide adaptation, mitigation, and productivity benefits¹⁰⁴⁰; and
- actions to improve soil health, or avoid negative productivity effects from poor soil conditions such as salinisation, could involve climate-smart agricultural practices (eg. changing crop varieties, crop rotations, intercropping with nitrogen-fixing legumes, conservation agriculture, and use of manure fertiliser).

Article 40 is important in terms of climate-smart agriculture because it requires consultation with Kenya's farmer organisations before policies/regulations affecting the agricultural sector are made, which could include policies/regulations directed at or supporting climate-smart agriculture.¹⁰⁴¹

4.3.1.4 Kenya Agricultural and Livestock Research Act 2013

The Kenya Agricultural and Livestock Research Organisation was established under this Act in order to “promote, streamline, co-ordinate and regulate research in crops, livestock, marine and fisheries, genetic resources and biotechnology in Kenya” as well as crop and livestock diseases, and to “expedite equitable access to research information, resources and technology and promote the application of research findings and technology in the field of agriculture.”¹⁰⁴² This research organisation and the actions prescribed under its mandate would be relevant to climate-smart agriculture in Kenya because climate-smart agricultural practices are ‘location-specific.’¹⁰⁴³ Research would need to determine which practices are the most appropriate in terms of, *inter alia*, potential adaptation, mitigation, and food security benefits, the local climate, access to inputs, and the equipment farmers have or would need for different practices.

¹⁰⁴⁰ Bryan, E. et al., *Agricultural Management for Climate Change Adaptation, Greenhouse Gas Mitigation, and Agricultural Productivity: Insights from Kenya*, IFPRI Discussion Paper 01098 (2011), at 3-5, Table 1.1.

¹⁰⁴¹ *Agriculture, Fisheries and Food Authority Act 2013* (Government of Kenya), art. 40 (“(1) For purposes of ensuring effective participation of farmers in the governance of the agricultural sector in Kenya, there shall be close consultation with all registered farmers' organisations in the development of policies or regulations and before the making of any major decision that has effect on the agricultural sector”).

¹⁰⁴² *Kenya Agricultural and Livestock Research Act 2013* (Government of Kenya), art. 5(1).

¹⁰⁴³ Bryan, E. et al., *Agricultural Management for Climate Change Adaptation, Greenhouse Gas Mitigation, and Agricultural Productivity: Insights from Kenya*, IFPRI Discussion Paper 01098 (2011), at 6. Smith, P. et al., ‘Greenhouse gas mitigation in agriculture’, 363 *Philosophical Transactions of the Royal Society* (2008), pp.789-813, at 795, Table 2.

4.3.1.5 *Agricultural Development Corporation Act 1965/revised edition 2012*

The Agricultural Development Corporation was designed to promote production of key inputs for Kenyan agriculture, such as seeds and livestock breeds, as well as other activities to develop agriculture.¹⁰⁴⁴ This could be applicable to climate-smart agriculture in terms of the adaptation, mitigation, and food security objectives of climate-smart farming techniques. Adoption of more resilient, different seed varieties is identified as a climate-smart agricultural practice¹⁰⁴⁵; therefore, development of adaptive seed varieties or livestock breeds that increase productivity and provide mitigation co-benefits under the Act would be potentially relevant to climate-smart agriculture in Kenya.¹⁰⁴⁶

4.3.2 *General legislation*

4.3.2.1 *Constitution of Kenya 2010*

The Constitution provides the basic framework for land ownership, use, rights and responsibilities in Kenya.¹⁰⁴⁷

Pertinent to climate-smart agriculture are the provisions mandating 1) land use planning¹⁰⁴⁸, 2) sustainable exploitation of natural resources and the equitable sharing of benefits from such exploitation¹⁰⁴⁹, and 3) a commitment to increase the national tree cover to 10%¹⁰⁵⁰.

¹⁰⁴⁴ *Agricultural Development Corporation Act 1965*, revised ed. 2012 (Government of Kenya), art. 12.

¹⁰⁴⁵ Bryan, E. et al., *Agricultural Management for Climate Change Adaptation, Greenhouse Gas Mitigation, and Agricultural Productivity: Insights from Kenya*, IFPRI Discussion Paper 01098 (2011), at 3-5, Table 1.1.

¹⁰⁴⁶ The Seeds and Plant Varieties Act (1972/Revised 2012) is another law applicable to seeds in Kenya, regulating “production, processing, testing, certification, and marketing of seeds” in order to prevent sale of ‘deleterious’ seeds, control the production of new varieties, and create measures to prevent cross-pollination between plants derived from certain types of seeds (arts. 3, 11-16). Potentially, the seeds developed under the regulations of this law could be utilised for climate-smart agricultural practices or farming techniques.

¹⁰⁴⁷ *Constitution 2010* (Government of Kenya), **art. 60**: “(1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles-- (a) equitable access to land; (b) security of land rights; (c) sustainable and productive management of land resources; (d) transparent and cost effective administration of land; (e) sound conservation and protection of ecologically sensitive areas; (f) elimination of gender discrimination in law, customs and practices related to land and property in land; and (g) encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution. (2) These principles shall be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.” *Ibid.* at **art. 61**: “(2) – Land in Kenya is classified as public, community or private”, and **arts. 62-69** which provide further detailed rights and responsibilities corresponding with the different land classifications.

¹⁰⁴⁸ *Ibid.*, art. 66: Any land may be regulated for land use planning, among other things, and “Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies.”

- 1) The land use planning provisions provide the basis for creating a land use plan that divides a certain area of land into sections and allocates the land uses which can be conducted in those sections, including agricultural uses.¹⁰⁵¹ Climate-smart agricultural actions would need to be conducted in accordance with the established land use plan.
- 2) The requirement to sustainably exploit and utilise natural resources would support climate-smart agriculture because climate-smart agricultural actions assist the implementation of sustainable agriculture by addressing potential climate change effects.¹⁰⁵² Any sharing of the accrued benefits from climate-smart agricultural actions in relation to sustainable use of resources would need to be equitable.¹⁰⁵³
- 3) Lastly, the provision requesting that the national tree cover be increased to 10% supports implementation of the climate-smart agricultural practice of agroforestry on farms to contribute to the goal.¹⁰⁵⁴

4.3.2.2 *Land Act 2012*

The Land Act 2012 established the National Land Commission, which is responsible for the administration of public land in Kenya.¹⁰⁵⁵ This includes identification of “ecologically sensitive areas” and taking action “to prevent environmental degradation and climate change” in those areas.¹⁰⁵⁶ The provision would support climate-smart agriculture, albeit on public lands instead of private farms,

¹⁰⁴⁹ *Ibid*, art. 67: The National Land Commission is given the power to manage public land for the national and county governments, recommend a national land policy, advise on a national land title registration programme, initiate investigations into present or historical land injustices, and monitor land use planning throughout Kenya.

¹⁰⁵⁰ *Ibid*, art. 69: The State is required to “ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.” Also, it shall “work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya”, “encourage public participation in the management, protection and conservation of the environment”, protect biodiversity, “eliminate processes and activities that are likely to endanger the environment”, and “utilise the environment and natural resources for the benefit of the people of Kenya.” These State responsibilities are accompanied by the duty of all people to cooperate in the protection and conservation of the environment and “ensure ecologically sustainable development and use of natural resources”.

¹⁰⁵¹ *Ibid*, arts. 66-67.

¹⁰⁵² *Ibid*, art. 69.

¹⁰⁵³ *Ibid*.

¹⁰⁵⁴ *Ibid*.

¹⁰⁵⁵ *Land Act* 2012 (Government of Kenya), art. 8.

¹⁰⁵⁶ *Ibid*. at art. 11 (“Conservation of ecologically sensitive public land: (1) The Commission shall take appropriate action to maintain public land that has endangered or endemic species of flora and fauna, critical habitats or protected areas. (2) The Commission shall identify ecologically sensitive areas that are within public lands and demarcate or take any other justified action on those areas and act to prevent environmental degradation and climate change. (3) Notwithstanding subsection (2) the Commission shall consult existing institutions dealing with conservation”).

because climate-smart agricultural practices aim to reduce the impacts of climate change and agricultural production on land, soil, water, and other natural resources.

Incentives for communities and individuals to invest in income generating natural resource conservation programmes are authorised as one of the possible rules and regulations the Commission must adopt for “sustainable conservation of land based natural resources.”¹⁰⁵⁷ It is possible that carbon farming projects implemented with climate-smart agricultural practices could qualify as income-generating natural resource conservation projects (a more extensive legal review would be necessary to determine whether “programmes” has a special meaning or set of requirements in Kenyan law which might exclude projects utilising climate-smart agriculture).

4.3.2.3 *Environmental Management and Co-ordination Act 1999/revised edition 2012*

Generally, the Environmental Management and Co-ordination Act (EMCA) establishes the overarching standards for environmental protection within Kenya to be maintained through regulations and processes (eg. Environmental Impact Assessments, or EIAs).¹⁰⁵⁸ Particularly relevant to climate-smart agriculture are the guidelines and measures which the National Environment Management Authority must issue for sustainable use of hilly terrains.¹⁰⁵⁹ The guidelines and measures “shall include those relating to – (a) appropriate farming methods, and (c) measures to curb soil erosion.”¹⁰⁶⁰

Climate-smart agriculture means that farming techniques or methods would be employed that increase sustainable use of the land, including hillsides, as well as curb soil erosion, such as agroforestry, cover crops, and conservation agriculture.¹⁰⁶¹ In addition to satisfying the statutory objective to protect hilly terrains through more sustainable use, such climate-smart agricultural practices could also potentially provide adaptation to extreme weather events (eg. roots and soil cover preventing intense rainfall from

¹⁰⁵⁷ *Ibid.* at art. 19. Art. 19 – The Commission must “make rules and regulations for the sustainable conservation of land based natural resources”, including “incentives for communities and individuals to invest in income generating natural resource conservation programmes” (eg. climate-smart agricultural projects), measures for communities to co-manage forests and other resources to which they have customary rights, and measures for benefit sharing with affected communities.

¹⁰⁵⁸ *Environmental Management and Co-ordination Act 1999/Revised 2012*, Preamble.

¹⁰⁵⁹ *Ibid.* at art. 47.

¹⁰⁶⁰ *Ibid.*

¹⁰⁶¹ Bryan, E. et al., *Agricultural Management for Climate Change Adaptation, Greenhouse Gas Mitigation, and Agricultural Productivity: Insights from Kenya*, IFPRI Discussion Paper 01098 (2011), at 3-5, Table 1.1.

washing away soil), mitigation through more above- and below-ground biomass and less soil erosion, and increased productivity through better soil health.¹⁰⁶²

4.3.2.4 *Forests Act 2005*

The current Forests Act from 2005 provides the general structure for forestland governance in Kenya.¹⁰⁶³

The current Act defines “farm forestry” as “the practice of managing trees on farms whether singly, in rows, lines, boundaries, or in woodlots or private forests.”¹⁰⁶⁴ Private forests include farm forestry (a term simply indicating privately owned forests which are established specifically on farmland), and if the private owner registers the forest, technical advice on forestry practices and conservation as well as loans from the Forest Management and Conservation Fund for development of the forest are available.¹⁰⁶⁵ This provision regarding farm forestry could be applicable to climate-smart agriculture because trees on-farm can be grown using the climate-smart agricultural practice of agroforestry, which is supposed to interact with the crops growing on the land rather than being solely to derive resources from the trees (timber, fuel, firewood, and construction materials).¹⁰⁶⁶

4.3.2.5 *Water Act 2002*

The Water Act 2002 governs the “management, conservation, use and control of water resources” and how rights are obtained to use water resources.¹⁰⁶⁷

The Act is relevant to climate-smart agriculture because permits are required for use of water resources, which would apply to irrigation carried out in the form of a climate-smart agricultural practice.¹⁰⁶⁸

¹⁰⁶² *Ibid.*

¹⁰⁶³ *Forests Act 2005* (Government of Kenya), Preamble.

¹⁰⁶⁴ *Forests Act 2005* (Government of Kenya), art. 3.

¹⁰⁶⁵ *Ibid.* at art. 25.

¹⁰⁶⁶ Ramachandran Nair, P.K., *An Introduction to Agroforestry*, World Agroforestry Centre (1993), Ch. 2.

¹⁰⁶⁷ *Water Act 2002* (Government of Kenya), Preamble.

¹⁰⁶⁸ *Ibid.* at art. 25 - “(1) A permit shall be required for any of the following purposes: (a) any use of water from a water resource, except as provided by section 26; (b) the drainage of any swamp or other land; (c) the discharge of a pollutant into any water resource; (d) any purpose, to be carried out in or in relation to a water resource, which is prescribed by rules made under this Act to be a purpose for which a permit is required. (2) Nothing in this section applies to the purposes of a state scheme under this Part”.

4.3.2.6 *Water Resources Management Rules 2007*

Subsidiary legislation under the Water Act, the Water Resources Management Rules, establish that subsistence irrigation is a priority when allocating water for irrigation.¹⁰⁶⁹ The allocation of water for irrigation must also “be guided by crop water requirements in the area and the efficiency of water use.”¹⁰⁷⁰ These rules are applicable to climate-smart agriculture because implementation of irrigation as a climate-smart agricultural practice would be subject to allocation requirements as would other farming techniques.

4.3.2.7 *Biosafety Act 2009*

Genetically modified organisms (GMOs) are regulated in Kenya under the Biosafety Act 2009; it restricts use or release of GMOs into the environment to circumstances in which formal approval has been obtained.¹⁰⁷¹ Proponents of GMO believe that modified seeds increase crop productivity, improve resilience to climate change and enhance mitigation of emissions via more efficient and better seed varieties.¹⁰⁷² Nonetheless, the use of GMO inputs is regulated and restricted. Therefore, other farming techniques exhibiting similar principles would be important to consider in addition to the possible use of GMOs. Potentially, climate-smart agricultural practices aimed at addressing food security, adaptation and mitigation could serve as viable alternatives to using GMO seeds in the Kenyan agricultural sector.

4.3.2.8 *Energy Act 2006*

The Energy Act promotes the use of crops for purposes other than food (ie. fuel); there is some debate regarding whether this could have an impact on food security in Kenya.¹⁰⁷³ It promotes growing trees on farms for biomass energy production, but in the form of “fast maturing trees” and “commercial

¹⁰⁶⁹ *Water Resources Management Rules* 2007 (Government of Kenya), art. 53.

¹⁰⁷⁰ *Ibid*, at art. 53.

¹⁰⁷¹ *Biosafety Act* 2009 (Government of Kenya), art. 18-21.

¹⁰⁷² Mtui, G.Y.S., ‘Involvement of biotechnology in climate change adaptation and mitigation: Improving agricultural yield and food security’ (2011) 2(13) *International Journal for Biotechnology and Molecular Biology Research*, pp. 222-231; and, AfricaAdapt, *GMOs or local crops for climate change adaptation in Africa?*, Policy Brief (August 2012). Available at http://www.africa-adapt.net/media/resources/850/africaadapt_policy_brief_gmo-vs-local-seeds.pdf, accessed 17 June 2013.

¹⁰⁷³ See Edame, G. et al., ‘Climate Change, Food Security and Agricultural Productivity in Africa: Issues and policy directions’ (2011) 1(21) *International Journal of Humanities and Social Science* (2011), pp.205-223, at 210.

woodlots.”¹⁰⁷⁴ This would likely exclude the climate-smart agricultural practice of agroforestry due to the types of trees planted (eg. varieties intended to provide woody biomass resources efficiently rather than interact with crops growing on the farmland).¹⁰⁷⁵

Carbon credit trading is another specific action outlined in the Act which may be used to promote development and use of renewable energy.¹⁰⁷⁶ This could include climate-smart agricultural practices as one of the options for different farming techniques to produce renewable energy sources under a carbon credit trading system.

4.3.2.9 *Co-operative Societies Act 2005/revised edition 2012*

The Co-operative Societies Act establishes the legislative structure for co-operatives in Kenya, which are common within the agricultural sector for the collective organisation of farmers’ products for sale, processing, distribution, and marketing.¹⁰⁷⁷ Distribution of co-operative proceeds to the members provides an established benefit-sharing mechanism¹⁰⁷⁸, which could provide an example for carbon farming initiatives using climate-smart agricultural practices.

4.3.2.10 *Societies Act 2008*

Societies may be formed for a lawful purpose and registered as a “club, company, partnership or other association of ten or more persons.”¹⁰⁷⁹ This formal structure is another way Kenyan farmers may organise and establish rules within a collective group as to how they will act and pool their resources.¹⁰⁸⁰ This could be relevant for climate-smart agriculture projects because it provides a way in which many farmers can collaborate on an issue. For example, over 60,000 farmers are

¹⁰⁷⁴ *Energy Act 2006* (Government of Kenya), art. 103.

¹⁰⁷⁵ Ramachandran Nair, P.K., *An Introduction to Agroforestry*, World Agroforestry Centre (1993), Ch. 2.

¹⁰⁷⁶ *Energy Act 2006* (Government of Kenya), art. 103.

¹⁰⁷⁷ For further information on co-operatives in Kenya, although statistics on the current number of co-operatives are slightly out-of-date, please see International Labour Organization (ILO), *Cooperative Facility for Africa: Kenya*, at <http://www.ilo.org/public/english/employment/ent/coop/africa/countries/eastafrica/kenya.htm>, last updated 13 August 2009.

¹⁰⁷⁸ Payments to members are in the form of “dividends” – a “member’s share of the surplus of the society which is divided amongst its members, calculated by reference to the proportion which that member’s share capital bears to the total share capital of the society.” *Co-operative Societies Act 2005*, revised ed. 2012 (Government of Kenya), art. 2.

¹⁰⁷⁹ *Societies Act 2008* (Government of Kenya), arts. 2, 4, 9, 19.

¹⁰⁸⁰ Described in terms of practical implementation and usefulness by Peter Gitika of the Kenya National Federation of Agricultural Producers (KENFAP). Gitika, Peter (Kenya National Federation of Agricultural Producers). Interviewed 13 April 2013 in Kiambu, Kenya.

participating in the Vi Agroforestry Kenya Agriculture Carbon Project – smaller groups had to be established at the local level in order to provide support, joint training and technical capacity building on successful SALM practices.¹⁰⁸¹

4.3.2.11 *Micro and Small Enterprises Act 2012*

The Micro and Small Enterprises Act “provide[s] a legal and institutional framework for the promotion, development and regulation of micro and small enterprises.”¹⁰⁸² The Micro and Small Enterprises Authority must stimulate technology transfer and research, market development, and access to credit and capacity building for micro and small enterprises through the Micro and Small Enterprises Development Fund (the Fund) created in the Act.¹⁰⁸³ The Act defines “farm enterprises”¹⁰⁸⁴ as a form of micro and small enterprise, which could be relevant to climate-smart agriculture in Kenya as a type or size of farm that could implement climate-smart agricultural practices and potentially access technology transfer, research, product markets, capacity building and credit through the Fund.

4.3.2.12 *SACCO Societies Act 2008*

This Act governs the licensing and oversight of ‘savings and credit co-operative’ (SACCO) societies, which receive deposits¹⁰⁸⁵ and issue loans to their members (upon demonstration of ability to repay and securing the loan with a guarantor’s endorsement or collateral).¹⁰⁸⁶ Smallholder access to credit could be relevant to climate-smart agriculture because some climate-smart agricultural practices involve switching to a different farming technique that requires new inputs or equipment (which could require financing).¹⁰⁸⁷ Alternatively, financing may be necessary during the gap between start-up and the payment for carbon credits generated from a climate-smart agricultural project.

¹⁰⁸¹ Andersson, Arne, Mutua, Rachel Wangu, and Wekesa, Amos (Vi Agroforestry). Interviewed 10 April 2013 at Vi Agroforestry offices (Nairobi, Kenya).

¹⁰⁸² *Micro and Small Enterprises Act 2012* (Government of Kenya), arts. 3.

¹⁰⁸³ *Ibid.* at arts. 46-53.

¹⁰⁸⁴ *Ibid.* at art. 2, “‘farm enterprise’ includes micro and small scale agricultural, livestock and fishing enterprises.’

¹⁰⁸⁵ *SACCO Societies Act 2008* (Government of Kenya), art. 23.

¹⁰⁸⁶ *Ibid.* at art. 33.

¹⁰⁸⁷ For example, crop rotations, switching to more resilient varieties of seeds, and agroforestry may all involve new types of inputs, in addition to the capital requirements for building water harvesting structures and irrigation equipment. Capital grants and seedlings may be provided (as in the “Strengthening capacity for climate change adaptation on sustainable land and water management in Kenya” by the FAO and SIDA), source: KARI, *Policy Learning Tour to FAO-KARI, SIDA and IFAD Funded Projects in Western Kenya*,

4.4 Issues for climate-smart agriculture arising from the current regulatory framework

Kenya's agricultural policy framework provides strong support for climate-smart agriculture, but potentially conflicting provisions of national legislation and policy could limit successful implementation of climate-smart agriculture. The Energy Act's emphasis on woody biomass for energy purposes may conflict with the Crops Act and FNSP's emphasis on food production. If production of crops for food is reduced in favour of using more land to produce bioenergy crops, food security could be negatively impacted. Then, if expansion of agricultural production into forestland results in order to compensate for lower food production on existing farmland (under bioenergy crop production), the energy policy initiative could actually work against efforts to prevent deforestation and forest degradation.

The Crops Act requirement that agriculture be conducted in an environmentally sustainable way, supporting implementation of climate-smart agriculture, could be undermined by the flagship project "Fertiliser Cost-Reduction Initiative" in *Vision 2030* if increased access to fertiliser is not accompanied by application training and extension support. The agricultural sector in Kenya is generally supported by the *National Agricultural Sector Extension Policy*¹⁰⁸⁸ and the *National Agricultural Research System Policy*¹⁰⁸⁹, which could contribute to the identification of effective climate-smart agricultural interventions as well as the support and training of local stakeholders for adoption and implementation of climate-smart agricultural practices. Lack of knowledge and capacity regarding application, timing or quantity of agricultural inputs, such as fertiliser and irrigation, could contribute to negative soil quality.¹⁰⁹⁰ Declining soil health could lead to land degradation, which could lower yields and again result in agricultural expansion into forests to compensate for lost agricultural production on existing degraded lands.¹⁰⁹¹

Project Video by KARI and FAO-Kenya, at <http://www.youtube.com/watch?v=xZPqShzXF2c&feature=youtu.be>, last accessed 24 June 2014. Alternatively, farmers could invest in inputs and equipment for their businesses with access to credit (complicated in traditional financing structures, such as commercial private banks, by their potential lack of collateral and high risk assessment of default), *source*: Warui, Gerald (Mukurwe-ini Wakulima Dairy Ltd). Interviewed 12 April 2013 at Wakulima Dairy offices (Mukurwe-ini, Kenya).

¹⁰⁸⁸ Government of Kenya, *National Agricultural Sector Extension Policy* (2012).

¹⁰⁸⁹ *Ibid.*

¹⁰⁹⁰ Smith, P. et al., 'Greenhouse gas mitigation in agriculture' (2008) 363 *Philosophical Transactions of the Royal Society*, pp.789-813, at 790-791.

¹⁰⁹¹ For an example of a Brazilian case study in which soil improvements helped increase yields and reduced deforestation rates, see Kissinger, G., Herold, M., and de Sy, V., *Drivers of Deforestation and Forest Degradation: A Synthesis Report for REDD+ Policymakers*, Lexeme Consulting (2012), at 22-23.

The 10% target for tree cover under the Constitution, the Forest Conservation and Management Bill 2014, and Farm Forestry Rules, reiterated in national policies such as *Vision 2030*, the NCCRS and the NCCAP, all have the potential to support the increase of trees on farms.

The ASDS mission is to develop “an innovative, commercially-oriented and modern agricultural sector”¹⁰⁹², which would be supported by the *National Agribusiness Strategy* and the *National Biotechnology Awareness Strategy*.¹⁰⁹³ The new Kenya Agricultural and Livestock Research Act aims to promote research in genetic resources and biotechnology¹⁰⁹⁴, which the Biosafety Act and Seeds and Plant Varieties Act are intended to regulate. The NCCRS stated that biotechnology might reduce emissions through different seed varieties.¹⁰⁹⁵ However, widespread use of GMO seeds could potentially conflict with the mitigation potential promoted by climate-smart agricultural practices since more synthetic fertiliser might also be used to make the GMO seeds perform optimally (which would contribute more emissions and potential environmental degradation).¹⁰⁹⁶ On the other hand, GMO’s potential to produce higher yields and climate-resilient varieties would contribute to the climate-smart agriculture principle of food security (prioritized in the FNSP) and adaptation.¹⁰⁹⁷ Potentially conflicting or contrasting objectives, strategies, requirements and other issues within the Kenyan regulatory framework that could apply to or support implementation of climate-smart agriculture need to be considered by the various stakeholders.

In general, climate-smart agriculture is supported by the Kenyan regulatory framework and appears to have a conducive environment for uptake with increased focus on research, extension, training, technical capacity building, access to and improved use of inputs, dedicated climate adaptation and mitigation incentives, and access to credit. Nonetheless, there are some national policies and laws that could work against the implementation of environmentally sustainable climate-smart agricultural

¹⁰⁹² Government of Kenya, *Agricultural Sector Development Strategy 2010-2020* (2010), at 6.

¹⁰⁹³ Government of Kenya, *National Agribusiness Strategy* (2012). The Government of Kenya, *National Biotechnology Awareness Strategy* (2008) was adopted for the period of 2008-2013 in order to increase awareness as to the ‘proper handling’ and safeguards which are claimed to reduce the detrimental effects of biotechnology use. See Otunge, D., ‘Kenya launches national biotechnology awareness strategy’, *Crop Biotech Update*, 3 October 2008, at <http://www.isaaa.org/kc/cropbiotechupdate/article/default.asp?ID=3215>, last accessed 26 June 2013.

¹⁰⁹⁴ *Kenya Agricultural and Livestock Research Act* 2013 (Government of Kenya), art 5.

¹⁰⁹⁵ Government of Kenya, *National Climate Change Response Strategy* (2010), at 62-63.

¹⁰⁹⁶ Pimental, D. et al., ‘Environmental, Energetic, and Economic Comparisons of Organic and Conventional Farming Systems’ (2005) 55(7) *BioScience*, pp. 573-582, at 573. See also Smith, P. et al., ‘Greenhouse gas mitigation in agriculture’ (2008) 363 *Philosophical Transactions of the Royal Society*, pp.789-813, at 790-791.

¹⁰⁹⁷ However, the sustainability of this adaptation has been questioned if there is consequential loss of biodiversity from use of GMOs. See FAO and Platform for Agrobiodiversity Research, *Biodiversity for Food and Agriculture: Contributing to food security and sustainability in a changing world*, Outcomes of an expert workshop, 14-16 April 2010 in Rome, Italy (2011), at 18-22.

practices. In particular, the strategies for agribusiness and biotechnology promote increased mechanisation, chemical use and potentially large-scale investment in the sector. In the absence of coordinating regulations and safeguards, conflicts could arise between large-scale commercial enterprises and smallholder farmers, with the potential to reduce food security (eg. if the emphasis is to shift away from food crops).

4.5 Institutional support for climate-smart agriculture

Various institutions would be relevant to the adoption and implementation of climate-smart agriculture in Kenya, providing cooperation and support in the development and coordination of research, policy making, planning, and monitoring and evaluation of climate-smart agriculture's implementation.

The Ministry of Agriculture, Livestock and Fisheries (MoA) would be responsible for matters related to climate-smart agriculture given that it is an agricultural strategy proposing different farming techniques for producing crops, livestock, and even fish (eg. innovative water harvesting ponds that can also be used for fish farming).¹⁰⁹⁸ Different aspects of climate-smart agriculture would be relevant for different departments within the Ministry, for example, the Department of Livestock would be a key player in determining ways in which livestock feed could be improved or supplemented and/or how breeds of livestock could be improved. Such research findings achieved in collaboration with other institutions, such as KARI and the International Livestock Research Institute (ILRI), would be important information for the Technical Department on Extension and Training to disseminate to the livestock farmers.¹⁰⁹⁹

The former Ministry of Agriculture and Rural Development established a climate change unit, which began “developing a policy on mainstreaming climate change within the sector, with climate change adaptation pilot projects being implemented in various parts of the country.”¹¹⁰⁰ Potentially, both the policy-making and adaptation pilot projects under this initiative are relevant to climate-smart agriculture because 1) climate-smart agriculture incorporates climate change considerations into and via different farming techniques, and 2) climate-smart agricultural practices could be used in the climate change adaptation pilot projects.

¹⁰⁹⁸ For an example of dual water harvesting and fish production, please refer to the “Sidindi Watershed Project” discussed above in Section 4.3.2. See also Bryan, E. et al., *Agricultural Management for Climate Change Adaptation, Greenhouse Gas Mitigation, and Agricultural Productivity: Insights from Kenya*, IFPRI Discussion Paper 01098 (2011), at 37.

¹⁰⁹⁹ Ministry of Agriculture, Livestock and Fisheries, *Technical Department: Extension and training*, at http://www.kilimo.go.ke/index.php?option=com_content&view=section&layout=blog&id=21&Itemid=25, last accessed 27 August 2013.

¹¹⁰⁰ Government of Kenya, *National Climate Change Action Plan* (2013), at 13, 56.

An important institution for the agricultural sector and the Ministry of Agriculture, Livestock and Fisheries is the Agricultural Sector Coordination Unit (ASCU). The ASCU's mandate is to coordinate action between different Ministries that involves the development of the agricultural sector¹¹⁰¹, which would include climate-smart agriculture. Research, evaluation, design, and adoption of climate-smart agricultural practices could involve inter-ministerial decision-making (eg. regarding target resources, such as soil, water, and forests; stakeholders; and, incentives) between, for example, the Ministry of Environment, Water and Natural Resources, Kenya Forest Service, and/or the Ministry of Energy and Petroleum.¹¹⁰² Climate-smart agricultural practices are aimed at the development of the agricultural sector since climate-smart agriculture can potentially increase productivity and build resilience against climate change. Therefore, the ASCU would be the coordinating actor for inter-ministerial action on climate-smart agriculture.

The Ministry of Environment, Water and Natural Resources (MEWNR) will likely assume the responsibilities of the former Ministry of Environment and Mineral Resources (MEMR) regarding climate change coordination.¹¹⁰³ The Climate Change Secretariat under the MEMR is responsible for all climate change activities, including climate-smart agricultural practices, within the institutional framework to develop the “policy, legal and institutional arrangements underpinning REDD+ strategies and measures to be implemented.”¹¹⁰⁴ NEMA, also established under the MEMR, is one of the agencies responsible for emissions trading in Kenya, so it would be important for future carbon credit trading from carbon farming projects.¹¹⁰⁵ The Regional Development Authorities (RDAs) discussed in the ASDS “are mandated to reverse development disparities” between regions in Kenya through resource mobilisation, including water for irrigation, and investment in their respective regions. RDAs would be important actors to consider in the development and expansion of climate-smart agricultural practices, such as innovative water harvesting, precision irrigation, and agroforestry.¹¹⁰⁶

¹¹⁰¹ Government of Kenya, *Agricultural Sector Development Strategy 2010-2020* (2010), at 84-85. See generally: Agricultural Sector Coordination Unit (ASCU), *About Us*, at <http://www.ascu.go.ke/about%20us-ascu.cfm>, last accessed 26 June 2013.

¹¹⁰² Ministry of Environment, Water and Natural Resources (MEWNR), *Department of Environment and Natural Resources*, at <http://www.forestryandwildlife.go.ke/>, last accessed 28 August 2013.

¹¹⁰³ Ministry of Environment and Mineral Resources (MEMR), *About the Ministry*, at <http://www.environment.go.ke/?s=Ministry+of+Environment%2C+Water+and+Natural+Resources>, last accessed 26 June 2013.

¹¹⁰⁴ Government of Kenya, *Revised REDD Readiness Preparation Proposal Kenya*, Submitted to the Forest Carbon Partnership Facility (August 2010), at 8.

¹¹⁰⁵ National Environment Management Authority – Kenya (NEMA), *About DNA*, http://www.nema.go.ke/index.php?option=com_content&view=category&id=100&Itemid=598.

¹¹⁰⁶ Government of Kenya, *Agricultural Sector Development Strategy 2010-2020* (2010), at 23.

One of the projects under implementation by the Kenya Forest Service (KFS) is the “Innovative Approaches towards Rehabilitating the Mau Ecosystem Project.”¹¹⁰⁷ A component of this project focuses on building sustainable livelihoods of the communities within the project area, partly through “improvement of agricultural productivity,” to reduce their dependency on deforestation of the surrounding forests.¹¹⁰⁸ If such productivity could be achieved using climate-smart practices, it provides an example of an initiative administered by the KFS that could support REDD+ implementation.

It appears possible that several institutions could assist with implementation of climate-smart agriculture, but they would first need a clear vision of which types of practices to promote in order to help their local constituents make informed management decisions. For example:

- The 27 Agricultural Training Centres across Kenya “provide intensive short-term training to farmers and stakeholders in agriculture through practical learning and demonstrations.”¹¹⁰⁹ This is important for dissemination of climate-smart agriculture practices;
- Agriculture Technology Development Centres “develop, test, customize and offer appropriate agricultural technology to farmers,” which would be a key player in increasing the local climate-smart agricultural practices, inputs and technologies¹¹¹⁰; and
- Agriculture Mechanisation Stations enable small-scale farmers to access machinery they may not be able to afford to purchase, offering “tractor hire and earth moving equipment at subsidized rates.”¹¹¹¹ New equipment developed through targeted research and existing equipment identified as necessary for implementation of climate-smart agricultural practices could be subsidised and provided for small farmers. The research findings and equipment would need to be supported by the widespread, improved extension services envisioned under the *National Agricultural Sector Extension Policy* for effective implementation.¹¹¹²

Providing an example of a failure to coordinate policies across different government agencies, the *National Agribusiness Strategy* stated that there is an unstable policy environment for the agribusiness subsector, stating that “different ministries, departments and agencies have their own agribusiness

¹¹⁰⁷ Kenya Forest Service (KFS), *Innovative Approaches towards Rehabilitating the Mau Ecosystem Project*, at <http://www.kenyaforests-service.org/iarm/>, last accessed 29 August 2013.

¹¹⁰⁸ *Ibid.*

¹¹⁰⁹ Ministry of Agriculture Office of the Permanent Secretary (Government of Kenya), *Ministry of Agriculture at a Glance* (2008), at 10. Available at http://www.kilimo.go.ke/kilimo_docs/pdf/moa_at_glance.pdf, accessed 4 April 2013.

¹¹¹⁰ *Ibid.*

¹¹¹¹ *Ibid.*

¹¹¹² Government of Kenya, *National Agricultural Sector Extension Policy* (2012), at 24.

agendas. They are rarely co-ordinated. This results in duplication, wastage of resources and inefficiencies. Interference in markets driven by political motives also contributes significantly to uncertainties and market distortion.¹¹¹³ Such a lack of coordination is problematic for companies, investors, farmers, and research institutions because of the lack of a clear indication of what the government will do, how it will do it, whether investments will be protected, or whether implementation will be abandoned. In demonstrating the problems potentially caused by a lack of institutional coordination, the example also highlights the generally important role that institutions play in developing, implementing, and monitoring policy. Institutions would be important actors in the development and integration of climate-smart agricultural practices within the Kenyan agricultural landscape and regulatory framework, and sufficient inter-ministerial coordination would be necessary to avoid inefficient or ineffective implementation.

5. CONCLUSION

Agriculture's role as a driver of deforestation in Kenya needs to be addressed, despite the importance of the sector for the national economy and acknowledging that millions of smallholder subsistence farmers depend on agriculture for subsistence needs and income. In the context of REDD+, Kenya's R-PP has acknowledged these conflicting concerns whilst emphasising 'early-action' strategy options to reduce pressure on forests from agriculture. It is possible that some of the proposed actions could be implemented in the form of climate-smart agricultural practices, which would aim to achieve the intended emissions reductions from deforestation/forest degradation whilst simultaneously increasing food security and climate change adaptation. Indeed, some of the strategy options in Kenya's R-PP are already compatible with or use actions that can be identified as climate-smart agricultural practices.

Kenya has the option to include climate-smart agricultural actions in its National REDD+ Strategy. The R-PP emphasises that the proposed REDD+ strategy options should build on existing policy and measures, rather than developing a new initiative.¹¹¹⁴ If Kenya decided to include climate-smart agriculture as part of its National REDD+ Strategy, the following issues would need to be considered:

- Which climate-smart agriculture practices are appropriate to Kenya's agricultural, ecological, stakeholder, and financial context;
- Whether the national institutions, policies, and laws are coherent and supportive of the adoption of such practices;

¹¹¹³ Government of Kenya, *National Agribusiness Strategy* (2012), at 6.

¹¹¹⁴ Government of Kenya, *Revised REDD Readiness Preparation Proposal Kenya*, Submitted to the Forest Carbon Partnership Facility (August 2010), at 37.

- Which aspects of Kenya's natural resource base should be prioritised and protected from pollution, unsustainable use, and climate change; and
- Where within the landscape these practices are desirable and how to deal with other competing land uses.

Broadly speaking, the regulatory policy framework is supportive of climate-smart agriculture, containing policies aimed at addressing food security in addition to climate change adaptation and mitigation. In particular, the national climate change policies specifically target agriculture as a sector which needs to build resilience and increase efficiency to contribute fewer emissions per product or per hectare (eg. the NCCAP allocated a large budget to increasing adoption of climate-smart agriculture in Kenya). Kenya's agriculture-specific laws also provide a conducive environment for the uptake of climate-smart agricultural practices due to their increased focus on research, extension, training, technical capacity building, access to and improved use of inputs, and dedicated climate adaptation and mitigation incentives. It should be noted, however, that it could be possible for conflicts between some agricultural and cross-sectoral laws and regulations to occur, due to different objectives or overlapping priorities in natural resource use and agricultural sector development. Inter-ministerial coordination between Ministries relevant to agriculture would help to reduce the possibility for conflict.

If REDD+ implementation under the Ministry of Environment, Water and Natural Resources is to include the promotion of climate-smart agriculture, further review of the relevant laws and options for institutional coordination between the different government agencies involved in the agricultural sector would be required. Given the contribution that climate-smart agriculture could make to both the *Vision 2030* agenda and potentially REDD+ outcomes, it is perhaps a good time to consider the topic in more depth.

ANNEXES

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ANNEX 1

EXAMPLES OF REQUIREMENTS FROM THE VOLUNTARY STANDARDS

1 REGULATING REDD+ PROJECTS DEVELOPED FOR THE VOLUNTARY MARKET

All REDD+ projects are implemented within the context of the domestic legal structures of their host countries, meaning that domestic regulations under land law, environmental law, investment law, contract law, tax law and potentially many other laws may apply. However, in the absence of compliance regimes that would prescribe the requirements a REDD+ project must meet in order to generate tradable credits (ie. if a project does not meet certain criteria or standards, it will not be able to sell credits), voluntary standards have developed as a non-regulatory instrument to provide guidance for project developers wishing to implement REDD+ activities. Given the complexity of developing REDD+ projects and the fact that they are often implemented in locations where regulatory uncertainty is high, voluntary standards can help to provide benchmarks for what forest carbon projects need to do in order to create robust, ‘investment-grade’ carbon offsets that can attract private investment. There are many such voluntary standards, although three often-used standards for forest carbon projects are outlined below.

2 THE VERIFIED CARBON STANDARD (VCS)



2.1 Overview

The Verified Carbon Standard (VCS) is an independent¹¹¹⁵ GHG programme that sets out ‘specific eligibility criteria’ and ‘pre-approved procedures for quantifying GHG emission reductions or removals.’¹¹¹⁶ Here, a project specifically refers to one that is actively seeking to reduce GHG

¹¹¹⁵ ‘Independent’ refers to programmes/standards that ‘offer or enable methodologies from a variety of locations and forestry project types’ (ie., as opposed to a domestic programme or standard). Molly Peters-Stanley, Katherine Hamilton and Daphne Yin, ‘Leveraging the Landscape: State of the Forest Carbon Markets 2012’ (Ecosystem Marketplace 2012) 29 para 6 <http://www.forest-trends.org/documents/files/doc_3242.pdf> last accessed 16 July 2013.

¹¹¹⁶ See VCS, *What is a GHG Program?* <<http://www.v-c-s.org/GHG-program>> last accessed 16 July 2013.

emissions.¹¹¹⁷ The VCS is sometimes referred to as containing ‘pre-compliance’ requirements that have been developed with the expectation that the standards create a benchmark on which future regulation could be based.

Projects that participate in the VCS programme are eligible to receive emissions reduction credits for their GHG reductions or removals, known within VCS as Verified Carbon Units (VCUs).¹¹¹⁸ These VCUs can then be purchased by entities or individuals wishing to offset or compensate their emissions.¹¹¹⁹

The VCS has 15 sectoral scopes, or categories of activities, that projects may be developed under.¹¹²⁰ Within the ‘Agriculture Forestry and Other Land Use’ (AFOLU) sectoral scope, the VCS provides methodologies for six different project categories including: Afforestation, Reforestation and Revegetation (ARR), Agricultural Land Management (ALM), Improved Forest Management (IFM), Reduced Emissions from Deforestation and Degradation (REDD), Avoided Conversion of Grasslands and Shrublands (ACoGS), and Wetlands Restoration and Conservation (WRC).¹¹²¹

Although the VCS is just one of many programmes providing standards and/or a registry within the voluntary forest carbon market,¹¹²² it is significant because it possesses the largest percent (28%) of the market share among independent and domestic carbon accounting standards.¹¹²³ In addition, the VCS is often paired with the Climate, Community and Biodiversity standards (CCB standards)¹¹²⁴ - a ‘co-benefit’ standard that is described more in the following section.

¹¹¹⁷ *Ibid.*

¹¹¹⁸ See VCS, *What is a VCU?* <<http://v-c-s.org/how-it-works/what-vcu>> last accessed 16 July 2013.

¹¹¹⁹ See VCS, *Where can I buy VCUs?* <<http://v-c-s.org/where-buy-VCUs>> last accessed 16 July 2013.

¹¹²⁰ These scopes include energy (renewable/non-renewable), energy distribution, energy demand, manufacturing industries, chemical industry, construction, transport, mining/mineral production, metal production, fugitive emissions from fuels, fugitive emissions from industrial gases, solvents use, waste handling and disposal, Agriculture Forestry and Other Land Use (AFOLU) and livestock and manure management. See VCS, *VCS Sectoral Scopes*, <<http://v-c-s.org/sectoral-scopes>> last accessed 16 July 2013.

¹¹²¹ See VCS, *Agriculture and Forestry Projects* <<http://v-c-s.org/develop-project/agriculture-forestry-projects>> last accessed 16 July 2013.

¹¹²² Molly Peters-Stanley, Katherine Hamilton and Daphne Yin, ‘Leveraging the Landscape: State of the Forest Carbon Markets 2012’ (Ecosystem Marketplace 2012) 29-35 <http://www.forest-trends.org/documents/files/doc_3242.pdf> last accessed 16 July 2013.

¹¹²³ *Ibid.*

¹¹²⁴ The VCS maintained 18% of the market share for independent and major co-benefit standards in 2011, whereas the VCS and CCB combined capture another 12% of the market share. Molly Peters-Stanley, Katherine Hamilton and Daphne Yin, ‘Leveraging the Landscape: State of the Forest Carbon Markets 2012’ (Ecosystem Marketplace 2012) 30 fig 28 <http://www.forest-trends.org/documents/files/doc_3242.pdf> last accessed 16 July 2013.

2.2 Key provisions

The VCS programme provides that:

1. Projects must follow a set of quality assurance principles and requirements to ensure that emissions reductions and credits generated are real, additional and third-party verified.¹¹²⁵

This includes a requirement for ‘**evidence of right of use**’:

Paragraph **3.17.2**: ‘For validation, the project proponent shall make available to the validation/verification body the project description, **evidence of right of use** and any requested supporting information and data needed to support statements and data in the project description and evidence of right of use’¹¹²⁶;

2. Projects must meet specific eligibility criteria and conform to pre-approved protocols for quantifying GHG emissions reductions or removals as established in a variety of different methodologies for specific project scenarios.¹¹²⁷
3. All emission reductions and credits need to be professionally verified by approved validation/verification bodies (VVBs).¹¹²⁸
4. A secure and transparent registry system is available for issuing and tracking each Verified Carbon Unit (VCU).¹¹²⁹

2.3 Process

The VCS project cycle includes for basic steps:

1. *Select a methodology*: ‘To determine project eligibility and quantify GHG emissions or removals, project proponents must select and use a methodology developed under VCS or another approved GHG program’.¹¹³⁰
2. *Validate the project description*: ‘Once a project is listed on the Project Pipeline, projects proponents develop a complete project description using the VCS template and have it validated by an approved validation/verification body (VVB). This process determines

¹¹²⁵ See VCS, *VCS Quality Assurance Principles*, <http://v-c-s.org/quality-assurance-principles> (last accessed July 17 2013).

¹¹²⁶ See VCS, VCS Standard (VCS Version 3 Requirements Document 4 October 2012, v3.3) 23 para 3.17.2 <<http://v-c-s.org/sites/v-c-s.org/files/VCS%20Standard,%20v3.3.pdf>> (last accessed 16 July 2013).

¹¹²⁷ See VCS, ‘What is a GHG Program?’ <http://www.v-c-s.org/GHG-program> (last accessed 16 July 2013) ‘What is a methodology?’ <http://v-c-s.org/methodologies/what-methodology> (last accessed 16 July 2013).

¹¹²⁸ See VCS, ‘What is validation and verification?’ <http://v-c-s.org/verification-validation/what-vvb> (last accessed 16 July 2013).

¹¹²⁹ See VCS, ‘VCS Registry System and VCUs’, <http://v-c-s.org/how-it-works/vcs-registry-system> (last accessed 16 July 2013).

¹¹³⁰ See VCS, *Develop a Project*, <<http://v-c-s.org/develop-project>> last accessed 3 March 2013.

whether a project meets all VCS rules and requirements. The PDD can be developed before, during or after project design and implementation’.¹¹³¹

3. *Verify emissions reductions*: ‘When a project starts, projects proponents monitor and measure GHG emission reductions or removals and other data. All information for a given monitoring period, including calculations of GHG benefits, are documented in a monitoring report, using the template listed with the VCS program documents’.¹¹³²
4. *Register the project and issue VCUs*: ‘Projects must open an account and submit all required documents to a VCS registry operator to be registered on the VCS Project Database and request issuance of VCUs’.¹¹³³

As seen above, the VCS process hinges on a ‘project proponent’ (PP), which it defines as ‘the individual or organization that has overall control and responsibility for the project, or an individual or organization that together with others, each of which is also a project proponent, has overall control or responsibility for the project’.¹¹³⁴ The PP must both sign key documents (ie., the registration/issuance representations) issued by the VCS registry administrator and be clearly identified on the project record for the VCS project database. The VCS additionally notes that ‘the carbon aggregator/consultant or the ...VCU buyer is generally not the project proponent’ as ‘such entities generally do not have overall control and responsibility for the project and are not in a position to sign the Registration/Issuance Representations.’¹¹³⁵

2.4 Further information about ‘right of use’

The AFOLU Standard provides further details with respect to how ‘right of use’ can be established. Section 3.4.2 of the AFOLU Standard requires that a Project Proponent demonstrates control over the entire project area with documentary evidence establishing rights of use¹¹³⁶. Section 3.11.1 of the Standard requires that Project Proponents produce documentary evidence establishing conclusively one or more of the following rights to carbon in respect of a project:

1. A right of use arising or granted under statute, regulation or decree by a competent authority.

¹¹³¹ *Ibid.*

¹¹³² *Ibid.*

¹¹³³ *Ibid.*

¹¹³⁴ See VCS, *Who is the project proponent on my project?* <<http://v-c-s.org/faqs/who-project-proponent-my-project>> last accessed 16 July 2013.

¹¹³⁵ *Ibid.*

¹¹³⁶ Defined as an undisputed and unencumbered ability to claim that the relevant project, or jurisdictional REDD+ program, will or did generate a or cause a GHG emissions reduction or removal’ (VCS Program Definitions, <http://www.v-c-s.org/sites/v-c-s.org/files/Program%20Definitions%2C%20v3.5.pdf>).

2. A right of use arising under law.
3. A right of use arising by virtue of a statutory, property or contractual right in the plant, equipment or process that generates GHG emission reductions and/or removals (where such right includes the right of use of such reductions or removals and the project proponent has not been divested of such right of use).
4. A right of use arising by virtue of a statutory, property or contractual right in the land, vegetation or conservational or management process that generates GHG emission reductions and/or removals (where such right includes the right of use of such reductions or removals and the Project Proponent has not been divested of such right of use).
5. An enforceable and irrevocable agreement with the holder of the statutory, property or contractual right in the plant, equipment or process that generates GHG emission reductions and/or removals which vests the right of use in the project proponent.
6. An enforceable and irrevocable agreement with the holder of the statutory, property or contractual right in the land, vegetation or conservational or management process that generates GHG emission reductions or removals which vests the right of use in the project proponent.
7. A right of use arising from the implementation or enforcement of laws, statutes or regulatory frameworks that require activities be undertaken or incentivize activities that generate GHG emission reductions or removals.

2.5 Key documents

- **VCS Program Guide:**

<http://v-c-s.org/sites/v-c-s.org/files/VCS%20Program%20Guide%2C%20v3.4.pdf>

This overarching document outlines rules and requirements governing the VCS Program, including the project registration process, the methodology approval process, the accreditation requirements for validation/verification bodies, and the functioning of the VCS registry system.

- **VCS Standard:**

<http://v-c-s.org/sites/v-c-s.org/files/VCS%20Standard%2C%20v3.3.pdf>

This discusses specific requirements for developing projects and methodologies, and for the validation, monitoring and verification of projects and GHG emission reductions and removals.

- **AFOLU Requirements:**

http://v-c-s.org/sites/v-c-s.org/files/AFOLU%20Requirements%20v3.3_0.pdf

This document details requirements for developing projects and methodologies in the Agriculture, Forestry and Other Land Use (AFOLU) sector.

3 THE CLIMATE, COMMUNITY AND BIODIVERSITY STANDARDS (CCB STANDARDS)



3.1 Overview

The Climate, Community and Biodiversity Standards (CCB standards) is an independent co-benefit standard developed by the Climate, Community, and Biodiversity Alliance (CCBA) to help ensure that forestry, agricultural and other land use activities are designed to ‘deliver significant and verifiable climate, community and biodiversity benefits.’¹¹³⁷ However, used alone, the CCB standards do not deliver quantified emissions reductions certificates, and so should be used in combination with a carbon accounting standard (such as the VCS) if the project seeks to trade or sell emissions reduction credits.¹¹³⁸

As of May 2013, 70 projects in 34 countries had been validated using the CCB standards, an additional 19 projects were undergoing validation, and 12 projects had achieved verification (wherein the carbon credits issued from the projects could be tagged with a CCB label).¹¹³⁹ In 2011, the VCS-CCB standard pairing captured 12% of the market share for independent and major co-benefit standards.¹¹⁴⁰

3.2 Key provisions

The CCB Standards require that:

- Projects must meet 17 discrete criteria categorized as ‘general’ requirements, ‘climate’ requirements, ‘community’ requirements, ‘biodiversity’ requirements, and ‘gold level’

¹¹³⁷ CCBA, *CCB standards Factsheet* <https://s3.amazonaws.com/CCBA/CCB_Standards_FactSheet.pdf> last accessed 16 July 2013.

¹¹³⁸ CCBA, *CCB standards* (Second edition, December 2008) 8 para 2 <[https://s3.amazonaws.com/CCBA/Upload/ccb_standards_second_edition_december_2008+\(1\).pdf](https://s3.amazonaws.com/CCBA/Upload/ccb_standards_second_edition_december_2008+(1).pdf)> accessed 16 July 2013.

¹¹³⁹ CCBA, *CCB standards Factsheet* <https://s3.amazonaws.com/CCBA/CCB_Standards_FactSheet.pdf> last accessed 16 July 2013.

¹¹⁴⁰ Katherine Hamilton and Daphne Yin, ‘Leveraging the Landscape: State of the Forest Carbon Markets 2012’ (Ecosystem Marketplace 2012) 30 fig 28 <http://www.forest-trends.org/documents/files/doc_3242.pdf> last accessed 16 July 2013.

requirements (each requirement is detailed and described further in the standards to guide projects).¹¹⁴¹

- To be approved, projects must meet all but the optional gold level requirements.¹¹⁴²
- To receive (optional) gold level validation, projects must additionally meet gold level criteria.¹¹⁴³

3.3 Process

The CCB standards entail a two-step process:

1. Validation, which is defined by the CCBA as ‘the systematic, independent and documented process for the evaluation of the design of a project against each of the CCB standards’ criteria’¹¹⁴⁴; and
2. Verification, which is defined by the CCBA as the ‘systematic, independent and documented process for the evaluation of a project’s delivery of net climate, community and biodiversity benefits in accordance with the project’s validated design and monitoring plan and each of the CCB standards’ criteria’.¹¹⁴⁵

Validation

1. Preparation of documentation that describes how the project meets the requirements of the CCB standards
2. Engagement of a qualified auditor
3. Publication and dissemination of the [Project Design Document, or PDD] for public comment
4. Validation audit site visit
5. Preparation by the auditor of a Draft CCB Validation Report
6. Revision of the project design to address any identified deficiencies
7. Preparation by the auditor of the Final CCB Validation Report and CCB Validation Statement
8. Publication of the revised PDD, Final CCB Validation Report, CCB Validation Statement and the project’s CCB Status on the CCBA website

¹¹⁴¹ CCBA, *CCB standards* (Second edition, December 2008) <[https://s3.amazonaws.com/CCBA/Upload/ccb_standards_second_edition_december_2008+\(1\).pdf](https://s3.amazonaws.com/CCBA/Upload/ccb_standards_second_edition_december_2008+(1).pdf)> accessed 16 July 2013.

¹¹⁴² *Ibid.*

¹¹⁴³ *Ibid.*

¹¹⁴⁴ CCBA, *Rules for the use of the Climate, Community & Biodiversity Standards* (Version June 21, 2010) 4 <https://s3.amazonaws.com/CCBA/Upload/CCB_Standards_Rules_Version_June_21_2010.pdf> last accessed 16 July 2013.

¹¹⁴⁵ *Ibid.*

Verification

1. Publication and dissemination of climate, community and biodiversity monitoring plans and reports
2. Preparation of documentation that describes how the project met the requirements of the CCB standards
3. Engagement of a qualified auditor
4. Publication and dissemination of the project implementation report for public comment
5. Verification audit site visit
6. Preparation by the auditor of a Draft CCB Verification Report
7. Response to deficiencies identified in the Draft CCB Verification Report
8. Preparation by the auditor of the Final CCB Verification Report and CCB Verification Statement
9. Posting of the Final CCB Verification Report, CCB Verification Statement and the project's CCB status to the CCBA website.

3.4 Key documents

- **Climate, Community and Biodiversity Project Design Standards:**

https://s3.amazonaws.com/CCBA/Third_Edition/CCB_Standards_Third_Edition_December_2013.pdf

This document details the specific requirements developing projects must follow to receive validation and verification through the CCBA.

- **Rules for the use of the Climate, Community and Biodiversity Standards:**

https://s3.amazonaws.com/CCBA/Upload/CCB_Standards_Rules_Version_June_21_2010.pdf

This document clarifies the process and provides specific guidance for the use of the CCB standards.

4 PLAN VIVO

Plan Vivo Improving livelihoods, restoring ecosystems

4.1 Overview

The Plan Vivo Standard has been developed by the Plan Vivo Foundation as part of a broader agenda intended to guide the planning, managing and monitoring of Verifiable Emissions Reductions (VERs) from community-based land-use projects.¹¹⁴⁶ In this context, 'community-based' means that communities decide which land use activities are most appropriate for protecting their environment

¹¹⁴⁶ Plan Vivo Foundation, *The Plan Vivo Standards* (2008) 1.1 at 11 <<http://www.planvivo.org/wp-content/uploads/Plan-Vivo-Standards-20081.pdf>> last accessed 16 July 2013.

and livelihood and propose a land management plan consistent with Plan Vivo's technical requirements.¹¹⁴⁷ Ultimately, a project that successfully adopts the Plan Vivo Standard is issued a Plan Vivo Certificate, which represents the long-term sequestration or reduction of one tonne of carbon dioxide in addition to a number of environmental and social benefits.¹¹⁴⁸

4.2 Key Provisions

Plan Vivo projects are specifically intended for rural communities with secure tenure over small-holder owned or leased farmland, community-owned land, and 'land for which communities have agreed use rights with the owner.' Currently, four types of projects may apply for certification under the Plan Vivo Standard:

- (1) afforestation and reforestation projects,
- (2) agroforestry projects,
- (3) forest restoration projects, and
- (4) avoided deforestation projects.¹¹⁴⁹

Plan Vivo's four primary guiding principles include:

- (1) effective and transparent governance,
- (2) flexible and robust standards,
- (3) additional and permanent carbon storage, and
- (4) capacity-building, diversification and community-led design.¹¹⁵⁰

4.3 Process

The Plan Vivo Standard involves a multi-phase process:¹¹⁵¹

- (1) Concept:
 - a. Development and submission of a project idea note (PIN), which defines the main aspects of the project including target groups, activities, project area, aims and objectives.

¹¹⁴⁷ See Plan Vivo, *About Plan Vivo* <<http://www.planvivo.org/about-plan-vivo/>> last accessed 16 July 2013.

¹¹⁴⁸ Plan Vivo Foundation, *The Plan Vivo Standards* (2008) 1.4 at 15 <<http://www.planvivo.org/wp-content/uploads/Plan-Vivo-Standards-20081.pdf>> last accessed 16 July 2013.

¹¹⁴⁹ *Ibid*, at 1.5.3 at 16

¹¹⁵⁰ *Ibid*, at 1.7 at 18

¹¹⁵¹ See a summary of the process at Plan Vivo Foundation, *The Plan Vivo Standards* (2008) 26-7 fig. 5 <<http://www.planvivo.org/wp-content/uploads/Plan-Vivo-Standards-20081.pdf>> last accessed 16 July 2013.

- b. PIN evaluation and registration by the Plan Vivo Foundation.
- (2) Project Design:
 - a. Development and submission of technical specifications and a project design document (PDD)
 - b. Technical specifications and PDD approval by the Plan Vivo Foundation, Technical Advisory Panel and expert reviewers.
- (3) Registration:
 - a. Plan Vivo Foundation, or an expert reviewer chosen by the Foundation, conducts a field visit to review the project against Plan Vivo Standards and develop a project validation report.
 - b. Plan Vivo Foundation reviews the PDD, technical specifications and validation report, registering projects competent to sell carbon sequestration benefits.
- (4) Active Project:
 - a. The project compiles field assessments, sales, monitoring, and qualitative data and submits an annual report to the Plan Vivo Foundation.
 - b. Plan Vivo Foundation issues certificates as a confirmation to purchasers of the delivery of ecosystem services.
 - c. A third-party conducts a desk-based review of the project, including the PDD, technical specifications, data and field visit, submitting a verification report and corrective actions intended to strengthen the project.

4.4 Key documents

- Plan Vivo Standard (Version 2013):
<http://www.planvivo.org/wp-content/uploads/Plan-Vivo-Standard-2013.pdf>

In addition to providing the standards that plans must follow to undergo validation and verification under Plan Vivo, this document gives an overview of the Plan Vivo system, describes that different actors that should be involved, and describes the different stages involved in developing and operating a Plan Vivo project.

ANNEX 2

Kenyan Constitutional History

The following table outlines Kenya's constitutional changes, preceding the current 2010 Constitution :

No.	ENABLING ACT	AMENDMENT
1	Constitution of Kenya (Amendment) Act No.28 of 1964	Established the office of the Vice President who would be appointed from the elected Members by the House of Representatives.
2	Constitution of Kenya (Amendment) Act No. 38 of 1964.	Repealed the provision allowing Regions to levy independent regional revenue, hence making the regions fully dependent on grants from the Central Government. ¹¹⁵² This weakened the <i>majimbo</i> system by centralizing power.
3	Constitution of Kenya (Amendment) Act No. 14 of 1965	Amended the Parliamentary approval for a state of emergency from a majority (65 % in both houses) to a simple majority. ¹¹⁵³ In addition, the majority requirement for amending the Constitution was reduced from 90% in the Senate and 75% in the House of Representatives to 65% in both Houses. ¹¹⁵⁴
4	Constitution of Kenya (Amendment) Act No. 17 of 1966	Provided that if a Member of Parliament was absent for more than eight consecutive sittings without the permission of the Speaker or were imprisoned for a term exceeding six months, then they would lose their seat in Parliament. The President could, however, pardon a Member of Parliament guilty of the above. ¹¹⁵⁵ The aim of this amendment was to ensure the attendance of Members of Parliament to their Parliamentary sessions. It also granted the President extensive powers to appoint persons to the various positions in public service, as well as terminate them at their discretion. ¹¹⁵⁶
5	Constitution of Kenya (Amendment) Act No. 17 of 1966.	This amendment required a Member of Parliament who resigned from the political party that sponsored him during the election at a time when that Party was still a parliamentary party, to vacate his seat. This amendment was effected after the ruling party (Kenya African National Union) experienced an

¹¹⁵² Media Development Association and Konrad Adenauer Foundation, *History of Constitution Making in Kenya* (2012). Available at http://www.kas.de/wf/doc/kas_32994-1522-2-30.pdf?121206115057, accessed May 15, 2013.

¹¹⁵³ *Ibid.*

¹¹⁵⁴ Lumumba, P.L.O., Mbondenyi ,M. and Odero, S.(eds.), *The Constitution of Kenya: Contemporary Readings* (2011) LawAfrica Publishing (K) Limited, at page 24.

¹¹⁵⁵ *Ibid.*

¹¹⁵⁶ Media Development Association and Konrad Adenauer Foundation, *History of Constitution Making in Kenya* (2012). Available at http://www.kas.de/wf/doc/kas_32994-1522-2-30.pdf?121206115057, accessed May 15, 2013.

No.	ENABLING ACT	AMENDMENT
		outflow of sitting Members of Parliament to the Kenya People's Union.
6	Constitution of Kenya (Amendment) Act No. 18 of 1966.	Removed the exercise of emergency powers from Parliament and vested the same in the President. ¹¹⁵⁷ The President could therefore order detention without trial at his own discretion.
7	Constitutional Amendment Act No. 40 of 1966	Established a unicameral legislature by abolishing the Senate and merging the two Houses.
8	Constitution of Kenya (Amendment) Act No. 16 of 1968	Removed the last traces of <i>majimboism</i> . This was achieved by abolishing the Provincial Councils, repealing all past laws of the regional assemblies, and deleting from the Constitution all references to provincial and district boundaries.
9	Constitutional Amendment Act No. 45 of 1968	Provided that the President can be elected through a General Election, as opposed to election by the National Assembly.
10	Constitutional of Kenya Act No.5 of 1969	This Act was passed in 1969. It was a consolidating Act, bringing together all the constitutional amendments since 1963. Other amendments made include: removing the powers to appoint the members of the Electoral Commission from the Speaker of the National Assembly, and vesting the same on the President.
11	Constitution of Kenya (Amendment) Act of 1974	Lowered the voting age from 21 years to 18 years. The Constitution of Kenya (Amendment) Act No. 2 of 1974 introduced Kiswahili as an official language of the National Assembly.
12	Constitution of Kenya (Amendment) Act of 1975	Provided that bills should be presented in English, and debated in either English or Kiswahili.
13	Constitution of Kenya (Amendment) Act No. 14 of 1975	Extended the prerogative of mercy (sole power of the President) to include the power to pardon a person found guilty of an elections offence.
14	Constitution of Kenya (Amendment) Act No. 13 of 1977	Upon the collapse of the East African Community, it established the Court of Appeal of Kenya and the Court of Appeal for East Africa. Allowed the Chief Justice to sit as both a High Court judge and a Court of Appeal judge. If he/she sat as a Court of Appeal judge at any particular time, he/she would act as chair of the Appellate judges. ¹¹⁵⁸ Abolished the right to remit compensation after compulsory acquisition.
15	Constitution of Kenya (Amendment) Act No. 1 of 1979 ¹¹⁵⁹	Affirmed that English could now be used as an alternative to Kiswahili in parliamentary proceedings, including the presentation and debate of bills.

¹¹⁵⁷ Lumumba, P.L.O., Mbondenyi, M. and Odera, S.(eds.), *The Constitution of Kenya: Contemporary Readings* (2011) LawAfrica Publishing (K) Limited, at page 29.

¹¹⁵⁸ *Ibid*, page 32.

¹¹⁵⁹ The first President of the Republic of Kenya died in office in August 1978. His then Vice President Hon Daniel Moi assumed office of the President immediately, initially for a period of 90 days. During this period, elections for the office of the President were conducted and Hon. Moi was elected. Constitutional amendments continued, and although fewer in number they were very significant. *See further* Media Development

No.	ENABLING ACT	AMENDMENT
16	Constitution of Kenya (Amendment) Act No. 5 of 1979	Provided that a public officer who wished to contest parliamentary elections had to resign at least six months before the elections.
17	Constitution of Kenya (Amendment) Act of 1982	This significant amendment introduced Section 2A to the Constitution, which converted Kenya into a one party state. The effect of this amendment was that all political power in Kenya was vested in the ruling party, the Kenya African National Union ('KANU'). One had to be a member of KANU to vie for any political office. Furthermore, at the time of this Amendment, Kenya was experiencing strong political tension after the attempted <i>coup d'état</i> in August 1982.
18	Constitution of Kenya (Amendment) Act No. 7 of 1984	The High Court now had finality in relation to determination of election petitions. Membership of the Public Service Commission increased from 7 to 17. It also gave the Public Service Commission powers to appoint officers to the local authorities. ¹¹⁶⁰
19	Constitution of Kenya (Amendment) Act No. 6 of 1985	Repealed Section 89 of the Constitution. The effect of this was that a person could only be recognized as a Kenyan citizen if the mother and father are Kenyan citizens.
20	Constitution of Kenya (Amendment) Act No. 14 of 1986	Removed security of tenure of the offices of the Attorney General, Controller, and Auditor General, thus eroding the independence of the two offices. The limit of parliamentary seats was set to a maximum of 188 and a minimum of 168.
21	Constitution of Kenya (Amendment) Act No. 20 of 1987	All capital offences punishable by death as provided in the Penal code (Cap 62) were made non-bailable.
22	Constitution of Kenya (Amendment) Act No. 4 of 1988	Changed the requirement for holding suspects of capital offences. Previously, such suspects were not to be held for a period exceeding 24 hours. The Amendment now provides that suspects of capital offences are not to be held for a period exceeding 14 days. Removed security of tenure for the office of the Public Service Commission, High Court judges and Court of Appeal judges. Created the Offices of the Chief Magistrate and Principal Magistrate.
23	Constitution of Kenya (Amendment) Act No. 2 of 1990	Restored security of tenure of the office of the Public Service Commission, High Court judges and Court of Appeal judges.
24	Constitution of Kenya (Amendment) Act No. 10 of 1991	Increased the maximum number of constituencies to 210 from 188 and the minimum number of constituencies to 188 from 68.
25	Constitution of Kenya (Amendment) Act No. 12 of	Repealed Section 2A of the Constitution, which converted Kenya to a one party state in 1982.

Association and Konrad Adenauer Foundation, *History of Constitution Making in Kenya* (2012). Available at http://www.kas.de/wf/doc/kas_32994-1522-2-30.pdf?121206115057, accessed May 15, 2013.

¹¹⁶⁰ Gicheru, H.B. and Miano, K., *A textbook of the Constitution and Government of Kenya for Secondary Schools* (1987) Sterling Publishers (1987), at page 151.

No.	ENABLING ACT	AMENDMENT
	1991	
24	Constitution of Kenya (Amendment) Act No. 10 of 1997	Reinforced the above repealing of Section 2A of the Constitution by introducing Section 1A. The effect of this was to change Kenya from a one party state to a multi-party state. It also amended Sections 7, 33, 41, 42A, 82 and 84 of the Constitution. In effect, the President was allowed to form his government from members of other political parties, the role of nominating members to parliament was transferred from the president to the parliamentary parties, the number of electoral commissioners was increased, voter education and ensuring free and fair elections was included as additional roles of the electoral commission, and lastly persons were allowed to appeal to the Court of Appeal on constitutional matters. ¹¹⁶¹
25	Constitution of Kenya (Amendment) Act 2008	Created a coalition government by establishing the office of the Prime Minister and the Deputy Prime Minister. This was necessary following the disputed elections of December 2007 and the ensuing violence that continued in to 2008.

¹¹⁶¹ Lumumba, P.L.O., Mbondeniyi, M. and Odero, S. (eds.), *The Constitution of Kenya: Contemporary Readings* (2011) LawAfrica Publishing (K) Limited, at page 36.

ANNEX 3

Procedures for Public Bills and Private Bills in Kenya

Procedures for Public Bills

- The member or committee first submits to the Speaker of the respective House a legislative proposal, accompanied by a memorandum of objectives and reasons.¹¹⁶² The Speaker will then refer the legislative proposal memorandum to the Clerk. The Clerk considers whether the legislative proposal conforms to the Constitution, whether it is in the format and style provided for in the National Assembly Standing Orders, whether it affects counties and, finally, whether it is a Money Bill. Where necessary, the Clerk drafts the legislative proposal in the proper form and submits it to the Speaker with comments on the above issues.
- In the case of the National Assembly, if the legislative proposal is a Money Bill, the Speaker of the National Assembly first submits it to the Cabinet Secretary responsible for finance for comments on how it affects the current and future budgets. Upon receipt of the Cabinet Secretary's comments, the legislative proposal is then referred to the Budget and Appropriations Committee for further commentary.
- Regarding other types of legislative proposals in the National Assembly, the Speaker of the House in which the bill was introduced submits the same to the relevant committee for pre-publication scrutiny and comments. The relevant committee is expected to forward its comments within 14 days of receipt of the legislative proposal. Upon receipt of the comments, the Speaker may rule that the legislative proposal should either not proceed or be accepted. If the Speaker accepts the legislative proposal, it is published as a Bill. The Bill is thereafter published in the Kenya Gazette.
- 14 days¹¹⁶³ after publication in the gazette and before the first reading, the Speaker of the National Assembly will firstly resolve any question about whether the Bill concerns any counties and whether it is an ordinary or a special Bill.¹¹⁶⁴ Secondly, the Speaker of the National Assembly

¹¹⁶² The memorandum of objectives and reasons sets out the objects and reasons of the bill, an indication as to whether it concerns county governments, and a statement of financial implications (including the estimate of public expenditure). See Article 117 of the National Assembly Standing Orders, and Article 115 of the Senate Standing Orders.

¹¹⁶³ Seven days for a consolidated fund bill, appropriation bill or a supplementary appropriation bill.

¹¹⁶⁴ A bill concerning county government is a bill that contains provisions that relate to the functions and powers of the county governments, the finances of county governments, or to the election of members of County Assembly or County Executive. It can be either a special bill or an ordinary bill. A special bill concerns the election of members of a County Assembly or County Executive or the annual county allocation of revenues bill. This is stipulated in Article 110 of the Constitution of Kenya, 2010.

communicates their decision to the Speaker of the Senate. If the Speaker of the Senate does not agree with the decisions made by the Speaker of the National Assembly, the two speakers shall decide together whether the Bill concerns counties and whether it is an ordinary or a special Bill. If, within 7 days¹¹⁶⁵ of the communication, the Speaker of the National Assembly does not receive any communication from the Speaker of the Senate as to whether he/she concurs or differs with the decisions made in relation to the Bill, the Speaker of the house of Parliament (either the National Assembly or the Senate) where the Bill in question originated directs that the Bill be read for the first time.

- A Bill usually goes through three readings before it is passed by Parliament.
 - During the first reading, no motion is made or questions put forward. After the Bill is read by the Clerk of the Assembly or Senate, it is committed to the relevant departmental committee¹¹⁶⁶ or Standing Committee,¹¹⁶⁷ who must come up with their report within 20 calendar days. In some circumstances, the National Assembly or Senate may resolve that the Bill be submitted to a select committee rather than the relevant departmental or Standing Committee. The relevant departmental or Standing Committee is tasked with facilitating public participation, and the views and recommendations of the public must be considered in the departmental or Standing Committee's Report to the House. The Report is thereafter presented to the House by the Chairperson of the relevant departmental or Standing Committee. The Bill is thereafter ordered to be read a second time on a set date.¹¹⁶⁸
 - When the Bill is read a second time, it is submitted to the Committee of the Whole House¹¹⁶⁹ for detailed consideration. The purpose of this Committee is to scrutinize the Bill and make amendments to it according to the National Assembly or Senate Standing Orders. After the committee of the whole house has finished considering the Bill, it resolves to report its considerations to the House. The House considers the Bill as reported upon carriage of the Motion that 'the House agrees with the Committee in the said report'. The House then proceeds to the third reading.¹¹⁷⁰
 - The third reading provides an opportunity for limited debate on the principles of the bill.
- Once the bill passes the third reading successfully, a certified copy of the Bill, signed by the Clerk

¹¹⁶⁵ Or such other duration of time as the speaker may determine.

¹¹⁶⁶ In the case of the National Assembly.

¹¹⁶⁷ In the case of Senate.

¹¹⁶⁸ It should be noted that in the event that the relevant departmental or standing committee does not present its report when it becomes due, the Bill shall nevertheless be ordered to be read a second time.

¹¹⁶⁹ This is the whole house sitting as a committee of itself.

¹¹⁷⁰ It should be noted that the Bill may be re-committed to the Committee of the Whole House to consider certain identified matters.

and endorsed by the Speaker, shall be forwarded to the Clerk of the other House for its concurrence. If both Houses pass the bill in the same form, the speaker of the National Assembly or Senate refers the Bill to the President, within 7 days, for assent.¹¹⁷¹ The President may have reservations about the Bill, in which case the respective House shall within 7 days of receipt refer the President's reservations to a Joint Committee appointed for that purpose. Within 14 days, the Committee must present its findings to the House for its consideration. The Speaker shall then forward to the other House for concurrence and resubmit the Bill to the President for his or her assent.

- A Bill that originates from the Senate and is forwarded to the National Assembly for concurrence or *vice versa* follows the same stages in either House, as though the Bill originated from that House. After the Bill that originates from another House is read for a third time, the Clerk returns the Bill to the House where the Bill originated with a message that the House has agreed to the Bill without amendments. If amendments have been made to the Bill, the House will seek agreement for such changes. If the Bill has been rejected, it is referred to a mediation committee.¹¹⁷²

Procedures for Private Bills

- Before the introduction of a Private Bill, special permission must be granted by the House. This is because the respective House must be satisfied that no other rights or interests would be prejudiced by the legislation. If the Bill directly affects private rights or property of any other person, a notice is published in at least three separate issues of the *Gazette* specifying the general nature and objects of the Bill.
- For a Private Bill to be introduced, a Petition for Leave must first be presented to the House with a copy of the Bill annexed. The Petition must be signed by some or all of the Promoters of the Bill. The Clerk thereafter examines the petition to ensure that it complies with the Standing Orders relating to Private Bills. The promoters of the Bill must supply the Clerk with sufficient copies of the Petition and the Bill for distribution to the Members. The petition is read by the Clerk to the House, and a decision is made as to whether the Promoters are granted leave to proceed. If allowed to proceed, the Clerk provides the Promoters an estimate of the cost of

¹¹⁷¹ The Speaker who presents the Bill for assent is the Speaker of the House where the Bill originated.

¹¹⁷² The mediation committee is established under Article 113 of the Constitution. It is a committee consisting of equal members from both Houses appointed by the respective Speakers. The task of the committee is to develop a version of the bill that will be acceptable by both houses. The agreed version is thereafter tabled in the two houses for consideration. If both houses approve the version of the bill proposed by the mediation committee, the Speaker of the National Assembly shall refer the Bill to the President, within seven days, for assent. If the mediation committee fails to agree on a version of the bill or a version proposed by the committee is rejected by either house, then the bill will stand defeated. See Article 113 of the Constitution of Kenya.

printing the Bill. It is the Promoters' responsibility to pay for this cost. The Promoters must deposit at least 25% of the said cost as security with the Clerk. 14 days after its publication, the Bill is printed, published and introduced into the respective House.

- The private bill then undergoes the same legislative process in the House as a Public Bill. However, if opposition to the Bill has been lodged with the Clerk, it shall be referred to a Select Committee and the Promoters are entitled to be heard before the Select Committee.

ANNEX 4

Procedure for Acquisition of Private Land in Kenya

In practice, the procedure for acquiring an interest in private land is to enter into a contract for the sale and purchase of the land with a defined completion period. The process is subject to freedom of contract but there are also guidelines from the Law Society of Kenya (LSK), set out in the *Law Society of Kenya Conditions of Sale*, to guide the legal practitioners facilitating land transactions. The key stages are as follows:

- (i) Payment of the deposit and signing of the sale agreement;
- (ii) Preparation to complete;
- (iii) Completion; and
- (iv) Registration.

(i) Deposit

A deposit is usually ten per cent (10%) of the purchase price, and is paid by the purchaser as a commitment to the transaction.

Before paying the deposit, it is imperative to carry out a search of the Register and obtain a Certificate of Official Search, to ascertain the true owner of the land, Section 29 of the Land Registration Act provides that every proprietor at the time of acquiring a land, lease, or charge shall be deemed to have had notice of every entry in the register relating to the land, lease, or charge.

The deposit will often be held by the vendor's lawyer prior to completion of the transaction. Although the vendor may want the money released to them, this is not considered good practice: in the event that the transaction fails, the purchaser would be left only with the option of suing for the return of the deposit. However, if the deposit is held by a lawyer, it will be available for return to the purchaser.

Once the deposit is paid, both parties sign the sale agreement. A period of time is also allowed for the transaction to complete.

(ii) Preparation to Complete

The sale agreement will provide for a completion period, usually of 90 days. The agreement should specify how completion will take place - whether by:

- exchange of title, the instrument of transfer and completion documents with the funds in respect of the balance of purchase price; or
- by exchange of the documents with an undertaking.

In the period between signing of the agreement and the completion date, the Vendor pays the outgoings on the property, such as land rent for leaseholds and rates for properties in municipalities. The Vendor also procures the clearances and consents necessary to register the title in favour of the purchaser.

(iii) Completion

On or before the date set for completion, the Vendor's lawyer procures the transfer executed by the Vendor in favour of the Purchaser, and sends a copy of this to the Purchaser's lawyer as an indication of the Vendor's readiness to complete. The Purchaser will then pay the balance of purchase price to the Vendor's lawyers. In exchange, the Vendor's lawyer sends to the Purchaser's lawyers all the documents that are necessary for the Purchaser to register the title in the Purchaser's name. In the event that completion is by undertaking, the documents will be sent in exchange of the undertaking. Ideally, the Vendor's lawyer should hold the balance of the purchase price and the balance until the Title is in the name of the Purchaser and then thereafter release it to the Vendor.

(iv) Registration

Upon receipt of the documents from the Vendor's lawyers. The Purchaser's lawyer then proceeds to pay stamp duty on the transaction. This is usually assessed at 4% of the purchase price for land in municipalities and towns, and 2% for land in rural areas.¹¹⁷³ Before the transfer is registered, a government valuer will assess the property to confirm that sufficient stamp duty was paid against the value of the property. After valuation, the Purchaser's lawyer goes ahead to present all the documents to the Registrar of Lands, then the transfer is registered and the title issued, reflecting the changed ownership of the land.

The Certificate of Title issued by the Registrar upon registration or issued to a purchaser of land upon a transfer or transmission by the proprietor is *prima facie* evidence that the proprietor is the absolute indefeasible owner of the land subject to any encumbrances noted on the register.¹¹⁷⁴ Under Section 81 of the *Land Registration Act*, any person suffering damage by reason of an error in a copy of or extract from the register is entitled to indemnity from the Government.

¹¹⁷³ Stamp Duty Act.

¹¹⁷⁴ S. 26(1) Land Registration Act.

ANNEX 5

Kenyan land tenure classifications presented in tables

- 5.1 Summary
- 5.2 Private land table
- 5.3 Public land table
- 5.4 Community land table
- 5.5 Forest land table

5.1 SUMMARY OF LAND TENURE CATEGORIES AND APPLICABLE LAW IN KENYA

	PRIVATE LAND	PUBLIC LAND	COMMUNITY LAND
KEY LAWS APPLICABLE TO EACH CATEGORY OF LAND	<p>Land Act (Act No.6 of 2012)</p> <p>Land Registration Act (Act No.3 of 2012)</p> <p>Land Control Act 1967</p> <p>National Land Commission Act (Act No. 5 of 2012) 2012</p> <p>Environmental Management and Coordination Act (Act No.8 of 1999)/Revised 2012</p> <p>Forests Act (Act No. 7 of 2005)/Revised 2012: Section 2 of the Act provides that the Act shall apply to all forests and woodlands on private land.</p>	<p>Land Act (Act No.6 of 2012)</p> <p>Land Registration Act (Act No.3 of 2012)</p> <p>Land Control Act 1967/Revised 2010</p> <p>National Land Commission Act (Act No. 5 of 2012)</p> <p>Environmental Management and Coordination Act (Act No.8 of 1999)/Revised 2012</p> <p>Forests Act (No. 7 of 2005)/Revised 2012: Section 2 provides that this Act shall apply to all forests and woodlands on State and local authority land.</p> <p>Wildlife (Conservation and Management) Act 2013</p>	<p>New Community Land Act (TBC). In lieu of this new Act, existing law applies:</p> <ul style="list-style-type: none"> • Land Act 2012 • Land Registration Act 2012 • Land Control Act 1967 • National Land Commission Act 2012 • Trust Lands Act, Chapter 288/Revised 2009 • Land (Group Representatives) Act, Chapter 287/Revised 2012. • Land Adjudication Act, Chapter 284/Revised 2010 • Land Consolidation Act, Chapter 283/Revised 2012 • Environmental Management and Coordination Act (Act No.8 of 1999)/Revised 2012.
	<p>FOREST LAND</p> <p>Forests Act (No. 7 of 2005)/Revised 2012</p> <p>Environmental Management and Coordination Act (No.8 of 1999)/Revised 2012</p> <p>Wildlife (Conservation and Management) Act 2013</p>		

SUMMARY OF APPLICABLE LAW FOR EACH LAND TENURE CATEGORY

	Private land	Public land	Community land	Forest land
Key laws applicable to each category	<p>Land Act (Act No.6 of 2012)</p> <p>Land Registration Act (Act No.3 of 2012)</p> <p>Land Control Act 1967</p> <p>National Land Commission Act (Act No.5 of 2012)</p> <p>Environmental Management and Coordination Act (Act No.8 of 1999) Revised 2012</p> <p>Forests Act (No. 7 of 2005)/Revised 2012. Section 2 of the Act provides that the Act shall apply to all forests and woodlands on private land.</p>	<p>Land Act (Act No.6 of 2012)</p> <p>Land Registration Act (Act No.3 of 2012)</p> <p>Land Control Act 1967/revised 2010</p> <p>National Land Commission Act (Act No. 5 of 2012)</p> <p>Environmental Management and Coordination Act 1999/Revised 2012.</p> <p>Forests Act (No 7 of 2005)/revised 2012. Section 2 provides that this Act shall apply to all forests and woodlands on State and local authority land.</p> <p>Wildlife (Conservation and Management) Act (Cap 376)</p>	<p>New Community Land Act – TBC</p> <p>In the absence of new law, existing law fills the void:</p> <ul style="list-style-type: none"> • Land Act 2012 • Land Registration Act 2012 • Land Control Act 1967 • National Land Commission Act 2012 • Trust Lands Act, Chapter 288/revised 2009. • Land (Group Representatives) Act, Chapter 287/revised 2012. • Land Adjudication Act, Chapter 284/revised 2010. • Land Consolidation Act, Chapter 283/revised 2012. • Environmental Management and Coordination Act, Act No.8 of 1999/revised 2012. 	<p>Forests Act No. 7 of 2005/revised 2012.</p> <p>Environmental Management and Coordination Act No.8 of 1999/revised 2012.</p> <p>Wildlife (Conservation and Management) Act 2013</p>

	Private land	Public land	Community land	Forest land
Administrative process for securing land rights	Land Act Land Registration Act Forests Act	Land Act Land Registration Act Forests Act Wildlife (Conservation and Management) Act (Cap 376)	The relevant legislation to govern Community land is yet to be enacted and in the meantime, the following laws shall be applicable: <ul style="list-style-type: none"> • National Land Commission Act • Trust Lands Act • Land (Group Representatives) Act • Land Adjudication Act (for Trust Land) • Land Consolidation Act (for Trust Land) 	Government forests are part of public land pursuant to Article 62(1)(g) of the Constitution. Under Article 62(3) of the Constitution, public land shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission. Forests Act 2005/revised 2012 Wildlife (Conservation and Management) Act
Governing Institutions / authorities	Ministry of Land, Housing and Urban Development Ministry of Environment, Water and Natural Resources <ul style="list-style-type: none"> • National Environmental Management Authority • Kenya Forest Service 	National Land Commission Kenya Forest Service Kenya Wildlife Service		Ministry of Environment, Water and Natural Resources <ul style="list-style-type: none"> • Kenya Forest Service • Kenya Wildlife Service Ministry of Land, Housing and Urban Development <ul style="list-style-type: none"> • National Land Commission
Dispute resolution	Environment and Land Court The Magistrates Court still have jurisdiction to entertain land matters subject to their pecuniary jurisdiction. This was set out in the Kenya Gazette (Notice Number 16268).	Environment and Land Court	Environment and Land Court: For land held by Group Representatives, the Magistrates Courts have jurisdiction by virtue of the Land (Group Representatives) Act.	Environment and Land Court

	Private land	Public land	Community land	Forest land
Options for tenure arrangements (and their applicable laws/governing arrangements)	<p>Freehold: Section 5(a) of the Land Act provides for a freehold tenure</p> <p>Further section 24(a) of the Land Registration Act provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land.</p>	<p>The National Land Commission will decide the mode of land holding whether it shall be freehold or leasehold because the National Land Commission is mandated to administer public land</p>	<p>National Land Commission shall manage and administer all unregistered trust land and unregistered community land on behalf of the county government.</p>	<p>Forest conservancy: Section 13 of the Forests Act provides that the Board of the Kenya Forest Service shall establish forest conservancy areas</p> <p>Leasehold/Freehold: Conversion of land from one form of land tenure to another is determined by of the National Land Commission pursuant to section 9(5)(c) of the Land Act.</p>
	<p>Leasehold (by Kenyan citizen) Section 5(b) of the Land Act provides for a leasehold tenure</p> <p>Further section 24(b) of the Land Registration Act provides that the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease</p>			
	<p>Leasehold (by foreigner) Article 65(1) of the Constitution provides that a person who is not a citizen may hold land on the basis of leasehold tenure only and for a term not exceeding ninety-nine years.</p>			

5.2 PRIVATE LAND

	PRIVATE LAND (per Article 64 of the Constitution of Kenya, 2010)
Key laws applicable	<p>Land Act (Act No.6 of 2012) This is an Act of Parliament enacted to revise, consolidate and rationalize land laws, to provide for the sustainable administration and management of land and land-based resources, and for connected purposes.</p> <p>Land Registration Act (Act No.3 of 2012) This is an Act of Parliament enacted to revise, consolidate and rationalize the registration of titles to land, to give effect to the principles and objects of devolved government in land registration, and for connected purposes.</p> <p>Land Control Act 1967 (revised 2010) This is an Act of Parliament enacted to provide for controlling transactions in agricultural land.</p> <p>National Land Commission Act (Act No.5 of 2012) This is an Act of Parliament to make further provision as to the functions and powers of the National Land Commission, qualifications and procedures for appointments to the Commission, to give effect to the objects and principles of devolved government in land management and administration and for connected purposes. Note: the National Land Commission can determine changes to land ownership and rights over land.</p> <p>Environmental Management and Coordination Act (Act No.8 of 1999/revised 2012)</p> <ul style="list-style-type: none"> Section 44: The [National Environment Management Authority] shall, in consultation with the relevant lead agencies, develop, issue and implement regulations, procedures, guidelines and measures for the sustainable use of hill sides, hill tops, mountain areas and forests and such regulations, guidelines, procedures and measures shall control the harvesting of forests and any natural resources located in or on a hill side, hill top or mountain area so as to protect water catchment areas, prevent soil erosion and regulate human settlement. All private land situated on hill sides and hill tops shall by virtue of this section be governed by the Environmental Management and Coordination Act. <p>Forests Act 2005/revised 2012. Section 2 of the Act provides that the Act shall apply to all forests and woodlands on private land.</p>
Administrative process for securing land rights	<p>Land Act (Act No.6 of 2012)</p> <p>Land Registration Act (Act No.3 of 2012)</p> <p>Forests Act (No. 7 of 2005; Revised 2012)</p>
Governing Institutions / authorities (and their governing law/regulations)	<p>Ministry of Land, Housing and Urban Development</p> <ul style="list-style-type: none"> National Land Commission: This is an independent Government Commission established under Article 67 of the Constitution <p>Ministry of Environment, Water and Natural Resources</p> <ul style="list-style-type: none"> National Environmental Management Authority: This is a government agency established under section 7 of the <i>Environmental Management and Coordination Act</i>

	<ul style="list-style-type: none"> Kenya Forest Service (established under section 4 of the <i>Forests Act</i>): manages all types of forests in Kenya as provided in section 5(a) of the Act
Dispute resolution	<p>Environment and Land Court</p> <ul style="list-style-type: none"> Provided for under Art 162(2)(b) of the Constitution which provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. The Court is established under section 4 of <i>Environment and Land Court Act, 2011</i>. This is an Act of Parliament to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes <p>Section 13(2) of the <i>Environment and Land Court Act</i> provides that the Court</p> <ul style="list-style-type: none"> shall have jurisdiction to deal with disputes relating to environmental planning and protection, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources, compulsory acquisition of land, land administration and management, public, private and community land and contracts or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land. Section 19(2) of the Environment and Land Court Act provides that the Court shall be bound by the procedure laid down by the <i>Civil Procedure Act</i> of Kenya. This means that disputes are commenced by way of a Plaint or a Petition if the dispute relates to infringement of the right to a clean and healthy environment as provide for in Article 42 of the Constitution. A plaint is a document filed in court setting out the grounds of a complaint made to the court and asking for redress of the grievance. <p>It is important to note that the Magistrates Courts still have jurisdiction to entertain land matters subject to their pecuniary jurisdiction. This was set out in Kenya Gazette (Notice Number 16268).</p> <ul style="list-style-type: none"> If the dispute affects a community, then a representative of the community appointed by members of that community can file the relevant claim on behalf of the other members of the community. This is provided for under Order 4 rule 4 of the Civil Procedure Rules 2010 which relates to representative suits. Complainants can have access to legal aid. In Kenya, Kituo Cha Sheria, FIDA and MUHURI are examples of organizations that offer legal aid. It is not possible to predict how long the Court will take to make a determination on a dispute as this will depend on the complexity of the matter, the number of witnesses involved amongst other things. Generally, the following procedure applies: <ol style="list-style-type: none"> the claimant files his/her claim and serves the other party; the other party files their defence within fourteen (14) days of service of the claim and then they serve the defence on the claimant; the claimant has an opportunity to file a reply to the defence within fourteen (14) days of service of the defence; parties then conduct a pre-trial conference to confirm that all procedures have been complied with; the matter then proceeds for hearing and this is subject to adjournments whenever necessary; once the hearing of the matter is completed, parties file their submissions which can be oral or written; and

	<p>vii. the Court will then make a determination and render its judgment accordingly.</p> <p>Article 159(2)(c) provides that in exercising judicial authority, the courts and tribunals shall be guided by alternative forms of dispute resolution including traditional dispute resolution mechanisms which shall subject to Article 159(3) not contravene the Bill of Rights, not be repugnant to justice and morality or results in outcomes that are repugnant to justice or morality and not inconsistent with the Constitution or any written law.</p>
Options for tenure arrangements (and their applicable laws/governing arrangements)	<p>Freehold: Section 5(a) of the Land Act provides for a freehold tenure</p> <p>Further section 24(a) of the Land Registration Act provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land.</p>
	<p>Leasehold (by Kenyan citizen): Section 5(b) of the Land Act provides for a leasehold tenure</p> <p>Also, section 24(b) of the Land Registration Act provides that the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease</p>
	<p>Leasehold (by foreigner): Article 65(1) of the Constitution provides that a person who is not a citizen may hold land on the basis of leasehold tenure only and for a term not exceeding ninety-nine years.</p>

5.3 PUBLIC LAND

	PUBLIC LAND (per Article 62 of the Constitution)
Key laws applicable	<p>Land Act (Act No.6 of 2012) This is an Act of Parliament enacted to revise, consolidate and rationalize land laws, to provide for the sustainable administration and management of land and land-based resources, and for connected purposes.</p> <p>Land Registration Act (Act No.3 of 2012) This is an Act of Parliament enacted to revise, consolidate and rationalize the registration of titles to land, to give effect to the principles and objects of devolved government in land registration, and for connected purposes.</p> <p>Land Control Act 1967 (revised 2010) This is an Act of Parliament enacted to provide for controlling transactions in agricultural land.</p> <p>National Land Commission Act (Act No.5 of 2012) This is an Act of Parliament to make further provision as to the functions and powers of the National Land Commission, qualifications and procedures for appointments to the Commission, to give effect to the objects and principles of devolved government in land management and administration and for connected purposes. Note: the National Land Commission can determine changes to land ownership and rights over land.</p> <p>Environmental Management and Coordination Act 1999/Revised 2012. This is an Act of Parliament to provide for the establishment of an appropriate legal an institutional framework for the management of the environment and for matters connected therewith. By virtue of Section 44 "The Authority shall, in consultation with the relevant lead agencies, develop, issue and implement regulations, procedures, guidelines and measures for the sustainable use of hill sides, hill tops, mountain areas and forests and such regulations, guidelines, procedures and measures shall control the harvesting of forests and any natural resources located in or on a hill side, hill top or mountain area so as to protect water catchment areas, prevent soil erosion and regulate human settlement. All public land situated on hill sides, hill tops, forests, mountains shall by virtue of this section be governed by the <i>Environmental Management and Coordination Act</i>.</p> <p>Forests Act 2005/Revised 2012. Section 2 provides that this Act shall apply to all forests and woodlands on State and local authority land.</p> <p>Wildlife (Conservation and Management) Act (Cap 376). This is an Act of Parliament to consolidate and amend the law relating to the protection, conservation and management of wildlife in Kenya and for purposes connected therewith and incidental thereto.</p>
Administrative process for securing land rights	<p>Land Act Land Registration Act Forests Act Wildlife (Conservation and Management) Act</p>

Governing Institutions / authorities	<p><i>National Land Commission (National Land Commission Act)</i></p> <ul style="list-style-type: none"> - Can allocate public land to private persons - Manages compulsory acquisition <p><i>Kenya Forest Service (Forests Act)</i> - manage all State forests under section 5(b) of the Act</p> <p><i>Kenya Wildlife Service</i> - manage National Parks and National Reserves under section 3A(c) of the <i>Wildlife (Conservation and Management) Act (Cap 376)</i></p>
Dispute resolution	Environment and Land Court
Options for tenure arrangements (and their applicable laws/governing arrangements)	<p>The National Land Commission will decide the mode of land holding (whether it shall be freehold or leasehold).</p> <ul style="list-style-type: none"> • The National Land Commission must administer public land. • Article 67(2)(a) of the Constitution establishes that the National Land Commission is to manage public land on behalf of the national and county governments. • This is corroborated by section 5(1)(a) of the <i>National Land Commission Act</i>.

5.4 COMMUNITY LAND

	COMMUNITY LAND (per Article 63 of the Constitution 2010)
Key laws applicable	<p>Under Article 63(5) of the Constitution (2010), Parliament is required to enact legislation to govern Community Land within five (5) years of promulgation of the Constitution (being 2015). The relevant legislation to govern Community land is yet to be enacted and in the meantime, the following laws shall be applicable:</p> <ul style="list-style-type: none"> • <i>Land Act (Act No.6 of 2012)</i> • <i>Land Registration Act (Act No.3 of 2012)</i> • <i>Land Control Act 1967 revised 2010</i> • <i>National Land Commission Act (Act No. 5 of 2012)</i> • <i>Trust Lands Act (Chapter 288/Revised 2009)</i> This is an Act of Parliament to make provision for Trust land • <i>Land (Group Representatives) Act (Chapter 28/Revised 2012)</i>. This is an Act of Parliament to provide for the incorporation of representatives of groups who have been recorded as owners of land under the Land Adjudication Act, and for connected purposes. • <i>Land Adjudication Act (Chapter 284/revised 2010)</i>. This is an Act of Parliament to provide for the ascertainment and recording of rights and interests in Trust land, and for purposes connected therewith. It governs Trust Land • <i>Land Consolidation Act (Chapter 283/revised 2012)</i>. This is an Act of Parliament to provide for the ascertainment of rights and interests in, and for the consolidation of, land in the special areas, for the registration of title to, and of transactions and devolutions affecting, such land and other land in the special areas and for purposes connected therewith. It governs Trust Land. • <i>Environmental Management and Coordination Act (Act No.8 of 1999/Revised 2012)</i>. Under Section 43 “The Minister may, by notice in the Gazette, declare the traditional interests of local communities customarily resident within or around a forest to be protected interests.”
Administrative process for securing land rights	<p>Under Article 63(5) of the Constitution (2010), Parliament is required to enact legislation to govern Community Land within five (5) years of promulgation of the Constitution (being 2015). The relevant legislation to govern Community land is yet to be enacted and in the meantime, the following laws shall be applicable:</p> <ul style="list-style-type: none"> • <i>National Land Commission Act</i> • <i>Trust Lands Act</i> • <i>Land (Group Representatives) Act</i> • <i>Land Adjudication Act (for Trust Land)</i> • <i>Land Consolidation Act (for Trust Land)</i>

Governing Institutions / authorities (and their governing law/regulations)	National Land Commission
Dispute resolution	<p>Environment and Land Court</p> <p>For land held by Group Representatives, Magistrates Courts have jurisdiction by virtue of the <i>Land (Group Representatives) Act</i></p> <ul style="list-style-type: none"> • Section 10(1) provides that if it appears to the Registrar of Group Representatives that there has been a dispute among the officers or members of a group so that he is not satisfied as to who are the officers of the group, he may in writing require the officers of the group to produce to him evidence of either <ul style="list-style-type: none"> (a) the settlement of the dispute and the proper appointment of officers of the group; or (b) the institution of proceedings for the settlement of the dispute and for a declaration as to who are the officers of the group, and where he does so the officers shall provide evidence accordingly within the time specified and it shall be signed by at least three of the officers. • Section 10(2) A District Magistrate's Court shall have jurisdiction to settle disputes and make declarations for the purposes of proceedings instituted under subsection (1) (b) of this section.
Options for tenure arrangements (and their applicable laws/governing arrangements)	Under Section 5(2)(e) of the <i>National Land Commission Act</i> , the National Land Commission shall manage and administer all unregistered trust land and unregistered community land on behalf of the county government.

5.5 FOREST LAND

	FOREST LAND
Key laws applicable	<p><i>Forests Act No. 7 of 2005/Revised 2012</i></p> <ul style="list-style-type: none"> • This is an Act of Parliament to provide for the establishment, development and sustainable management, including conservation and rational utilization of forest resources for the socio-economic development of the country. • Section 2 of the Act provides that the Act shall apply to all forests and woodlands on State, local authority and private land. <p><i>Environmental Management and Coordination Act No.8 of 1999/Revised 2012</i></p> <ul style="list-style-type: none"> • Section 43: “The Minister may, by notice in the Gazette, declare the traditional interests of local communities customarily resident within or around a forest to be protected interests.” • Section 44: provides that the National Environment Management Authority shall, in consultation with the relevant lead agencies, develop, issue and implement regulations, procedures, guidelines and measures for the sustainable use of forests and such regulations, guidelines, procedures and measures shall control the harvesting of forests and any natural resources located in or on a forest so as to protect water catchment areas, prevent soil erosion and regulate human settlement. <p><i>Wildlife (Conservation and Management) Act 2013/Revised 2009</i> This is an Act of Parliament to consolidate and amend the law relating to the protection, conservation and management of wildlife in Kenya. Section 3(1) of the Act establishes the Kenya Wildlife Service whose function is to manage national parks and national reserves, formulate policies regarding the conservation, management and utilization of all types of flora.</p>
Administrative process for securing land rights	<p>Government forests are part of public land pursuant to Article 62(1)(g) of the Constitution. Under Article 62(3) of the Constitution, public land shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.</p> <p>Article 67 of the Constitution establishes the National Land Commission and one of its functions under Article 67(2)(a) of the Constitution is to manage public land on behalf of the national and county governments. Further, under section 5(1)(a) of the National Land Commission Act one of the functions of the National Land Commission is to manage public land on behalf of the national and county governments</p> <p>Section 4 of the <i>Forests Act</i> establishes the Kenya Forest Service whose function under section 5(a) is to manage all State forests</p> <p><i>Wildlife (Conservation and Management) Act:</i> Section 3(1) of the Act establishes the Kenya Wildlife Service whose function under section 3A (c) is to manage National Parks and National Reserves.</p>

Governing Institutions / authorities (and their governing law/regulations)	<p>Ministry of Environment, Water and Natural Resources</p> <ul style="list-style-type: none"> Kenya Forest Service this is a State Corporation established under section 4 of the <i>Forests Act</i> Kenya Wildlife Service (manage National Parks and National Reserves) formulate policies regarding the conservation, management and utilisation of all types of flora <p>Ministry of Land, Housing and Urban Development</p> <ul style="list-style-type: none"> National Land Commission
Dispute resolution	Environment and Land Court
Options for tenure arrangements (and their applicable laws/governing arrangements)	<p>Forest conservancy: Section 13 of the <i>Forests Act</i> provides that the Board of the Kenya Forest Service shall establish forest conservancy areas for the proper and efficient management of forests and may divide such conservancy areas into forest divisions and stations. Section 13(2) of the Act provides for the establishment of a forest conservation committee in respect of each conservancy area and the committee shall work with the Board of the Kenya Forest Service in managing forest conservancy areas.</p> <p>Leasehold/Freehold: Conversion of land from one form of land tenure to another is the preserve of the National Land Commission pursuant to section 9(5)(c) of the <i>Land Act</i>.</p>

ANNEX 6

Kenyan business structures presented in tables

- 6.1** **Comparative table of business structures**
(Company limited by guarantee, Bare Trust, Society, Non-governmental organisation)
- 6.2** **Company limited by guarantee**
- 6.3** **Bare Trust**
- 6.4** **Society**
- 6.5** **Non-governmental organisation**
- 6.6** **Joint Venture**

6.1 COMPARATIVE TABLE OF KENYAN BUSINESS STRUCTURES

	Company limited by guarantee	Bare Trust	Society	Non-governmental organisation
Governing legislation	Companies Act (Cap 486)	Trustees Act (Cap 167) Trustees (Perpetual Succession) Act (Cap 164)	Societies Act (Cap.108)	Formerly governed by the Non-Governmental Organizations Co-Ordination Act, 1990 Now governed by the Public Benefit Organisation Act Act No. 18 of 2013
Overview	In the event of a wind up, the liability of members is limited to the amount that members have guaranteed to contribute to the assets of the company. Can be incorporated either with or without share capital. However, in most cases companies limited by guarantees are incorporated without share capital.	Also known as a simple trust. Each beneficiary has an immediate and absolute right to both capital and income. Beneficiaries also have the right to actual possession of trust property.	A flexible method of constituting an association for charitable purposes.	A private voluntary grouping of individuals or associations not operated for profit or for other commercial purposes. Have organized themselves nationally or internationally for the public benefit, and the promotion of social welfare, charity or research in areas including health, relief, agriculture, education, industry and the supply of amenities and services.
When should this structure be used?	Appropriate for professional, trade and research associations, and clubs supported by annual subscription. Can also be used for registration of charitable and not for profit organizations.	Can be used in any situation where a trust is required.	Best suited for a charity that is initiated by a group of ten or more people rather than a single founder and that relies on subscriptions, voluntary contributions and fundraising efforts rather than on substantial endowments. In Kenya, the type of organizations that are registered	Incorporated for public benefit and to promote social welfare, health, relief, agriculture, education, industry and the supply of amenities and services.

	Company limited by guarantee	Bare Trust	Society	Non-governmental organisation
			as societies include political parties, self-help groups, neighborhood associations and a wide variety of charitable associations.	
Members and officers	<p>No maximum number of members.</p> <p>Minimum number of members is two (2) for a private company or seven (7) for a public company.</p> <p>No restrictions on non-Kenyan citizens.</p>	<p>No minimum or maximum number of members prescribed by law but this is set out in the trust deed.</p> <p>Trustees may be individuals (whether local or foreigners), or a body corporate in the nature of a trust corporation, or a mixture of both.</p> <p>Under Section 36 of the Trustee Act, in the case of settlements and dispositions on trust for sale of land the number of trustees shall not exceed four, and, where more than four persons are named as trustees, the four first named (who are able and willing to act) shall alone be the trustees, and the other persons named shall not be trustees unless appointed on the occurrence of a vacancy. This section only applies to settlements and dispositions of land, and the restrictions imposed on the number of trustees do not apply - (a) in the case of land vested in</p>	<p>By its definition, the minimum number of members is ten.</p> <p>No restrictions on non-Kenyan citizens.</p>	No restrictions on non-Kenyan citizens

	Company limited by guarantee	Bare Trust	Society	Non-governmental organisation
		trustees for charitable, ecclesiastical or public purposes; or (b) Where the net proceeds of the sale of the land are held for those purposes.		
Foreign investment restrictions	No foreign investment restrictions	No foreign investment restrictions	No foreign investment restrictions	No foreign investment restrictions
Initial steps to establishment	<p>Members propose a name and the objects of the Company.</p> <p>The following details must be provided upon Registration:</p> <ol style="list-style-type: none"> 1. Address, nationality, and occupation of each proposed director; 2. Address and CPS number of the Company Secretary; and 3. Address of the proposed Registered Office, including its postal and physical address (plot and section number, and road name). <p>Suitable Memorandum and Articles to be prepared and filed.</p> <p>The capital that each member undertakes to contribute must be stated in the Memorandum.</p> <p>The Memorandum and Articles must be stamped and registered</p>	<p>Trustees prepare a Trust Deed which defines:</p> <ul style="list-style-type: none"> - the objects of the Trust; - the Name of the Trust; - the powers of the trustees; - the powers to change and appoint additional trustees; - resignation and removal of trustees; and - meeting of trustees. <p>Once the trust deed has been approved by the trustees, the deed is signed and thereafter stamped.</p> <p>After stamping, the trust deed is presented for registration at the Registry of Documents</p> <p>Upon Registration, a certified copy of the trust deed and a petition for incorporation is prepared in the prescribed form then lodged with the Cabinet Secretary for land for</p>	<p>A society may be classified as 'registered' or 'exempt'.</p> <p>Societies are exempt when they do not have to comply with certain requirements, such as rendering accounts and annual returns to the Registrar of Societies.</p> <p>Applications for registration, or for exemption from registration, are made to the Registrar of Societies. Applications must be lodged together with a copy of the society's (proposed) constitution and rules.</p> <p>Once a society has been registered or is exempt from registration, the Registrar shall issue a certificate of registration or exemption from registration to the society, in the prescribed form.</p>	<p>Applications for registration must be submitted to the executive director of the Non-Governmental Organizations Co-ordination Board in the prescribed form.</p> <p>An application for registration is made by the chief officer of the proposed organization and must specify:</p> <ol style="list-style-type: none"> (a) other offices of the organization; (b) the head office and postal address of the organization; (c) the sectors of the proposed operations; (d) the districts, divisions and locations of the proposed activities; (e) the proposed average annual budgets; (f) the duration of the activities; (g) all sources of funding; (h) the national and international affiliation and the

	Company limited by guarantee	Bare Trust	Society	Non-governmental organisation
	with the Registrar of Companies.	incorporation of the trust. Please note that this process is very extensive.		certificates of incorporation. Upon registration a certificate of registration is issued to the non-governmental organization.
Fees	For incorporation K.Shs.75,000/=	For incorporation K.Shs.50,000/=	For incorporation K.Shs.50,000/=	For incorporation K.Shs.50,000/=
Taxes applicable	Value Added Tax (where applicable)	Value Added Tax (where applicable) Income Tax: The Trust may be exempted from income tax pursuant to paragraph 10 of the <i>First Schedule to the Income Tax Act</i> (Cap 470) if the trust is established solely for the purposes of the relief of poverty or distress of the public, or for the advancement of religion or education The transfer of property into a charitable organisation is only exempt from stamp duty if the sale or transfer is for the purposes of construction or expansion of educational institutions.	Income Tax Value Added Tax (where applicable)	Income Tax (subject to the exemptions under Paragraph 10 of the first schedule of the <i>Income Tax Act</i>) Section 138 (1) of <i>The Customs and Excise Act</i> (Cap 472) allows the Finance Minister to remit, in whole or in part, duty payable by any person on certain goods, aircraft, vessels or vehicles imported by that person, if the Minister is satisfied that: <ul style="list-style-type: none"> • it is in the public interest to do so • if such goods are donated or purchased for donation by any person to non-profit making organizations or institutions approved by the Government, for their official use or for free distribution to poor and needy persons, or • for use in medical treatment, educational, religious or

	Company limited by guarantee	Bare Trust	Society	Non-governmental organisation
				<p>rehabilitation work.</p> <p>In Sections 29 and 30 of the <i>Non-Governmental Organizations Co-Ordination Act</i> (1990) a non-governmental organisation may be entitled to various tax exemptions (upon making the necessary applications and procuring the necessary consents) relating to:</p> <ol style="list-style-type: none"> duty in respect of imported goods or equipment; value added tax on goods and services required to meet the Organization's objectives; value added tax on income generating activities; and Income tax for expatriate employees.
Reporting and compliance	<p>If the company has share capital, it must file an annual return to the Companies Registry like any other limited liability company.</p> <p>If the company has no share capital, it must file an annual return stating the address of the registered office.</p> <p>Particulars of the total amount of the company's indebtedness in respect of all mortgages and</p>	Subject to less onerous accounting and reporting requirements than companies.	<p>Notice in the prescribed form of any change of the situation of the office, or of the postal address, must be given to the Registrar of Societies within 14 days of such change.</p> <p>Every registered society shall keep a register of its members in such form as the Registrar of Societies may specify, containing the:</p> <ul style="list-style-type: none"> name and address of each member, 	The Non-Governmental Organisations Co-ordination Board shall keep books of records of the non-governmental organisation's income, expenditure, assets and liabilities.

	Company limited by guarantee	Bare Trust	Society	Non-governmental organisation
	charges are required to be registered with the Registrar of Companies		<ul style="list-style-type: none"> the date of their admission to membership, and the date on which he ceases to be a member. <p>Every registered society shall annually furnish to the Registrar of Societies, on or before the prescribed date, such returns, accounts and other documents as may be prescribed.</p>	
Liability of members	<p>Members have limited liability. In the event of a company being wound up, a company's members are only liable for the start-up capital they invested.</p> <p>A member continue to be held liable for a period of one year after their membership ceases.</p>	<p>Trustees are personally liable for all contractual relationship that arise with third parties.</p> <p>Trustees are also personally liable for the actions of employees which were done in the course of their employment and within the scope of their authority.</p> <p>Third parties have no direct right to payment out of the trust assets.</p> <p>Trustees may, however, be entitled to an indemnity out of the trust fund for liabilities properly incurred.</p> <p>Further, a trustee's personal liability may be limited or exempted by creating express provisions in the trust</p>	<p>Once the society is registered, all current and subsequent members are collectively considered to be a body corporate under the name of the society.</p> <p>The incorporated society takes on a separate legal identity distinct from its members.</p>	Body corporate capable of suing and being sued in its corporate name.

	Company limited by guarantee	Bare Trust	Society	Non-governmental organisation
		<p>instrument.</p> <p>Trustees of a charity may also apply pursuant to the provisions of the <i>Trustees (Perpetual Succession) Act</i> for a certificate of incorporation of the trustees as a corporate body. If this certificate is granted to the trustees, the trustees shall thereupon become a body corporate by the name described in that certificate, and shall have perpetual succession and a common seal, and power to sue and be sued in their corporate name.</p> <p>Therefore, the combination of registering a trust under the <i>Trustees (Perpetual Succession) Act</i> and utilising corporate trustees may significantly reduce the risk associated with exposing individual trustees to unlimited personal liability.</p> <p>Trustees may be liable for breach of trust if, for example, they act with negligence or in excess of the duties imposed on them by the trust.</p> <p>Where several trustees are implicated in a breach of trust, all such trustees will be jointly</p>		

	Company limited by guarantee	Bare Trust	Society	Non-governmental organisation
		<p>and severally liable to the person entitled to sue.</p> <p>However, for those trustees not implicated in such breach, they can benefit from the statutory liability exemption provisions set out in Section 32 of the <i>Trustee Act</i> (Cap 167) which states that:</p> <p>“A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee.”</p>		
Jurisdiction	National	National	National	National
Disposal of assets on winding up	After a winding-up order has been made, the liquidator takes into his custody or under his control all the property to which the company is or appears to be entitled.	No procedure for winding up is provided. As such, the trust deed should set out how the assets of the trust will be disposed in the event of it being wound up.	Upon winding up, the court appoints a Receiver who shall then be responsible for the winding up of the assets of the society.	No procedure for winding up is provided. As such, the procedure for disposal of assets should be set out in the constitutional documents.
Restrictions on the activities of the entity, i.e. commercial activities, land holding, etc.	Under Article 65 of the Constitution, a person who is not a citizen may hold land on the basis of leasehold tenure for a term not exceeding ninety-	Under Article 65 of the Constitution, a person who is not a citizen may hold land on the basis of leasehold tenure for a term not exceeding ninety-	Under Article 65 of the Constitution, a person who is not a citizen may hold land on the basis of leasehold tenure for a term not exceeding ninety-	Under Article 65 of the Constitution, a person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease,

	Company limited by guarantee	Bare Trust	Society	Non-governmental organisation
	<p>nine years.</p> <p>A body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens.</p> <p>This means land held by a company which is not wholly owned by one or more citizens can only be held for a leasehold term of 99 years.</p> <p>Where a transaction involves the sale, lease or transfer of agricultural land in which the consent of the Land Control Board is required, then under the <i>Land Control Act</i>, the Land Control Board will not grant its consent if the transaction is to a non-Kenyan citizen, or a private company, or co-operative society, all of whose members are non-citizens of Kenya.</p> <p>Any dealing in land is subject to the user of that land which is set out in the document of title in respect to that land. This is another form of restriction in land holding (a 'user of land' is the specific 'use' to which that land may be applied, eg. industrial, residential,</p>	<p>nine years.</p> <p>A body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens.</p> <p>Property held in trust shall be regarded as being held by a citizen only if all of the beneficial interest of the trust is held by Kenyan citizens.</p> <p>This means that land held by a trust which is not wholly owned by one or more citizens can only be held for a leasehold term of 99 years.</p> <p>Where a transaction involves the sale, lease or transfer of agricultural land in which the consent of the Land Control Board is required, then under the <i>Land Control Act</i>, the Land Control Board will not grant its consent if the transaction is to a non-Kenyan citizen, or a private company, or co-operative society, all of whose members are non-citizens of Kenya.</p> <p>Any dealing in land is subject to the user of that land which is set out in the document of title in</p>	<p>nine years.</p> <p>A body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens.</p> <p>This means that land held by a society which is not wholly owned by one or more citizens can only be held for a leasehold term of 99 years.</p> <p>Where a transaction involves the sale, lease or transfer of agricultural land in which the consent of the Land Control Board is required, then under the <i>Land Control Act</i>, the Land Control Board will not grant its consent if the transaction is to a non-Kenyan citizen, or a private company, or co-operative society, all of whose members are non-citizens of Kenya.</p> <p>Any dealing in land is subject to the user of that land which is set out in the document of title in respect to that land (a 'user of land' is the specific 'use' to which that land may be applied, eg. industrial, residential, commercial, etc. The user is normally stated on the</p>	<p>however granted, shall not exceed ninety-nine years.</p> <p>A body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens.</p> <p>This means that land held by an NGO which is not wholly owned by one or more citizens can only be held for a leasehold term of 99 years.</p> <p>Where a transaction involves the sale, lease or transfer of agricultural land in which the consent of the Land Control Board is required, then under the <i>Land Control Act</i>, the Land Control Board will not grant its consent if the transaction is to a non-Kenyan citizen, or a private company, or co-operative society, all of whose members are non-citizens of Kenya.</p> <p>Any dealing in land is subject to the user of that land which is set out in the document of title in respect to that land. This is another form of restriction in land holding.</p>

	Company limited by guarantee	Bare Trust	Society	Non-governmental organisation
	commercial, etc. The user is normally stated on the document of title to that land).	respect to that land (a 'user of land' is the specific 'use' to which that land may be applied, eg. industrial, residential, commercial, etc. The user is normally stated on the document of title to that land) This is another form of restriction in land holding.	document of title to that land). This is another form of restriction in land holding.	

6.2 COMPANY LIMITED BY GUARANTEE

	Company limited by guarantee
Governing legislation	Companies Act (Cap 486)
Overview	<ul style="list-style-type: none"> • In the event of a wind up, the liability of members is limited to the amount that members have guaranteed to contribute to the assets of the company • Can be incorporated either with or without share capital. However, in most cases companies limited by guarantees are incorporated without share capital.
When should this structure be used?	Appropriate for professional, trade and research association, and clubs supported by annual subscription. Can also be used for registration or charitable and not-for-profit organizations.
Members and officers	<ul style="list-style-type: none"> • No maximum number of members provided for • Minimum number of members is two (2) for a private company or seven (7) for a public company • No restrictions on non-Kenyan citizens
Foreign investment restrictions	No foreign investment restrictions
Initial steps to establishment	<ul style="list-style-type: none"> • Members propose a name and objects of the Company • Provide details of the addresses, nationality and occupations of the persons proposed to be the directors of the company • Details of the person who is to be the company secretary • Details of the registered office of the company, that is its postal and physical address (plot and section number and road name) • Suitable Memorandum and Articles be prepared and filed • The amount of money that each member undertakes to contribute must be stated in the Memorandum. • The Memorandum and Articles must be stamped and registered with the Registrar of Companies.
Fees	For incorporation K.Shs.75,000/=
Taxes applicable	Value Added Tax (where applicable)

Reporting and compliance	<p>If the company has share capital, it must file an annual return like any other limited liability company If it has no share capital, it must file an annual return stating the address of the registered office.</p> <ul style="list-style-type: none"> • If the register of members is not kept at the registered office, the address of the place where it is kept. • The particulars of the directors and the secretary, which are required to be kept in the register of directors and secretaries. • Particulars of the total amount of the company's indebtedness in respect of all mortgages and charges required to be registered with the Registrar of Companies
Liability of members	<p>Members have limited liability: only liable to the specified amount which a member undertakes to contribute towards the assets of the company in the event of its being wound up.</p> <p>Liability extends to one year after a member ceases to be one.</p>
Jurisdiction	National
Disposal of assets on winding up	<p>After a winding-up order has been made the liquidator takes into his custody or under his control all the property to which the company is or appears to be entitled.</p> <p>The liquidator may, after giving such indemnity, if any, as the court may direct, bring or defend in his official name action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company .</p>
Restrictions on the activities of the entity, i.e. commercial activities, land holding, etc.	<p>Under Article 65 of the Constitution, a person who is not a citizen may hold land on the basis of leasehold tenure for a term not exceeding ninety-nine years.</p> <p>A body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens. This means that land held by a company which is not wholly owned by one or more citizens can only be held for a leasehold term of 99 years. Under the Land Control Act, where a transaction involves the sale, lease or transfer of agricultural land in which the consent of the relevant Land Control Board is required, the Land Control Board will not grant its consent if such sale, lease or transfer is to a non-Kenyan citizen or a private company or co-operative society all of whose members are not citizens of Kenya</p> <p>Any dealing in land is subject to the user of that land which is set out in the document of title in respect to that land. This is another form of restriction in land holding.</p>

Formation of a Limited Liability Company

Companies are registered under the Companies Act Chapter 486, Laws of Kenya:

1. **Reservation of Name.**¹¹⁷⁵ The lawyer requests the Registrar of Companies to reserve the three names notified to him by letter. This prompts the Registrar to conduct a search to confirm the names' availability and desirability.
2. **Preparation of Memorandum & Articles of Association and requisite forms.**¹¹⁷⁶ The lawyer then proceeds to prepare the Memorandum & Articles of Association. They incorporate the information procured during the client meeting. The Memorandum and Articles are the constitution of the company and lay out its objects, its management structure and moderates the relationship between shareholders, directors and third parties. The constitution documents are prepared along with the requisite registration forms.
3. The constitution and the registration forms are then signed by the founders and the designated company secretary.¹¹⁷⁷
4. They are then forwarded to the collector of stamp duty for the assessment of stamp duty (tax) payable and thereafter the stamp duty is paid. This is a process that takes 3 to 5 working days.
5. Once the stamp duty payment receipt is back, the constitution and all the registration¹¹⁷⁸ forms are submitted to the Registrar of Companies for the incorporation of the company.
6. In the case of a Company Limited by Guarantee, the National Intelligence Service then undertakes a security check on all the subscribers to the Memorandum and Articles of Association.
7. Once the documents are lodged, the certificate of incorporation is prepared and issued within fourteen (14) days. In the case of a Company Limited by Guarantee, the certificate of incorporation¹¹⁷⁹ is released after a period of between 6 to 12 months owing to the security checks.

¹¹⁷⁵ Section 19(1)(a) of the Companies Act.

¹¹⁷⁶ Section 4 (1), 5, 9, 10, 11, 12 Companies Act.

¹¹⁷⁷ Section 12 Companies Act.

¹¹⁷⁸ Section 15 Companies Act.

¹¹⁷⁹ Section 16(1) Companies Act.

8. If requested to do so, the lawyer who is engaged would proceed to procure for the Company a Personal Identification Number (PIN) from the Kenya Revenue Authority for taxation purposes. In addition the lawyer may also procure a company seal.

There are two points to note:

- A Company Limited by Guarantee means that the member of the company have agreed to an amount that will each contribute toward the debts of the company on winding up. While a Company Limited by shares has the liability of the members limited to the extent to the extent of the share capital not paid up.
- The incorporation of the Company Limited by Guarantee involves a security check on the members that prescribe to the Memorandum. This prolongs the registration process.

A successful completion of all these steps establishes¹¹⁸⁰ the company as a body corporate with limited liability. The liability is limited either to the extent to the uncalled up amount on the shares held by a member where the company is limited shares while it is limited to the amount guaranteed by a clause in the Memorandum of Association. The company also enjoys perpetual succession and the power to hold land.

¹¹⁸⁰ Section 16(2) Companies Act.

6.3 BARE TRUST

	Bare Trust
Governing legislation	Trustees Act (Cap 167) Trustees (Perpetual Succession) Act (Cap 164)
Overview	Also known as a simple trust Each beneficiary has an immediate and absolute right to both capital and income Beneficiaries have the right to take actual possession of trust property
When should this structure be used?	Can be used in any situation where a trust is required
Members and officers	No minimum or maximum number of members prescribed by law but this is set out in the trust deed Trustees may be individuals, both local and foreigners, or a body corporate in the nature of a trust corporation, or a mixture of both. Under section 36 of the Trustee Act, in the case of settlements and dispositions on trust for sale of land the number of trustees shall not exceed four, and, where more than four persons are named as trustees, the four first named (who are able and willing to act) shall alone be the trustees, and the other persons named shall not be trustees unless appointed on the occurrence of a vacancy. This section only applies to settlements and dispositions of land, and the restrictions imposed on the number of trustees do not apply - (a) in the case of land vested in trustees for charitable, ecclesiastical or public purposes; or (b) where the net proceeds of the sale of the land are held for those purposes.
Foreign investment restrictions	No foreign investment restrictions
Initial steps to establishment	Trustees prepare a Trust Deed which defines: <ul style="list-style-type: none"> • the objects of the Trust; • the Name of the Trust; • the powers of the trustees; • the powers to change and appoint additional trustees; • resignation and removal of trustees; and • meeting of trustees. <p>Once the trust deed has been approved by the trustees, the deed is signed and thereafter stamped.</p> <p>After stamping the trust deed is presented for registration at the Registry of Documents.</p>

	<p>After registration under the Registry of Documents, a certified copy of the trust deed and a petition for incorporation is prepared in the prescribed form then lodged with the Minister responsible for Land matters for incorporation of the trust.</p> <p>Please note that this is a very long process</p>
Fees	For incorporation K.Shs.50,000/=
Taxes applicable	<p>Value Added Tax (where applicable)</p> <p>Income Tax</p> <p>The Trust may be exempted from income tax pursuant to paragraph 10 of the First Schedule to the Income Tax Act (Cap 470) if the trust is established solely for the purposes of the relief of poverty or distress of the public, or for the advancement of religion or education.</p> <p>The transfer of property into a charitable organisation would be exempted from payment of stamp duty if it is for the sale or transfer of land for the construction or expansion of educational institutions.</p>
Reporting and compliance	Subject to less onerous accounting and reporting requirements than companies
Liability of members	<ul style="list-style-type: none"> • Trustees are personally liable to third parties for a contractual relationship. • Third parties would not have a direct right to payment out of the trust assets. • Trustees are also liable personally for the acts of employees done in the course of their employment and within the scope of their authority. • Trustees may, however, be entitled to an indemnity out of the trust fund for liabilities properly incurred. • Further, a Trustee's personal liability may be limited or exempted by creating express provisions in the trust instrument. • Trustees of a charity may also apply pursuant to the provisions of the Trustees (Perpetual Succession) Act for a certificate of incorporation of the trustees as a corporate body. • If such a certificate is granted to the trustees the trustees shall thereupon become a body corporate by the name described in that certificate, and shall have perpetual succession and a common seal, and power to sue and be sued in their corporate name. • Therefore, the combination of registering a trust under the Trustees (Perpetual Succession) Act and utilising corporate trustees may significantly reduce the risk associated with exposing individual trustees to unlimited personal liability. • Trustees may be liable for breach of trust if, for example, they act with reference to trust property in contravention of the duties imposed on them by the trust, in excess of those duties or negligently. • Where several trustees are implicated in a breach of trust, all such trustees will be jointly and severally liable to the person entitled to sue in respect thereof. • However, for those trustees not implicated in such breach, they can benefit from the statutory liability exemption provisions set out in Section 32 of the Trustee Act (Cap 167) which states that: "A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts,

	receipts, neglects or defaults, and not for those of any other trustee”.
Jurisdiction	National
Disposal of assets on winding up	No procedure for winding up is provided. As such the trust deed should set out how the assets of the trust will be disposed in the event of it being wound up.
Restrictions on the activities of the entity, i.e. commercial activities, land holding, etc.	<p>Under Article 65 of the Constitution, a person who is not a citizen may hold land on the basis of leasehold tenure for a term not exceeding ninety-nine years.</p> <p>A body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens.</p> <p>Property held in trust shall be regarded as being held by a citizen only if all of the beneficial interest of the trust is held by persons who are citizens. This means that land held by a trust which is not wholly owned by one or more citizens can only be held for a leasehold term of 99 years.</p> <p>Under the Land Control Act, where a transaction involves the sale, lease or transfer of agricultural land in which the consent of the relevant Land Control Board is required, the Land Control Board will not grant its consent if such sale, lease or transfer is to a non-Kenyan citizen or a private company or co-operative society all of whose members are not citizens of Kenya.</p> <p>Any dealing in land is subject to the user of that land which is set out in the document of title in respect to that land.</p>

6.4 SOCIETY

	Society
Governing legislation	Societies Act (Cap.108)
Overview	It is a flexible method of constituting an association for charitable purposes.
When should this structure be used?	<p>Best suited for a charity that is initiated by a group of ten or more people rather than a single founder and that relies on subscriptions, voluntary contributions and fundraising efforts rather than on substantial endowments.</p> <p>In Kenya, the type of organizations that are registered as societies include political parties, self-help groups, neighborhood associations and a wide variety of charitable associations.</p>
Members and officers	<p>By its definition, the minimum number of members is ten.</p> <p>No restrictions on non-Kenyan citizens.</p>
Foreign investment restrictions	No foreign investment restrictions.
Initial steps to establishment	<ul style="list-style-type: none"> • A society may be a registered society or an exempt society. • Societies are exempt when they do not have to comply with certain requirements of societies such as rendering accounts and annual returns to the Registrar of Societies. • Applications for registration or for exemption from registration for societies are made to the Registrar of Societies together with a copy of the society's constitution and rules • Upon registering a society or exempting it from registration, the Registrar shall issue to the society a certificate of registration or exemption from registration in the prescribed form.
Fees	For incorporation K.Shs.50,000/=
Taxes applicable	<p>Income Tax</p> <p>Value Added Tax (where applicable)</p>

Reporting and compliance	<p>Notice in the prescribed form of any change of the situation of the office, or of the postal address, of a registered or exempted society must be given to the Registrar of Societies within fourteen days of such change.</p> <p>Every registered society shall keep a register of its members in such form as the Registrar of Societies may specify or as may be prescribed containing the name and address of each member, the date of his admission to membership and the date on which he ceases to be a member.</p> <p>Every registered society shall furnish annually to the Registrar of Societies, on or before the prescribed date, such returns, accounts and other documents as may be prescribed.</p>
Liability of members	<p>Once the society is registered, all current and subsequent members are collectively considered to be a body corporate under the name of the society.</p> <p>The incorporated society takes on a separate legal identity distinct from its members.</p>
Jurisdiction	National
Disposal of assets on winding up	Upon winding up, the court appoints a Receiver who shall then be responsible for the winding up of the assets of the society.
Restrictions on the activities of the entity, i.e. commercial activities, land holding, etc.	<p>Under Article 65 of the Constitution, a person who is not a citizen may hold land on the basis of leasehold tenure for a term not exceeding ninety-nine years.</p> <p>A body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens. This means that land held by a society which is not wholly owned by one or more citizens can only be held for a leasehold term of 99 years.</p> <p>Under the Land Control Act, where a transaction involves the sale, lease or transfer of agricultural land in which the consent of the relevant Land Control Board is required, the Land Control Board will not grant its consent if such sale, lease or transfer is to a non-Kenyan citizen or a private company or co-operative society all of whose members are not citizens of Kenya.</p> <p>Any dealing in land is subject to the user of that land which is set out in the document of title in respect to that land (ie. this is a form of restriction in land holding).</p>

Establishing a Common Law (non-Corporate) Trust

Trusts are common forms of association intended for both profit making and not-for-profit. Trusts are regulated under the Trustee Act Chapter 167 Law of Kenya. The law allows a lot of room for the formulator of the trust deed to set out the nitty-gritty of the trust. A trust is formed as follows:

1. Identify the name of the trust being created.
2. Identify the persons that will be the first trustees (full names and addresses).
3. Identify clearly and accurately the property that will constitute the trust funds
4. Identify clearly and accurately the people or class of persons that will be the beneficiaries of the trust fund.
5. Based on the above information, the Trust Deed (which is the constitution of the Trust) is prepared. In addition to the information in 1 – 4, the Deed should set out the following to avoid application of the default provisions of the Trustee Act:
 - a. The person who may appoint new or additional trustees and the extent of that power
 - b. The reasons for the removal of a trustee
 - c. The procedure for the amendment of the trust deed
 - d. Powers of investment and nature of investments that might be made by the trustees or their agents. Care needs to be taken to ensure that the power granted under the deed does not purport to grant power to allow investments prohibited by the Trustee Act.
 - e. Power of appointment of official of the trust
 - f. Extent of the powers of the trustees
 - g. Dissolution and winding up procedure and powers
 - h. In the case of a trust set up for charitable purposes, the trust ought be formed as an irrevocable trust

The Trustees will then be required to sign the Trust Deed which is then assessed for stamping and on the payment of a fee, it is stamped. Once this is done, the trust deed is presented for registration under the Registration of Documents Act (Cap. 285). The process of establishing a common law (non - corporate) trust ordinarily ends here.

This registration does not confer corporate status and the trustees will be liable in their individual capacity even though they may seek indemnity from the Trust.

Establishing a Common Law (Corporate) Trust

If a corporate trust is desired, then after completing the steps for a common law trust, the founders must application for incorporation under section 5 (1) of the Trustees (Perpetual Succession) Act (Cap. 164, Laws of Kenya). The objects of the trust must be limited to religious, educational, literary, scientific, social, athletic or charitable purpose and should be not-for-profit.¹¹⁸¹ The minister having regard to the extent, nature and objects and other circumstances of the trust concerned, may grant a certificate accordingly, subject to such conditions or directions generally as he thinks fit to insert in the certificate.¹¹⁸² The conditions may relate to the qualifications and number of the trustees, their tenure and avoidance of office, the mode of appointing new trustees, the custody and use of the common seal, the amount of movable or immovable property which the trustees may hold, and the purposes for which that property may be applied.¹¹⁸³

The incorporation of the trust in this manner makes the trustees a body corporate by the name described in the certificate with perpetual succession and a common seal, and power to sue and be sued in their corporate name and, subject to the conditions and directions contained in the certificate, to hold and acquire, and by instruments under the common seal to convey, transfer, assign, charge and demise any movable or immovable property.¹¹⁸⁴

¹¹⁸¹ Section 3(1) of the Trustees (Perpetual Succession) Act.

¹¹⁸² Section 3(2) of the Trustees (Perpetual Succession) Act.

¹¹⁸³ Section 3(2) of the Trustees (Perpetual Succession) Act.

¹¹⁸⁴ Section 3(3) of the Trustees (Perpetual Succession) Act.

6.5 NON-GOVERNMENTAL ORGANISATION

	Non-governmental organisation
Governing legislation	<p>Formerly governed by the Non-Governmental Organizations Co-Ordination Act, 1990.</p> <p>Now governed by the Public Benefit Organisation Act No. 18 of 2013. Commencement by notice but pursuant to the transitional provisions under the Fifth Schedule of the Act, NGOs registered under the repealed law (Non-Governmental Organizations Co-Ordination Act, 1990) are deemed to be registered under the new law and have up to 1 year to seek registration as a Public Benefit Organization under the new law.</p>
Overview	It is a private voluntary grouping of individuals or associations, not operated for profit or for other commercial purposes but which have organized themselves nationally or internationally for the benefit of the public at large and for the promotion of social welfare, development charity or research in the areas inclusive of, but not restricted to, health, relief, agriculture, education, industry and the supply of amenities and services.
When should this structure be used?	Incorporated for public benefit and to promote social welfare, health, relief, agriculture, education, industry and the supply of amenities and services.
Members and officers	No restrictions on non-Kenyan citizens.
Foreign investment restrictions	No foreign investment restrictions.
Initial steps to establishment	<p>Applications for registration must be submitted to the executive director of the Non-Governmental Organizations Co-ordination Board in the prescribed form. An application for registration is made by the chief officer of the proposed organization and it must specify -</p> <ul style="list-style-type: none"> (a) other offices of the organization; (b) the head office and postal address of the organization; (c) the sectors of the proposed operations; (d) the districts, divisions and locations of the proposed activities; (e) the proposed average annual budgets; (f) the duration of the activities; (g) all sources of funding; (h) the national and international affiliation and the certificates of incorporation <p>Upon registration a certificate of registration is issued.</p>

Fees	For incorporation K.Shs.50,000/=
Taxes applicable	<p>Income Tax (subject to the exemptions under paragraph 10 of the first schedule of the Income Tax Act)</p> <p>Section 138 (1) of The Customs and Excise Act (Cap 472) allows the Minister responsible for Finance to remit in whole or in part duty payable by any person on certain goods, aircraft, vessels or vehicles imported by that person if he is satisfied that it is in the public interest to do so if such goods are donated or purchased for donation by any person to non-profit making organizations or institutions approved by the Government, for their official use or for free distribution to poor and needy persons, or for use in medical treatment, educational, religious or rehabilitation work.</p> <p>The Non-Governmental Organizations Co-Ordination Act, 1990 states in Sections 29 and 30 of this Act that a non-governmental organisation may be entitled to various tax exemptions (upon making the necessary applications and procuring the necessary consents) relating to:</p> <ul style="list-style-type: none"> • duty in respect of imported goods or equipment; • value added tax on goods and services required to meet the Organization's objectives; • value added tax on income generating activities; and • Income tax for expatriate employees.
Reporting and compliance	Books of records of account of its income, expenditure, assets and liabilities shall be kept with the Non-Governmental Organizations Co-ordination Board.
Liability of members	Body corporate capable of suing and being sued in its corporate name
Jurisdiction	National
Disposal of assets on winding up	No procedure for winding up is provided. As such the procedure for disposal of assets should be set out in the constitutional documents
Restrictions on the activities of the entity, i.e. commercial activities, land holding, etc.	<ul style="list-style-type: none"> • Under Article 65 of the Constitution, a person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years. • A body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens. This means that land held by an NGO which is not wholly owned by one or more citizens can only be held for a leasehold term of 99 years. • Under the Land Control Act, where a transaction involves the sale, lease or transfer of agricultural land in which the consent of the relevant Land Control Board is required, the Land Control Board will not grant its consent if such sale, lease or transfer is to a non-Kenyan citizen or a private company or co-operative society all of whose members are not citizens of Kenya. • Any dealing in land is subject to the user of that land which is set out in the document of title in respect to that land.

Establishing a Non-Governmental Organisation (NGO)

A Non-Governmental Organization is registered under the Non-Governmental Organizations Co-Ordination Act, 1990. An NGO is defined under section of the Act as “a private voluntary grouping of individuals or associations, not operated for profit or for other commercial purposes but which have organized themselves nationally or internationally for the promotion of social welfare, development, charity or research through mobilization of resources”.¹¹⁸⁵ NGOs are regulated by the NGO Coordination Bureau (“the Bureau”).

There is a distinction under the Act between a National NGO and an International NGO. “National Non-Governmental Organization” is an NGO “*registered exclusively in Kenya with authority to operate within Kenya*.”¹¹⁸⁶ An International NGO is “a Non- Governmental Organization with the original incorporation in one or more countries other than Kenya, but operating within Kenya under a certificate of registration.”¹¹⁸⁷

Despite a distinction in the definition of the National NGO and an International NGO, the registration of an International and a national NGO is the same. The process is as follows:

1. Application is made for approval of the name in which the organization is to be registered.¹¹⁸⁸ The name is reserved and the applicant notifies according if the name is in the opinion of the director desirable.¹¹⁸⁹
2. The registration is undertaken by Application to the Executive of the Bureau.¹¹⁹⁰ The application is made by the chief officer. Such application must specify:

¹¹⁸⁵ Section 2 of the Non-Governmental Organizations Co-Ordination Act, 1990.

¹¹⁸⁶ Section 2 of the Non-Governmental Organizations Co-Ordination Act, 1990.

¹¹⁸⁷ Section 2 of the Non-Governmental Organizations Co-ordinations Act, 1990 .

¹¹⁸⁸ Regulation 8 of the Non-Governmental Organizations Co-ordination Regulations, 1992.

¹¹⁸⁹ Regulation 8(3) of the Non-Governmental Organizations Co-ordination Regulations, 1992.

¹¹⁹⁰ Section 10(3) of the Non-Governmental Organizations Co-Ordination Act 1990, and Regulation 9(1).

- a. Who the other officers of the organization are;
- b. The head office and postal address of the organization;
- c. The sectors of the proposed operations;
- d. The districts, divisions and locations of the proposed activities;
- e. The proposed average annual budget;
- f. The duration of the activities;
- g. All sources of funding; and
- h. The national and international affiliation and certificates of incorporation;

The application must be signed by the chief officer of the intended organization and must be accompanied by:

- (i) a copy of the minutes of the meeting of the proposed organization authorizing the filing of the application;
- (ii) a copy of the constitution of the proposed organization, specifying the Name of Non-Governmental Organization, object for which the Non-Governmental Organization is established, administrative units, custody, use and investment of the funds and property of the Non-Governmental Organization and the designation of the persons responsible for them, purpose for which the funds may be used, persons to whom membership is open, Structure and management of the Organization, quorum and meetings, financial year, manner of amending the constitution and dissolution mechanisms.
- (iii) a notification of the situation of the registered office and postal address of the proposed organization of the proposed organization.

The director may request other information as the Board may prescribe.

If the Board approves the application for registration, the Director registers the proposed organization by entering in the register of organizations the name of the organization, postal address, physical address, classification by sector and date of registration in Kenya.¹¹⁹¹ The Board then issues a certificate of registration.¹¹⁹²

Upon registration the NGO becomes:¹¹⁹³

- a. a body corporate
- b. with capacity to sue and be sued;
- c. Able to take, purchase or otherwise acquire, hold, charge or dispose of movable and immovable property
- d. enter into contracts; and
- e. do or perform all such other things or acts necessary for the proper performance of its functions under the Act, which may lawfully be done or performed by a body corporate.

The NGO will in the near future be superseded by a new legal regime and transform into a Public Benefits Organization. For the entity to survive the expected change it must re-register under the new regime. **It is important to note that the Public Benefits Organizations Act 2013 (PBO) intended to repeal the Non-Governmental Organizations Co-Ordination Act, 1990 is awaiting publication in the Kenya gazette and commencement. Once the PBO comes into force, all NGO will have to re-register or risk losing their NGO registration status. The information required to register or re-register under the PBO is not dissimilar to that under the current regime. The biggest advantage with the PBO is that tax exemptions that have to be applied for under the current regime accrue automatically.**

¹¹⁹¹ Regulation 10, Section 2 of the Non-Governmental Organizations Co-ordinations Act, 1990.

¹¹⁹¹ Regulation 10 of the Non-Governmental Organizations Co-ordination Regulations, 1992.

¹¹⁹² Section 12 (1) of the Non-Governmental Organizations Coordination Act 1990; and Regulation 11 of the Non-Governmental Organizations Coordination Regulations, 1992.

¹¹⁹³ Section 12(3) of the Non-Governmental Organizations Coordination Act 1990.

6.6 JOINT VENTURE

	JOINT VENTURES IN KENYA
Governing legislation	<ol style="list-style-type: none"> 1. <i>Companies Act</i> (Cap 486) if the parties wish to establish a separate legal entity as a vehicle for the joint venture 2. <i>Partnership Act</i> (Cap 29) if the parties wish to carry out the joint venture as partners 3. <i>Limited Liability Partnership Act</i> (Act No. 42 of 2011) if the parties wish to limit their liability in the partnership 4. <i>Law of Contract Act</i> (Cap 23)
Overview	<p>A joint venture is a commercial arrangement between two or more economically independent natural or legal persons who combine property and expertise in order to carry out a single business enterprise while maintaining a joint proprietary interest, a joint right to control and a sharing of profits and losses.</p> <p>The parties in a joint venture must agree on:</p> <ul style="list-style-type: none"> • The scope and the purpose of the joint venture • The ‘vehicle’ to be used to carry out the joint venture (eg. company, partnership) • The management of the joint venture • The division of power between the parties • The capitalisation and financing of the company including the respective contributions of the parties to the venture • The terms on which any party can transfer its share to a third party • How to deal with disputes and deadlock between the parties
When should this structure be used?	<p>A joint venture is appropriate for:</p> <ul style="list-style-type: none"> • Research and development projects • Natural resource exploration and exploitation • Engineering and construction • Production and manufacturing
Members and officers	<p>Company</p> <ul style="list-style-type: none"> • The minimum number of members is two (2) for a private company or seven (7) for a public company. • There are no restrictions on non-Kenyan citizens.

	<p>Partnership</p> <ul style="list-style-type: none"> There is no maximum number of partners for partnerships, nor any restrictions on non-Kenyan citizens. <p>Limited Liability Partnership</p> <ul style="list-style-type: none"> Section 26 of the <i>Limited Liability Partnership Act</i> provides that a limited liability partnership is required to have at least two partners. Section 27 provides that it must have at least one manager who is resident in Kenya.
Foreign investment restrictions	<p>Company, Partnership and Limited Liability Partnership</p> <p>There are no foreign investment restrictions, however:</p> <ul style="list-style-type: none"> Approval from the Kenya Investment Authority is required for new investments If the investment is going to have an adverse impact on the environment, approval from the National Environment Management Authority (NEMA) is required If the investment will have an adverse impact on health, approval from the relevant Public Health Authorities is required (eg. Ministry of Health, County Health officer for the relevant county) Approvals from parent ministries for investments in restricted areas include: <ul style="list-style-type: none"> i. Investment in forest products requires clearance from the Ministry of Environment and natural resources ii. Investment in energy and petroleum products requires clearance from the Ministry of Energy iii. Investment in mining requires clearance from the Ministry of Mining iv. Investment in the tourism industry requires clearance from the Ministry of Tourism
Initial steps to establishment	<p>Company</p> <ul style="list-style-type: none"> Members propose a name and objects of the Company Provide details of the addresses, nationality and occupations of the persons proposed to be the directors of the company Details of the person who is to be the company secretary Details of the registered office of the company, that is its postal and physical address (plot and section number and road name) Suitable Memorandum of Articles must be prepared and filed The amount of money that each member undertakes to contribute must be stated in the Memorandum. The Memorandum of Articles must be stamped and registered with the Registrar of Companies. Upon incorporation of the company, the Registrar will issue a Certificate of Incorporation. <p>Partnership</p> <ul style="list-style-type: none"> Partners propose name of the firm Partners prepare the partnership deed which should, amongst others, provide for: <ul style="list-style-type: none"> i. Names of the partners and their capacity;

	<ul style="list-style-type: none"> ii. Date of commencement and dissolution of the partnership; iii. Assets of the partnership; iv. Details of the registered office of the partnership; v. The capital of the partnership and the individual partners; vi. The salary and profit entitlement of the partners; vii. The banking arrangements and the right to draw cheques; viii. The partnership accounts. <p>Limited Liability Partnership</p> <ul style="list-style-type: none"> • Section 17 of the <i>Limited Liability Partnership Act</i> provides that in order to register a limited liability partnership, a statement in the prescribed form with the following details must be lodged with the Registrar of Limited Liability Partnerships: <ul style="list-style-type: none"> (a) The name of the partnership (b) The general nature of the proposed business (c) The proposed registered office of that partnership (d) The name, identity document (if any), nationality, and usual place of residence of each person who will be a partner (e) The name, identity document (if any), nationality, and usual place of residence of each person who will be a manager of the partnership • The statement must be signed by each person who proposes to be a partner of the proposed limited liability partnership. • Under section 18 of the Act, once the statement lodged under section 17 has been received by the Registrar of Limited Liability Partnerships and he is satisfied that the requirements of the Act have been complied with, the Registrar shall register the statement and issue a certificate of registration. • Under Section 7 of the <i>Limited Liability Partnership Act</i>, upon successful registration the limited liability partnership becomes a separate legal entity from its partners capable of suing and being sued, acquiring, owning, holding and developing or disposing of movable and immovable property.
Fees	<p>Company For incorporation between K.Shs.75,000/= - K.Shs.100,000/= plus VAT and costs.</p> <p>Partnership For establishment of the partnership K.Shs.50,000/= plus VAT and costs.</p> <p>Limited Liability Partnership For establishment of the limited liability partnership between K.Shs.75,000/= - K.Shs.100,000/= plus VAT and costs.</p>

Taxes applicable	Value Added Tax (where applicable) Income Tax Stamp Duty Excise Duty (where applicable) PAYE Customs Duty Compensating Tax
Reporting and compliance	<p>Company</p> <ul style="list-style-type: none"> • If the company has share capital, it must file an annual return like any other limited liability company • If it has no share capital, it must file an annual return stating the address of the registered office. • If the register of members is not kept at the registered office, the address of the place where it is kept must be stated. • The particulars of the directors and the secretary, which are required to be kept in the register of directors and secretaries. • Particulars of the total amount of the company's indebtedness in respect of all mortgages and charges required to be registered with the Registrar of Companies <p>Partnership Partnerships are subject to less onerous accounting and reporting requirements than companies.</p> <p>Limited Liability Partnership A Limited Liability Partnership must:</p> <ol style="list-style-type: none"> (a) Have a manager (b) Lodge an annual declaration by its manager that the partnership is either solvent or insolvent (c) Keep proper accounting records (d) Have a registered office in Kenya (e) All documents relating to the partnership business when issued must bear the name and registration number of the partnership and a statement that it is registered with limited liability.
Liability of members	<p>Company</p> <ul style="list-style-type: none"> • Members have limited liability – they are only liable for the specified amount that they undertake to contribute towards the assets of the company in the event of its being wound up (ie. the distribution or liquidation of assets after dissolution). • Liability extends for one year after a member ceases to be one.

	<p>Partnership</p> <ul style="list-style-type: none"> Section 11 of the Partnership Act provides that every partner in a firm is jointly liable with the other partners for all debts and obligations of the firm incurred while s/he is a partner, but a person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before s/he became a partner. <p>Limited Liability Partnership</p> <ul style="list-style-type: none"> There are no clear lines on the extent of limitation of liability and it appears that there are instances where a partner could be found liable. Section 10 of the Limited Liability Partnership Act provides that a limited liability partnership shall be solely obligated to an issue arising from contract, tort or otherwise. A person is not personally liable, directly or indirectly, for such an obligation only because the person is a partner of the limited liability partnership. However, this shall not affect the personal liability of a partner in tort for the wrongful act or omission of that partner. If a partner of a limited liability partnership is liable to a person other than another partner of the partnership as a result of a wrongful act or omission of that partner in the course of the business of the limited liability partnership or with its authority, the partnership is liable to the same extent as that partner. The liabilities of a limited liability partnership are payable out of the property of the limited liability partnership.
Jurisdiction	<p>Company, Partnership and Limited Liability Partnership Kenya</p>
Disposal of assets on winding up	<p>Company</p> <ul style="list-style-type: none"> After a winding-up order has been made, the liquidator takes into custody or under control all the property to which the company is or appears to be entitled to. The liquidator may, after giving such indemnity, if any, as the court may direct, bring or defend in his official name action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company. Under section 311 of the <i>Companies Act</i>, the following shall be paid in priority to all other debts: <ol style="list-style-type: none"> All taxes and local rates due from the company and having become due and payable within twelve months All Government rents not more than one year in arrear All wages or salary of any clerk or servant of the company All retirement benefits contributions of any clerk or servant of the company <p>Partnership Under section 48 of the <i>Partnership Act</i>, the following rules apply on dissolution of a partnership: (a) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the</p>

	<p>partners individually in the proportion in which they were entitled to share profits</p> <p>(b) The assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order -</p> <p>(i) In paying the debts and liabilities of the firm to persons who are not partners therein</p> <p>(ii) In paying to each partner rateably what is due from the firm to him/her for advances as distinguished from capital</p> <p>(iii) In paying to each partner rateably what is due from the firm to him/her in respect of capital</p> <p>(iv) The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible</p> <p>Limited Liability Partnerships</p> <ul style="list-style-type: none"> • The Fifth Schedule to the Act provides for winding up of limited liability partnerships. • It may be wound up by the court on an application by the partnership or a creditor. It may also be wound up voluntarily by a resolution passed by all the partners. However, the requirement for an application to the Court applies even if the limited liability partnerships being wound up voluntarily. • Paragraph 47 of the Fifth Schedule to the Act provides that on completion of the winding up of a limited liability partnership, the liquidator shall, unless the limited liability partnership agreement otherwise provides, distribute the property among the partners according to their rights and interests in the partnership, but this is subject to the provisions of the Act regarding the making of preferential payments. • Paragraph 58 of the Fifth Schedule provides that all proper costs, charges and expenses of, and incidental to, the winding up of a limited liability partnership (including the remuneration of the liquidator) are payable out of the assets of the partnership in priority to all other claims.
<p>Restrictions on the activities of the entity, i.e. commercial activities, land holding, etc.</p>	<p>Company</p> <ul style="list-style-type: none"> • Under Article 65 of the Constitution, a person who is not a citizen may hold land on the basis of leasehold tenure for a term not exceeding ninety-nine years. • A corporate body shall be regarded as a citizen only if the corporate body is wholly owned by one or more citizens. This means that land held by a company that is not wholly owned by one or more citizens can only be held for a leasehold term of ninety-nine years. • Under the <i>Land Control Act</i>, where a transaction involves the sale, lease or transfer of agricultural land in which the consent of the relevant Land Control Board is required, the Land Control Board will not grant its consent if such sale, lease or transfer is to a non-Kenyan citizen or a private company or co-operative society all of whose members are not citizens of Kenya. • Any dealing in land is subject to the user of that land, which is set out in the document of title in respect to that land. This is another form of restriction in land holding. <p>Partnerships</p> <ul style="list-style-type: none"> • Under Article 65 of the Constitution, a person who is not a citizen may hold land on the basis of leasehold tenure for a term not exceeding ninety-nine years. This means that if some of the partners in a partnership are not Kenyan citizens, then any land owned by

	<p>the partners can only be held for a leasehold term of ninety-nine years.</p> <ul style="list-style-type: none"> • Under the <i>Land Control Act</i>, where a transaction involves the sale, lease or transfer of agricultural land in which the consent of the relevant Land Control Board is required, the Land Control Board will not grant its consent if such sale, lease or transfer is to a non-Kenyan citizen or a private company or co-operative society all of whose members are not citizens of Kenya. • Any dealing in land is subject to the user of that land which is set out in the document of title in respect to that land. This is another form of restriction in land holding. <p>Limited Liability Partnership</p> <ul style="list-style-type: none"> • Under Article 65 of the Constitution, a person who is not a citizen may hold land on the basis of leasehold tenure for a term not exceeding ninety-nine years. This means that if some of the partners in a limited liability partnership are not Kenyan citizens, then any land owned by the partners can only be held for a leasehold term of ninety-nine years. • Under the <i>Land Control Act</i>, where a transaction involves the sale, lease or transfer of agricultural land in which the consent of the relevant Land Control Board is required, the Land Control Board will not grant its consent if such sale, lease or transfer is to a non-Kenyan citizen or a private company or co-operative society- all of whose members are not citizens of Kenya. • Any dealing in land is subject to the user of that land which is set out in the document of title in respect to that land. This is another form of restriction in land holding.
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ANNEX 7

CARBON RIGHTS IN AUSTRALIAN LEGISLATION

In 2011 the Federal Parliament enacted the *Carbon Credits (Carbon Farming Initiative) Act 2011* (C'th) (*CFI Act*) establishing a scheme whereby landholders may establish carbon abatement and sequestration projects that generate tradable carbon credits - the Carbon Farming Initiative or CFI. The person proposing the project (Project Proponent) must have the legal right to carry out the project and, for sequestration projects, they must hold the Carbon Sequestration Right (CSR). The CSR is the right to the benefit of any carbon sequestered in land or vegetation. This right may rest with a landholder or may be separated from land and transferred to a third party. Satisfying these two requirements will ensure that the project qualifies as an Eligible Offset Project under the CFI. Each state differs significantly in their registration and characterisation of CSRs.

How each state and territory deals with these issues is outlined below.

New South Wales

In New South Wales a Carbon Property Right over freehold Torrens title is created as a Carbon Sequestration Right (CSR) under the *Conveyancing Act 1919 (NSW) (Act)*, as a form of "forestry right". A forestry right is a deemed profit-à-prendre under the Act and is defined by s 87A.

The Act also allows for the registration of forestry covenants which is incidental to a forestry right. The usual practice is to register both a forestry right and a forestry covenant to enable, for example, the provision of access to or the maintenance of trees or forests on land that is the subject of any CSR. The *Crown Lands Act 1989 (NSW)* and the *Western Lands Act 1901 (NSW)* both permit the registration of forestry rights (including CSR's) on all leasehold land in NSW.

Queensland

The *Land Title Act 1994 (Qld) (Land Title Act)* and *Land Act 1994 (Qld) (Land Act)* provide a statutory right for a Carbon Abatement Interest (CAI) to be registered on the Land Title Register, which will give a grantee of a CAI the exclusive right to any economic benefit associated with the carbon sequestration by carbon abatement products on the land. Carbon abatement products are defined to include living biomass, dead organic matter, soil and carbon sequestered in each of those products. A CAI runs with the land, and is registered as an 'interest' on the relevant parcel of land, similar in effect to an easement document. It permits the grantee to deal with carbon abatement matter which includes living biomass, dead organic matter and soil.

South Australia

In South Australia CPRs are created under the *Forest Property Act 2000* (SA) (*FP Act*) and are called Forest Property Agreements (*FPA*). Under the FP Act, two types of FPA may be created:

- forest property (vegetation) agreement (FPVA): the owner has rights to the forest vegetation on the land; and
- forest property (carbon) agreement (FPCA): the owner has rights to the carbon sequestered by the forest vegetation on the land.

Under the FP Act, an FPCA (and an FPVA) is deemed to be a chose in action, which is a personal right only. However, s 7(3) and s 9 of the Act ensure that the FPCA, if registered on title, is enforceable against the world at large (in the same way that proprietary interests such as registered leases, are enforceable against the world at large).

Tasmania

In Tasmania, CPRs can be created as Carbon Sequestration Rights (*CSR*) under the *Forestry Rights Registration Act 1990* (Tas) (*FR Act*), as a form of "Forestry Right". Forestry rights include the following interests: ownership of trees, a CSR and a right to establish, maintain or harvest, trees. It is deemed a profit-à-prendre under s 5 of the FR Act. Similar to New South Wales, the FR Act provides for forestry covenants, incidental to the forestry rights.

In Victoria, CPRs are recognised as a statutory right under the *Climate Change Act 2010* (Vic) ("*CC Act*") which establishes the framework for the ownership CPRs. As with other States, in Victoria the ownership of a carbon sequestration right can be separated from the ownership of the forest itself. Under the CC Act three proprietary interests may be created, collectively called 'Forest Carbon Rights' (*FCR*). These are: a carbon sequestration right, a forestry right and a soil carbon right. Each FCR is able to be registered on title to the land, and acts to bind successive landowners, or persons with an interest in that land.

Under the CC Act, the Crown is entitled to grant to a third party a carbon sequestration right or soil carbon right. This grant is made under a Carbon Sequestration Agreement.

Western Australia

In Western Australia CPRs are recognised as a statutory right under the *Carbon Rights Act 2003* (WA) (*CR Act*). The CR Act deals with CPRs in two ways: by allowing the registration of a "Carbon

Right" and allowing for the owner of a Carbon Right to register a Carbon Covenant. Although a Carbon Right and Carbon Covenant are registered separately, a Carbon Right relates primarily to the ownership of sequestration, while the Carbon Covenant sets out the agreement between the land owner and the owner of the Carbon Right in relation to various ancillary rights.

The CR Act differs from some other States in that it is not solely related to carbon sequestered by vegetation on the land, rather it applies to any sequestration occurring on the land, whether by vegetation or some other means, such as soil sequestration

Northern Territory and Australian Capital Territory

Currently, neither the Australian Capital Territory nor the Northern Territory provides for any form of Carbon Property Right to be registered as an interest in or on title to the land.

ANNEX 8

REDD and other Forestry Projects¹¹⁹⁴

PROJECT	STANDARD	DEVELOPER ¹¹⁹⁵	LOCATION	OTHER STAKEHOLDERS	FUNDING	SUMMARY
The Kasigau Corridor REDD Project, Phases I (Rukinga Sanctuary) and II (the Community Ranches)	VCS & CCB	Wildlife Works	Taita Taveta District, Coast Province	Rukinga Ranching Company Ltd; ¹¹⁹⁶ Indigenous Community Ownership Groups; ¹¹⁹⁷ Marungu Hill Conservancy Association; ¹¹⁹⁸ Kasigau Conservation Trust (KCT) ¹¹⁹⁹	Funding is provided by Wildlife Works and generated from project activities, including the sale of carbon.	Among other activities, the project includes an organic clothing factory, organic greenhouse and nurseries, dryland farming, mushroom farms, eco-charcoal production facility, ecotourism, forest and biodiversity monitoring, and the reforestation of Mt. Kasigau.

¹¹⁹⁴ See the CCB Project Database <http://www.climate-standards.org/category/projects/>; See the VCS project database <https://vcsprojectdatabase2.apx.com/myModule/Interactive.asp?Tab=Projects&a=1&t=1>; See the Forest Carbon Portal Database http://www.forestcarbonportal.com/projects?search=&proj_type=All&seeking=All&market=All&country=ke&standard=All

¹¹⁹⁵ Instead of ‘Developer’, VCS uses the term ‘Project Proponent’ to describe ‘the individual or organization that has overall control and responsibility for the project, or an individual or organization that together with others, each of which is also a project proponent, has overall control or responsibility for the project’. See VCS, ‘Who is the project proponent on my project?’ <<http://www.v-c-s.org/faqs/who-project-proponent-my-project>> accessed 27 July 2013.

¹¹⁹⁶ Wildlife Works, ‘Kasigau Corridor REDD Project Phase I – Rukinga Sanctuary: Project Document for Validation’ (Version 9, 31 January 2011)’ <https://vcsprojectdatabase2.apx.com/myModule/ProjectDoc/Project_ViewFile.asp?FileID=5953&IDKEY=ciofj09234rm9oq4jndsma80vcalksdjf98cxkjaf90823nmq3v8209187> accessed 27 July 2013.

¹¹⁹⁷ Wildlife Works, ‘Kasigau Corridor REDD Project Phase II – The Community Ranches’ (Version 14, 19 April 2011) pg 7 section 5.1 <https://vcsprojectdatabase2.apx.com/myModule/ProjectDoc/Project_ViewFile.asp?FileID=6495&IDKEY=f98klasmf8jflkasf8098afnasfkj98f0a9sfsakjflsakjf8dk8956605> accessed 27 July 2013.

¹¹⁹⁸ *Ibid* pg 17 para 4.

¹¹⁹⁹ *Ibid* pg 22 para 3.

The International Small Group & Tree Planting Programme (TIST)	VCS & CCB	Clean Air Action Corporation (CAAC)	Laikipia, Nyeri, Meru and Kirinyaga districts	Small Groups; Institute for Environmental Innovation (I4ED); United States Agency for International Development (USAID) ¹²⁰⁰	USAID provides funding for sustainable development components of TIST. ¹²⁰¹	TIST is a reforestation and sustainable development project carried wherein farmers plant trees on their land, retain ownership of the trees and produce, receive training from TIST and a portion of the carbon revenues from CAAC. ¹²⁰²
Aberdare Range/Mt. Kenya Small Scale Reforestation Initiative	CCB ¹²⁰³	Green Belt Movement (GBM)	North Imenti, Lari, Kinangop, Kieni, Central Imenti Constituency	Community Forest Associations (CFAs); Ministry of Environment and Natural Resources; Kenya Forest Service (KFS); Government of Canada; International Bank for Reconstruction and Development as a Trustee of the World Bank Group for the Biocarbon Fund ¹²⁰⁴	The Canadian and Italian governments are listed as giving assistance. ¹²⁰⁵ In addition to public sources, income stems from in kind contributions, sweat equity,	Project requires the development of forest management plans, offers payment to Constituency Community Association or Community Forest Association members who plant trees, and generates revenue from carbon sales. The verified emission reductions go to the GBM. ¹²⁰⁷

¹²⁰⁰ Clean Air Action Corporation, 'Project Description for TIST program in Kenya VCS-006' (Version 2, 24 August 2012) pg 4-5 <https://vcsprojectdatabase2.apx.com/myModule/ProjectDoc/Project_ViewFile.asp?FileID=10630&IDKEY=90e98hfalksuf098fnsdalfkjfoijmn4309JLKJFJlaksjfla9f14658770> accessed 27 July 2013.

¹²⁰¹ *Ibid* pg 5 section 1.4.

¹²⁰² *Ibid*.

¹²⁰³ Project withdrawn before CCB Standards Validation (Jun 18, 2013). See <<http://www.climate-standards.org/2009/06/10/aberdare-rangemt-kenya-small-scale-reforestation-initiative/>>.

¹²⁰⁴ CDM, 'Project Design Document: Aberdare Range/ Mt. Kenya Small Scale Reforestation Initiative' (Version 04.2, 17 January 2011) <http://cdm.unfccc.int/filestorage/Q/E/H/QEHLPO87592BZ0VXM3IAF1YJCKR6TN/PDD_Kamae-Kipipiri_ver.04.2?t=eW18bXFtbXNnfDDVRqrDUjvA3EPMhhBGzOm0> accessed 27 July 2013.

¹²⁰⁵ *Ibid* pg 40-41.

					and carbon revenues. ¹²⁰⁶	
Forest Again Kakamega Forest	CCB	Eco2librium	Western Province	Kenya Forest Service (KFS); Kakamega Environmental Education Programme (KEEP)	Funding provided by the Hyundai Climate Grant ¹²⁰⁸ and through carbon revenues.	Project focuses on planting trees that mimic indigenous forests, with carbon revenues providing jobs and funding the expansion of KEEP activities, including developing non-timber sources of forest-related income (e.g. butterflies, honey, medicines), HIV/AIDS health programmes, conservation education, and capacity building to enhance tourism and provide management assistance to the KFS forest station. ¹²⁰⁹
Mikoko Pamoja, Mangrove Restoration	Plan Vivo	Earthwatch Institute	Gazi Bay, Kwale District	Gazi Area Community Forestry Association; Earthwatch International, Kenya Marine and Fisheries Research Institute (KMFRI) ¹²¹⁰	Income from carbon revenues; start up funding and labour provided by Aviva, Earthwatch Institute, Edinburgh	Project intends to protect and restore mangrove forests, raising income from forest resources, including the sale of carbon credits. ¹²¹²

¹²⁰⁷ *Ibid* pg 2.

¹²⁰⁶ *Ibid* pg 7 of the Supporting Document.

¹²⁰⁸ Eco2librium, 'Forest Again Kakamega Forest' (Project Design Document for the CCBA, 24 April 2009) Section G3(2) <https://s3.amazonaws.com/CCBA/Projects/Forest_Again_Kakamega_Forest/Forest_Again_PDD.pdf> accessed 27 July 2013.

¹²⁰⁹ Eco2librium (n 16) G3(2).

¹²¹⁰ Plan Vivo, 'Project Idea Note: Mikoko Pamoja Mangrove Restoration in Gazi Bay' (March 2010) section 6 <http://www.planvivo.org/wp-content/uploads/gazi_pin_PlanVivo_Kenya.pdf> accessed 28 July 2013.

					Napier, Bangor and Edinburgh Universities, and KMFRI. ¹²¹¹	
Mount Elgon Regional Ecosystem Conservation Programme (MERECP)	None	NA	Trans-nzoia District of Rift Valley Province ¹²¹³	Governments of Norway and Sweden; East African Community (EAC); IUCN East Africa Regional Programme; Lake Victoria Basin Commission (LVBC); Ministry of Environment and Mineral Resources (MEMR); Ministry of Forestry and Wildlife (MFW); Kenya Forest Service (KFS); Kenya Wildlife Service (KWS) ¹²¹⁴	NOK 34.2 million (approximately USD 6 million); ratio of 2:1 provided by the Governments of Norway and Sweden. ¹²¹⁵	As a part of the larger conservation programme, forestry activities included plantations for livelihood improvement (including trees and other crops), forest restoration planting in degraded areas, and payments for avoided deforestation, which were made on the basis of biodiversity preservation rather than the amount of carbon sequestered. ¹²¹⁶
Treeflights Kenya Planting	None	Treeflights	Coastal Province	Tree-Nation; Size of Wales	The public can make donations	Cashew trees are distributed to local farmers to plant on their own land,

¹²¹² *Ibid.*

¹²¹¹ *Ibid* section 10.

¹²¹³ Project is transboundary, spanning Kenya and Uganda.

¹²¹⁴ *Ibid* pg i and pg 1 section 1.

¹²¹⁵ LTS International Ltd., 'Mount Elgon Regional Ecosystem Conservation Programme: End-Review Report' (2 November 2011) pg 1 section 2
<http://www.norway.go.ug/Global/SiteFolders/webkamp/MERECP%20End%20Review%20-%20LTS%20Final%20Report%20-%2020November%202011.pdf>
 accessed 27 July 2013.

¹²¹⁶ *Ibid* pg 10-12 sections 4.2.2-4.2.4.

Project					and ‘purchase trees’ online. ¹²¹⁷	after which farmers can profit from the resulting crop. ¹²¹⁸
Enoosupukia Forest Trust Project	None	Clinton Climate Initiative (CCI)	Rift Valley Province	County Council of Narok; Kenya Forest Service; Green Belt Movement; Ministry of Environment and Mineral Resources ¹²¹⁹	Feasibility study has been conducted to analyse the viability of forest carbon and outline the business case for attracting investment ¹²²⁰	CCI conducted a feasibility study, prepared a draft business plan and has helped to establish 65 tree nurseries, train 650 community members on civic and environmental education, and form 43 Tree Nursery Groups. ¹²²¹

¹²¹⁷ Treeflights, ‘Project Info’ <<http://www.treeflights.com/>> accessed 28 July 2013.

¹²¹⁸ Treeflights, <<http://www.treeflights.com/>> accessed 28 July 2013.

¹²¹⁹ CCI, ‘Enoosupukia Forest Trust Land’ <http://www.clintonfoundation.org/assets/files/cci/forestry/cci_overview_kenya_2011.pdf> accessed 28 July 2013.

¹²²⁰ LTS International, ‘Forest Carbon Project in the Enoosupukia Forest Trust Land and Adjoining Areas’ <<http://www.ltsi.co.uk/projects/kenya-forest-carbon-project-in-the-enoosupukia-forest-trust-land-and-adjoining-areas/>> accessed 28 July 2013.

¹²²¹ CCI, ‘Enoosupukia Forest Trust Land’ <http://www.clintonfoundation.org/assets/files/cci/forestry/cci_overview_kenya_2011.pdf> accessed 28 July 2013.

ANNEX 9

CANCUN SAFEGUARDS

SAFEGUARDS OUTLINED UNDER THE UNFCCC FRAMEWORK FOR REDD+ (THE "CANCUN SAFEGUARDS")	
SUMMARY OF ELEMENT	GOVERNING PROVISIONS IN THE UNFCCC TEXTS
<p>The safeguards are:</p> <ul style="list-style-type: none"> • Consistent with national forest programmes and commitments under international agreements; • Transparent and effective forest governance • Respect for indigenous and community rights • Stakeholder participation • Conservation of natural forests • Supporting permanence • Preventing leakage 	<p>Appendix 1 of the Cancun Agreement:</p> <p>2. When undertaking the activities referred to in paragraph 70 of this decision, the following safeguards should be promoted and supported:</p> <p>(a) That actions complement or are consistent with the objectives of national forest programmes and relevant international conventions and agreements;</p> <p>(b) Transparent and effective national forest governance structures, taking into account national legislation and sovereignty;</p> <p>(c) Respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the United Nations General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples;</p> <p>(d) The full and effective participation of relevant stakeholders, in particular indigenous peoples and local communities, in the actions referred to in paragraphs 70 and 72 of this decision;</p> <p>(e) That actions are consistent with the conservation of natural forests and biological diversity, ensuring that the actions referred to in paragraph 70 of this decision are not used for the conversion of natural forests, but are instead used to incentivize the protection and conservation of natural forests and their ecosystem services, and to enhance other social and environmental benefits [FOOTNOTE 1: Taking into account the need for sustainable livelihoods of indigenous peoples and local communities and their interdependence on forests in most countries, reflected in the United Nations Declaration on the Rights of Indigenous Peoples, as well as the international Mother Earth Day].</p> <p>(f) Actions to address the risks of reversals;</p> <p>(g) Actions to reduce displacement of emissions.</p>

Countries need to report on their progress in implementing the safeguards. Countries need to:

- Provide a summary of information
- Submit the summary with their National Communication to the UNFCCC, or voluntarily via the web platform on the UNFCCC website

Warsaw decision, “The timing and the frequency of presentations of the summary of information on how all the safeguards referred to in decision 1/CP.16, appendix I, are being addressed and respected”

1. *Reiterates* that according to decision 12/CP.17, paragraph 3, developing country Parties undertaking the activities referred to in decision 1/CP.16, paragraph 70, should provide **a summary of information on how all of the safeguards referred to in decision 1/CP.16, appendix I, are being addressed and respected throughout the implementation of the activities;**

2. *Also reiterates* that according to decision 12/CP.17, paragraph 4, the summary of information referred to in paragraph 1 above should be provided periodically and be included in national communications, or communication channels agreed by the Conference of the Parties;

3. *Agrees* that the summary of information referred to in paragraph 1 above could also be provided, on a voluntary basis, via the web platform on the UNFCCC website;

4. *Decides* that developing country Parties should start providing the summary of information referred to in paragraph 1 above in their national communication or communication channel, including via the web platform of the UNFCCC, taking into account paragraph 3 above, after the start of the implementation of activities referred to in decision 1/CP.16, paragraph 70;

5. *Also decides* that the frequency of subsequent presentations of the summary of information as referred to in paragraph 2 above should be consistent with the provisions for submissions of national communications from Parties not included in Annex I to the Convention and, on a voluntary basis, via the web platform on the UNFCCC website.

Warsaw agreements, “Work programme on results-based finance to progress the full implementation of the activities referred to in decision 1/CP.16, paragraph 70”:

4. *Agrees* that developing countries seeking to obtain and receive results-based payments in accordance with decision 2/CP.17, paragraph 64, **should provide the most recent summary of information on how all of the safeguards referred to in decision 1/CP.16, appendix I, paragraph 2,** have been addressed and respected before they can receive results-based payments

ANNEX 10

FURTHER DETAILS REGARDING PAYMENT FOR ECOSYSTEM SERVICES SCHEMES

TYPES OF ECOSYSTEM SERVICES

Provisioning Services <i>Ecosystem services that describe the material or energy outputs from ecosystems</i>	Regulating Services <i>Services that ecosystems provide by acting as regulators</i>	Habitat or Supporting Services	Cultural Services <i>Non-material benefits obtained from ecosystems</i>
Food Raw materials Fresh water Medicinal resources	Local climate and air quality Carbon sequestration and storage Moderation of extreme events Waste-water treatment Erosion prevention and maintenance of soil fertility Pollination for the development of fruits, vegetables and seeds Pest and disease control	Habitats for species Maintenance of genetic diversity	Recreation and mental and physical health Tourism Aesthetic appreciation and inspiration for culture, art and design Spiritual experience and sense of place
Supporting Services			
Soil formation	Nutrient cycling	Primary production	

Source:

The Economics of Ecosystems and Biodiversity (TEEB), *Ecosystem Services*
<http://www.teebweb.org/resources/ecosystem-services/>.

TYPES OF MARKETS AND PAYMENTS FOR ECOSYSTEM SERVICES

Types of Markets and Payments for Ecosystem Services	
Public payment schemes for private land owners to maintain or enhance ecosystem services	Country-specific. Commonly involve direct payments from a government agency, or another public institution, to landowners and/or managers.
Formal markets with open trading between buyers and sellers, either: (1) Under a regulatory cap or floor on the level of ecosystem services to be provided, or (2) Voluntary	Regulatory ecosystem service markets are established through legislation that creates demand for a particular ecosystem service by setting a "cap" on the damage to, or investment focused on, an ecosystem service. Voluntary markets
Self-organised private deals in which individual beneficiaries of ecosystem services contract directly with providers of those services	Voluntary markets are a category of private payments for ecosystem services Private PES deals also exist in contexts where there are no formal regulatory markets (or non are anticipated in the near term) and where there is little (if any) government involvement.

Table is adapted from:

Forest Trends, The Katoomba Group, and UNEP, *Payments for Ecosystem Services: Getting Started – A Primer* (2008) page 4, Table 2 <http://www.unep.org/pdf/PaymentsForEcosystemServices_en.pdf> last accessed 12 January 2013.

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