



LEGAL REPORT

Forest Governance, REDD+ and Sustainable Development in Kenya



KENYA REDD+ ANALYTICAL SERIES - ISSUE #3
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The Ministry of Environment, Water and Natural Resources is vested with the Government mandate to monitor, protect, conserve and manage the environment and natural resources. This mandate is discharged through specialized agencies including the National Environment Management Authority (NEMA), Kenya Meteorological Department (KMD), Kenya Forest Service (KFS) and the Kenya Forestry Research Institute (KEFRI). The Directorates of Environment and Natural Resource based at the Ministry headquarters provide the required policy guidance. Two Departments have been established within the Ministry for efficient discharge of responsibilities; the State Department of Environment and Natural Resources and the State Department of Water. Climate Change response Programmes, including REDD+ are coordinated from the State Department on Environment and Natural Resources.

UN-REDD PROGRAMME



The UN-REDD Programme is the United Nations collaborative initiative on Reducing Emissions from Deforestation and forest Degradation (REDD+) in developing countries. The Programme was launched in 2008 and builds on the convening role and technical expertise of the Food and Agriculture Organization of the United Nations (FAO), the United Nations Development Programme (UNDP) and the United Nations Environment Programme (UNEP). The UN-REDD Programme supports nationally-led REDD+ processes and promotes the informed and meaningful involvement of all stakeholders, including Indigenous Peoples and other forest-dependent communities, in national and international REDD+ implementation.

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List of abbreviations

| | |
|--------|---|
| AFLEG | East Africa Law Enforcement and Governance |
| ASALs | Arid and semi-arid lands |
| ATIA | African Trade Insurance Agency |
| BRT | Bus Rapid Transit |
| C&I | Kenyan Criteria and Indicators |
| CBD | Convention on Biological Biodiversity |
| CCS | Climate Change Secretariat |
| CDM | Clean-development mechanism |
| CER | Certified emission reduction |
| CFA | Community forest association |
| CIC | Commission for the Implementation of the Constitution |
| COP 16 | 16 th Conference of the Parties |
| CSO | Civil society organization |
| DC | District commissioner (of Local Native Council) |
| DDC | District Development Committee |
| DEC | District Environment Committee |
| DEO | District Environment Officer |
| DRSRS | Department of Resource Surveys and Remote Sensing |
| EAC | East African Community |
| EACC | Ethics and Anti-corruption Commission |
| EIA | Environmental Impact Assessment |
| EMCA | Environment Management and Coordination Act |
| ERS | Economic Recovery Strategy for Employment and Wealth Creation |
| FAO | Food and Agriculture Organization of the United Nations |
| FCC | Forest conservation committee |
| FCPF | Forest Carbon Partnership Facility |
| GDP | Gross domestic product |
| GHG | Greenhouse gas |
| ICT | Information and communication technology |
| ILEG | Institute for Law and Environmental Governance |

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|--------|---|
| IMCE | Inter-ministerial Committee on the Environment |
| IPR | Institute of Primate Research |
| IUCN | International Union of Conservation of Nature |
| KAM | Kenya Association of Manufacturers |
| KEFRI | Kenya Forestry Research Institute |
| KEPSA | Kenya Private Sector Alliance |
| KFS | Kenya Forest Service |
| KFWG | Kenya Forest Working Group |
| KNBS | Kenya National Bureau of Statistics |
| KVDA | Kerio Valley Development Authority |
| KWS | Kenya Wildlife Service |
| LNC | Local Native Council |
| MDGs | Millennium Development Goals |
| MEMR | Ministry of Environment and Mineral Resources |
| MIGA | Multilateral Investment Guarantee Agency |
| MoU | Memorandum of Understanding |
| NACOFA | National Association of Community Forest Associations |
| NARC | National Rainbow Coalition |
| NBA | National Business Agenda |
| NBSAP | Kenya National Biodiversity Strategy and Action Plan |
| NCCRS | National Climate Change Response Strategy |
| NEAP | National Environment Action Plan |
| NEC | National Environment Council |
| NEMA | National Environmental Management Authority |
| NES | National Environment Secretariat |
| NESC | National Economic and Social Council |
| NGO | Non-governmental organization |
| NLC | National Land Commission |
| NLP | National Land Policy |
| NMK | National Museums of Kenya |
| NPD | National programme document |
| NRCO | National REDD+ Coordination Office |

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| NRSC | Intersectoral National REDD+ Steering Committee |
| ODA | Official development assistance |
| OHCHR | Office of the High Commissioner for Human Rights |
| PES | Payment for environmental services |
| PPCSCA | Permanent Presidential Commission on Soil Conservation and Afforestation |
| PROFOR | Program on Forests of the Food and Agriculture Organization of the United Nations |
| PSDS | Private Sector Development Strategy |
| PV | Photovoltaic |
| REDD | Reducing Emissions from Deforestation and Forest Degradation |
| REDD+ | Reducing Emissions from Deforestation and Forest Degradation, to foster conservation and sustainable management of forests and to enhance forest carbon stocks |
| RISSEA | Research Institute of Swahili Studies of Eastern Africa |
| R-PIN | Readiness Plan Idea Note |
| R-PP | REDD+ Readiness Preparation Proposal |
| RRI | Rights and Resources Initiative |
| RSC | REDD+ Steering Committee |
| SEEA | System of Integrated Environmental and Economic Account |
| SNA | System of national accounts |
| TARDA | Tana and Athi River Development Authority |
| TVET | Technical Vocational Education and Training |
| TWG | Technical Working Group |
| UN | United Nations |
| UNCCD | United Nations Convention to Combat Desertification |
| UNCED | United Nations Conference on Environment and Development |
| UNDP | United Nations Development Programme |
| UNEP | United Nations Environment Programme |
| UNFCCC | United Nations Framework Convention on Climate Change |
| UN-REDD | United Nations initiative on Reducing Emissions from Deforestation and Forest Degradation |
| VCM | Voluntary Carbon Markets |
| WARMA | Water Resources Management Authority |
| WRUA | Water resource users association |
| WWF | World Wildlife Fund |

Executive summary

This synthesis report identifies and analyses the challenges and opportunities for Reducing Emissions from Deforestation and Forest Degradation to foster conservation and sustainable management of forests and to enhance forest carbon stocks (REDD+) law reform and its implementation in Kenya. It also gives recommendations for strengthening Kenya's legal framework relevant to REDD+.

Laws and institutions provide an overall enabling framework that guides public and private sector activities towards desired ends. An effective legal and institutional framework can thus enhance implementation of REDD+ by eliminating challenges to REDD+ activities and promoting social and environmental benefits. The analysis in this report is founded mainly on the Cancun Agreements reached at the 16th Conference of the Parties to the United Nations Framework Convention on Climate Change, which provide the basic framework for REDD+ activities, guidance and safeguards.

This report underscores the cross-sectoral nature of REDD+. Although forests are its primary concern, REDD+ cuts across a wide range of sectors including land tenure, land-use planning, protected areas and trade that are governed by laws concerned with the drivers of deforestation and forest degradation, like energy, water and agriculture. These laws affect issues such as carbon ownership and use, the risk of reversals and displacements, participatory decision-making, benefit sharing and incentives to relieve forests of services that can be substituted with low-emission alternatives.

The review of laws, policies and institutions of those sectors suggests that a number of challenges may hinder Kenya's implementation of REDD+. The key challenges are as follows, *inter alia*:

- Lack of a specific policy goal or national strategy for REDD+ readiness and implementation, coupled with lack of a National Environment Policy to guide the management of environmental resources.
- Insecurity and unreliability of tenure, especially of community land, where most REDD+ activities will be conducted. Although Kenya's constitution requires the Community Land Bill to address tenure, it does not yet address it.
- Lack of clarity and coherence on some forest related laws, including the criteria for defining "communities" according to ownership of community land, and the disconnect between the tenure regimes under the Forest Act and the constitution.
- Lack of mutual support and cooperation among forest-related institutions. This institutional challenge is expected to worsen with the entry of a devolved governmental structure. Forest institutions are also affected by lack of adequate resources and insufficient funding.
- Lack of an agreed upon formula for owning carbon rights and sharing REDD+ benefits.

This report gives a number of recommendations for a successful implementation of REDD+ in Kenya. They include:

- Integrating specific provisions on REDD+ into the relevant laws and policies starting with those currently under review;
- Clarifying the roles and mandates of all the forest-sector institutions to avoid overlaps and incoherence;
- Crafting the rules for access, use rights and carbon rights benefit sharing;
- Defining a Kenyan Criteria and Indicators (C&I) for sustainable forest management;
- Finalizing legislation on community land. The legislation should, *inter alia* define "community" and "community land" in a way that promotes both sustainable use of forests and interethnic cohesion.

1. Introduction

The Cancun Agreements reached at the 16th Conference of the Parties (COP 16)¹ to the United Nations Framework Convention on Climate Change (UNFCCC) set the stage for a nationally driven phased approach to reduce emissions from deforestation and forest degradation, and to foster conservation, sustainable management of forests and enhancement of forest carbon stocks – now called REDD+. In Kenya, REDD+ is already translating into real actions on the ground. Aimed at harnessing the potential benefits of REDD+ for sustainable development and the appropriate response to the challenge of global warming, considerable policy-making and programming activities are being undertaken. Actively involved in policy-making and programming the two main international initiatives – the United Nations initiative on Reducing Emissions from Deforestation and Forest Degradation (UN-REDD) Programme² and the Forest Carbon Partnership Facility (FCPF) – support developing countries' efforts to prepare and implement their national REDD+ strategies.

While early discussions on REDD+ focused on policy frameworks and positive incentives, increasing attention is now being placed on the design of legal frameworks supporting in-country REDD+ implementation. The issues to be addressed through REDD+ legislation are diverse and complex. Successful REDD+ implementation will require harmonized and updated legal frameworks to generate economic, environmental and social benefits. In addition, REDD+ implementation will need to be supported by broader sustainable development strategies and participatory processes at the national level. Consistent legal frameworks are crucial tools to integrate REDD+ within national development priorities and policies. Such frameworks must necessarily address economic, environmental and social issues related to REDD+ coherently and in line with human rights principles³ and international environmental treaties and conventions (e.g. UNFCCC, Convention on Biological Biodiversity [CBD] and United Nations Convention to Combat Desertification [UNCCD]).⁴

Indeed, Kenya's REDD+ Readiness Preparation Proposal (R-PP) recognizes that effective REDD+ governance will incorporate at the readiness stage a strong legal framework that promotes investments and clearly defines carbon rights and effective REDD+ benefit-sharing arrangements. Well-defined land and property rights would enable public or private payment for environmental services (PES).

This paper examines the legal, policy and institutional frameworks of forest governance in Kenya with reference to REDD+. Section 2.0 examines the linkage between forest governance and sustainable development in Kenya. Section 3.0 analyses land tenure laws and their relationship to forest management. This is followed by the review of the legal and policy frameworks in Sections 4.0 and 5.0 respectively. Section 6.0 presents a brief analysis of some of the emerging legal issues related to REDD+ in Kenya. The last section, 8.0, concludes the paper.

1 UNFCCC, Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010. Decisions adopted by the Conference of the Parties, FCCC/CP/2010/7/Add.1

2 The UN-REDD Programme is the United Nations' collaborative initiative on Reducing Emissions from Deforestation and Forest Degradation (REDD+) in developing countries. The Programme was launched in 2008 and builds on the convening role and technical expertise of FAO, UNEP and UNDP.

3 Human rights are rights inherent to all us human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups (Office of the High Commissioner for Human Rights [OHCHR]).

4 It is important to note that Article 2(5) of Kenya's Constitution decrees, "The general rules of international law shall form part of the law of Kenya," and Article 2(6) says, "Any treaty or convention ratified by Kenya shall form part of the law of Kenya..."

2. Forest governance and sustainable development in Kenya

Kenya's forests cover a total area of 3.456 million ha, equivalent to 5.9 percent of the country's land area. Out of this, 1.406 million ha or 2.4 percent of Kenya's total land area comprises indigenous, closed-canopy forests, mangroves and plantations on both public and private land.⁵ Ranked high as an important national asset, forests have significant economic, environmental, social and cultural values. It is estimated that the forestry sector contributes approximately 1 percent in monetary terms to Kenya's gross domestic product (GDP) and 13 percent in non-monetary terms.⁶

Effective governance of the forest sector remains one of the country's greatest challenges. In 1942 the colonial administration set up the Forest Department headed by the Chief Conservator of Forests to superintend the forest sector. The next half a century saw a massive reduction in the country's forest cover from 60 percent to just about 2 percent in the 1990s owing to increased population, land-use changes, inappropriate legal frameworks and corruption, among others. The issue of corruption is worth further attention. In Transparency International's Corruption Perceptions Index for 2012, Kenya was ranked 139th out of 176 countries. The forestry sector has not been spared from poor governance in the past and still faces considerable challenges. Poor forest governance has ripple effects and is often itself a ripple caused by the overall weaknesses in environmental governance within a country as outlined below.

2.1 Historical background

The evolution and operation of the formal environmental management system in Kenya can be better understood if we take into account the era of colonialism. From the time the British colonized Kenya in 1895, the main politico-economic agenda was to expand imperialism by maximizing the exploitation of natural resources. A legal and policy framework was developed to perpetuate a system focused on allocation, exploitation, appropriation and expropriation of natural resources. Conservation was conceived to protect selected natural resources (for example wildlife species, forests, top soil in vulnerable landscapes, etc.) from human activity. The consequence was a "command and control" regime of sectoral laws, policies and institutions on agriculture, forests and water resources, among others. Several departments were created to oversee the implementation of these laws and policies. The Forest Department was established in 1942 under the Forest Act that was valid until 2005, when the current Forests Act⁷ was enacted.

The East Africa (Lands) Order-in-Council of 1901 and the Crown Land Ordinance of 1902 placed the British Government in control of the more productive land and resources, paving the way for wide-scale alienation of such lands and the settlement of European immigrants.⁸ The colonial administration had a largely ambivalent official attitude towards the existing traditional institutions. The legislature and the judiciary assisted the administration by facilitating the allocation and exploitation of the natural resources.

5 KFS, 2009, Kenya Forest Service Strategic Plan (2009/2010-2013/2014).

6 Forest Plantations and Woodlots in Kenya, 2011, African Forest Forum Working Paper Series.

7 No. 7 of 2005.

8 Okoth-Ogendo, H.W.O., 1991, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, Nairobi, ACTS Press.

Several colonial institutions with environmental functions were established during the colonial period. The colonial office encouraged the society to set aside large tracts of land for wildlife conservation, like American National Parks, and to use the raised money from hunting licenses for game preservation (Kameri-Mbote 2002). This was the beginning of the protected-areas system that has dominated Kenya's conservation approach. Conservation challenges led the colonial government to promulgate conservation policies and create environmental institutions (MacKenzie 1988; Steinhart, E. 1994; Steinhart 1989). In 1945, the Royal National Parks Ordinance was founded with the aim of strengthening conservation initiatives. The ordinance vested the governor with the power, subject to the consent of the legislative council, to declare any area of land a national park through gazettelement.

The colonial administration encouraged state and private property rights, not perceiving any added value in the indigenous systems of land use. Accordingly, there was virtually no consultation with the indigenous peoples in the creation of these protected wildlife areas, and concerns raised by local communities were not taken into account. Communal wildlife and forest resources were formally made state property, managed by forest and wildlife departments without considering prior rights of the natives over these resources. This explains in part the main issues related to the management of natural resources in Kenya today.

2.2 Post-independence environmental governance

At independence, the new administration largely inherited the colonial environmental system. In the early independence period, the Sessional Paper No. 10 of 1965 on *African Socialism and Application to Planning in Kenya* (Republic of Kenya 1965) registered the government's interest in conserving natural resources. Kenya enthusiastically prepared for the United Nations Conference on the Human Environment, held in Stockholm in June 1972. Through a cabinet decision made on 8 December 1971, the government established a small secretariat – the National Environment Secretariat (NES) – in the Ministry of Natural Resources to oversee preparations for the event.⁹

Following the Stockholm Conference, NES was elevated and transferred to the office of the president. In 1980, it was again relocated to the newly created Ministry of Environment and Natural Resources where it remained for the next two decades as a technical department headed by a director. The secretariat maintained a small staff, and the resources were not enough to coordinate and effectively manage the diverse environmental challenges faced by Kenya.

Development planning was conducted through periodic five-year plans. For example, the 1979–1983 Development Plan brought important institutional developments as it led to the establishment of the Long-Range Planning Unit in the Ministry of Planning and National Development. The unit's role was to promote the integration of environmental conservation and sustainable utilization in development policy planning. The creation of the Inter-Ministerial Committee on the Environment (IMCE) in 1981 was also an important effort. Convened by the Director of NES, the IMCE comprised the Ministries of Health, Industry, Water, Agriculture, Energy, Regional Development, and the Tana and Athi Rivers Development Authority. This initiative provided a multi-sectoral high-level forum for discussing environmental issues such as appraising the environmental impact of proposed projects. Although interest in the forum waned, the committee remained an important consultative forum for non-contentious issues during the life of NES.

In response to the ever-growing challenges of deforestation and loss of vegetation cover, the government created the Permanent Presidential Commission on Soil Conservation and Afforestation (PPCSCA) through a

9 The preparations were so thorough that the Kenyan conference delegation managed to persuade the global community to locate the United Nations Environment Programme in Nairobi. Okidi, C. O. & Kameri-Mbote, P., 2001, *The Making of a Framework Environmental Law in Kenya*, Nairobi, ACTS Press.

1981 presidential administrative directive. PPCSCA focused on conserving soil and water catchments. In addition, it reviewed the existing legislation relating to soil conservation, afforestation and flood control with a view of recommending an effective course of action.

Like in the colonial period, the provincial administration retained considerable environmental management powers in post-independence Kenya. The provincial administration carried out the PPCSCA's *ad hoc* environmental conservation initiatives – like planting trees and building gabions and terraces. In 1988 this role was decentralized through the government's policy of district focus for rural development, which brought policy implementation to the districts, thereby giving the district commissioners, officers and chiefs considerable environmental management responsibilities.

Following this decentralization towards districts' level, an inter-sectoral policy decision-making authority called the District Development Committee (DDC) chaired by the District Commissioner was established in each district. The government also established a District Environment Officer (DEO) position for each administrative district. The DEO was responsible for supervising and coordinating all environmental matters at the district level. It is worth noting that the DEOs worked in the office of the president, while NES was located in the Ministry of Environment and Natural Resources.

In addition to the institutions described above, a vast range of sectoral institutions and agencies with environmental functions has been set up under various ministries, such as the Fisheries Department, the Forest Department (now the Kenya Forest Service) and the Department of Mines and Geology – all established in the Ministry of Environment and Natural Resources. However, the principal concern of these institutions has largely been focused on the protection and exploitation rather than on the planned management of the resources for which they are responsible.

2.3 1992 Rio Summit and sustainable development in Kenya

The previous sections illustrate a long-standing search for suitable institutional arrangements to improve environmental governance in Kenya. However, the major developments on this front can be attributed to the United Nations Conference on Environment and Development (UNCED) process that culminated in the Earth Summit in Rio de Janeiro in June 1992. The process represented an important paradigm shift, from the environmental protection of the post-Stockholm Conference era to sustainable development as a global agenda. It also promoted democracy and constitutional reforms not just in Kenya but also across the entire African continent.

The Rio Declaration and Agenda 21 exhorted governments to establish an effective legal and regulatory framework that would enhance national capacities to respond to the challenges of sustainable development. In Kenya, the period of the Rio Summit coincided with not only an increased integration of environmental concerns in development planning but also more attention to environmental law and policy formulation. For example, although the 1984–1988 Development Plan merely stressed the government's commitments to environmental protection, the sixth National Development Plan, for 1989–1993, included an environmental component in different resource sectors. The National Environment Action Plan (NEAP), concluded in 1994 as a basis for translating Agenda 21, underscored the need for a comprehensive environmental policy and law. An environmental policy was formulated by 1996 but was not presented to parliament for discussion. A framework environmental law was enacted in 1999 as the Environment Management and Coordination Act (EMCA).

EMCA did not remove the sectoral environmental institutions created during the colonial era and inherited at independence. Thus the current institutional framework comprises the various ministries concerned with natural

resources like water, agriculture and wildlife, the numerous agencies created under various laws, and a vast range of institutions established under the EMCA.

2.4 Recent constitutional and legal developments

Kenya's new constitution was promulgated on 27 August 2010,¹⁰ and in many ways it represented a key moment in addressing the country's land and environmental governance. The constitution, widely acclaimed as progressive and green, pays considerable attention to political and institutional matters associated with land and to sound natural-resource management and nature conservation. It seeks to ensure synergetic relations between the national and county level governments in the management, utilization and equitable benefit sharing of natural resources.

The constitution highlights the need for good governance. It moves Kenya away from the previous environmental-management models that focused on dominant state institutions that managed the use of natural resources. These previous models tended to be unresponsive to the pertinent interests of local people, thereby compromising the models' legitimacy and effectiveness as they failed to capture the crucial inputs and innovations of the citizens. In contrast, management approaches that involve local communities and recognize local behaviors and patterns of resource use can utilize locally developed and controlled responses, making these approaches more likely to be successful in solving environmental problems.

The new constitution has several implications for forest governance and the development of an appropriate legal framework for reducing emissions from deforestation and forest degradation (REDD+). It dedicates its entire chapter five to land and environment. It also entrenches a wide range of social, political, economic and cultural rights. It drastically changes the entire system of political governance by devolving authority to county governments and decreeing the need for citizen participation in decision-making. It enshrines the right to information and makes principles of international laws and treaties ratified by Kenya part of the country's municipal law.

¹⁰ Republic of Kenya, 2010, *Constitution of Kenya, 2010*, Nairobi, Government Printer.

3. Land tenure and forest governance in Kenya

3.1 Contextualizing land tenure

According to the United Nations, “land tenure is the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land”.¹¹ Land property rights in most developing countries reflect a diversity of tenure regimes. This notion is often complemented by the description of the “bundle of rights”,¹² which are the property rights of forests and land in relation to access rights, withdrawal rights, management rights, exclusion rights and alienation rights.

The Constitution of Kenya categorizes land as private, public or communal, depending on the tenure regime. In relation to REDD+, land tenure rights are connected to the forest and agriculture sectors, since agriculture expansion is one of the main factors of deforestation. Tenure of forests includes ownership, tenancy and other arrangements for the use or conservation of forests, trees and forest resources. It is a combination of legally or customarily defined forest ownership and of rights and arrangements to manage and use forest resources such as timber, charcoal or fuel wood. Tenure defines the methods by which individuals or groups acquire, hold, transfer or transmit property rights of land.

The tenure regime adopted should also strive to satisfy various policy objectives such as:

- efficiency in land use by providing a smooth-functioning land market and permitting maximum productivity of land resources for all types of uses. The system should also respond on demand to various changes;
- equity by ensuring that the tenure system provides reasonable access to all groups, especially low-income or vulnerable groups;
- compatibility with other policy instruments dealing with economic development and with existing legislation;
- continuity to avoid abrupt breaks in the existing political and cultural set up.

These objectives should be achieved whether the land is held in freehold, leasehold, customary or other interests.¹³

3.2 Kenya's land tenure regimes

There are three main tenure regimes in Kenya: community, public and private.

3.2.1 Community tenure

Community tenure refers to unwritten land ownership practices carried out by certain communities under customary law. Kenya, being an ethnically diverse country, has multiple customary tenure systems, which vary mainly due to different agricultural and cultural practices and climatic conditions.

The community tenure system allows individuals or groups by virtue of their membership in some social unit of production or political community to have guaranteed rights to access to land, while the control over the

11 FAO, 2002, Land tenure studies: land tenure and rural development, Rome.

12 For the expanded “bundle of rights” approach see: Rights and Resources Initiative (RRI), 2012, *What Rights? A Comparative Analysis of Developing Countries' National Legislation on Community and Indigenous Peoples' Forest Tenure Rights*, Washington DC.

13 Sessional paper no. 3 of 2009 on the National Land Policy.

natural resources rights are vested in the political authority of the unit or community. This control is derived from sovereignty over the area where the relevant resources are located.

Prior to Kenya's first ever land policy¹⁴ and its 2010 constitution, customary land rights were neither recognized as a legal tenure regime nor given adequate attention by the law. Group or community ownership rights were recognized under the form of trust land and group ranches. During the colonial period, trust land referred to areas that were occupied by the natives but were not consolidated, adjudicated or registered in an individual's or a group's name; native land referred to land that was not taken over by the government. Trust lands were governed by the Trust Land Act¹⁵ and were held, prior to the 2013 general election, by local authorities or county councils. In respect of the occupation, use, control, inheritance, succession and disposal of trust land, the act granted to every tribe, group, family and individual all the rights that were allocated by existing African customary law or any subsequent modifications thereof.

The act details an elaborate procedure to follow in case the government or the county council wanted to allocate a portion of trust land for public purposes. The procedure, *inter alia*, prohibits expropriation of trust land without compensation. However, as Kameri-Mbote et al.¹⁶ point out, the record shows that this procedure has routinely been disregarded. County councils in many cases irregularly and illegally disposed of trust lands.¹⁷ A similar situation occurred with community or group ownership.

Group tenure over land has been recognized only in exceptional cases, one being the registration of group ranches in pastoral communities.¹⁸ A group ranch refers to a demarcated area of rangeland that a group of pastoralists have official land rights to graze their individually owned herds. Group ranches are governed by the Land (Group Representatives) Act.¹⁹ The act, for its purposes, defines a group as a "tribe, clan, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner".²⁰ In many cases, the group representatives entrusted with the management of group land disposed of it without consulting the other members.²¹ Group ranches suffered two other setbacks.²² First, the group representatives lacked the authority of traditional leaders, which led to questions over their legitimacy. Second, government policy has tended to emphasize individual land rights over group ownership. These factors led to defensive subdivision and individual titling of land within group ranches to avoid encroachment by government or other entities.

The conversion of trust land and group ranches into individual or state ownership has had significant implications. The land is removed from the ambit of council control for conservation and development purposes, and access by communities that previously occupied the land is curtailed.²³

14 Ibid, paragraph 5.

15 Laws of Kenya, Chapter 288.

16 Kameri-Mbote, P., Odote, C., Musembi, C. & Kamande, M., 2013, *Ours by Right: Law, Politics and Realities of Community Property in Kenya*, Nairobi, Strathmore University Press.

17 Laws of Kenya, Chapter 287, paragraph 65.

18 Kameri-Mbote et al., 2013.

19 The Laws of Kenya, Chapter 287.

20 Land (Group Representatives) Act, Section 23 (2)(a).

21 Sessional paper no. 3 of 2009 on the National Land Policy, paragraph 65.

22 Kameri-Mbote et al., 2013.

23 Ibid.

The Constitution of Kenya 2010 and the National Land Policy (NLP) recognize community rights to land. The two texts replace the traditional government, trust and private tenure regimes with public, community and private tenure regimes, presenting an opportunity to establish new land laws for the protection of all three tenure regimes. The parliament has already enacted the Land Act and the Registration of Land Act to govern all private and public lands. The constitution requires the parliament to enact pieces of legislation to govern community land within five years.²⁴ A Community Land Bill has been drafted but has not yet been adopted by the parliament.

The constitution vests community land to communities identified on the basis of ethnicity, culture or similar community of interest.²⁵ It states that any unregistered community land should be held in trust by county governments on behalf of the communities. Community land comprises land registered in the name of group representatives under the provisions of any law; land transferred to a specific community by any process of law; land declared community land by an act of parliament; land that is held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; and land held as trust land by the county governments.²⁶ The constitution also predicates any disposition or use of community land by legislation that specifies the nature and extent of the individual and collective rights of each community member.²⁷

The NLP designates all land in Kenya as public land, community land or private land.²⁸ The policy defines community land as “land lawfully held, managed and used by a specific community as shall be defined in the Land Act”.²⁹ In the National Land Commission Act,³⁰ community is defined as a group of users of land identified on the basis of ethnicity, culture or similar community of interest. These land-user groups hold a set of clearly defined rights and obligations over land and land-based resources as provided under article 63(1) of the constitution.^{31,32} The NLP particularly identifies subsistence farmers, pastoralists and hunters and gatherers as vulnerable groups who require facilitation in securing access to land and land-based resources, participation in decision-making over land and land-based resources, and protection of their land rights from unjust and illegal expropriation.³³

To secure community land, communities are encouraged to settle land disputes through recognized local community initiatives consistent with the constitutional imperatives³⁴ of non-discrimination, participation, equity and fairness. Also, the National Land Commission Act mandates the National Land Commission to encourage using traditional dispute-resolution mechanisms in land conflicts.³⁵

The constitution and the NLP provide a framework for recognizing community land rights. Though the provisions protecting customary land rights also present challenges.³⁶ Firstly, the parameters for identifying communities

24 Article 63 (5).

25 Article 63 (1).

26 Article 63 (2).

27 Article 63 (4).

28 Sessional paper no. 3, 2009, on the National Land Policy, p.57.

29 Sessional paper no. 3 of 2009 on the National Land Policy, p.63.

30 Act no. 5, 2012.

31 Ibid, Section 2.

32 See the glossary of terms section of the National Land Policy.

33 Sessional paper no. 3 of 2009 on the National Land Policy, pp.195-198.

34 The Constitution of Kenya, 2010, Article 60 (1).

35 Section 5(1)(f), Act no. 5, 2012.

36 Kameri-Mbote *et al.*, 2013.

are very general. For example, it is not clear if communities can be derived from an amalgamation of all three identifiers or if the identifiers are mutually exclusive. Secondly, the provisions for community rights to land come at a time of heightened ethnic awareness in Kenya that has followed the 2007–2008 post-election violence. Community claims to land could therefore ignite ethnic tensions unless handled carefully.

Thirdly, “community” has diverse meanings, and neither the constitution nor the NLP offer sufficient guidance on which of the three criteria (ethnicity, culture and community of interest) should be applied in defining community in specific situations. Fourthly, many communities linked by culture and ethnicity and governed by African customary laws often exclude women and youth from exercising authority over property relations especially land. This exclusion presents a challenge: the balance of respecting cultural norms and practices, of attaining equality and non-discrimination and of guaranteeing meaningful involvement of marginalized groups in the design of a community land rights regime. These potentially conflicting goals are contained in the 2010 constitution. Lastly, customary tenure is very resilient; it has survived successive official attempts on its life. Drafting a lasting community land rights regime, therefore, requires very careful treatment of customary practices.

3.2.2 Private tenure

Private tenure refers to registered land held by any person under a freehold or leasehold tenure, or any other land declared private land under an act of parliament.³⁷ Freehold tenure confers the greatest interest in land; it is the absolute right of ownership or possession of land, indefinitely or in perpetuity. Leasehold tenure is an interest in land for a definite term of years, it may be granted by a freeholder who is usually subject to the payment of a fee or rent, and it is subject to certain conditions that must be observed, such as conditions on developments and usage. In Kenya a leasehold title can be granted for a maximum period of 99 years.

3.2.3 Public tenure

Public tenure refers to land owned by the government for its own purpose; it includes un-utilized or un-alienated government land reserved for use by the government or the general public for various uses.³⁸ Notably, public land includes all minerals and government forests other than those lawfully held, managed or used by specific communities. Also included as public land are government game reserves, water catchment areas, national parks, protected areas, roads and thoroughfares, rivers, lakes and other water bodies.³⁹

3.3 The relationship between tenure and forest governance

The forest sector is comprised of three distinct tenure systems:

1. Public forests – gazetted forests including national parks and national reserves;
2. Private forests – owned by private individuals, businesses or institutions;
3. Local authority forests – forests on land held by communities defined on basis of ethnicity, culture or similar community of interest. Although classified as local authority forests under the Forests Act, 2005, the local

37 The Constitution of Kenya, 2010, Article 64.

38 Ibid, Article 62 (1).

39 Ibid, (f),(g),(h) and (i).

authorities ceased to exist under the new devolved system of government. Therefore, the local authority forests are now held in trust by county governments on behalf of the people resident in the county.⁴⁰

Trust land forests constituted the largest forest tenure system in Kenya in 2010, making up approximately 58 percent of the country's forest area.⁴¹ Publicly owned forests were the second largest ownership system, at approximately 39 percent, with privately owned forests having the remaining share at 2.6 percent.⁴²

Under the Forests Act, 2005, all forests in Kenya other than private and trust land forests are vested to the state to be managed by the Kenya Forest Service subject to the rights of the user.⁴³ The minister responsible for forests may declare a state forest as any un-alienated government land or land purchased or acquired by the government.⁴⁴ Private forests are pegged to ownership of land, while community forests management is pegged on the registration of a community forest association under Section 46 of the Forests Act. Land tenure is inextricably linked to many forest governance factors, thus it is difficult to disentangle one from the other. Most fundamentally, the various land tenure systems are composed of many different property rights bundles, and specific bundles affect forest outcomes in different ways.

Tenure relies on, and is conditioned by, governance. Effective tenure is impossible to achieve without supportive policy and institutional systems and rather useless without broader institutional capacity to do something with it. For example, rights without effective sanctions against their transgressions are insufficient, while institutional effort in support of wise forest management is likely to be wasted in the absence of clear forest use rights. Understanding tenure requires an understanding of the extent and the ways that national legislation is actually applied on the ground. It also demands an understanding of other systems of resource tenure that may not be reflected in legislation but may enjoy legitimacy for local people. A notable example is the customary rights to land that, prior to the 2010 constitution, were not recognized by law. In fact, in relation to forest tenure, there is still a disjuncture between the provisions of the constitution and those of the Forests Act of 2005. While the constitution provides for public, private or community forests, the Forests Act of 2005 categorizes forests as state, local authority⁴⁵ or private. The Forests Act of 2005 is, however, currently under revision to align it with the provisions of the constitution.

40 This excludes un-alienated government land; land transferred to the state by way of sale, reversion or surrender; land in respect of which no individual, community ownership or heir can be identified by any legal process; or land lawfully held, used or occupied by a national or state organ as lessee under a private lease.

41 Stiebert. S., Murphy.D., Dion.J., & McFatridge. S., 2012, Kenya's Climate Change Action Plan: Mitigation, Chapter 4.

42 Ibid.

43 Forests Act, 2005, Section 20.

44 Ibid, section 22.

45 See *supra* note 23.

4. Forest related policies

The concept of forest governance refers to the process of formulation, articulation, administration and implementation of policies, institutions, legislation, regulations, guidelines and norms relating to ownership, access, control, rights and responsibilities and practices for sustainable management of forests at local or national levels,⁴⁶ which become the subject of comprehensive and appropriate forest policies. Failure to address governance issues in a comprehensive forest policy can lead to low levels of transparency, accountability, equity and public participation in decision-making, as well as weak coordination across different sectors and levels of government.

These consequences have been the fate of forest governance in Kenya. Over the years, weak forest governance has led to massive deforestation and forest degradation. In 1963 when Kenya got its independence, the forest cover stood at approximately 11 percent.⁴⁷ Owing to poor forest governance, deforestation reduced Kenya's forest cover to just about 2 percent in the late 1990s, with the country losing approximately 12 000 hectares of forest a year despite the government's attempts to alleviate the problem.⁴⁸ Though there are diverse drivers of deforestation, the main ones in Kenya are the conversion of forests to agricultural land in response to demographic pressures; unsustainable production methods and consumption patterns for charcoal; degazetting of forest lands; ineffective institutions and enforcement; corruption; illegal logging; and unclear land tenure for forest-adjacent peoples.⁴⁹

Prior to 2007, Kenya did not have a forest policy articulated in an official sessional paper. A draft policy developed during the late 1990s and early 2000s remained the main reference point in terms of articulation of key policy issues and objectives in the forest sector. To this draft policy, one could add the sketchy two-page Forest Policy of 1968 that has since become obsolete. The early 2000s saw widespread public concern over the environmental impacts of forest loss. This resulted in revision and updating of both the Forest Policy and legislation in order to improve forest governance as well as to reverse the trend of forest degradation and destruction.⁵⁰ Both the revised Forests Act of 2005 and the Forests Policy came into force in 2007.

The dominant features of the revised policy and act were the creation of a new institution (Kenya Forest Service, KFS) to replace the Forest Department, enhancement of civil society participation and partnerships in forest management, new benefit-sharing arrangements and recognition of the important role of forests in livelihoods and sustainable development. Both the Forests Act of 2005 and Forests Policy of 2007 are currently being revised again in order to align with the new constitution of 2010. The subsidiary legislation and the operating rules and regulations required to effectively implement the act are also in the process of being developed. Other than the Forests Policy and the Forests Act, Kenya's forest governance can also be appreciated by examining salient issues affecting the sector as articulated in the constitution and various sectoral legislation and policies.

4.1 Vision 2030

Kenya's overall sustainable development framework is contained in its Vision 2030, referred to as *Ruwaza ya Kenya 2030* in Swahili. Launched on 10 June 2008, it articulates the country's long-term development programme

46 Mathu W., 2007, Forest Law Enforcement and Governance in Kenya. A paper prepared for the East Africa community-led regional process in the framework of the Ministerial Declaration, Yaounde, Cameroon, October 16, 2003 on the East Africa Law Enforcement and Governance (AFLEG).

47 Institute of Economic Affairs, 2010, Biodiversity and Development. Trade Notes 24, Nairobi, Institute of Economic Affairs, p.5.

48 FAO, 2010, Global Forest Resource Assessment Country Report: Kenya, Rome, p. 10.

49 Government of Kenya, 2010, REDD Readiness Preparation Proposal Annex, Nairobi.

50 Ibid.

for the period between 2008 and 2030. Its stated objective is to help transform Kenya into a “middle-income country providing a high-quality life to all its citizens by the year 2030”. Vision 2030 was developed through all-inclusive and participatory stakeholder consultations. It is organized around three pillars: economic, social and political. The vision is to be implemented in successive five-year medium-term plans. The first such plan covered the period 2008–2012. Subsequent plans will be developed to cover the remaining five-year periods until 2030. It is hoped that through these plans, the country will be able to meet the Millennium Development Goals (MDGs) by 2015, as well as any other future sustainable development goals.

Accordingly, Vision 2030 has become the key reference point of the country’s macro- and micro-economic development planning. The vision provides an important basis for improving environmental management including forest governance; thus, it is critical for the success of REDD+ implementation. It acknowledges that the country’s planned 10 percent growth rate per annum will bring changes that are likely to have adverse impacts on the environment. The changes include exploiting natural resources such as forests and increasing pollution levels and urbanization. The vision calls for effective management in order to ensure sustainability.

Vision 2030 recognizes several challenges facing environmental management⁵¹ in Kenya. Among these challenges is the destruction and degradation of the five water towers⁵² that constitute Kenya’s main forests.⁵³ The other challenges that relate to REDD+ include destruction of critical wildlife habitats; environmental degradation caused by, *inter alia*, industrial, car and wood fuel emissions; climate change and desertification; and a low capacity to harness natural resources. To address these challenges and achieve the vision for the environmental sector that sees “a people living in a clean, secure and sustainable environment,” Vision 2030 details the strategic thrusts, concrete goals and flagship projects required. Most of the flagship projects are very closely linked to forests and can enhance the success of REDD+. They include water catchment management and full rehabilitation of the five water towers; secure wildlife corridors and migratory routes; and accurate and continuous land cover and land-use mapping. The flagship projects are to be achieved through initiatives such as farmland and dry-land tree planting, carbon-offset schemes (e.g. REDD+), strengthened capacity for environmental and natural resource information management, and use of market-based environmental instruments.

Other sectors under the vision’s social pillar also touch on REDD+ related issues. For instance, to achieve the vision of the tourism sector, niche products will be developed to complement the coastal and safari products that tourism has traditionally focused on. Among the niche products to be developed is ecotourism, and the vision specifically aims to develop ecotourism sites in Kakamega Forest, Ruma National Park, Mt. Elgon and Mt. Kenya Regions. These are basically forested areas. Their conservation and management for ecotourism will also have implications for REDD+ activities.⁵⁴ Section 4.7 of Vision 2030 deals with gender, youth and vulnerable groups. In order to give youth a chance to excel in various aspects of life, the vision identifies flagship projects aimed at enhancing youth empowerment, sports and music. Other initiatives to be implemented alongside the flagship projects include encouraging youth to participate in environmental conservation (e.g. by planting trees) to increase afforestation. If implemented well, this will clearly boost REDD+ efforts.

51 Ministry of Northern Kenya and Other Arid Lands, 2012, *Vision 2030: Northern Kenya and Other Arid Land*, Nairobi, Government Printer, Chapter 4.6.

52 The five water towers are Mau Escarpment, Mt. Kenya, Aberdare Ranges, Cherangany Hills and Mt. Elgon.

53 Destruction of water catchments is also identified as a challenge and dealt with under the water and sanitation section of Vision 2030.

54 REDD+ activities refer to the activities that the developing country parties of the Cancun Agreements are required to undertake to contribute to mitigation actions in the forest sector. They are reducing emissions from deforestation; reducing emissions from forest degradation; conservation of forest carbon stocks; sustainable management of forests; and enhancement of forest carbon stocks. UNFCCC, Report of the Conference of the Parties on its 16th session, held in Cancun from 29 November to 10 December 2010, paragraph 70.

Government departments and agencies are required to align their sustainable development policies with Vision 2030. Various ministries that existed prior to the March 2013 election have already made such alignments.⁵⁵ For instance, the now obsolete Ministry of State for Northern Kenya and Other Arid Lands formulated its version of Vision 2030 to “complement and deepen the national Vision 2030 by explaining how its goals will be realized in the specific context of Northern Kenya and the country’s arid and semi-arid lands”.⁵⁶ Since the ministry was abolished in April 2013 by the new government, it will be interesting to see if the vision will be supported and implemented by the county governments in Northern Kenya and other arid lands, as well as by the national government, perhaps through the new Ministry of Devolution and Planning.

The Vision 2030 for Northern Kenya and Other Arid Lands acknowledges the special circumstances of previously marginalized communities and places a premium on reducing poverty and inequality and rebalancing regional development. It thus articulates the form that investment would take in the north of Kenya and the country’s arid and semi-arid lands, accounting for the distinctive characteristics of these areas. Like its national counterpart, Northern Kenya’s vision will be implemented through a series of five-year medium-term investment plans.

The Vision includes the arid and semi-arid lands (ASALs), which make up to 89% of the country.⁵⁷ These are the same areas where many of REDD+’s activities will happen in the near future. The dominant production system in the arid counties, and in some of the semi-arid counties, is pastoralism. The ASALs are synonymous with the concept of Northern Kenya, or the area once known as the Northern Frontier District. There are three main characterizations of this area: dryness, pastoralism and relatively poor public service delivery – all of which have distinct but overlapping policy implications.

4.2 National Climate Change Response Strategy (NCCRS)

With the NCCRS,⁵⁸ Kenya plans to align its REDD+ policy, Land Policy, draft of the Environment Policy, draft of the Forest Policy and Energy Policy. The NCCRS has been developed to steer Kenya onto a climate-proofed and low-carbon development path and identifies the forestry sector as one of the key sectors to implement climate change mitigation actions.

The NCCRS recognizes that climate change is affecting and will continue to affect every facet of life of the Kenyan people. According to the strategy, adverse impacts of climate change have been observed to affect or they will potentially affect natural systems such as forests, land use, rangelands, wildlife and water resources. Adverse impacts on key economic sectors have also been observed: impacts on agriculture and food security, tourism, wildlife, fisheries and forest products, as well as on physical and social infrastructure such as transport, communication, health, energy and settlement.⁵⁹ The NCCRS seeks to tackle these impacts by ensuring that adaptation and mitigation measures are integrated in all government planning and development objectives. To do this, the strategy calls for collaborative and joint action with all stakeholders (private sector, civil society, non-governmental organizations [NGOs], etc.).

55 The new government massively restructured the national government after the March 2013 election. Several ministries were merged together in an attempt to form a lean but effective government.

56 Ministry of Northern Kenya and Other Arid Lands, 2012, *Vision 2030: Northern Kenya and Other Arid Lands*, Nairobi, Government Printer.

57 Ibid. Arid counties alone make up 70% of Kenya- and are home to 38% of the population.

58 Government of Kenya, 2010, *National Climate Change Response Strategy*, Nairobi.

59 Ibid, Chapter 2.

The NCCRS is critical for the success of Kenya's REDD+ implementation. Firstly, the forest sector is indicated as among the key priority areas identified by the NCCRS for quick and immediate actions.⁶⁰ Secondly, the NCCRS's proposed mitigation interventions include restoring the country's forest cover, developing renewable energy sources, implementing energy efficiency programmes and reducing emissions from the agricultural and transport sectors.⁶¹ These interventions are consistent with the REDD+ activities, which aim to reduce emissions from deforestation and forest degradation, conserve forest carbon stocks and sustainably manage forests.⁶² The NCCRS also refers specifically to carbon markets, clean development mechanism (CDM) and REDD+ as a way of encouraging the mitigation interventions mentioned above. It details how the mitigation projects can gain monetarily from carbon markets by selling certified emission reduction (CER) credits to developed countries or through the Voluntary Carbon Markets (VCM). The NCCRS details the measures that Kenya needs to take to participate and benefit from the carbon market.⁶³

Thirdly, some of the NCCRS's strategic objectives⁶⁴ form the requirements under the Cancun Agreements that support REDD+ activities.⁶⁵ They include concerting action plans, monitoring and evaluating impacts of mitigation actions and enhancing research and technology. Fourthly, the key NCCRS objectives are also consistent with REDD+ guidance and safeguards.⁶⁶ These are, *inter alia*, understanding the national and international climate change obligations and maximizing Kenya's beneficial effects of the international agreements, policies and processes. Other NCCRS objectives are recommending capacity building and enabling policy, legal and institutional frameworks.

4.3 The NCCRS Action Plan

The NCCRS gives a detailed breakdown of its action plan, the institutions that implement specific activities, their time frame and their costs. The plan covers 20 years and coincides with Vision 2030 and the initial five years for fulfilling its Millennium Development Goals (MDGs). The plan's activities cut across various sectors such as health, agriculture, forestry and wildlife, environment, tourism, regional development authorities, water and irrigation, energy, roads and transport, gender, youth and sports, education and information and communication technology (ICT). Many of the proposed activities can support Kenya's REDD+ process by promoting afforestation, reforestation or forest conservation.

NCCRS's activities under the agriculture sector include promotion of agroforestry, while its marine and fisheries activities include mitigation against loss of biodiversity through, among other ways, mangrove restoration and planting vegetation to prevent riverine and lakeshore erosion. The agriculture sector is also required to reduce carbon emissions by promoting use of renewable energy technologies. A draft of REDD+ relevant proposed activities are listed under the plan's forestry and wildlife sector. The action plan also contributes to the operationalization of the Forests Act of 2005, as well as to afforestation and reforestation programmes targeting an additional 4.1 million ha of land under forest cover. The strategy also requires the forestry and

60 The other key economic sectors to be given immediate attention under the NCCRS are agriculture and food security, water, rangelands, health and social and physical infrastructure. See *Ibid*, at Chapter 3.2.

61 *Supra* note 43, Chapter 4.

62 UNFCCC, Report of the Conference of the Parties on its 16th session, held in Cancun from 29 November to 10 December 2010, Paragraph 70.

63 See *Supra* note 43, Chapter 4 for a review of the proposed measures.

64 *Ibid*, Chapter 3.3.3.

65 *Ibid*, Paragraph 73.

66 For the Cancun Agreements guidance and safeguards, read Appendix I to the Cancun Agreements (Decision 1/CP.16). UNFCCC, Report of the Conference of the Parties on its 16th session, held in Cancun from 29 November to 10 December 2010.

wildlife sector to enhance the conservation and management of all types of forests, including industrial forest plantations, and to engage with a wide range of stakeholders for that purpose. In addition, the forestry sector is required to pursue innovative funding mechanisms that will include payment for environmental services. This requirement can effectively take advantage of the opportunities offered by REDD+. Lastly, the forestry sector is expected to promote climate change research.

The environment sector is required under the strategy to coordinate sustainable environmental management. REDD+ related proposed activities in the energy sector include the promotion of renewable energy technologies and water catchments protection programmes. The regional development authorities and the cooperatives' movement are also expected to spearhead climate change response activities, some of which can enhance the success of REDD+. For instance, the Tana and Athi River Development Authority (TARDA) is required to undertake the Upper Tana Catchment Afforestation and Conservation Project, while Kerio Valley Development Authority (KVDA) is required to do the same for the Cherangany Hills Watershed.

In the transport sector, proposed activities include development of a Bus Rapid Transit (BRT) System and light rail, in order to reduce greenhouse gas (GHG) emissions. The NCCRS also targets the gender, children and social services sector by requiring climate change education and awareness programmes and support for environmental conservation groups. The NCCRS plans to take advantage of youth and sports to mount mass tree planting countrywide as youth employment. NCCRS also proposes climate change education and awareness to be mainstreamed in the education and ICT sectors.

4.4 National Land Policy

The National Land Policy (NLP) has a vision to guide the country towards a sustainable and equitable use of land. The land policy calls for immediate actions to address environmental problems that affect land, such as degradation, soil erosion and pollution. For instance, the policy stipulates the principle of conservation and management of land-based natural resources and of protection and management of fragile and critical ecosystems including wetlands and arid lands.⁶⁷ The policy further calls for extensive overhauls to current policies and institutions in an attempt to address chronic land tenure insecurity and inequity.

The NLP designates all land in Kenya as public, private (freehold or leasehold tenure) or community land, or land held, managed and used by a specific community. The NLP has thus been formulated to address the critical issues of land administration: access to land, land use planning, restitution for historical injustices, environmental degradation, conflicts, unplanned proliferation of informal urban settlements, outdated legal framework, institutional framework and information management. The NLP is particularly important for REDD+ in Kenya, as it provides guidance on issues relating to land use. The land policy principles are equitable access to land, intra- and intergenerational equity, gender equity, secure land rights, effective regulation of land development, sustainable land use, access to land information, efficient land management and transparent and good democratic governance of land.

The policy also deals with environmental management and requires, *inter alia*, conservation and sustainable management of land-based natural resources, including forests, national parks and arid and semi-arid lands. It also requires an environmental assessment and audit on all land developments that are likely to degrade the environment. Importantly, the NLP calls for cross-sectoral coordination and cooperation among related sectors such as agriculture, water, energy, human settlement, industry, tourism, wildlife and forestry. These

67 National Land Policy of 2007. Section 4.2: Environmental Management Principles.

requirements are consistent with the REDD+'s activities of sustainably managing forests and addressing the drivers of deforestation and forest degradation. The requirements are also coherent with REDD+ safeguards, such as the requirement for actions to be consistent with the objectives of national forest programmes and relevant international conventions and agreements; transparent and effective national forest governance structures; effective participation of relevant stakeholders; consistency of actions with the conservation of natural forests and biological diversity. The NLP can therefore enhance the success of REDD+ if properly implanted. Already the Land Act (No. 6 of 2012) was enacted to put the policy in operation, and there are ongoing efforts to develop the rules and procedures for its full implementation.

4.5 Energy Policy

The Energy Policy has important repercussions for total national greenhouse gas emissions, particularly as Kenya depends widely on the use of fuel wood and charcoal in both rural and urban populations. Impacts of energy production and consumption include atmospheric pollution, deforestation, climate change, soil erosion and siltation of hydropower reservoirs and river systems, among others. This policy ensures that the relevant ministries and organizations address environmental problems associated with energy. Its related act supports the promotion and development of renewable sources of energy, especially through agroforestry, and the conservation of energy through appropriate technologies.

About 5.9 percent of Kenya's land area is covered by forests that produce about 45 percent of the biomass-energy resources including wood wastes. The balance is derived from farmlands in the form of woody biomass as well as crop and animal residues. Some of the proposed actions within the Energy Policy include promoting the use of fast maturing trees for energy production and biofuels, establishing commercial woodlots and peri-urban plantations and harnessing opportunities offered under the CDM and other mechanisms like carbon credit trading to promote the development and exploitation of renewable energy sources. The government has promoted agroforestry and social forestry programmes to increase the stock of woody biomass on farms and to make up for the loss of trees as forestland is converted into agricultural and settlement land.

The Energy Policy supports the development of renewable sources of energy, mainly via more sustainable agroforestry systems for fuel wood, charcoal and biomass, which remain key energy sources and key drivers of deforestation and degradation in Kenya. The policy recognizes the importance of, and urgency for, energy efficiency and conservation. It outlines a draft of strategies that include recognizing energy efficiency and conservation as a high priority and promoting their initiatives in all sectors.

4.6 The draft of the Forest Policy

The draft *Sessional Paper No. 1 of 2007 on Forest Policy* aims to enhance the contribution of the forestry sector in the provision of economic, social and environmental goods and services. While the policy highlights several objectives, the two most critical ones are (1) enhancing forests' contribution to poverty reduction, employment creation and improvement of livelihoods through sustainable use, conservation and management of forests and trees and (2) promoting participation of communities and other stakeholders in forest management and decision-making. At the same time, the forestry sector has been beset by conflicts over access to forest resources between forest managers and communities adjacent to forests. The new Forest Policy is still in draft form; however, its provisions are enacted by the Forests Act of 2005, which came into force in 2007. The specific objectives of the revised Forest Policy are to:

- contribute to poverty reduction, employment creation and improvement of livelihoods through sustainable use, conservation and management of forests and trees;

- contribute to sustainable land use through soil, water and biodiversity conservation;
- promote the participation of the private sector, communities and other stakeholders in forest management to conserve water catchment areas, create employment, reduce poverty and ensure the sustainability of the forest sector;
- promote farm forestry to produce timber, wood fuel and other forest products;
- promote dry-land forestry to produce wood fuel and to supply wood and non-wood forest products;
- promote forest extension to enable farmers and other forest stakeholders to benefit from forest-management approaches and technologies;
- promote forest research, training and education to ensure a vibrant forest sector.

4.7 The draft of the National Environment Policy

The revised draft of the National Environmental Policy is another instrumental tool that aims to promote REDD+ activities in Kenya. Dated April 2012, the draft sets out important provisions relating to the management of ecosystems and to the sustainable use of natural resources, and it recognizes that natural systems are under intense pressure from human activities, particularly critical ecosystems such as forests, grasslands and arid and semi-arid lands. The objectives of the policy include developing an integrated approach to environmental management, strengthening the legal and institutional frameworks for effective coordination, promoting environmental management tools (including PES), supporting the implementation of the Forests Act of 2005 and developing national standards and appropriate forest-based development mechanisms in emerging carbon markets.

The key policy statements of the forestry and ecosystems section of the National Environmental Policy include the Government of Kenya's pledge to (1) formulate an innovative strategy to increase forest and tree cover from the current 5.9 percent to at least 10 percent as required under the constitution; (2) develop and implement a National Strategy for Rehabilitation and Restoration of degraded forest ecosystems; (3) protect and conserve forests located in key water catchment areas; (4) support effective implementation of the Forests Act of 2005; (5) develop and implement cost-effective, objective and measurable national standards, principles and criteria of sustainable forest management; and (6) develop and support appropriate forest-based development mechanisms in the emerging carbon markets. The policy proposes seven government actions, including the development of forest-based development mechanisms in the emerging carbon markets.

4.8 The Kenya National Biodiversity Strategy and Action Plan (NBSAP)

The overall objective of the NBSAP⁶⁸ is to address the national and international undertakings of the Convention on Biological Biodiversity (CBD).⁶⁹ The NBSAP details the national framework of action to implement the convention's agreements that strive to reverse the rate of biodiversity loss and to maintain levels of biological resources at sustainable levels for posterity. Most of the action areas identified by the plan are very critical to REDD+ since they relate to the protection and conservation of biodiversity habitats, which are mostly forests.

The NBSAP identifies the following issues for action: conservation within protected areas, arid and semi-arid areas, forests, degraded ecosystems; threatened and alien species; genetically modified organisms; indigenous

68 Ministry of Environment and Natural Resources, 2000. *The Kenya National Biodiversity Strategy and Action Plan*.

69 CBD is an international legally binding treaty. Its objective is to develop national strategies for the conservation and sustainable use of biological diversity.

systems; and knowledge. The action plan addresses other fundamental concerns of biodiversity management such as agricultural biodiversity, incentive measures, research and training, public education and awareness, impact assessment, access to genetic resources, institutional capacities and linkages, gender concerns, policy and legislation, poverty, biotechnology and other technologies, information exchange, technical and scientific cooperation and financial resources.

5. Forest related laws

5.1 The Constitution of Kenya

The Constitution of Kenya, 2010, has markedly reordered Kenya's political, social and economic setting. It reorganizes the Kenya State from a central unitary state to a devolved one based on one national government and 47 county governments. It also has very innovative and progressive provisions in many areas, ranging from human rights to land and environmental management.

5.1.1 Environment and natural resources in the constitution

The Constitution of Kenya, Chapter V, Part 2,⁷⁰ deals with the environment and natural resources. It outlines the environmental obligations of the national government. The constitution has also given the responsibility for the implementation of some national government's policies on natural resources and environmental conservation, including forestry to the county governments. Article 69 says the state shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure the equitable sharing of the accruing benefits. The state shall also work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya and utilize the environment and natural resources for the benefit of the people of Kenya.

Every person has a duty to cooperate with state organs and other entities to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. The Kenyan public has the capacity to bring legal action with respect to environmental matters, whether or not a person has directly suffered personal loss or injury from an action or an omission of a defendant. Previously, the Kenyan public had *no loci standi* in environmental matters; therefore, the public could not legally challenge the actions of the government and non-governmental bodies. This addition to the constitution shows that the government has realized and learnt the importance of environmental protection and conservation.

The 2010 constitution not only seeks to restructure Kenya into a modern and democratic state but also puts in place elaborated measures to achieve this desire. Article 10 of the constitution details the treatment of the values and principles that should govern the operations of all entities within the state. It encourages adherence to the national values and principles when implementing the constitution and adopting, interpreting and applying any law or policy. In addition to stating the well-accepted principles that include rule of law, human rights and gender equality, the constitution requires people to consider sustainable development. By placing sustainable development within the context of national values, the constitution has made the drive towards environmental sustainability a constitutional and national imperative. Four articles in the new constitution specifically address the environment, going so far as to allow individuals to seek legal redress if their environmental rights are infringed.

Moreover, Article 69 outlines the obligations of the government in respect to the environment, asserting, "The State shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure the equitable sharing of the accruing benefits." The constitution also mandates that the state increase tree cover to 10 percent of Kenya's total land area, the minimum recommended for ecological sustainability. The Kenyan farmers' trees will undoubtedly help the nation accomplish its commitments to the people and environment.

⁷⁰ Constitution of Kenya, 2010.

The new constitution provides national values and principles of governance. These values and principles include (i) the sharing and devolution of power, (ii) the rule of law, (iii) democracy and participation of the people, (iv) equity, (v) integrity, transparency and accountability, (vi) defining, recognizing, protecting and enforcing human rights, (vii) access to information, (viii) objectivity and impartiality in decision-making and (ix) ensuring that decisions are not influenced by nepotism, favouritism or other improper motives or corrupt practices.⁷¹ This provides a solid foundation – and an urgent imperative – to improve governance in the forestry sector.

Pursuant to Article 162 (2) b of the Constitution of Kenya 2010, the Environment and Land Court was created to be a superior court of record with both original and appellate jurisdiction and to hear matters relating to the environment and the use, occupation and title to land.⁷² The court will be guided by a number of principles: the principle of sustainable development, precautionary principle, the principles of land policy,⁷³ the principles of judicial authority,⁷⁴ national values and principles of governance⁷⁵ and the values and principles of public service.⁷⁶

The state shall have the responsibility to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and to ensure equitable sharing of accruing benefits. Protection and enhancement of intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities will encourage public participation in the management, protection and conservation of the environment.⁷⁷

In order to enhance forest conservation and management, the constitution classifies all forests other than private and community forests as public land. Thus public land includes all government forests other than those lawfully held, managed or used by specific communities, and government game reserves, water catchment areas, national parks, government animal sanctuaries and specially protected areas. The constitution vests that the public land, as classified by the national government, is to be held in trust for the people of Kenya and administered on their behalf by the National Land Commission. The state can take advantage of these provisions to protect forests and promote their sustainable utilization and management.

The constitution also protects every person's right to acquire and own property of any description, including forests in any part of Kenya. It prohibits parliament and the state from depriving or limiting a person's enjoyment of a property on any grounds other than for a public purpose or in the public interest. If someone is deprived of using the land, it must be done in accordance with the constitution and any act of parliament, requires prompt and just compensation and must allow the affected person a right of access to a court of law. The constitution also provides that compensation may be paid in good faith to occupants of an acquired property who may not hold title to the land. However, such compensation rights do not extend to any property found unlawfully acquired. This provision can be used by the state to acquire threatened and illegally acquired forests with a view to sustainably protecting and managing them.

71 Ibid, Article 10.

72 Environment and Land Act no. 19, 2011, Section 13 (a).

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

74 Ibid, Article 159.

75 Ibid, Article 10(2).

76 Ibid, Article 232(1).

77 Ibid, Article 69.

5.1.2 Forests and the 2010 constitution

Kenya desires to achieve and maintain a minimum tree cover of 10 percent, an increase from its current cover of 5.9 percent.⁷⁸ Forests have diverse productive and protective functions; the latter feature is instrumental to water conservation through ground-water recharge and sustenance of water catchment areas. The constitutional responsibility binds the national and county governments as the state. And so it will be necessary to determine the specific responsibilities of the national and county governments, because each level of government exercises distinct authority over different categories of forests and water resources. Illustratively, the constitution defines public land as government forests, water catchment areas (held by the national government)⁷⁹ and trust lands that are vested in county governments, which in some cases comprise local authority forests and are now defined as community land⁸⁰ under the Forests Act of 2005.⁸¹ The national government will also exercise competence over national forests and agriculture policy, while the county governments will be responsible for implementation and for community and on-farm forests.

Bearing in mind the importance attached to socio-economic and ecological roles of all types of forests, which include the trees outside formal forests, this constitutional obligation bears upon the Kenyan state to pursue mechanisms for increasing total acreage of private, on-farm forests and those forests on land that is dominantly used in other ways, such as for agriculture. This is an opportunity to fulfill constitutional obligations; it is also an opportunity for Kenya to participate and implement emerging international REDD+ efforts under the UNFCCC.

5.1.3 Forest management and devolution under the 2010 constitution

The 2010 Constitution of Kenya significantly altered the structure of national governance from a centralized state to a devolved government. After the 2013 general elections, the Government of Kenya comprises one shared national government and 47 devolved county governments with constitutionally defined autonomy.⁸² Article 6(2) of the constitution reiterates that governments at the national and county levels are distinct and interdependent and shall perform their functions while respecting the functional and institutional integrity of the other levels of government. They are obligated to assist, support, consult and liaise between each level of government to exchange information, coordinate policies, administrate and enhance capacity.⁸³ In mandatory terms, the constitution further requires both levels of government and the different county-level governments to cooperate by setting up joint committees and authorities.⁸⁴ The Intergovernmental Relations Act, 2012, gives full effect to these constitutional articles and proposes to set out coordination forums and committees to enhance cooperation and to bring together the president, governors, different county governments and different administrative levels within a county.⁸⁵

78 KFS, 2009. Kenya Forest service Strategic Plan (2009/2010-2013/2014); Republic of Kenya, 2009, *Report of the Government's Task Force on the Conservation of the Mau Forests Complex*, Nairobi: Office of the Prime Minister.

79 The Constitution of Kenya, 2010, Article 62 (1) (g).

80 Ibid, Article 63(2) (d) (iii).

81 The Forests Act, 2005, Section 24.

82 The Constitution of Kenya, 2010, Article 1(4).

83 Ibid, Article 189 (1) (a, b &c).

84 Ibid, Article 189(2).

85 The Intergovernmental Relations Act, 2012, Part II.

5.2 Statute law

5.2.1 Forest laws

5.2.1.1 Forests Act of 2005

The Forests Act of 2005⁸⁶ is the main statute governing forest management and conservation in Kenya. It replaced the Forest Act of 1942,⁸⁷ which was grossly ill equipped to deal with the ever-increasing challenges in the forest sector. The present act seeks to ensure, *inter alia*, appropriate partnerships, systems of incentives and certification standards and procedures for sustainable production and use of forests. The act provides for the establishment, development and sustainable management of forest resources for the socio-economic development of the country, which includes conservation and rational utilization of forests. The Forests Act, 2005, applies to all forests and woodlands on state, local authority and private land.⁸⁸

The overall spirit of the Forests Act is devolution of authority and responsibilities in management of forests and promotion of partnerships through communities' increased access to benefits. It seeks to promote sustainable forest management through management plans, which are mandatory for all categories of forests in Kenya,⁸⁹ although there is no explicit requirement for private forests. A management plan is defined by the act as "a systematic programme showing all activities to be undertaken in a forest or part thereof during a period of at least five years, and includes conservation, utilization, silvicultural operations and infrastructural developments."

The act created community forest associations that allow communities to participate in the joint management of public or county forests. Furthermore, the act granted customary use rights to communities who traditionally have relied upon forests for their livelihoods, provided that they do not use the forest resources for commercial purposes. However, it is clear that this statutory definition of management plans does not overtly refer to the objective of sustainability or create an explicit obligation or responsibility for activities to safeguard forest health or vitality. In light of the provisions of Article 69(1) of the constitution, there is need to redefine the nature, scope and sustainability objectives of management plans, for all types of forests, if the Kenyan state is to create an overarching sustainability obligation in management of its natural resources.

5.2.1.2 Energy Act

The Energy Act provides the regulatory framework for energy in Kenya. The minister is required to promote the development and use of renewable energy technologies, such as biomass, biodiesel, bioethanol, charcoal, fuel, wood, solar, wind, tidal waves and municipal waste.⁹⁰ Using these technologies, the Minister for Energy has made a number of regulations to support the act.⁹¹ Additionally, the minister is given power to formulate a national strategy for coordinating research in renewable energy and for providing an enabling framework for efficient and sustainable production, distribution and marketing of biomass, solar and municipal waste. REDD+ will strengthen the implementation of this act through promoting efficient charcoal-making technologies and fast-growing fuel plantations to supply fuel wood.⁹²

86 Forests Act, 2005, No. 7.

87 Former Chapter 385, Laws of Kenya, now repealed.

88 Forests Act, Section 2.

89 Ibid, Section 35.

90 Energy Act, Section 103 (1).

91 These regulations are discussed in Section 5.3 of this report, "Regulations and by-laws".

92 Government of Kenya, 2010, *Revised REDD Readiness Preparation Proposal Kenya*. Submitted to the Forest Carbon Partnership Facility, Nairobi.

5.2.2 Land Laws

5.2.2.1 Land Act

The Land Act⁹³ puts Article 68 of the constitution into effect by revising, consolidating and rationalizing land laws in Kenya, as well as providing for the sustainable administration and management of land and land-based resources. It details (in Section 3) the administration and management of all land declared as public land, private land and community land under Articles 62, 64 and 63⁹⁴, respectively, of the constitution. The Land Act adopts guiding values and principles of land management and administration from the constitution. These values and principles contained in Section 4 of the Land Act shall bind all state organs, state officers, public officers and persons who enact, apply or interpret the act, as well as those who make or implement public policy decisions.

The act (in Section 5) provides for four forms of land tenure: freehold, leasehold, partial interest — such as easement — and customary land rights. In Section 6, land is managed and administered through the instrumentalities of the cabinet secretary and the National Land Commission. The cabinet secretary is mandated to (a) develop policies on land on the recommendation of the commission; (b) facilitate the implementation of land policy and reforms; (c) coordinate the management of the National Spatial Data Infrastructure; (d) coordinate the formulation of standards of service in the land sector; (e) regulate service providers and professionals — including physical planners, surveyors, valuers, estate agents and other land-related professionals — to ensure quality control; and (f) monitor and evaluate land sector performance.

The act (in Section 7) sets forth various methods of acquiring land: through allocation, adjudication, compulsory acquisition, prescription, settlement programmes, transmissions, transfers, long-term leases exceeding 21 years created out of private land and any other manner prescribed in an act of parliament. Part II of the act, in Sections 8–19, deals with the administration of public land. In managing public land on behalf of the national and county governments, the National Land Commission is required to:

- (a) identify public land and prepare and keep a database of all public land, which shall be geo-referenced and authenticated by the statutory body responsible for the survey;
- (b) evaluate all parcels of public land based on land capability classification, land-resources mapping consideration, overall potential for use and resource evaluation data for land-use planning;
- (c) share data with the public and relevant institutions to discharge their respective functions and powers under this act;
- (d) require the land to be used for specified purposes and to be subject to such conditions, covenants, encumbrances or reservations as are specified in the relevant order or another instrument.

Section 9 of the act makes provision for conversion of land from one category to another. Public land may be converted to private land by alienation. It may also be converted to community land subject to public needs or to the interest of defense, public safety, public order, public morality, public health or land-use planning. Similarly,

93 Land Act No. 6 of 2012.

94 Article 63 (5) of the Constitution of Kenya, 2010, requires parliament to enact legislation to govern the management and administration of community land. Pursuant to this, a draft of the Community Land Bill, 2011, provides for the allocation, management and administration of community land. The bill has yet to be tabled in parliament.

private land may be converted to public land by compulsory acquisition, reversion of leasehold interest to the government after the expiry of a lease, transfers or surrender. Community land may be converted to either private or public land in accordance with the law relating to community land pursuant to Article 63(5) of the constitution. It is important to note that any substantial transaction involving the conversion of public land to private land requires approval by the national assembly or county assembly.

The law enjoins the commission to keep a register containing the following particulars: (a) public land converted to private land by alienation; (b) names and addresses of all persons whose land has been converted to public land through compulsory acquisition or reversion of leasehold; (c) community land converted to either private or public; and (d) other details such as the commission may direct. The commission may make rules for better carrying out the provisions that convert land from one category to another: (a) prescribing substantial transactions requiring approval of the national assembly or the county assembly; (b) prescribing anything so required; (c) regulating and controlling the conversion of land from one category to another; or (d) prescribing applicable or accountable factors in determining land that is to be converted.

Further, Section 10 enjoins the commission to prescribe guidelines for the management of the actual occupation or use of public land by all public agencies, statutory bodies and state corporations. Such guidelines must indicate management priorities and operational principles for the management of public-land resources for identified uses. Section 11 deals with conservation of ecologically sensitive public land. It requires the commission to take appropriate action to maintain public land that has endangered or endemic species of flora and fauna, critical habitats or protected areas. The commission shall identify such ecologically sensitive areas that are within public lands, demarcate or take justified action on those areas and act to prevent environmental degradation and climate change. It must do this in consultation with existing institutions dealing with conservation.

Under Section 12, the commission may, on behalf of the national or county governments, allocate public land by way of (a) public auction to the highest bidder at prevailing market value subject to and not less than the reserved price; (b) application confined to a targeted group of persons or groups in order to ameliorate their disadvantaged position; (c) public notice of tenders as it may prescribe; (d) public drawing of lots as may be prescribed; (e) public request for proposals as may be prescribed; or (f) public exchanges of equal value as may be prescribed.

The commission shall ensure that any public land that has been identified for allocation does not fall within any of the following categories: (a) public land that is subject to erosion, floods, earth slips or water logging; (b) public land that falls within forest and wildlife reserves, mangroves and wetlands, these reserves' buffer zones or environmentally sensitive areas; (c) public land that is along watersheds, river and stream catchments, public water reservoirs, lakes, beaches, fish-landing areas, riparian areas and the territorial sea as may be prescribed; (d) public land that has been reserved for security, education, research and other strategic public uses as may be prescribed; (e) natural, cultural, and historical features of exceptional national value that falls within public lands; (f) reserved land; or (g) any other land categorized as such by the commission or an order published in the gazette. The commission shall also set aside land for investment purposes, subject to Article 65 of the constitution. In so doing, the commission must ensure that investments in land benefit local communities and their economies.

Further, the commission may, in consultation with the national and county governments, allocate land to foreign governments on a reciprocal basis in accordance with the Vienna Convention on Diplomatic Relations. At the expiry, termination or extinction of a lease granted to a non-citizen reversion of interests or rights in and over the land shall be vested in the national or county government. But no such allocation of public land could occur unless the land in question has been planned, surveyed and serviced and the guidelines for its development have been prepared in accordance with Section 16 of this act.

Public land that was allocated shall not be sold, disposed of, subleased or subdivided, unless it is developed for the purpose for which it was allocated. In case this condition is breached, the allocated land shall automatically revert to the national or county government. And in effecting such allocation, the commission may impose any terms, covenants, stipulations and reservations, including (a) the applicant shall personally occupy and reside on the land for a period set by the commission; (b) the applicant shall do work and spend money for the permanent improvement of the public land within the period specified by the commission; or (c) the consideration that must be paid for a disposition of public land.

The law requires the commission to make regulations prescribing the criteria for allocation and connected matters. It also enjoins the commission to make regulations prescribing the criteria for allocation. Such procedures may include (a) forms of ownership and access to land under all tenure systems; (b) the procedure and manner of setting aside land for investments; (c) procedures for the auction and disposition of land; (d) appropriate mechanisms for the repossession of land given to citizens at the expiry of a lease; and (e) mechanisms of benefit sharing with local communities whose land has been set aside for investment.

Part X of the Land Act deals with partial interest in land: easements and analogous rights. The act retains all easements that have been made or come into force on or after its commencement.⁹⁵ The nature of easements include any rights to do something over, under or upon the servient land;⁹⁶ any right that something should not be done; any right to require the owner of the servient land to do something over, under or upon that land; and any right to graze stock on the servient land. This provision can provide an opportunity for conserving or restoring threatened forests or for using open or degraded lands for afforestation or reforestation programmes.

The act also requires the National Land Commission to develop rules for the conservation of land-based natural resources.⁹⁷ The Land Act specifically requires rules relating to benefit sharing, access use and co-management of forests by communities who have customary rights to the forests, measures for the protection of critical ecosystems and habitats and promoting income-generating natural-resource conservation programmes. These provisions are important for promoting use of land and recognizing tenurial aspects of REDD+. They provide anchorage for REDD+ related regulations through the National Land Commission.

5.2.2.2 The Trust Land Act, 1970 (revised 2009)

The Trust Land Act was enacted to govern all trust lands in Kenya.⁹⁸ It elaborates procedures to be followed when the government wants to set aside trust land for public purposes. Such public purposes may include regulating the use and conservation of any area; regulating issues relating to tenure and licenses; and for the protection of trees and forest products on land that is not within a forest area as defined by the Forests Act.

The challenge with this act is that it vests trust land in the local authorities or county councils. These institutions ceased to exist after the devolved system of governance brought by the 2010 constitution.⁹⁹ Despite this, the Trust Land Act has neither been repealed nor recommended for review. The act remains technically in place, yet its roles have seemingly been transferred to the county governments. The county governments manage all the

⁹⁵ Land Act, 2012, No. 6, Section 137.

⁹⁶ Servient land, for purposes of the act, refers to the land of the person for whom an easement is created, which is referred to as the "dominant land". See the Land Act, 2012, Section 136.

⁹⁷ Land Act, 2012, No. 6, Section 19.

⁹⁸ Trust land consist of areas that were occupied by the natives during the colonial period and have not been consolidated, adjudicated or registered in individual or group names; it also refers to native land that has not been taken over by the government.

⁹⁹ Trust lands are now vested in and held by the county governments in trust for the people resident in the county.

environmental resources within the trust land under their jurisdiction, and they control the development of that land. They also regulate the use and conservation of these lands, including the management of forests, wildlife and water resources.¹⁰⁰ In particular, they regulate the felling or removal of any tree and forest product, ensure that the land is conditioned and can prohibit the occupation of any trust land. The county governments also deal with matters relating to tenure in trust lands.¹⁰¹

5.2.2.3 Other acts

As stated, implementing the land and environment provisions of the new constitution will require radical policy, legislative and institutional reforms. At least six pieces of legislation are specifically identified. These relate to 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). These legislative reforms will create new institutions.

Article 67 establishes the National Land Commission as the overall public body responsible for managing land on behalf of national and county governments. The National Land Commission Act governs the functions and powers of the commission.¹⁰² The act also makes further provisions for the qualifications and procedures of appointments to the commission and for provisions to give effect to the objects and principles of the devolved government in land management and administration. Recently, an act of parliament established the land and environment court. How this court will impact the continued existence of the Land and Environment Division of the High Court is yet to be clearly understood. Furthermore, considerable sectoral-policy reforms will have to be undertaken in virtually all sectors to bring the existing policies in line with the new structures and principles embodied in the new constitution.

5.2.3 Environment Laws

5.2.3.1 Environment Management and Coordination Act (EMCA)

The EMCA provides an appropriate legal and institutional framework for the management of the environment, as well as an administrative coordination of the diverse sectoral initiatives that are necessary to improve the national capacity to manage the environment. Implementation of this act is guided by the principle of public participation in the development of policies, plans and processes for environmental management. It also recognizes the communities' traditional, cultural and social principles for natural-resource management.

The act establishes the National Environment Management Authority (NEMA) that is mandated with the overall responsibility of environmental management throughout the country. Specifically, the authority is mandated to conduct an Environmental Impact Assessment on terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management.¹⁰³ EMCA makes specific provisions for the sustainable use of hilltops, hillsides, mountainous areas and forests, such as controlling the harvesting of forests. It requires every District Environment Committee (DEC) to identify and notify the director general of NEMA of hilltops, hillsides and mountainous areas within its jurisdiction that are at risk of environmental degradation. The DEC's are then required to specify which areas are to be targeted for afforestation or reforestation and to take measures to plant trees or other vegetation.¹⁰⁴

¹⁰⁰ The Laws of Kenya, Section 65, Chapter 288.

¹⁰¹ Ibid.

¹⁰² The National Land Commission Act, 2012, No. 5.

¹⁰³ Environmental Management and Coordination Act, 1999, No. 8, Section 63.

¹⁰⁴ Ibid, Sections 44–47.

In addition, EMCA empowers courts to grant, through group or individual application, an environmental easement or an environmental conservation order with the aim of furthering the principals of environmental management.¹⁰⁵ Such environmental easements may be imposed and shall thereafter be attached to the land in perpetuity, for a term of years or for an equivalent interest under customary law as the court may determine.¹⁰⁶ Among other reasons, the act states that an environmental conservation order may be imposed on burdened land so as to preserve flora and fauna; preserve any outstanding geological, physiographical, ecological, archeological or historical features of the burdened land; preserve scenic views; permit persons to walk in a defined path across the burdened land; preserve the natural contours and features of the burdened land; prevent or restrict the scope of an agricultural activity on the burdened land; create and maintain works on burdened land so as to limit or prevent harm to the environment; and create or maintain migration corridors for wildlife.¹⁰⁷ These reasons can be relied upon to conserve and sustainably manage forests. The environmental easements and conservation orders can thus be a very useful tool for conservation and sustainable utilization of forests and for enhancing the success of REDD+ in Kenya.

5.2.3.2 *Water Act*

The Water Act provides for the management, conservation, use and control of water resources. It encourages the devolution of power to regional service boards that in turn will license water-service providers. It provides for the establishment of the Water Resources Management Authority, which can develop principles, guidelines and procedures for the allocation of water resources and protect and manage water-catchment areas.¹⁰⁸ The act is ideal for catchment protection and protection of wells and springs that occur in the forest, because it supports community involvement through a catchment-management strategy for managing, using, developing, conserving, protecting and controlling water resources within each catchment area.¹⁰⁹ The act supports the user-pay principle as proposed in the Forests Act.¹¹⁰ Kenya Forest Service can therefore work with water-user groups (consumers), service providers and water-service boards to conserve catchment forests.

5.2.3.3 *Wildlife (Conservation and Management) Act*

The Wildlife Act was adopted in 1976, but since then eight amendments and revisions have been made, with the latest being in 1990. As provided for in the act, the process of gazettment and degazettment requires parliamentary approval, so the heightened level of decision-making and legitimacy ensures no grabbing of protected areas.¹¹¹

5.2.3.4 *Agriculture, Fisheries and Food Authority Act, No. 13 of 2013*

The Agriculture, Fisheries and Food Authority Act repealed the Agriculture Act, Chapter 318. The current act promotes soil and water conservation and prevents the destruction of vegetation. Part IV provides for policy guidelines on development, preservation and utilization of agricultural land, as well as for the rules of utilization of such land.¹¹² Through it, the cabinet secretary can declare a plant as a noxious or invasive weed, and thus its need to

105 Ibid, Section 112.

106 Ibid, Section 112 (12).

107 Ibid, Section 112 (13).

108 Water Act, 2005, Sections 7 & 8.

109 Ibid, Section 15.

110 Ibid, Sections 94 & 105.

111 Ibid, Section 7.

112 Agriculture, Fisheries and Food Authority Bill Act, 2013, No. 13, Sections 21 & 22.

be eliminated.¹¹³ This act can help address the biggest threat to forest conservation, i.e. short-term shifting cultivation or slash-and-burn agriculture, which is the main force behind forest degradation. Public participation is provided for by ensuring effective participation of farmers in the governance of Kenya's agricultural sector, by encouraging close consultation with all registered farmers' organizations in the development of policies or regulations and before making any major decisions that affect the agricultural sector.¹¹⁴ Under the act, the cabinet secretary can make rules to prohibit, regulate and control clearing land for cultivation, thus complementing the Forests Act.

5.2.3.5 National Museums and Heritage Act, No. 6 of 2006

The National Museums and Heritage Act has been used to gazette areas of historical importance and threatened heritage, e.g. the Kayas at the coast have been protected under this act. It also provides for the establishment, control, management and development of national museums and the identification, protection, conservation and transmission of the cultural and natural heritage of Kenya. However, the National Museums of Kenya's (NMK) mandate does not adequately cover management of forest resources in these sites as most of the Kayas are now threatened by cultivation, charcoal burning and mining.

5.2.3.6 Fisheries Act, 1991 (Revised 2012)

The Fisheries Act regulates trout fishing in the forests, protects fish-breeding areas¹¹⁵ and is relevant to mangrove management at the coast.

5.3 Regulations and by-laws

5.3.1 Forest (Charcoal) Regulations, 2009¹¹⁶

The Forest Regulations aim to legitimize sustainable charcoal production and to give guidance and regulation to the industry to reduce this significant driver of deforestation (KFS 2007). The Environmental Management and Coordination Act, while citing broad, overarching environmental policies, mandates the sustainable use of forest areas within the country and controls the harvesting of forests and any natural resources to protect water-catchment areas, prevent soil erosion and regulate human settlement. The Trusts Land Act, revised in 2009, provides licensing conditions governing the protection and removal of timber and forest produce in areas not included in the Forests Act.

5.3.2 Energy Management Regulations, 2012¹¹⁷

The Energy Management regulations were made to promote energy efficiency among owners or occupiers of industrial, commercial and institutional facilities. It deals with, *inter alia*, energy-consumption rating, energy-management policy, energy audits, energy-investment plans, energy-conservation measures and licensing of energy auditors or energy-audit firms. The regulations do not specifically mention REDD+, but they allow an owner or occupier to investigate the inclusion of their energy-investment plans into a clean-development mechanism or any other carbon-finance project.

¹¹³ Ibid, Section 24.

¹¹⁴ Ibid, Section 40.

¹¹⁵ Legal Notice Number 86 of 2012.

¹¹⁶ Legal Notice Number 188 of 2009.

¹¹⁷ Legal Notice Number 102 of 2012.

5.3.3 Solar Photovoltaic Systems Regulations, 2012

The Energy (Solar Photovoltaic [PV] Systems) Regulations, 2012,¹¹⁸ apply to solar PV system manufacturers, importers, vendors, technicians, contractors and system owners, as well as to solar PV system installation and consumer devices. The regulations aim to promote adoption of solar technology in Kenya. The regulations govern licensing, use and disposal, standardization and inspection, as well as offences and penalties.

5.3.4 Energy (Solar Water Heating) Regulations, 2012¹¹⁹

The Energy (Solar Water Heating) Regulations require, within a period of five years, all premises within a local authority that require more than 100 litres of hot water per day need to install and use solar-heating systems. The regulations also allow an owner or occupier to possibly include a relevant solar water-heating system into a clean-development mechanism or any other carbon-finance projects.

There are also proposed Energy (Improved Biomass Cook Stoves) Regulations, 2013, currently in draft form. The draft regulations cover licensing, manufacturing, distribution and inspection of improved biomass cook stoves, as well as offences and penalties. They put strict conditions on individuals or companies that wish to be licensed as a technician, manufacturer, importer or distributor. These regulations are particularly critical for REDD+, given that use of wood fuel is one of the key drivers of deforestation and forest degradation in Kenya. Efficient use of wood fuel would go a long way in conserving forests and enhancing forest carbon stocks.

118 Legal Notice Number 103 of 2012.

119 Legal Notice Number 43 of 2012.

6. Forest institutions

Critical to the success of REDD+ is a suitable institutional architecture for decision-making and implementation. The current institutional framework comprises various ministries concerned with natural-resource sectors like land, water, agriculture and wildlife; numerous government agencies created under various laws; and a vast range of institutions established under the Environmental Management and Coordination Act.¹²⁰ There are also many civil society organizations (CSOs) and private sector institutions involved in forest-related activities that are relevant to REDD+.

6.1 National government institutions

These include ministries (departments), lead agencies¹²¹ and constitutional bodies such as the Commission for the Implementation of the Constitution (CIC) and the National Land Commission. Others are the various governmental agencies such as the judicial and quasi-judicial bodies (like the Environment and Land Court, the Public Complaints Committee and the National Environment Tribunal) and the legislature, as well as policy oversight and coordinating bodies like the National Environment Management Authority (NEMA), the National Environment Council (NEC) and the Commission on Administrative Justice (ombudsman).

6.1.1 National Environment Management Authority (NEMA)

NEMA is a state corporation that is mandated with the responsibility of policy coordination and harmonization, conducting environmental impact assessments and compliance under EMCA and resolving inter- and cross-sectoral disputes through the Environmental Tribunal. With respect to forests and forest conservation, the EMCA gives every Kenyan the right to complain on environmental degradation; provides for protection of forests; allows the director general to enter into contractual agreements with private land owners with a view to declaring such land as forest land; and provides for Environmental Impact Assessments (EIAs) of forestry related developments.

6.1.2 Kenya Wildlife Service (KWS)

The Kenya Wildlife Service (KWS) is the government lead agency in charge of protected areas, and therefore it has capacity to inventory and monitor in protected areas, with a focus on habitat change and wildlife. The Kenya Wildlife Services has a mandate to enforce the rules and regulations governing the management of wildlife in parks and nature reserves that also contain forests. The Wildlife (Conservation and Management) Act not only defines wildlife to include flora, but also, in Section 15, empowers the minister to declare special areas known as protection areas within national parks, game reserves and local sanctuaries to ensure the security of animal or vegetable life or to preserve habitat and ecology.¹²² Further, the Memorandum of Understanding (MoU) signed between the KWS and the then Forest Department was to jointly manage of forests for 25 years. The MoU aims primarily at the conservation of biological diversity in Kenya and the maintenance of the functioning of ecological processes such as water catchment in forested areas.

6.1.3 Kenya Forest Service

The Kenya Forest Service (KFS) was established by the Forests Act of 2005 as a semi-autonomous body, which has the overall responsibility for formulating policies regarding the management, conservation and utilization of all

¹²⁰ Environmental Coordination and Management Act, 1999, No. 8.

¹²¹ A lead agency is defined in Section 2 of the EMCA as “any government ministry, department, parastatal, state corporation or local authority in which any law vests functions of control or management of any elements of the environment or natural resources.”

¹²² Laws of Kenya, Revised Edition 1992, Chapter 376.

types of forest areas in the country. Its mission is to enhance conservation and sustainable management of forests and allied resources for environmental stability and socio-economic development. The core functions of KFS are to:

- sustainably manage natural forests for social, economic and environmental benefits;
- increase productivity of industrial forest plantations and enhance efficiency in wood utilization;
- promote farm forestry and commercial tree farming;
- promote efficient utilization and marketing of forest products
- promote sustainable management of forests in the dry lands;
- protect forestry resources and KFS property;
- develop and maintain essential infrastructure for effective forest management and protection;
- develop manpower for the forestry sector;
- develop forestry resources for education, research and community development;
- build capacity on formation and operationalization of conservation institutions;
- collect all revenues and charges due to the service in regard to forest resources, produce and services.

6.1.4 Kenya Forestry Research Institute

The Kenya Forestry Research Institute (KEFRI) was established in 1986 to carry out research in forestry and natural resources. The institute conducts research in forestry, cooperates with other research bodies both nationally and internationally and establishes partnerships with other organizations and institutions. KEFRI's goals include contributing to Vision 2030 by developing technologies for the sustainable development and use of forests and natural resources. Its objectives include generating knowledge and technologies for forest development, conservation and management; strengthening research and management capacity; improving seed production, distribution and marketing; disseminating forest research financings; and strengthening links with stakeholders.

6.1.5 National Museums of Kenya

The National Museums of Kenya (NMK) institution was established under the National Museums and Heritage Act.¹²³ NMK is a multidisciplinary institution whose role is to collect, preserve, study, document and present Kenya's past and present cultural and natural heritage. Its purpose is for of enhancing knowledge, appreciation, respect and sustainable utilization of these resources for the benefit of Kenya and the world, for now and posterity. NMK has two institutes: The Research Institute of Swahili Studies of Eastern Africa (RISSEA) and the Institute of Primate Research (IPR). NMK issues various research permits for collection and export of antiques and monuments.

6.1.6 Ministry of Environment, Water and Natural Resources

The Ministry of Environment, Water and Natural Resources was created after the 2013 general election by restructuring and merging several ministries that dealt with the environment and natural resources: the Ministries of Environment and Mineral Resources; of Water and Irrigation; and of Forestry and Wildlife.¹²⁴ In the preceding

¹²³ National Museums and Heritage Act, 2006, No. 6.

¹²⁴ At the time of writing this paper, the restructuring of the ministries was not yet clear. For example, it was not clear whether issues related to wildlife would be handled by this ministry or by the Department of Tourism under the Ministry of East African Community (EAC) Affairs, Commerce and Tourism, or whether irrigation issues would fall here or under the Ministry of Agriculture, Livestock and Fisheries.

government structure, the ministry in charge of water was mandated with the responsibility of gazettelement of water catchments. The Water Resources Management Authority's mandate is to manage and protect water catchments;¹²⁵ when it has been proved to the Water Resource Management Authority that special measures are necessary for the protection of a catchment area or part of one, it may, with the approval of the minister, declare such an area to be protected. The authority may impose requirements and regulate or prohibit conduct or activities on or in relation to a protected area as it thinks necessary for the protection of the area and its water resources.¹²⁶

The Ministry of Forestry and Wildlife was tasked with the mission of providing a beneficial environment for the practice and promotion of sustainable and participatory management of forestry and wildlife resources in Kenya. Specifically its duties were (1) the formulation, coordination and monitoring or the development of policies including the Forestry Development Policy and Wildlife Conservation Policy; (2) the development of forests, afforestation and agroforestry as well as water catchment area conservation; (3) to collaborate with stakeholders and facilitate the management and conservation of forestry and wildlife resources; (4) the promotion of conservation education programmes; (5) to facilitate the utilization of forestry and wildlife products; (6) to develop and enhance human resource management and physical infrastructure for forestry and wildlife resource management; and (7) to facilitate the dissemination of research findings in forestry and wildlife resources and to monitor, evaluate and coordinate the Kenya Forestry Research Institute, Kenya Forest Service, Kenya Wildlife Service and Wildlife Clubs of Kenya with regards to their operations to implement the strategic plan. The Ministry of Forestry and Wildlife was consulted in the process of the Readiness Plan Idea Note (R-PIN) preparation for Kenya. It was also expected to host the Kenya REDD+ readiness efforts steered by the Intersectoral National REDD+ Steering Committee (NRSC).

Some functions of the former Ministry of Environment and Mineral Resources (MEMR) are expected to fall under the new Ministry of Environment, Water and Natural Resources.¹²⁷ MEMR was mandated to monitor, protect, conserve and manage the environment and natural resources through sustainable exploitation and socio-economic development aimed at eradicating poverty, improving living standards and ensuring a clean environment now and in the future. MEMR was comprised of various institutions including the National Environment Management Authority (NEMA) and the Department of Resource Surveys and Remote Sensing (DRSRS). MEMR was charged with several core functions: environment and natural resources policy formulation, analysis and review; conservation of environment; continuous development of geo-database for integrated natural resources and environmental management systems; conducting applied research and dissemination of research findings in land resources and geology; and promoting, monitoring and coordinating environmental activities as well as enforcing compliance of environmental regulations and guidelines. Most of these functions are expected to be carried out by the new Ministry of Environment, Water and Natural Resources. It is only the functions related to mining that have been shifted off and now are the responsibility of the Ministry for Mining.

6.1.7 National Land Commission

The constitution creates the National Land Commission (NLC) under Article 67 (1), and it gives the commission extensive functions that include managing public land on behalf of the national and county governments, recommending a national land policy to the national government, advising the national government on a comprehensive programme for the registration of titles throughout Kenya and conducting research on land and the use of natural resources. Kenya National Land Commission will also investigate present or historical land injustices and recommend redress, encourage the application of traditional dispute-

125 Water Act, 2005, Section 8 (f).

126 Water Act, 2005, Section 17.

127 The new cabinet structure also created the Ministry of Mining, which is expected to deal with exploration and extraction of oil and solid minerals.

resolution mechanisms in land conflicts, assess tax on land and premiums on immovable property and have oversight over land use.

The National Land Commission Act¹²⁸ was enacted to make further provision as to the functions and powers of the NLC, as well as qualifications and procedures for appointments to the commission. The act also makes provisions to give effect to the objects and principles of the devolved government in land management and administration.

A number of provisions relevant for forest governance can be discerned from the National Land Commission Act. For instance, the act empowers the commission to ensure that public land and land under the management of designated state agencies are sustainably managed for their intended purpose and for future generations.¹²⁹ This provision can be relied on to ensure that KFS, KWS and other state agencies sustainably manage their forests. The act also requires the commission to manage and administer all unregistered trust land and unregistered community land on behalf of the county government.¹³⁰ Trust land forests and forests occurring in unregistered community land can be sustainably managed by this provision. The act empowers the commission to make regulations to better operationalize the act.¹³¹ Such regulations can provide the basis for protection and sustainable utilization of forests falling on land under the jurisdiction of the NLC.

In addition, the act empowers the commission, within five years of commencement of the act, to review all grants or dispositions of public land to establish their propriety or legality and to make a determination. Such determination may include directing the registrar to revoke the title if it was acquired in an unlawful manner and taking appropriate corrective steps.¹³² This provision can be used to identify illegally acquired forests on public land and to revert them to the government for sustainably using and managing them. The act also empowers the commission, in consultation and cooperation with the national and county governments, to establish county land management boards to manage public land. Among other functions, the county management boards are required, subject to the physical planning and survey requirements, to process applications for allocation of land, change and extend the user, subdivide public land and renew leases.¹³³ These roles have direct implications on forests falling on such land, hence can be used for their sustainable management.

6.1.8 Environment and the Land Court

The Land Court was established in 2011 by the Environment and Land Court Act¹³⁴ to give effect to Article 162(2) (b) of the constitution. It established a superior court with both original and appellate jurisdiction to hear and determine disputes relating to the environment, to the use and occupation of, and title to, land and to make provision for its jurisdiction functions and powers. The court is to be guided by the following principles:¹³⁵

- public participation in the development of policies, plans and processes for the management of the environment and land;

128 The National Land Commission Act, 2012, No. 5.

129 Ibid, Section 5 (2).

130 Ibid.

131 Ibid, Section 36.

132 Ibid, Section 14.

133 Land Act, 2012, No. 6, Section 18.

134 Environment and Land Court Act, 2011, No.19.

135 Environment and Land Court Act, 2011, Section 18.

- cultural and social traditions of any community in Kenya for the management of the environment or natural resources in so far as they are relevant and not inconsistent with any written law;
- international cooperation in the management of environmental resources shared by two or more states;
- intergenerational and intragenerational equity;
- polluter-pays;
- precautionary.

These principles could help entrench environmental sustainability in the determination of disputes relating to land, forests and the environment.

In addition, the court's jurisdiction¹³⁶ has a direct bearing on forest governance and thus has implications for REDD+. For instance, the court has jurisdiction over disputes relating to environmental planning and protection, climate issues, land-use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources. The court also has powers to hear and determine disputes relating to compulsory acquisition of forested lands, since the act gives the court jurisdiction over disputes relating to compulsory acquisitions of land. The court also has jurisdiction over disputes over land administration and management; public, private and community land; and any other dispute relating to environment and land. The court has a big role to play in forest management, since forests may fall under any of these categories of land.

6.1.9 REDD+ Institutions

Other than the broad forest governance framework institutions, there are institutions created recently to specifically manage the REDD+ readiness and implementation process. Prior to the 2013 general election, the presidential circular on ministerial responsibilities vested climate change coordination activities on the ministry in charge of environment, while the mandate on forest conservation and management was vested on the ministry in charge of forestry and wildlife.¹³⁷ With the new ministerial structure issued by the new government, these responsibilities are expected to fall under the Ministry of Environment, Water and Natural Resources. Following proposals in the National Climate Change Response Strategy (NCCRS),¹³⁸ a Climate Change Secretariat was established within the Ministry of Environment and Mineral Resources¹³⁹ to be responsible for all climate change activities. The proposals required the secretariat to be backed by appropriate climate change policies and laws and to have powers to enforce new laws and regulations relating to climate change. According to Kenya's REDD Readiness Preparation Process (R-PP),¹⁴⁰ the policy, legal and institutional arrangements of REDD+ will be designed within the institutional framework proposed by the NCCRS (see Figure 1).

The management arrangements for implementing REDD+ will be linked to the division dealing with REDD+, land use and land-use change. Linked to the REDD+ and Land Use Division, a four-tier structure has been created to oversee the evolving REDD strategy (see Figure 2). It consists of a National REDD+ Steering Committee, a Technical Working Group and a National REDD+ Coordinating Body with the REDD+ Component Task Forces and Local Conservancy Officers below.¹⁴¹ These institutions are briefly discussed below.

136 Ibid.

137 Government of Kenya, 2010, *Revised REDD Readiness Preparation Proposal Kenya*. Submitted to the Forest Carbon Partnership Facility, Nairobi.

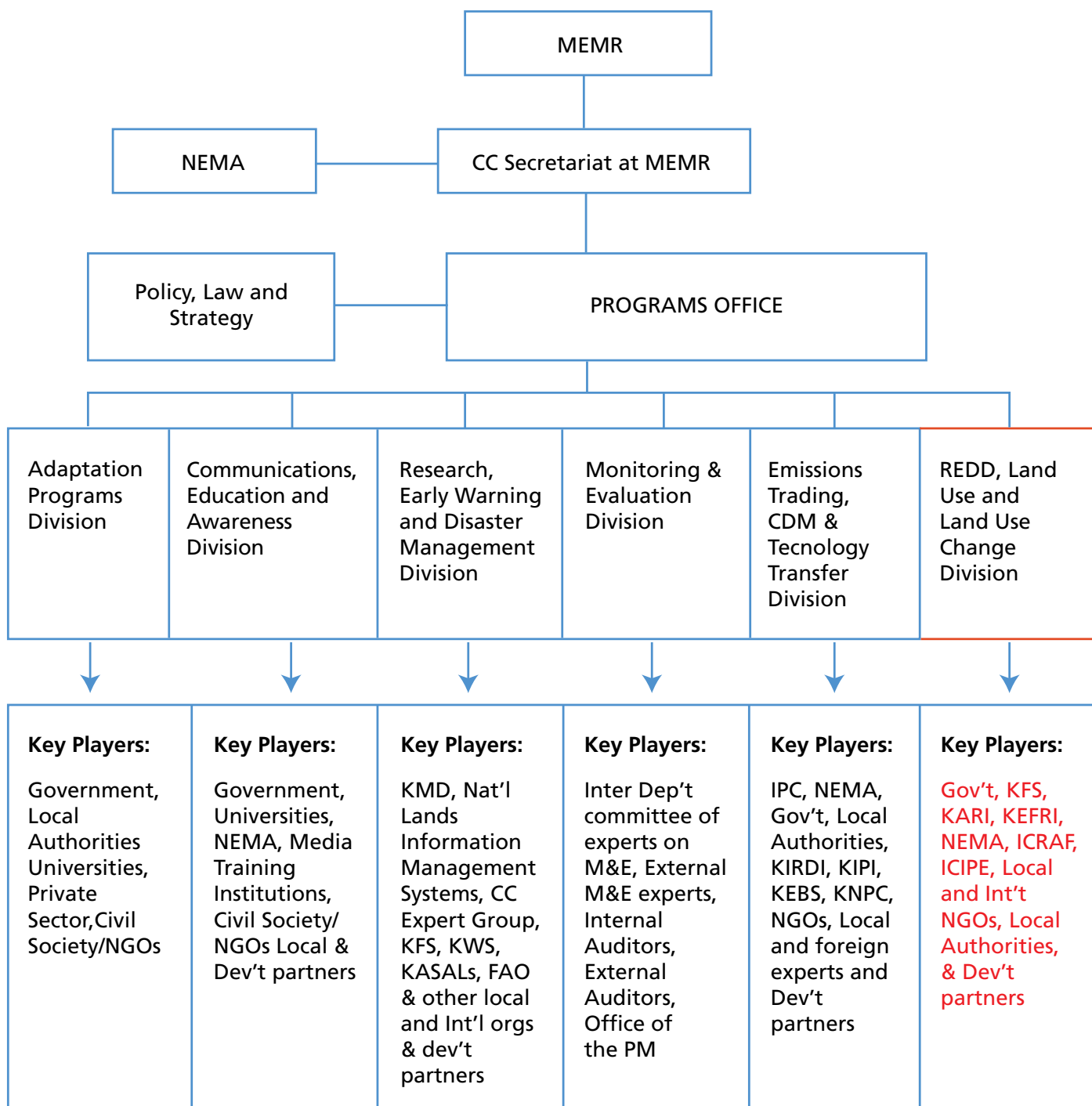
138 Government of Kenya, 2010, *National Climate Change Response Strategy*, Nairobi.

139 The new cabinet structure after the 2013 election now includes the Ministry of Environment, Water and Natural Resources.

140 Government of Kenya, 2010, *Revised REDD Readiness Preparation Proposal Kenya*. Submitted to the Forest Carbon Partnership Facility, Nairobi.

141 Ibid.

Figure 1: Climate change governance institutions proposed by the NCCRS

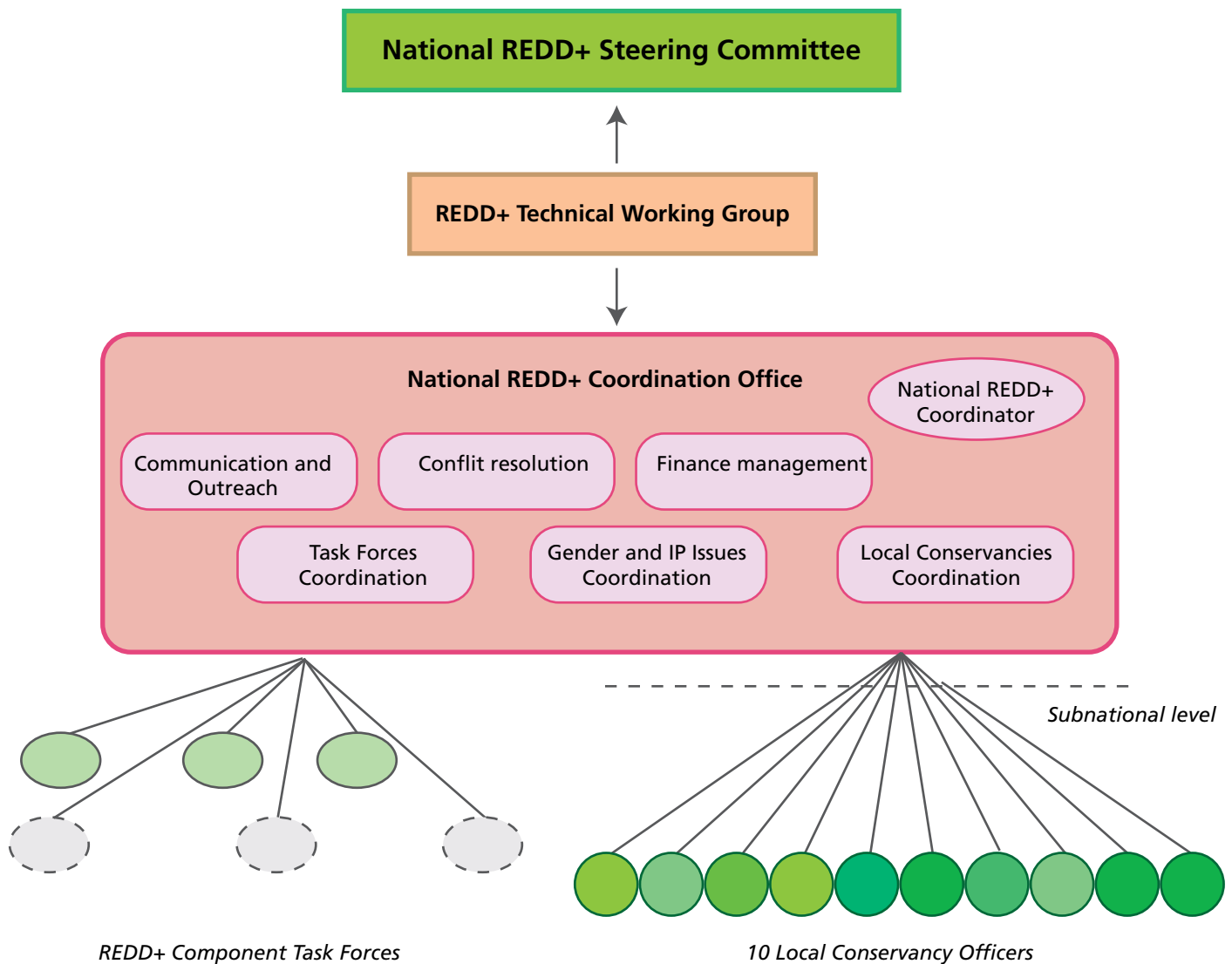


Source: Kenya's REDD Readiness Preparation Proposal

6.1.9.1 The National REDD+ Steering Committee (RSC)

The RSC's roles are, inter alia, policy guidance and implementation of REDD+ activities; national coordination of inter- and intrasectoral REDD+ activities; resource mobilization; assurance of timely delivery of a national REDD+ strategy, a national reference emission level and an effective carbon-monitoring system; quality control

Figure 2: Proposed REDD+ management structure in Kenya



Source: Kenya’s REDD Readiness Preparation Proposal

of REDD+ preparedness deliverables; and providing a mechanism for international collaboration with other REDD+ processes. The committee is chaired by the principal secretary in the ministry responsible for forestry, with KFS and KEFRI providing secretariat services. RSC membership comprises the principal secretaries from the Ministry of Environment, Water and Natural Resources; of Energy; of Planning; and of Finance, as well as the directors of KFS, KEFRI and NEMA. Others memberships are International Union of Conservation of Nature (IUCN), World Wildlife Fund (WWF), Kenya Forest Working Group (KFWG), a representative from universities, United Nations Development Programme (UNDP), United Nations Environment Programme (UNEP), FAO and the Donor Coordination Group. At the time of writing this paper, it was not clear whether recommendations to include a representative of the National Association of Community Forest Associations (NACOFA) in the committee had had been effected.

6.1.9.2 REDD Technical Working Group (TWG)

Since November 2009, the current Technical Working Group (TWG) comprises about 40 individuals who have participated in meetings, consultations, drafting of texts, revisions and leading consultations. The TWG is

currently divided into three 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 required for this phase. Among other qualifications, members are expected to have expertise in forestry, finance, land use, agriculture, wildlife management, range management, timber production and the management of private-sector enterprises. In addition, there will be one representative from CSOs, one representative from the 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, the TWG will be responsible for overseeing of the R-PP implementation process and for managing the monitoring and evaluation activities.

6.1.9.3 *The National REDD+ Coordination Office (NRCO)*

The National REDD+ Coordination Office (NRCO) will be constituted immediately upon approval of the R-PP by the Forest Carbon Partnership Facility (FCPF). The secretariat, which currently consists of part-time KFS staff, will be replaced by the NRCO consisting of 15 full-time staff dedicated to R-PP implementation activities. The NRCO will be dedicated to implementing REDD+ activities: it will coordinate work carried out by various task forces; communicate the overall REDD+ process and consultation; resolve conflict and manage grievances; manage finance; and any other duties relevant for strategy formulation.

6.1.9.4 *REDD+ Component Task Forces*

The proposed REDD+ Component Task Forces are small groups comprising members elected according to the subject matter of the REDD+ strategy they will work on and to the possible demonstration sites for that task force. The task forces are expected to include task-force members that together have the expertise required for the design and oversight of each particular strategy.

6.2 County government institutions

Devolution has brought with it important questions on how resources and revenues will be managed and shared in Kenya. These considerations are already influencing a sense of nativity and first-rights claims to the benefits accruing from the natural resources found within counties. Article 176 of the constitution (read together with the First Schedule) establishes 47 county governments, each with a county assembly and county executive committee. The County Government Act, which seeks to give effect to Chapter 11 of the constitution, provides for the county governments' powers, functions and responsibilities to deliver services. In so doing, the act further elaborates the management of the affairs of the county assembly (Articles 177, 178 and 185 of the constitution), the county executive committee and the county governor (Articles 179 to 183). In addition, the act elaborates on the important issue of public participation (Article 196) in the affairs of county governance, as well as issues of community and cultural diversity and concern for minorities (Article 197).

The principles of planning and development facilitation, as detailed in the County Government Act, lay a firm foundation for sustainable management of forests and other natural resources within the counties. The principles shall, *inter alia*, integrate national values in all processes and concepts. The national values as given in the constitution are participation of the people, equity, good governance and sustainable development. Planning and development in a county is also required to observe intra- and intergenerational equity. The act's principles protect the right to self-fulfillment within the county's communities; promote the pursuit of equity in resource allocation within the counties; and have a responsibility to future generations. The rights and interests of minorities and marginalized

groups and communities are to be protected and integrated in county planning and development. More specifically, county planning and development is required to protect and develop natural resources in accordance with national and county government policies, and to effectively mobilize resources for sustainable development.

A number of the stated objectives of county planning show the act's intention to ensure sustainable management of the counties' forests and other natural resources. The objectives start with the requirement for the county government to work towards the achievement and maintenance of a tree cover of at least 10 percent of Kenya's land area, as provided in Article 69 of the constitution. County planning also aims to ensure productive use of scarce land, water and other resources for economic, social, ecological and other functions and to maintain a viable system of green and open spaces for a functioning eco-system. Another objective of county planning is to protect historical and cultural heritage, artifacts and sites within the county. This objective can be relied on to protect cultural heritage forests, such the Kaya forests and Kakamega forest.

The act obligates the county-planning authorities¹⁴² to plan for the county and to ensure that public funds are not appropriated outside the plans. In developing the county-planning framework, authorities are required, *inter alia*, to integrate economic, physical, social, environmental and spatial planning and to promote public participation by incorporating non-state actors in the planning processes.

In addition, the County Government Act makes further provisions as to the roles of the county assembly, such as implementing specific national government policies on natural resources and environmental conservation, including forestry. The county assembly is also mandated to approve the budget and expenditure of the county government, the borrowing by the county government and the county-development planning. These functions all have implications for sustainable and effective forest governance.

6.2.1 Transition to county governments

The new constitution established a two-tier governance system at the national and county level. An Act of Parliament, the Transition to Devolved Government Act, has been enacted to provide the framework for transition to devolved government pursuant to Section 15 of the Sixth Schedule to the constitution. Part II (Sections 4–22) of the act establishes the Transition Authority as the key operational mechanism for the transition. Established under Article 4, the authority comprises a chair and eight members – all of whom must be graduates with experience, assisted by the office of the president, attorney general and the state departments in charge of devolution, public service, finance, planning and justice (Section 5 and 6).

The functions of the authority are categorized into phase one and phase two activities (Section 7 of the act and Fourth Schedule of the constitution). Phase I is the authority's time of operation, from inception to the date of the first general election. Phase II is the period of three years after the first general election.

In fulfilling its mandate in line with the Fourth Schedule of the constitution, the authority is required to establish resource needs, including inaugural county budgets, and evaluate the sustainability of ongoing activities (Section 7 of the Transition Act). It is also required to develop the criteria for the phased or asymmetric transfer of functions, previously shared assets, liabilities and staff of national and local governments. The authority is also required to evaluate and determine capacity needs and the nature of requisite capacity-building needs. It is imbued with extensive powers of access to information, data and interviews to enable it to perform these functions (Section

¹⁴² The act requires the county government to designate county departments, cities, urban areas, sub-counties and wards as planning authorities of the county.

8). The executive functions of the authority are undertaken by a secretary supported by the staff (Section 17) and committees (Section 20) necessary to deliver its obligations.

In the performing its functions and exercising its powers, the authority must be accountable to the people of Kenya and ensure their participation in the transition process; transparently, objectively and fairly facilitate the transition to the devolved system of government; promote and sustain fair procedures; ensure technical and administrative competence; be non-partisan and apolitical; and promote the national values and principles provided under the constitution (Section 14). Part III (Sections 23–24) elaborates on the phased transfer of functions, initially determined by the authority but eventually applied for by individual county governments (Section 23). The criteria for the transfer of functions include the existence of adequate legislation, frameworks, administrative capacity, infrastructure, financial management systems, plans and other pertinent variables for the delivery of the service (Section 24).

6.2.2 County governments

County governments in Kenya are to be governed in accordance with the County Government Act. The act seeks to give effect to Chapter 11 of the constitution by providing for county governments' powers, functions and responsibilities to deliver services. In so doing, it elaborates the management of the affairs of the county assembly (Articles 177, 178 and 185), the county executive committee and the county governor (179 to 183). In addition, the act elaborates on the important issue of public participation (Article 196) in the affairs of county governance as well as issues of community, cultural diversity and concern for minorities (Article 197). Finally, it prescribes uniform norms and standards for the establishment and abolition of county public services and the appointment and discipline of officers at that level (Article 235).

Section 4 of the County Government Act empowers counties to enact legislation, giving them independent identities (flags, coat of arms and public seals). This underscores Article 6(2)'s provision that the national government and county governments are "distinct and [even if] interdependent". Part II (Sections 4–6) elaborates on the functions and powers of the county government, emphasizing its constitutional authority to enter into contracts; acquire, hold and dispose of assets; and delegate functions, such as through subcontracts and partnerships.

In relation to environmental governance, Part VIII (Sections 85–90) of the proposed legislation focuses on principles of citizen participation, and it also addresses their right to petition the county government, which has an obligation to "respond expeditiously" and conduct a referendum of pertinent issues. In addition, Part IX (Section 91–95) addresses the principles of, objectives of and frameworks for communication that ensure access to information while also promoting the inclusion and integration of minorities. These aspirations will be enhanced through civic education, whose principles, purposes, objectives and frameworks are addressed in Part X (Sections 96–99).

According to Section 102, "[a] county government shall plan for the county and no public funds shall be appropriated outside a planning framework developed by the county executive committee and approved by the County Assembly." This planning function is the focus of Part XI (Sections 100–113), which outlines the principles, objectives and outputs of the five-year county integrated development plan. This plan incorporates sectoral and spatial plans, as well as those of cities and municipalities. Part XI underscores the link between the development plan, action plans, county budget and performance indicators.

Section 113 emphasizes public participation in all these activities. The principles of, standards of and frameworks for public service delivery are the subject of Part XII (Sections 114–119). The emphasis is on equity, efficiency, accessibility, nondiscrimination, transparency, accountability, information sharing and subsidiarity, alongside a

focus on basic needs; which are monitored through Citizen Service Centres at all levels of the county government. This part also discusses fairness in setting tariffs; Section 118 provides that access to basic services for poor households should be ensured through tariffs covering only operating and maintenance costs. This part also mandates assistance to needful county governments by the ministry in charge of intergovernmental relations to ensure service delivery.

Part XIII (Sections 120–128) provides procedures for the suspension of county governments. Among the reasons for suspension are conflict or war and actions deemed contrary to the interests of its citizenry. This part also provides for the prorogation of the county assembly, suspension of the county executive committee and establishment and eventual dissolution of an Interim County Management Board on accession of a new government. Part XIV (Sections 129–133) discusses pensions, personal liability and repeal of the Local Government Act. Finally, Part XV (Sections 134–136) covers transitional considerations: the first sitting of the county assembly, facilitation of civic education and the continuing status of civil servants on the coming into effect of the act.

6.2.3 Cities, municipalities and towns

Prior to the devolved system of government brought about by the 2010 constitution, local authorities managed the cities, municipalities and towns in Kenya. The local authorities traced their lineage to the Local Native Councils (LNCs), which were established in 1924. Each LNC had a district commissioner (DC) appointed by the central government as its chairman. The DCs were autocratic administrators who applied strict rules in ensuring compliance with government policies. Many of these policies related to environmental issues, such as soil conservation and the preservation of water catchments. The use of forced labour and corporal punishment as means of pursuing compliance with environmental objectives was commonplace. An ordinance promulgated in 1937 provided for some democracy in governance by establishing positions for elected councilors. However, the LNCs continued to have little autonomy and provided only a narrow range of services. Further attempts were made towards devolving a greater degree of autonomy to the local councils through the 1950 African District Councils Ordinance. However, the DC retained his position as council chairman.

With independence, the African District Councils and the European Councils were dissolved and the structure of local government in Kenya unified. However, the central government retained tight control over local authorities. Indeed, the local authorities became “simply appendages of the central government” (Oyugi 1983:123). The councils shared the same administrative areas delineated by provincial, district and divisional borders of the provincial administration.

The local authorities retained a considerable degree of leverage as far as environmental management was concerned. They were vested with authority over the trust lands, which straddle much of Kenya’s arid, semi-arid, grassland and woodland areas known for their vast biodiversity, especially wildlife. These authorities exercised their jurisdiction by licensing various types of land and resource accesses and uses: for example, allocating land to individuals, groups or communities for construction of business enterprises and extraction of timber. Over the years, many local authorities ceded the authority to license timber extraction to the District Commissioners of their respective districts.

Many other local authority responsibilities had very direct implications for environmental management, such as disposal of waste, town and city planning, construction of rural access roads and formulation and enforcement of by-laws. In fact, a large percentage of local authority by-laws are geared towards ensuring clean and healthy environments. They focus, *inter alia*, on issues of health and sanitation, waste disposal and destruction of vegetation. These by-laws are legally enforceable in mainstream courts of law. The local authorities also maintained a cadre of *askaris*, which were well known for their rogue manners when enforcing the by-laws or court orders.

Furthermore, such activities as licensing and collecting taxes from businesses by the local authorities also brought environmentally beneficial effects. Levying taxes on charcoal and fish sales, for instance, can be disincentives for trading these products, thereby acting as important disincentives for over-exploitation of these resources. It is unfortunate that the local authorities scarcely ever saw their licensing authority as a means of discouraging wanton use of such resources. Indeed, this function may have worsened the situation of resource use, as it is open to abuse by individuals who can afford the licenses.

Of even greater significance for the environment was the jurisdiction local authorities had over game reserves. They were responsible for managing these reserves for the benefit of their local communities. Not only did they raise fees for entry into the reserves for tourism, but they also licensed businesses to operate within the reserves. These activities provided important revenues for running local authorities with game reserves in their areas of jurisdiction. Indeed, the richer local authorities – like Kajiado County Council – were those with game reserves in the wildlife-rich areas of the country.

With time, it became clear that the wildlife management functions of local authorities needed rethinking, streamlining and reinforcement. Local authorities were ill equipped and ill resourced to deal effectively with the highly technical challenge of managing wildlife. In managing the game reserves, most local authorities with reserves relied heavily on the central government, private enterprises and KWS. The result was considerable controversy and wrangles over resource sharing among the central government, businesses and local communities involved. Little, if any, resources were ploughed back into the management of the reserves and natural resources.

It is worth noting that many district and provincial-level local authorities – the municipalities and counties, respectively – maintained directorates of environment or, at least, the position of an environmental officer. The same were maintained and applied to environmental issues such as physical planning and health and water services. These officers were responsible for advising the responsible local authorities on environmental implications of activities. They were also responsible for ensuring that the local authorities protected and enhanced the environment.

The devolved government structure brought about by the 2010 constitution vested most functions of the local authorities on the county governments. Specifically, cities and municipalities are now managed by county governments and administered on their behalf by city or municipality boards.¹⁴³ City or municipality managers (or town administrators in the case of towns) implement the decisions of the boards.¹⁴⁴ It is worth noting that the Urban Areas and Cities Act did not remove the by-laws, licenses or permits made and issued by the local authorities who were established, under the Local Government Act, and subsisting or valid immediately before the commencement of the new Act. Such by-laws licenses and permits are deemed to have been given, issued or made by the boards established pursuant to the Urban Areas and Cities Act; the by-laws are valid until they expire, are amended or are repealed.

The city and municipality boards are the overseers of the affairs of the city or municipality and are charged with a raft of other functions,¹⁴⁵ which impact the environment, forests and other natural resources. For instance the boards are required to promote a safe and healthy environment. Also of particular interest to forests and REDD+, the boards are charged with the duty to: “control land use, land sub-division, land development and

143 Urban Areas and Cities Act, 2011, No. 13. The act, pursuant to Article 184 of the constitution, makes provisions for classification, governance and management of urban areas and cities, for the criteria of establishing urban areas and for the principle of governance and participation of residents.

144 Urban Areas and Cities Act, 2011, No. 13, Section 12.

145 Ibid, Section 20.

zoning by public and private sectors for any purpose, including industry, commerce, markets, shopping and other employment centres, residential areas, recreational areas, parks, entertainment, passenger transport, agriculture, and freight and transit stations within the framework of the spatial and master plans for the city or municipality as may be delegated by the county government.”¹⁴⁶

The city and municipality boards also develop, adopt, implement and monitor the impact and effectiveness of policies, plans (including integrated development plans), strategies and programmes for their respective counties, as well as implement applicable national and county legislation. The county governments may also delegate to the boards the role of infrastructural and other development services of the city or municipality. This role may have an impact on forests and the environment. Additionally, the boards are mandated to enter into contracts, partnerships or joint ventures necessary for their functions. It is also the boards’ role to monitor, and where appropriate, regulate city and municipal services where service providers are not the board of the city or municipality. In the case of towns, the functions of the board are performed by a committee appointed by the county governor and approved by the county assembly.

Other than these roles, the boards of cities and municipalities empowered to, *inter alia*, promote the constitutional values and principles of participation of the people, equity, good governance and sustainable development. The boards’ powers also include making by-laws, recommending issues to be included in by-laws and ensuring residents’ participation in all decision-making including through citizen fora. Using these powers, the cities and urban areas can participate in ensuring sustainable utilization and management of forests within their jurisdiction.

6.3 Local communities and non-state actors

Local communities and non-state actors have a critical role to play in the development of the REDD+ framework.¹⁴⁷ In fact, the Forests Act requires, in mandatory terms, the establishment of forest conservation committees (FCCs) for each forest conservancy area. They are based on forest divisions and stations, advise the forest service on local needs, monitor implementation of law and policy, assist local communities in achieving equitable benefit sharing and recommend potential forest areas.¹⁴⁸

Various institutions also make significant contributions in policy analysis and research. For example, the Institute for Law and Environmental Governance (ILEG) can contribute through research and capacity-development initiatives that link environmental management, governance and the search for sustainable development in Kenya.¹⁴⁹ Universities and national research institutes can also make important contributions in this regard.

Over the years, the role of the private sector in environmental management has been very minimal, if any, partly because there has been little appreciation of sustainability principles by business. However, recent developments point to great progress in the right direction. The Kenya Association of Manufacturers (KAM) has recently been involved in implementing a number of sustainable development projects in a wide range of issues, including renewable energy, cleaner production and climate change. In addition, many private enterprises are starting to support environmental projects in response to the vogue corporate responsibility paradigm that is moving up the agenda in the corporate world, boardrooms and shareholders meetings.

146 Ibid.

147 The term “Local communities and non-state actors” is used here as an equivalent of the word “civil society” as applied by the UN. See UNEP, 2002, *Natural Allies: UNEP’s Engagement with Civil Society*, Nairobi: UNEP.

148 Parliament of Kenya, 2005, Kenya Forest Act.

149 For more on ILEG’s work, see www.ilegkenya.org.

7. Trade, investment and financial accountability

7.1 Trade and investment

As with other types of trade and investments, REDD+ activities will require fiscal incentives, accessible business development procedures and a conducive business environment to attract investors. Kenya's economy went through a very difficult phase in the 1990s, characterized by low or no growth, and a decline in real per capita incomes between 1980 and 1999. As part of efforts to address the economic decline, the National Rainbow Coalition (NARC) published the Economic Recovery Strategy for Employment and Wealth Creation (ERS) when it took over in 2003 (Oparanya 2011).¹⁵⁰ The ERS set guidelines for economic recovery from 2003 to 2007. Under ERS, Kenya GDP growth rose from 0.6 percent in 2002 to 7.1 percent in 2007. Recovery was felt in a rise in stock market indicators, employment — especially in the informal sector — electricity connections in the rural areas, earnings from tourism, productivity in agriculture and industry and poverty reduction.¹⁵¹

In order to sustain the momentum of social and economic development brought by the ERS, the government launched the National Economic and Social Council (NESC) in January 2004.¹⁵² The NESC's role was to provide timely, accurate and independent economic and social advice to the government and to continuously provide a consultative platform to improve coordination between the government and the private sector. The specific responsibilities of the council include the following:

- to create a forum in which government, business and labour unions can identify and discuss policy issues and make recommendations consistent with the development aspirations of the country;
- to appraise the various programmes and activities of the government in the light of government policy;
- to improve the targeting and addressing of strategic objectives with a focus on the most critical social and economic needs;
- to utilize private-sector and civil society capacities and synergies through collaboration, engagement and networking to promote efficiency and effectiveness in economic planning.¹⁵³

The NESC thus set the stage for improving the business environment and attracting investors. Hon. Wycliffe Oparanya, Kenya's then Minister for Planning, National Development and Vision 2030, noted that Kenya's NESC, unlike the councils of other countries, had remarkable success. Among other things, the NESC generated the idea of the Vision 2030.¹⁵⁴

Kenya Vision 2030¹⁵⁵ was launched in June 2008. The vision recognizes the important role of increasing public and private investment in its effort to transform Kenya into a newly industrializing, middle-income country providing a high-quality life to all its citizens by the year 2030. According to the vision, private-sector investments

150 Oparanya, W. A., 2011, *Role of the National Economic and Social Council in the implementation of Kenya Vision 2030*. A keynote speech by Hon. Wycliffe Ambetsa Oparanya, EGH, MP, Minister for Planning, National Development and Vision 2030, to the United Nations Department of Economic and Social Affairs meeting on managing economic and social councils as a driving force of the national dialogue on economic and social policies, Nairobi, 7 and 8 March 2011.

151 Ibid.

152 Ibid.

153 Kenya Private Sector Alliance (KEPSA), Strategic Plan Document 2010–2012.

154 Oparanya, 2011.

155 Government of Kenya, 2007, Kenya Vision 2030.

were 15.6 percent of the GDP in 2006–2007. This is expected to have risen to 22.9 percent in 2012–2013 and rise to over 24 percent of the GDP during the period 2020–2021 to 2030. Foreign direct investment is expected to comprise a significant share of the increase. In order to achieve this level of private investment, the vision proposes the following interventions:

- restoration and expansion of the infrastructure stock;
- upgrading financial services to world-class levels;
- strengthening capital markets;
- improving the regulatory and licensing framework to reduce bureaucratic costs;
- strengthening the judiciary;
- corruption control;
- ensuring that labour markets operate flexibly enough to reflect the true cost of labour;
- ensuring that human-resource quality is upgraded to enable human capital to play a larger role in raising productivity.

These interventions are to be underpinned by macro-economic stability, assurance of the rule of law and protection of property rights including intellectual property rights. Vision 2030, therefore, provides a very useful framework for promoting REDD+ related investments. The vision gives special attention to investments in the arid and semi-arid districts and in communities with high incidences of poverty, unemployed youth, women and all vulnerable groups. It is expected that much of the REDD+ activities will be undertaken in the arid and semi-arid areas. Promoting investments in these areas will clearly give impetus to REDD+ success.

The Government of Kenya also launched the Private Sector Development Strategy (PSDS)¹⁵⁶ in January 2007 to create a conducive business environment for private-sector growth by alleviating major constraints, and to enhance the growth and competitiveness of the private sector. The specific goals of the PSDS are relevant to a future REDD+ finance mechanism because they can enhance investments in forest plantations and renewable energy technologies. They are:

- improving Kenya's general business environment;
- accelerating public-sector institutional transformation;
- facilitating economic growth through greater trade expansion;
- improving the productivity of enterprises;
- supporting entrepreneurship and indigenous enterprise development.

In addition, parliament enacted the Public Private Partnerships Act¹⁵⁷ to provide for the participation of the private sector in the financing, construction, development, operation or maintenance of the government's infrastructure or development projects through concession or other contractual arrangements. The act also establishes institutions to regulate, monitor and supervise infrastructure or development project agreements.

The Public Private Partnerships Act established institutions whose functions are key to promoting investments in REDD+ activities. The Public Private Partnership Committee was established¹⁵⁸ to, *inter alia*, formulate policy

¹⁵⁶ Government of Kenya, Private Sector Development Strategy 2006–2010.

¹⁵⁷ Public Private Partnerships Act, 2013, No. 15.

¹⁵⁸ *Ibid*, Section 4(1).

guidelines on public-private partnerships; ensure that all projects are consistent with the national priorities specified in the relevant policy on public private partnership; approve project proposals; formulate or approve standards, guidelines and procedures for awarding contracts and standardized bid documents; examine and approve the feasibility study conducted by a contracting authority under the act; review the legal, institutional and regulatory framework of public-private partnerships; and ensure the efficient implementation of any project agreement entered into by contracting authorities.¹⁵⁹ The committee is chaired by the principal secretary of the National Treasury. The committee's membership also comprises the principal secretaries in the ministries of the Interior and coordination of the national government; Devolution and Planning; and Land, Housing and Urban Development. Also serving as members of the committee are the attorney general or a person deputized by him in writing; four non-public officers appointed by the cabinet secretary for the National Treasury; and the director, who shall be the secretary to the committee.¹⁶⁰

The act also established the public-private partnerships unit within the National Treasury to provide secretariat and technical functions to the committee.¹⁶¹ The unit comprises a director and such staff as the Cabinet Secretary may, in consultation with the Director, consider necessary for the performance of the functions of the unit. The act also makes provisions for the formation of public-private partnership nodes by contracting authorities that intend to enter into a public-private partnership.¹⁶² The nodes identify, screen and prioritize projects according to the committee's guidelines; prepare and appraise project agreements; undertake the procurement process; monitor the implementation of a project agreement; liaise with all key stakeholders; oversee the management of a project; and submit project reports to the unit.

The Government of Kenya is taking specific steps to promote investments in green projects and to make Kenya a competitive carbon-finance investment destination.¹⁶³ For instance, the Ministry of Finance is in the process of developing a policy on carbon trading to enable the government to harness potential revenue from projects that cut greenhouse gas emissions. The National Policy on Carbon Finance and Emissions Trading, currently in draft form, is expected to pave the way for the government to plan incentives for the private sector and encourage investors to engage in green projects. According to the chief economist at the treasury, Mr. Erastus Wahome, the policy will facilitate resource mobilization by attracting foreign investments to such projects, allow sustainable growth by guaranteeing stable carbon revenues and enhance the country's capacity to adopt carbon-finance instruments.¹⁶⁴

Private sector institutions also play key roles in promoting trade and investment in Kenya. Incorporated in 2003, the Kenya Private Sector Alliance (KEPSA) is the national apex body of the private sector in Kenya.¹⁶⁵ KEPSA is comprised of more than 60 business membership organizations and more than 180 corporate organizations.¹⁶⁶ KEPSA's objective is to create and maintain an enabling business environment through high-level advocacy and strategic interventions. Specific objectives include:

159 Ibid, Section 7.

160 Ibid.

161 Ibid, Section 11.

162 Ibid, Section 16.

163 Ministry of Environment and Mineral Resources, *Carbon Trading Platform Approach in Kenya*. <http://www.environment.go.ke/archives/3112>. Internet accessed 2 June 2013.

164 Karambu, I., 2012, *Kenya drafts policy on carbon trading*, Sunday Nation Digital Edition. Posted Monday, 3 September 2012. <http://www.nation.co.ke/Features/smartcompany/Kenya-drafts-policy-on-carbon-trading/-/1226/1493718/-/13ij2k5z/-/index.html>. Internet accessed 2 June 2013.

165 KEPSA, Strategic Plan Document 2010–2012.

166 Ibid.

- to strengthen the role of the private sector as the pillar and engine of economic growth, employment and wealth creation;
- to ensure the formulation and implementation of pro-growth policies that promote Kenya's competitiveness, encourage domestic and foreign investment and pursue regional, continental and international economic opportunities;
- to promote values of good business ethics and practices, innovation, hard work, goodwill and collective responsibility;
- to promote action-based best practices, corporate social responsibility, conservation, protection and prudent use of Kenya's natural resources;
- to ensure dignified living conditions, quality life, socio-cultural wealth, human development, growth and sustainable development for posterity;
- to promote, coordinate, monitor and evaluate private-sector activities in pursuit of an enabling business environment;
- to facilitate harmonized private-sector approaches on cross-sectoral issues.¹⁶⁷

KEPSA initiated various dialogue platforms through which it engages with the government: the Presidential Private Sector Working Forum, Prime Minister's Round Table, Speaker's Round Table, Ministerial Stakeholder Forums, Chief Justice Forum and Parliamentary Departmental Committees.¹⁶⁸ KEPSA's advocacy through these platforms was heavily guided by the business needs and priority issues contained in what became known as the National Business Agenda (NBA).¹⁶⁹ The National Business Agenda was developed in 2008 with the Kenya Association of manufacturers (KAM) and implemented through KEPSA. The NBA was developed as a joint platform to articulate of key concerns of Kenya's business sector that required urgent action by the government to extend the private sector's role and enable it to play its key role in wealth and employment creation.

The NBA identified several key issues that hinder growth of the private sector and provided recommendations to Vision 2030. They are, *inter alia*, adequate physical infrastructure; less crime and insecurity; meaningful and less burdensome business regulations; labour-market regulations that incentivize creation and expansion of employment; and expansion of external trade through improved facilitation and market access. Other improvements are the creation of a tax regime and tax administration conducive to business growth; the protection of Intellectual Property Rights; and enhanced government and private-sector engagement and coordination. From 2008, the NBA formed the backbone of the private sector's engagement with the government, through the Prime Minister's Round Table meetings and Ministerial Sector Forums. The pending issues were to be integrated into the Vision 2030 Medium-Term Plan.

The NBA II¹⁷⁰ was developed through updating the key successes of the NBA I and reviewing its major unresolved issues. The NBA II will cover 2013–2018 and will prioritize ten thematic issues that the private sector will focus its efforts on. These thematic issues are all important to creating a conducive environment for investments in REDD+ activities. They are:¹⁷¹

- improving the regulatory environment by addressing the constraints of high-tax rates, high costs of access to finance, high-labor costs, corruption, insecurity, poor infrastructure and business licensing;

167 Ibid.

168 Ibid.

169 Ibid.

170 KEPSA, The Kenya National Business Agenda II, 2013–2018.

171 Ibid.

- reducing costs and revenue losses to businesses due to insecurity by creating a professional and effective police service, increasing the private-security industry's participation in national security, addressing corrupt elements within the criminal justice system and fighting cybercrime;
- improving governance by building, strengthening and sustaining institutions for accountability and by addressing delays and high costs at the courts regarding dispute settlements for commercial matters, inadequate investor protection laws and corruption;
- improving physical and social infrastructure by expanding and rehabilitating transport networks and (air) ports, promoting public-private partnerships in energy, increasing housing supply for low- and medium-income markets and promoting integrated urban planning;
- promoting and developing of micro, small and medium-sized enterprises;
- improving productivity and competitiveness of the agricultural sector;
- natural resources management by, *inter alia*, increasing Kenya's forest cover, reducing poaching, promoting green energy, increasing access to safe water and ensuring transparent and prudent management of the extractive industry;
- improving trade and investment by promoting export diversification, tackling non-tariff barriers, strengthening engagement with the diaspora and attracting strategic investors;
- re-investing in human capital development by increasing investments in Technical Vocational Education and Training (TVET) and improving linkages between research, education and training institutions and the private sector;
- promoting a culture of high performance by improving the linkages between policy and planning, increasing consultation with the private sector during policy development and expediting key projects with huge effects on economic growth.

7.2 Financial transparency and accountability

Transparency and accountability of financial systems are very critical to the success of REDD+ as they can attract investors and equitable revenue sharing. Financial transparency and accountability will also ensure that investors earn carbon credits that are commensurate to their specific contributions towards reducing GHG emissions. It is thus imperative for any country willing to attract investments in REDD+ activities to address legal and institutional issues such as anticorruption, multijurisdictional information systems and risk sharing or insurance. If these issues are unchecked, financial flows from REDD+ may risk possible misrepresentation, misappropriation and inefficient allocation of resources.

These issues warrant attention because REDD+ funds will normally follow multiple pathways, involve many different intermediaries and mingle with flows from a range of sources. The many pathways of funds raises the possibility of the funds being counted multiple times, which would result in the perceived scale of REDD+ financial flows as greater than actual flows. Furthermore, countries may adopt different definitions for distinguishing between REDD+ financing and official development assistance (ODA), which may lead to ODA and REDD+ funding being counted as the same. This may also lead to existing flows simply being repackaged as REDD+ finance. Misappropriation may also take the form of claiming money for projects that do not exist or over-claiming REDD+ payments.

The following measures are important to ensure robust, efficient and accountable procedures for REDD+ financial flows:

- improve transparency on commitments and disbursements;

- improve transparency on decision-making by making key documents and reasons for decisions publicly available and opening meetings to observers;
- improve accountability by consulting and involving all actors like civil society organizations, indigenous peoples and local communities in decision-making and financial control of REDD+;
- improve efficiency by establishing a coordination entity within REDD+ recipient countries to define REDD+ needs and match these needs to donor capabilities and capacity building specifically on fiduciary safeguards;
- minimize the risks of misappropriation and poor practice by getting private sector actors involved in spending REDD+ finance; sharing information regarding blacklisted companies between multilateral and bilateral institutions involved in REDD+; and requesting that any company involved in or benefitting from REDD+ finance be required to publish details of its beneficial ownership.

Misappropriation of public funds and resources has been a persistent problem in Kenya. In the forest sector, this has manifested in illegal logging and corruption, which has been identified as the most devastating threat to forest law enforcement and governance.¹⁷² This misappropriation of public funds poses a big threat to REDD+ success as it could undermine political will to safeguard important Cancun Agreement requirements for transparency and accountability.

The Government of Kenya has promised to strengthen its war on corruption. The Constitution of Kenya established the Ethics and Anti-corruption Commission (EACC), whose role is to combat corruption and economic crime through education, prevention and law enforcement, and to conduct mediation, conciliation and negotiation.

The commission boasts of good and positive outcomes. In 2011–2012, for example, the commission recovered key public assets, including land, and recommended several corruption cases for prosecution. It also participated in conjunction with other stakeholders in formulating the Ethics and Anti-corruption Act, 2011, and the Leadership and Integrity Act, 2012. The commission also undertook a number of corruption-prevention programmes, including REDD+ relevant ones such as the ongoing partnership with the lands sector, which is where the lands-management information-management system was done. Other preventive measures undertaken by the commission are public education and awareness creation; advisory services; promoting standards and best practices; and research on corruption and governance related issues.¹⁷³

With respect to guarantees for investors against the risks of reversals, Kenya is a signatory to several international commercial and economic organizations. Some of these organizations offer risk-insurance facilities to protect investors from war, strife, disasters, political actions, land expropriation and other disturbances. These include the Multilateral Investment Guarantee Agency (MIGA) of the World Bank, the African Trade Insurance Agency (ATIA) and other bilateral investment protocols with a number of countries. Those agreements may not provide automatic coverage for REDD+ investors seeking indemnity for possible reversals, as investors must contribute their own funds to be insured. However, Kenya's and other countries' contribution to the insurance pool can somewhat lower the costs for investors. It is also important to note that additional risk-sharing mechanisms at the domestic, regional or international level specific to climate change, and possibly REDD+, are currently the subject of ongoing UNFCCC negotiations.

¹⁷² UNFCCC, Report of the Conference of the Parties on its 16th session, held in Cancun from 29 November to 10 December 2010.

¹⁷³ For specific preventive programmes undertaken by the commission in this period, see Ethics and Anti-Corruption Commission, 2011, Annual Report 2011/2012.

8. Analysis of issues

In this section, we analyse the salient issues emerging from forest governance in Kenya with regard to REDD+ and make suggestions and options for legal and policy reform. We revisit the issue of land-use laws in relation to sustainable development in Kenya, as well as the convergence and harmony of REDD+ laws and policies. Also discussed are adequacy of Kenya's institutional framework; carbon rights and benefit sharing in REDD+; transparency and accountability in REDD+ transactions; and continuing legal reforms in the forest sector.

8.1 Land-use law and sustainable development in Kenya

Land use is an important key to sustainable development, and understanding land use requires examining what human activities are conducted on the land.¹⁷⁴ Agriculture needs farmland as forestry needs forested land. Even activities on the sea, such as fishery and maritime transportation, need land for ports and harbors as well as for anchoring sites. Furthermore, rivers, lakes, and swamps all inevitably use land in a variety of ways. These human activities usually have a direct effect on the land and may indirectly affect land and areas farther away. For example, the cutting of trees in the upper-stream area of a river will dry up the groundwater downstream or have an adverse effect on fishery resources around the mouth of the river. This example illustrates that various forms of land use affect the environment both directly and indirectly.

The challenge of sustainable development then is balancing environmental conservation imperatives with the many competing land uses. Setting aside land for forests or biodiversity conservation means the land remains undeveloped and economic activities on the land are forgone. In Kenya, land in parks and reserves is used mainly for wildlife-based tourism, and forest land is used mainly for forestry and for gathering non-timber forest products. These types of land are always under pressure from other uses, especially agriculture. Despite the stated intention to transform into a newly industrializing, middle-income country by 2030, Kenya's economy is still agro-based.¹⁷⁵ The Agricultural Sector Development Strategy for 2010–2020 reaffirms this fact by pointing out that “the agricultural sector is not only the driver of Kenya's economy but also the means of livelihood for the majority of Kenyan people”.¹⁷⁶

Given the competing land uses, a critical balance is needed to ensure environmental conservation, economic growth and enhancement of people's livelihoods. This balance brings into focus the principle of sustainable development, a key concept in development and environmental literature that has emerged after the Brundtland report, *Our Common Future*.¹⁷⁷ Sustainable development requires countries to approach development in a way that ensures it meets the needs of the present without compromising the ability of future generations to meet their own needs.

The idea of conservation introduced during colonialism and followed for the most part by post-colonial governments, mainly sought to maintain state coffers and benefit powerful individuals. This kind of conservation resulted in the stripping of local communities of any powers of management or control of their natural resources

174 Morishima, A., 2007, *Challenges of Environmental Law – Environmental Issues and their Implications to Jurisprudence* in Chalifour, N. J., Kameri-Mbote, P., Lye, L. H. & Nolon, J. R. (Eds), *Land Use Law for Sustainable Development*, New York, Cambridge University Press.

175 Republic of Kenya, 2007, *Kenya Vision 2030*.

176 Government of Kenya, 2010, *Agricultural Sector Development Strategy: 2010–2020*, page xii.

177 The Report of the World Commission on Environment and Development (WCED), 1987, *Our Common Future*, New York, Oxford University Press.

and alienated people from conservation.¹⁷⁸ To date, many Kenyans still consider conservation as a less attractive option for land use. However, as pointed out by Hodas,¹⁷⁹ there are enormous opportunities in conservation and sustainable management of Kenya's natural resources such as forests. Although the author refers generally to African countries, the opportunities are very relevant to Kenya. They include an enormous capacity to sequester and preserve carbon in forests, agricultural land and pasture and to reduce CO₂ emissions by protecting existing forests, along with other mitigation approaches. Other opportunities are a huge untapped potential for renewable energy and ordinary improvements in fossil fuel efficiency.

In order to successfully exploit these opportunities, land-use laws need to be strengthened and aligned to the imperatives of sustainable development. The new land laws have not properly addressed tenure insecurity, especially on community lands that host much of Kenya's forests. This is coupled with lack of clarity on who holds carbon rights and who are the potential beneficiaries of forest resources, such as REDD+ carbon finance. In addition to being unclear and incoherent, most land-related laws are outdated. The institutional framework for managing land and land-based resources, like forests, is weak. These challenges are worsened by lack of a land-use policy that would guide the critical balance between the many competing land uses. These challenges have led to continued degradation of land and land-based resources; frequent land-related violence; conflict and duplication of duties among different institutions; and communities' continued marginalization and loss of livelihoods. We analyse each of these issues in more detail below.

8.2 REDD+ and the land-tenure system in Kenya

Land tenure is critical to REDD+ in a number of ways. It determines, *inter alia*, the extent to which the legal framework recognizes and protects forest-related tenure and rights to carbon; the extent to which the legal framework recognizes customary and traditional rights of indigenous peoples, local communities and traditional forest users; the consistency between formal and informal rights to forest resources; and the extent to which the legal framework provides effective means of resolving disputes by due process. Indeed, the Cancun Agreements, in Paragraph 72, request parties to address land tenure issues. The challenge is addressing land tenure equitably and securely.

8.2.1 Key issues in equitable and secure land tenure for REDD+ in Kenya

There are a number of tenure-related issues that have implications for the success of REDD+ in Kenya. First, while constitution categorizes land into public, private or community, the Forests Act, 2005, categorizes forests as government gazetted forests, local authority forests and private forests. The forest-tenure regime is therefore unclear given that all forests fall on land. The local authority forests, formerly governed by the Trust Land Act, are now presumably community forests vested in county governments. However, these forests still lack legal protection given that the Community Land Law has not been enacted by parliament. In addition, the Land Act, which has already been enacted to govern public and private land, does not specifically give treatment nor recognize the importance of REDD+.

Second, since the colonial period and through successive post-colonial governments, policies and laws on land have protected private land rights at the expense of indigenous or communal land rights. Individual land tenure

178 Kameri-Mbote, P., 2007, *Land Tenure, Land Use, and Sustainability in Kenya: Toward Innovative Use of Property Rights in Wildlife Management* in Chalifour, N. J., Kameri-Mbote, P., Lye, L. H. & Nolon, J. R. (Eds), *Land Use Law for Sustainable Development*, New York, Cambridge University Press.

179 David R. Hodas, 2007, *Climate Change and Land Use in Africa* in Chalifour, N. J., Kameri-Mbote, P., Lye, L. H. & Nolon, J. R. (Eds), *Land Use Law for Sustainable Development*, New York, Cambridge University Press.

was introduced in Kenya during the colonial period as the tenure for white settlers. Late in its tenure, the colonial government also initiated a policy of converting customary land tenure to individual private ownership. The wisdom of this decision was that private tenure was the most suitable tenure regime to ensure agricultural productivity. Successive Kenyan governments continued this policy.

The individualization of land rights has undermined indigenous culture and conservation systems and destroyed traditional resource management institutions. It has also, in effect, undermined the role of indigenous people in the management and conservation of forests and other land-based resources. In addition, the government's widespread abuse of trust has undermined effective management of trust lands. For example, county councils, which were the trustees of trust lands, disposed of trust land irregularly and illegally. Despite these issues, however, customary land tenure continued to be the most widespread and dominant land tenure system in Kenya.

Both the National Land Policy and the 2010 constitution provide a critical basis for addressing the long-standing tensions around land tenure and use in Kenya. The constitution brought a fundamental shift in the manner and terms used to govern the country. It seeks to make Kenya an open and democratic society and requires that justice, fairness and the people's interest prevail in all affairs of the state, including management of natural resources such as forests. In particular, the constitution recognizes the right to a clean and healthy environment as a constitutional right.¹⁸⁰ The constitution incorporates principles of land policy, borrowed from the National Land Policy, as follows:

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;
- (g) encouragement of communities to settle land disputes through recognized local community initiatives consistent with this constitution.

To the institution of property, the changes brought by the constitution were vesting the radical title on the people collectively as a nation, as communities and as individuals.¹⁸¹ Other changes are the protection of the right of every person to acquire and own property and the formation of a National Land Commission to manage all public land on behalf of the state. The constitution also brought fundamental shifts in the property regime by replacing the categories of government, trust and private land with state, community and private land.¹⁸²

¹⁸⁰ Constitution of Kenya, 2010, Article 42.

¹⁸¹ Ibid, Article 61.

¹⁸² Ibid, Article 61(2).

The National Land Policy addresses tenure issues in a number of ways. With regard to community land, the policy recognizes and protects customary land rights and reasserts their viability.¹⁸³ The policy requires the government to document and map existing forms of communal tenure, whether customary or non-customary, and to provide for its recognition and protection, as well as restitution of “illegally acquired parts of trust land to the affected communities”. The policy requires community land to be vested in the community. But it is not clear whether this refers to both communities of common descent and communities of common residence, or to only the latter. Another challenge is that a good deal of land has been converted to individual ownership yet is still in practice managed according to a mix of formal and customary rules. Also, there is active conflict between those asserting claims under the old and new systems. In such cases, the policy is not clear whether a roll back of the conversion to individual ownership is anticipated, and what would be the implications of such actions for existing title holders.

The National Land Policy of 2007, the Land Act and the constitution require parliament to enact legislation to give effect to the constitutional provisions for community land. However, the legislation as required by Article 63 of the constitution is not in place, though there is a draft of the Community Land Bill, 2011. The bill proposes to establish land administration committees and land administration boards to manage community land. Under the bill, the cabinet secretary would be required by way of a gazette notice to establish land administration areas to elect members to serve in the land administration committee. The land administration committees would allocate customary land rights but would be subject to the community land boards, also created by the cabinet secretary to hold and manage community land on behalf of those communities.

For public land, the National Land Policy proposes to establish an inventory to be held and managed by the National Land Commission (NLC) in trust for the people of Kenya. There is also a call for repossession of “public land acquired irregularly”. On this regard, questions abound as to what is considered not bona fide. If this refers to land acquired by fraud or other corrupt practices, which must be proven in court, it is a perfectly legitimate provision. If, however, it refers to land acquired legally, but as a result of abuse of discretion, including ethnic favouritism, it raises serious questions.

The Land Act of 2012¹⁸⁴ details the management and administration of public land, in line with the constitution and the Land Policy. It requires the National Land Commission to establish geo-referenced data of all public land, which is to be authenticated by the statutory body responsible for the survey.¹⁸⁵ The act also mandates the commission to share the data with the public and relevant institutions to discharge their respective functions and powers.¹⁸⁶ The act deals with conversion of land, stating that any land can be converted from one-tenure regime to another.¹⁸⁷ Specifically, it states that public land may be converted to private land by alienation or to community land subject to public needs or in the interest of defense, public safety, public order, public morality, public health or land-use planning. Importantly, the Land Act puts a threshold of parliamentary approval for any substantial transaction involving the conversion of public land to private land.¹⁸⁸ The act empowers the commission to prescribe guidelines for the management of public land for all public agencies, statutory bodies and state corporations.¹⁸⁹ It also deals with allocation of public land.¹⁹⁰ However, the act doesn't provide guidance

183 Sessional paper no. 3 of 2009 on the National Land Policy, Section 3.3.

184 Land Act, 2012, No. 6.

185 Ibid, Article 8(a).

186 Ibid, Article 8(c).

187 Ibid, Article 9.

188 Ibid, Article 9(3).

189 Ibid, Article 10.

190 Ibid, Article 12.

on repossession of land acquired irregularly prior to its enactment, though it does set out what is to be excluded from the law that governed land immediately prior to the commencement of the act.¹⁹¹

In addition, successive governments in Kenya have been poor stewards of government land and trust land. For example, the government, even under the past constitution, had the power to regulate property rights through compulsory acquisition or eminent domain and through development control or police powers. However, this power was largely not applied in the interest of environmental conservation. In many cases, they were used to reward organizations or individuals for political or other reasons. In other cases, the government also lacked administrative capacities for effective management of land.

The constitution and the Land Policy both envisage reforms of how the state uses its power to regulate land use. Paragraph 42 of the Land Policy adds a new condition that the exercise of these powers should be based on rationalized land-use plans and agreed upon public needs established through democratic processes. The National Land Policy also requires, in Paragraph 47, that the powers of compulsory acquisition be exercised based on criteria, processes and procedures that are accountable, transparent and efficient. However, it fails to define such criteria to include ecological imperatives such as conservation and protection of natural resources such as forests. On the state's police power, the National Land Policy requires, amongst other things, that efficient, transparent and accountable standards, procedures and processes are established for zoning. Other important inclusions are local practices and community values on land use and environmental management and effective public participation in the exercise of development control.¹⁹²

8.2.2 Summary conclusions on Kenya's land tenure and legal preparedness for REDD+

Having secure and equitable land tenure is critical to addressing the issues of the Cancun Agreements and REDD+ activities, guidance and safeguards. There have been consistent efforts and progress in improving the legal and institutional framework for land tenure in Kenya. However, significant challenges remain.

1) There is the challenge of tenure security especially of trust lands and un-alienated government land, as no authority holds the title deed for these lands.

The proposed Community Land Bill promises to address this issue by establishing land administration committees and community land boards to hold and manage community land on behalf of those communities. Until the discussions are finalized and the bill is passed in parliament, insecurity of tenure over community land will continue to hinder sustainable management and use of community land, which has direct implications for Kenya's REDD+ preparedness because many forests fall on community lands. This legislation, once enacted, will protect the rights of forest-dependent communities and facilitate their access, co-management and derivation of benefits from the forests.

2) Some laws regarding tenure are unclear. For instance, while the National Land Policy calls for repossession of "irregularly" acquired public land, existing laws —the Land Act, 2012 — do not tell how to repossess the land. Furthermore, there are no clear definitions on what is irregularly acquired land or bona fide ownership of land.

3) Despite that much of Kenya's forests are on community land, there is no agreed or clear definition of "community" or of "community land". It is not clear whether these refer to both communities of common

191 Ibid, Article 162.

192 Sessional paper no. 3 of 2009 on the National Land Policy, Paragraph 51.

descent and communities of common residence, or to only the latter. Such lack of clarity may hinder sustainable use of land and land-based resources such as forests. The constitution defines “communities” on the basis of ethnicity, culture or community of interest. While culture and ethnicity are intuitive, it is less clear what “community of interest” means. Yet this might phrase be the key to defining communities in a way that promotes national cohesion and co-existence.

4) Many laws and policies relating to land and natural resources such as forests have evident gaps and are incoherent. For instance, the Forests Act is not aligned with the Constitution of Kenya, 2010, or the Land Act and the tenure categorization that they have established.

8.3 Convergence and harmony of REDD+ laws and policies

Clear and coherent laws and policies are crucial for ensuring cross-sectoral coordination across the different relevant entities of REDD+ and that, when REDD+ activities are implemented, forest-dependent communities are not deprived of human needs, such as food and energy. Clear and coherent laws and policies are also important for understanding hierarchies in land and natural resource interests, such as mining, easements and acquisitions. Lack of a clear understanding can undermine REDD+ implementation.

8.3.1 Key challenges to clarity and coherence of laws and policies for REDD+ in Kenya

The REDD+ programme in Kenya is relatively young. As such, knowledge and information sharing among government departments and agencies and coordination of laws, policies and institutional mandates across diverse sectors have been minimal. The forest sector cannot implement REDD+ alone. There are challenges in information sharing and coordinating all the forest-related sectors to work together on different goals towards achieving REDD+ success.

Several statutes are relevant to the success of REDD+ implementation in Kenya: the major ones being the Forest Policy, 2007; Forests Act, 2005; EMCA, 1999; the National Land Policy; the Energy Policy; and others. Most of these statutes have adopted the principle of sustainability in the management of natural resources, and at least to that extent, are in agreement in promoting the success of REDD+ implementation. For example, Vision 2030 provides Kenya’s overall sustainability framework and requires all government departments and agencies to align their development with its objectives. The stated vision of the Land Policy is to guide the country into sustainable and equitable use of land. Among the objectives of the Energy Policy is to address environmental problems and to promote renewable energy technologies. The Constitution of Kenya also places sustainable development within the content of national values. The environment and land court, established pursuant to Article 162 (2) b of the constitution, is also to be guided by the principle of sustainable development.

Despite the cross-sectoral nature of sustainability, the laws are not completely harmonized as each of them considers relevant environmental issues from a sectoral rather than a multi-sectoral and integrated perspective. For example, certain policies and legislations (e.g. the Agriculture Act) tend to focus on economic development and will allow clearance of natural habitats to attain their goals without considering environmental issues. In this way, some forests have been cleared in favour of establishing tourism facilities, roads and agricultural projects.

There are other examples of laws that are inconsistent. Article 14 (l) of the Water Act provides for the gazette of water catchment areas, most of which are gazetted as forest reserves under the Forests Act. There is a lack of clarity about who is responsible for certain actions between the lead institutions, in this case the Water Resources Management Authority (WARMA) and KFS. The confusion goes further. The Forests Act, 2005, provides for

formation of community forest associations (CFAs) at forest-station level. Under the Water Act, 2002, water catchment committees are formed to manage catchment areas gazetted under the Water Act. Water resource users associations (WRUAs) are also being formed at the local level. Since almost all the water catchment areas are gazetted forest reserves, the area under which WRUAs and CFAs operate overlap.

There also exists potential for conflict between the Forests Act and the Wildlife (Conservation and Management) Act. The double gazettement of forests as forest reserves (under the Forests Act) and national reserves (under the Wildlife Act) may make law enforcement difficult. For example, while the Wildlife (Conservation and Management) Act prohibits extractive uses of forests, the Forests Act permits it under Section 46 (2).

The sectoral approach to conservation and development has widely failed to address the cross-cutting environmental and conservation issues. The resultant inter-sectoral inconsistencies, duplications and conflicts have contributed to further loss of forests.

The Environmental Management and Coordination Act (EMCA), through the National Environmental Management Authority (NEMA), is mandated to ensure coordination and harmonization of the many pieces of legislation that govern environmental management including forests. However, this mandate has remained elusive, as manifested in the persistent disputes and lack of coherence while implementing the MoU between KWS and the then Forest Department that provided for joint law enforcement.¹⁹³

The revised draft of the National Environmental Policy recognizes the lack of harmony in the law and policy instruments relating to the environment and seeks to address the issue. The objectives of the policy include developing an integrated approach to environmental management and strengthening the legal and institutional framework for effective coordination and management of the environment and natural resources. Once concluded and adopted, the draft policy promises to go a long way in ensuring harmony and coordination of the policies and legislations governing management of the environment and natural resources including forests. The draft of the Forest Policy 2007,¹⁹⁴ also in recognition of the said challenges, proposes to establish an inter-ministerial committee that will bring together forest-related sectors. Moreover, it expands the mandate of KFS to be responsible for management of all types of forests, in order to reduce overlaps.

8.3.2 Summary conclusions on clarity and coherence of laws and policies for REDD+

Strengthening national governance structures is a key requirement for REDD+ to work for development in any country. In particular, the establishment of clear and coherent laws and policies related to REDD+ are crucial to overcome inhibitive ambiguities and conflicts among REDD+ actors. Despite considerable effort and progress in improving forest governance, Kenya continues to face challenges in establishing a clear and coherent legal and policy frameworks for governance of REDD+ activities. The laws established under several statutes are not completely harmonious, because each of them considers the issue from a rather narrowly defined perspective, as opposed to a multi-sectoral and integrated one. The challenges to clarity and coherence of REDD+ related laws and policies are summarized as follows:

- The legislation relevant to the management of forests is inscribed under many different sectoral laws, leading to failure to address the cross-cutting environmental and conservation issues. The resultant inter-

193 Mathu W., 2007, Forest Law Enforcement and Governance in Kenya. A paper prepared for the East Africa community-led regional process in the framework of the ministerial declaration, Yaounde, Cameroon, October 16, 2003 on the East Africa Law Enforcement and Governance (AFLEG).

194 Republic of Kenya, 2007, Sessional Paper No. 1 on Forest Policy, Nairobi: Government Printer.

sectoral inconsistencies, duplications and conflicts have contributed to further loss of forests. EMCA, 1999, did not remove the edifice of sectoral environmental institutions created during the colonial era and inherited at independence.

- Although EMCA, 1999, has relevant provisions for promoting REDD+,¹⁹⁵ it does not effectively address several REDD+ related issues. These issues include the development of national inventories by source of anthropogenic emissions of GHG in Kenya and removal of GHG by sinks; a national framework for carbon finance; and access to environmentally sound technologies.
- The Forests Act, the Water Act and the Wildlife (Conservation and Management) Act overlap the jurisdictions of related institutions to manage areas where forests are located.
- The National Environment Policy, 2012, has useful provisions for addressing the lack of clarity and coherence in legal and policy frameworks for environmental governance. However, the policy has yet to be adopted as a framework to govern the environment in Kenya.
- The existing laws and policies of forest governance do not clearly show the rules for access and use rights; for sharing of revenues between KFS and other forest-sector actors; and for legal holders of “carbon rights”.
- There is insufficient enabling legislation to involve non-state actors including forest-dependent rural communities, civil society and the private sector, as required by the Constitution, the Forests Act and the Forest Policy.

8.4 Adequacy of the institutional framework

The success of REDD+ implementation will depend to a great extent on strong institutions with clear mandates and sufficient capacity to govern REDD+ activities. The key institutions dealing with forestry in Kenya include the newly created Ministry of Environment, Water and Natural Resources, Kenya Forest service, Kenya Wildlife Service, Kenya Forestry Research Institute, National Museums of Kenya, county governments and education institutions. Others are the non-state actors: non-governmental organizations, professional associations and the private sector. The Forests Act, 2005, also established other institutions: forest conservation committees and community forest associations. Others are the institutions proposed under the climate change response strategy to specifically manage the REDD+ readiness and implementation process. They are the Climate Change Secretariat (CCS), the National REDD+ Steering Committee, the Technical Working Group, the National REDD+ Coordinating Office and the REDD+ Component Task Forces and Local Conservancy Officers.¹⁹⁶

The institutions must be stable to operate and function effectively, deliver their mandates, sustainably manage forests and consequently, successfully implement REDD+. The Program on Forests (PROFOR) of the Food and Agriculture Organization of the United Nations, 2011,¹⁹⁷ provides the following indicators for examining the adequacy institutional frameworks for forest governance:

- extent to which the forest-related mandates of national agencies are clear and mutually supportive;
- extent to which the forest-related mandates of national and subnational governments are clear and mutually supportive;

¹⁹⁵ These provisions include those for the establishment of air-quality standards together with emissions requirements (Part VIII), environmental impact assessment requirements (Part VI), environmental restoration orders and environmental conservation orders (Part IX).

¹⁹⁶ Government of Kenya, 2010, *Revised REDD Readiness Preparation Proposal Kenya*. Submitted to the Forest Carbon Partnership Facility, Nairobi.

¹⁹⁷ PROFOR, 2011, *Framework for Assessing and Monitoring Forest Governance*, Rome, Italy.

- adequacy, predictability and stability of forest agency budgets and organizational resources;
- availability and adequacy of information, technology, tools and organizational resources for the pursuit of agency mandates.¹⁹⁸

Against these indicators, and despite the existence of many institutions involved in forest governance in Kenya,¹⁹⁹ there remain key institutional challenges that hinder effective forest governance and the successful implementation of REDD+.

8.4.1 Key issues and challenges in adequacy of institutional framework for REDD+ in Kenya

The first challenge is the clarity and mutual support of national agencies involved in forest governance. By virtue of Section 9 of the EMCA, the role of NEMA is to exercise general supervision and coordination over all matters relating to the environment. As such, NEMA is not an implementing institution but must perform its role by cooperating with other institutions. Under the various sectoral policies and legislations, there are lead agencies coordinated by NEMA to address environmental issues.²⁰⁰ However, over the years, some sectoral ministries have complained that NEMA has encroached on their sectoral mandates. On its part, NEMA has justified such interventions on the ground that some lead agencies are not performing their role properly and that NEMA must prod them to ensure diligent implementation of the environmental law.

Lack of clear national agencies' mandates has also been manifested among some of the lead agencies. A case in point is the disputes and lack of coherence that arose from the MoU between KWS and the then Forest Department. With KFS expected to take a more aggressive approach to the management of forests and the need to levy charges for environmental services, the level of conflict can be expected to intensify, particularly with the Ministry of Water and KWS. Under Article 4 (l) of the Forests Act, 2005, KFS is charged with the duty to collaborate with other organizations and communities in the management and conservation of forests. KFS can use this provision to be proactive in identifying issues of conflict and calling on NEMA to coordinate and facilitate conflict resolution. In addition the relationships among KFS, NEMA and the National Land Commission will require further clarification and harmonization so as to enhance clarity, coordination and efficiency.

There have also been challenges relating to the second indicator – clear forest-related mandates of national and subnational governments. As discussed, even before the establishment of the county governments, the local authorities had considerable say over the management of environmental resources. Although there has been much cooperation between the national government and the local authorities, there have also been cases of disagreements. A good example is the case where local authorities, relying on the central government and other entities for the management of game reserves, have felt short-changed with regard to resource sharing, leading to wrangles and controversy.

Potential conflict with national government also arises from the powers given to the boards of cities and municipalities under the Urban Areas and Cities Act.²⁰¹ The boards of cities and municipalities are empowered to make by-laws or recommendations of what to include in by-laws. The by-laws made by the former local

198 These indicators are not country specific, so can be used to view and analyse the institutional framework for the governance of Kenya's forests and forest resources.

199 See Chapter 6 of this paper: "Forest governance institutions".

200 The role of lead agencies and their relations with NEMA are discussed in Angwenyi, A. N., *An Overview of Environmental Management and Conservation Act* in Okidi C. O et al. (Eds), 2008, *Environmental Governance in Kenya: Implementing the framework law*, Nairobi: East African Educational Publishers, p 142-182.

201 Urban Areas and Cities Act, 2011, No. 13.

authorities — such as those used to control cutting of timber, destruction of trees and shrubs and afforestation and to take necessary measures to control bush fires etc. — are effective under the Urban Areas and Cities Act until their expiry, amendment or repeal. It is worth noting that certain sectoral laws also empower relevant ministers to make regulations for the implementation of such laws. Such regulations may affect or even conflict the cities' and municipal boards' regulations like those relating to forests management and made under the Agriculture Act and the Physical Planning Act.

Under the 2010 Constitution of Kenya, the devolved government structure established promises to address some of these overlap issues. While the constitution, at Article 6(2), reiterates that governments at the national and county levels are distinct and interdependent, it promotes cohesiveness and cooperation. It obligates the two levels of government to assist, support, consult and liaise between each other in order to exchange information, coordinate policies, administrate and enhance capacity. Article 189 (2) extends the requirement of cooperation in performance of functions and exercise of powers, which includes setting up joint committees and authorities, to cover both levels of government and different governments at the county level. Pursuant to this article, the Intergovernmental Relations Act of 2012 proposes to set out coordination forums and committees that bring together different county governments, as well as different administrative levels within a county to enhance cooperation.

The other two indicators relate to the adequacy of funding, organizational resources, information, technology and tools for the pursuit of institutional mandates. The issues of adequate funding and other organizational resources for forest management and development have been very prominent in Kenya, particularly in the law enforcement institutions such as KFS and KWS. In the past, the central government and development partners mainly funded forestry activities in Kenya. While the major central government share to the forestry sector goes to Ministry of Forestry and Wildlife and KFS, the government also provides financial support to other forest-related institutions. In addition to the central government budget, donors provide funding to the forest governance institutions like KFS, KWS, KEFRI, NMK, NGOs and universities. Other sources of income include revenues and interest income.

However, the funding to the forest sector has been inadequate, as stated in the draft of the Forest Policy 2007.²⁰² In KFS for example, the government contributed KSh2.1 billion while KSh0.71 billion was contributed by development partners in the financial year 2010/2011.²⁰³ Inadequate funding has limited the number of forest guards and other staff and the level of training of available staff. Limited funding has also contributed to low wages and poor equipment leading to low morale amongst the forest guards and other law enforcement staff.²⁰⁴ Although KFS has continuously improved its revenue generation capacity since its inception, it has neither reached its capacity nor is the revenue generated sufficient for its activities.

Low funding of the forest sector by the government can partly be attributed to non-inclusion of the total value of forest products and services and inadequate data on forestry contribution to gross domestic product. The forestry sector in Kenya contributes significantly more benefits to the economy than are reported through the Kenya National Bureau of Statistics (KNBS)'s conventional system of national accounts (SNA) of the United Nations (UN).²⁰⁵ The SNA does not adequately include or represent the natural capital stocks and flows. The omitted

202 Environment and Land Act no. 19, 2011, Section 13 (a).

203 KFS, 2009, KFS Annual Report (2010/2011).

204 Mathu W. (2007) Forest Law Enforcement and Governance in Kenya. A Paper prepared for the East Africa Community-led regional process in the framework of the Ministerial Declaration, Yaounde, Cameroon, October 16, 2003 on the East Africa Law Enforcement and Governance (AFLEG).

205 Oksanen, T., Gachanja, M. & Blåsten, A., 2011, Strategy Note for Forest Governance Reform in Kenya. Paper prepared for "Miti Mingi Maisha Bora – Support to Forest Sector Reform in Kenya" (MMMB), Programme of Indufor, Helsinki. Available at: <http://formin.finland.fi/public/download.aspx?ID=107024&GUID=%7BFC61ED21-F7A4-4682-9BF2-C69C3361A1DB%7D>

contributions of the forest sector arise from the value addition to forest products through the manufacturing sector; the provisions of goods (timber and non-timber) to the subsistence economy (also referred to as the non-monetary economy); the supply of cultural services; and the supply of a set of ecosystem services that regulate ecological processes. In response to this omission, the United Nations developed the System of Integrated Environmental and Economic Account (SEEA) to extend the asset boundary of the SNA to include all natural resources in the economy. However, Kenya has not implemented the SEEA.

Forestry management has also been plagued by inadequate research and education, as reaffirmed by the Forest Policy 2007. The policy acknowledges that the “current institutional linkage between forestry research, education, administration, resource owners and users is weak”.²⁰⁶ For example, little knowledge on forest legislation on the part of prosecutors has hindered litigation of forest-related cases. Article 4(f) of the Forests Act refers to research as part of the role of KFS. However, this role has not been pursued aggressively.

Information failure is another key factor that has contributed to ineffectiveness of the forest-governance institutions. Availability of sufficient data and information would allow for timely preparation of the requisite management plans. Information failures in forest governance institutions are, for example, lack of updated national inventories on forest areas, growth and yield; lack of established criteria and indicators for effective forest governance evaluation; and lack of even simple things such as the definition of “all types of forests” for clear understanding of mandates.²⁰⁷

Other institutional issues in forest governance concern the involvement of non-state actors. It is common knowledge that some non-governmental organizations, professional associations and the private sector have in-depth experience in forest-related matters. Their experiences have, however, not been fully used to enhance forest governance, owing to lack of proper enabling mechanisms. This can also be said of the experiences of local communities and community forest associations, which in most cases lack financial capacity to execute their mandates.

8.4.2 Summary conclusions on adequacy of the institutional framework for governance of REDD+ activities

The challenges in the institutional arrangement for forest governance in Kenya can be summarized as follows:

- There is low funding to KFS and other forest-sector public institutions, caused partly by undervaluation of the how much the forest sector contributes to the GDP. Low funding has made most Kenyan forest-sector institutions depend on donor funding, especially regarding the development budget. Donor funding presents a significant risk because it is usually project-activity based and short term.
- There are insufficient resources and human capacity in forest governance institutions, leading to weaknesses in law enforcement.
- There is inadequate cooperation among the national agencies (NEMA, KWS, KFS and the Ministry of Water) in supporting the forestry sector, owing to lack of clarity and coherence in their roles.
- The constitution proposes the establishment of coordination forums and committees among different county governments, as well as different administrative levels within a county. The establishment of these groups should be fast tracked to avoid potential conflict between the national government and county governments over use and management of forest.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

- The forest-sector management is hindered by weak institutional linkages between forestry research, education, administration and resource owners.
- There is lack of sufficient data and information on updated national inventories of forest areas, growth and yield; established criteria and indicators for effective forest-governance evaluation; and a commonly agreed definition of “forests”.
- The local-level forest governance institutions (CFAs and FCCs) are still weak, both in terms of financial capacity and ability to influence policy decisions regarding forest governance.
- There is need to focus on devolving the structures of KFS to correspond to the county structure that has been operationalized under the Constitution of Kenya, 2010.
- The links between the National Land Commission and KFS require clarity to harmonize responsibility of land management and its implications for forest governance and REDD+.

8.5 Carbon rights and benefit sharing in REDD+

8.5.1 Ensuring success of REDD+ implementation through an equitable benefit-sharing system

For REDD+ to achieve the desired results, it is imperative that mechanisms for equitable benefit sharing are put in place. Equitable benefit sharing will not only ensure sustained emissions reductions, but also realize substantial benefits to the forest communities and avoid worsening the condition of vulnerable people.

In the context of REDD+, benefit sharing refers to how financial incentives transferred from international funds or carbon markets are shared between actors within a country.²⁰⁸ Benefit sharing has been highlighted as a key aspect of the processes of REDD+ readiness and implementation. For example, most of the submitted Readiness Preparation Proposals under the World Bank’s Forest Carbon Partnership Facility and the national programme documents (NPDs) under the UN-REDD programme refer to the importance of developing benefit-sharing systems.²⁰⁹ Some of these documents also make commitments to transparent and equitable benefit sharing.²¹⁰

Beyond the understanding that potentially large financial benefits of REDD+ will need to be distributed across the wide range of stakeholders, there are other clear rationales²¹¹ for benefit sharing in REDD+. Firstly, all stakeholders are potential beneficiaries of a benefit-sharing mechanism. It allows affected communities to become partners in projects and potentially empowers them in decisions with outcomes that would affect them. For the government, benefit sharing is a practical policy tool to achieve greater social inclusiveness and balance social, economic and environmental factors in planning, design, implementation and operation of REDD+ projects. From an investor perspective, benefit sharing could help to reduce risks associated with the project such as non-permanence. Secondly, equitable and collaborative benefit sharing in REDD+ could help to enhance sustainability by turning conflicts over natural resources into consensus. In this context, benefit sharing encourages local-level stewardship of natural resources and leads to decreased pressure on forest ecosystems. Thirdly, clear benefit-sharing arrangements in REDD+ could help to address past weaknesses in financial management linked to forests and to increase trust.

208 Peskett, L, 2011, *Benefit Sharing in REDD+. Exploring the implications for poor and vulnerable people*, World Bank and REDD-net.

209 bid.

210 Williams and Davis, 2012, *Getting Ready with Forest Governance: A Review of the Forest Carbon Partnership Facility Readiness Preparation Proposals and the UN-REDD National Programme Documents*, v 1.9, WRI Working Paper, Washington DC, World Resources Institute. Online at <http://www.wri.org/publication/getting-ready>.

211 Peskett, L, 2011.

For REDD+ benefits to be shared equitably, questions abound as to who should enjoy the REDD+ benefits and who holds the carbon rights. There is no agreed definition of “carbon rights” in academic literature to date. Darryl²¹² defined “carbon rights” as the “legal right to benefit from reduced carbon dioxide emissions and/or increased carbon dioxide sequestration” and “REDD+ benefits” as “any financial or non-financial benefit generated as a result of a REDD+ activity”.

The definition of “carbon rights” adopted in each country should respect the rights of local populations, as well as provide mechanisms for these populations to receive benefits.²¹³ It is important to note that REDD+ effectively creates a new value for carbon removed from the atmosphere by, and stored in, forests. Carbon rights are therefore linked to the property rights of land and forests where carbon is stored or to use and management rights of forests. However, the right to own or manage a forest does not necessarily confer a right to benefit from it. For example, REDD+ rules will include social safeguards such as respect for the knowledge and rights of indigenous peoples,²¹⁴ and may also promote other policy objectives e.g. respect for human rights and democracy. Unless there are effective management mechanisms and land tenure systems, financial mechanisms such as REDD+ may be susceptible to unfair practices and inequitable distribution. Therefore, for a country to benefit from REDD+, the national laws and policies should be aligned to the requirements of the REDD+ mechanism that is ultimately adopted. In addition, the laws should establish clearly who has the legal rights to carbon.

The Cancun Agreements do not tell policy makers how to allocate rights to benefit from REDD+. Instead, each country needs to agree on its strategies for allocation of these rights. However, because the REDD+ regime will measure net emissions on a large scale (national and sub-national level), it will require allocation of the rights among a wider set of actors including governments, communities and other entities participating in the shared effort. It is important that a significant share of REDD+ benefits go to the actors who actually make decisions on forest use. Often these are the communities who live in or near the forest and who have the right to benefit from the forest resources. Such communities are in the best position to protect the forest or use it sustainably. As such, recognizing them is the best way to ensure both forest protection and equitable benefit sharing.²¹⁵

8.5.2 Key issues and challenges in REDD+ and an equitable benefit-sharing system in Kenya

Kenya has not yet agreed in express terms on the strategies for sharing REDD+ benefits, although some of the recent laws and policies refer to some potential beneficiaries. The National Climate Change Response Strategy, published in 2010,²¹⁶ proposes giving financial incentives to forest-dependent rural communities under a REDD+ mechanism as a way of encouraging sustainable use of forest resources. To achieve this, the strategy further defines the involvement and roles of such rural communities in forest management. The draft of the Forest Policy of 2007 seems to identify KFS as one of the potential beneficiaries of REDD+ benefits, as the policy identifies the carbon market as one of the tools that KFS will use to expand its funding base.²¹⁷ Although the draft of the Forest Policy recognizes the role of other actors in forest conservation and management, it does not detail how

212 Darryl Vhugen, 2012, *REDD+ and Carbon Rights: Lessons from the field*, Property Rights and Resource Governance Project, Working Paper, Seattle, USA.

213 Ibid.

214 For the Cancun Agreements guidance and safeguards, read Appendix I to the Cancun Agreements (Decision 1/CP.16). UNFCCC, Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010.

215 Knox, A., Caron, C., Goldstein & Miner, J., 2010. *The interface of land and natural resource tenure and climate change mitigation strategies: Challenges and options*. UN-FAO. Rome. 2010

216 Government of Kenya, 2010, National Climate Change Response Strategy, Nairobi.

217 Policy statement 3.3.5 of draft of the Forest Policy.

REDD+ benefits will be shared with and among these actors. It only proposes government support for the non-state actors and local communities for forest-related development activities.²¹⁸

Access to benefits under REDD+ is governed by many different factors (Peskett, 2011): land tenure; interpretation of “carbon rights”; revenue-sharing agreements and mechanisms; socio-economic criteria; and requirements for emissions’ reduction and removal.²¹⁹ Land tenure is probably the main and most important factor in REDD+ benefit sharing, because it determines who has the rights to carry out activities on specific areas of land and to claim benefits from these activities. As discussed, three tenure regimes exist in Kenya: public, community and private. In line with these provisions, there are three forest tenure systems in Kenya: government gazetted forests that fall under public land, community forests that fall under community land and private forests. There have been long-standing tensions over land tenure in Kenya, particularly with regard to trust land forests. Access to subsistence resources in trust land forests was often prohibited, resulting in conflicts between communities and forest authorities.

Kenya’s new forest governance arrangements²²⁰ recognize and reassert the viability of all three tenure regimes, including community tenure. However, the delay in enacting tenure-related legislations and mechanisms has hindered the local communities’ role in managing and accessing the benefits of community forests. Unless such legislations and mechanisms are in place, the laws and policies may not reflect the realities on the ground, including the roles and potential benefits of various actors. For example, despite the distinct tenure regimes in Kenya, a good deal of land is still in practice managed according to a mix of formal and customary rules. Over other land, there is active conflict between those asserting claims under the old and new systems. Such complex tenurial systems make it difficult to identify beneficiaries and establish benefit-sharing systems.

As another example, the Forests Act established CFAs to manage community forests allocated by KFS. However, few CFAs have been set up to date, and the existing ones lack sufficient training and financial capacity to operate effectively. The lack of operational CFAs may hinder equitable REDD+ benefit sharing especially with regard to forest communities. In addition, the private sector has recently become important to the forest sector. Other than establishing commercial plantations, a number of private companies have expressed interest in taking concessions of state plantations as provided for in the 2005 Forests Act. However, to date, no concession arrangements have been made, and the regulations governing them have not been finalized.

The allocation of financial benefits from REDD+ will not necessarily be linked to land tenure alone (Peskett, 2011), because the right to own or manage a forest does not necessarily confer a right to benefit from it. It is possible that in some countries carbon rights belong to the government even if communities own the land and forests. Government ownership means that communities will not benefit unless effective benefit-sharing mechanisms are in place. In other cases, emissions reductions will result from broad policy reforms rather than from interventions in specific locations involving a limited set of actors. Again, this requires consultations and agreements on benefit-sharing modalities among the many actors. According to Kenya’s R-PP,²²¹ discussions on benefit-sharing arrangements are underway among KFS, communities and the private sector. The potential benefits to be shared are access to firewood and other forest resources and participation in taungya system planting on plantations. In a few cases, KFS has offloaded all carbon rights to communities who have invested in management and conservation of specific forest blocks. Consultations on benefit sharing between KFS and other actors are, however, generally slow and likely to slow down the REDD+ process.

218 Ibid.

219 These factors may vary depending on a country’s approach to REDD+.

220 These arrangements include the 2010 Constitution of Kenya, the National Land Policy, the Forests Act and the Forests Policy of 2007.

221 Government of Kenya, 2010, *Revised REDD Readiness Preparation Proposal Kenya*. Submitted to the Forest Carbon Partnership Facility, Nairobi.

The interpretation of “carbon rights” is another key factor in benefit sharing, because its definition will influence which actors are eligible for financial benefits. REDD+ effectively creates a new value for carbon removed from the atmosphere by, and stored in, forests. Carbon rights are linked to the property rights of the land and forests where carbon is stored or to use and management rights of forests. But the right to own or manage a forest does not necessarily confer a right to benefit from it. Lack of a clear definition and allocation of carbon rights may especially hinder non-state actors from engaging in REDD+ activities. In particular, poor or vulnerable individuals and groups are less likely to participate in REDD+ and receive direct financial benefits. Typically these groups include the landless, forest-dependent people, women, the elderly, the indigenous peoples and ethnic minorities. These actors often lack assets, have fewer rights or are less able to influence how benefits from REDD+ are distributed.

Kenya has not yet established a clear definition or allocation strategies for carbon rights, although it is listed in the R-PP as a priority issue. The R-PP lists the following as priorities, *inter alia*: defining a clear set of procedures and rules for carrying out carbon-credit generating activities and establishing transparent rules on the allocation of carbon rights.²²² Such clear rules will lessen challenges for non-state actors, especially vulnerable people, to engage in REDD+ and help build the necessary infrastructure for managing national REDD+ activities in the future.

8.6 Legal, policy and institutional barriers to REDD+ implementation

Kenya is committed to the REDD+ readiness process and is participating actively in international REDD+ negotiations. It has a REDD+ Readiness Plan that outlines how it will develop its national strategy for participating in an evolving international REDD+ mechanism. Despite its progress and effort, there remain key legal and policy barriers to REDD+ implementation in Kenya. Firstly, the lack of a specific policy goal or national strategy for REDD+ readiness process and implementation is a challenge. Such a policy goal or action plan would provide the framework for effectively addressing REDD+ related issues: the development of national inventories of anthropogenic emissions of GHG in Kenya by source and removal of GHG by sinks; national framework for carbon finance; and access to environmentally sound technologies.

Secondly, despite the ongoing land reforms, there still exists tenure insecurity and unreliability, especially for community land. The proposed community land bill that promises to address the issue is yet to be finalized. The discussions should be finalized and the bill enacted in parliament to ensure that tenure insecurity does not hinder sustainable management and use of community land. This situation has direct implications for Kenya’s REDD+ preparedness because a significant amount of forests fall on community lands. Also closely linked to tenure is the lack of clarity of some tenure laws, such as the lack of a clear bona fide ownership of land under the different tenure regimes and the criteria for defining “communities” in relation to ownership of community land. Another obstacle is that the Forests Act does not categorize tenure in line with the Constitution of Kenya, 2010, and the Land Act and other related tenure categorization.

Thirdly, the laws relevant for forest governance and thus REDD+ are established under several statutes. Coherence among laws embracing the broad concept of sustainability is often a challenge. They sometimes overlap, are duplicated and conflict with one another. The draft of the National Environment Policy, 2012, has useful provisions that address the lack of clarity and coherence in the legal and policy frameworks for environmental governance. However, the Policy has not been adopted as a framework to govern the environment sector in Kenya.

Fourthly, despite an array of institutions charged with forest governance, there are many institutional challenges that, if unchecked, will hinder REDD+ implementation. For instance, there has been a considerable lack of mutual

²²² Ibid.

support and cooperation among national institutions charged with forest governance. This lack is partly a result of the lack of clarity and coherence of the laws that created these institutions.²²³ With the entry of the devolved government structure, conflicts are also expected between the two levels of government, as well as between county governments. Another long-standing institutional challenge for forest governance in Kenya is availability of adequate funding and the pursuit of institutional mandates. Low funding has made the forest sector rely heavily on donor funding, which is traditionally unreliable because it is short-term and project-activity based.

The other challenge relates to carbon rights and the benefit-distribution system. Kenya has not agreed in express terms on the strategies for sharing REDD+ benefits. The absence of agreement stems in part from the lack of a policy goal or national REDD+ strategy. In addition, lack of legislation for managing community land will continue to hinder the participation of communities in decision-making processes and their access to the potential benefits from the forests. A good starting point for addressing carbon rights and benefit distribution is to interpret and define carbon rights in the Kenyan context, as this will influence which actors are eligible for financial benefits.

8.7 Recommendations for continuing legal reforms

Forest governance in Kenya has seen considerable efforts and progress in the past years. However, there are still some challenges and actions needed, especially with the emergence of REDD+ mechanisms.

- Fast track the revision of the Forest Policy to establish a clear direction for continued forest-sector reforms. The Forests Act should also be revised to be in line with the new Constitution and to give effect to the Forest Policy. The National Environment Policy should be finalized and adopted. The recommended areas for action in the legal, policy and institutional framework to ensure REDD+ success are: advocate and mobilize for inclusion of specific REDD+ provisions in the relevant laws and policies, starting with the ones that are currently under review e.g. the Forests Act, Forest Policy and National Environment Policy. In the long term, specific legislation to govern REDD+ implementation in Kenya should be put in place.
- Provide legislative framework for public participation and involvement of non-state actors — such as forest-dependent rural communities, civil society and the private sector — in the management of forests and other natural resources.
- Clarify the roles and mandates of all the forest sector institutions to avoid overlaps and incoherence. For instance, the laws should define the role of the Kenya Forest Service (KFS) in managing forests that fall on community land and the National Land Commission in promoting forest conservation. Indeed, the establishment of the Ministry of Environment, Water and Natural Resources provides an important opportunity for rationalizing institutional responsibilities and clarifying roles. To manage natural resources at the local level, the associations formed in respect of forests (CFAs) and water (Water resource users associations [WRUAs]) could be merged in order to avoid duplicity, turf wars and neglect.
- Clearly define rules for access, use rights and revenue sharing among KFS and other forest-sector actors, like community associations and county governments. Also, clearly define who has legal rights to REDD+ benefits — now commonly referred to as “carbon rights”.
- Create rules for establishing and implementing Forest Management Agreements between KFS and other sector actors.
- Establish a forest database and information sharing that includes an updated national forests inventory.
- Provide a definition of forests through a participatory process.

²²³ For example, the Forests Act, 2005, created the KFS while the Water Act created WARMA. There is potential for conflict over management of forests gazetted both as water catchment areas under the Water Act and as forest reserves under the Forests Act.

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- Define Kenyan Criteria and Indicators (C&I) for sustainable forest management.
 - Finalize and enact legislation on community land in Parliament. The legislation should clearly define “community” and “community land”. The meaning of “community of interest,” anticipated in the Constitution, should also be clarified and defined in a way that promotes interethnic cohesion. Additionally, the Community Land Law should allow customary right holders of land to engage in REDD+ processes and protect their rights to carbon benefits sharing. The law should repeal or recommend a review of the Trust Land Act. It should also recognize the resilience of customary tenure and the role customary tenure can play in protection and conservation of forests.

9. Conclusion

The purpose of this report is to review and analyse Kenya's preparedness with respect to legal, policy and institutional aspects of the Cancun Agreements and REDD+ activities, guidance and safeguards as the country begins to implement the evolving international REDD+ mechanisms. It identifies key gaps, barriers, challenges and opportunities for REDD+ design and implementation in the existing policy, legal, institutional and regulatory framework. The review and analysis in this report, while based on the Cancun Agreements, also draws from a wealth of authoritative sources, including the UNREDD Programme, FAO and PROFOR. It is hoped that this report will shed light on the challenges and opportunities that policy makers face when facilitating REDD+ implementation.

Part 1 provides a brief introduction and places the international REDD+ mechanism in the Kenyan context. Part 2 examines Kenya's governance framework with regard to sustainable development; it includes the historical antecedents, post-independence environmental governance, international commitments and recent constitutional and legal developments. The 2010 Constitution of Kenya created two levels of government, the national and county governments. Any REDD+ mechanism will need to respond to the requirements of the national government, which is charged with implementing national policies, and the county governments, which are responsible for the management of county resources. Part 3 examines the land-tenure regime in Kenya, and its implications for forest governance.

Parts 4–6 review the existing policy, legal and institutional frameworks for forest governance in Kenya. The laws are reviewed by issue areas: climate change; land use, ownership and management; forestry; integrated environmental management; and energy. The review establishes that there exist a wide array of policies, laws and institutions in Kenya that relate to REDD+ design and implementation. Coordination across national and county government actors, as well as civil society and the private sector, is for REDD+ implementation to succeed. Part 7 examines the trade and investment climate in Kenya, including transparency and accountability of REDD+ transactions.

In Part 8 analyses the salient issues emerging from forest governance in Kenya with regard to REDD+ and suggests areas and options for legal and policy reform. Kenya does not yet have a standalone REDD+ policy or strategy. This report recommends that provisions for REDD+ be included in the laws and policies currently under review, and that in the long term, legislation on REDD+ be put in place.

Part 8 also highlights the challenges of legal preparedness for REDD+ in Kenya, focusing on those most pertinent to the Cancun Agreements. Although specific challenges are raised throughout this country synthesis report, the following four are analysed in-depth in Parts 4–6 based on the review of laws, policies and institutions: land-use law and sustainable development particularly with regard to equitable and secure land tenure; clarity and coherence of laws and policies related to REDD+; adequacy of the institutional framework for forest governance; and carbon rights and benefit sharing in REDD+. Part 8 also distills the legal and policy barriers to REDD+ implementation in Kenya, and concludes by giving recommendations to be considered in the ongoing legal and institutional reforms.

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