CARBON RIGHTS AND BENEFIT-SHARING FOR REDD+ IN KENYA

ASSESSMENT AND RECOMMENDATIONS

Republic of Kenya
Ministry of Forestry and Wildlife

United Nations Development Programme

UN-REDD Programme

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Summary

Acronyms

ACR	American Carbon Registry
AR	Afforestation/Reforestation
CAAC	Clean Air Act Corporation
CCBS	Community Carbon and Biodiversity Standard
CCX	Chicago Climate Exchange
CDM	Clean Development Mechanism
CFA	Community Forest Association
CIF	Climate Investment Fund
CLOUT	Centre for Livelihood Opportunities Unlimited and Technologies
COMIFAC	*Commission des Forêts d'Afrique Centrale*
COP	Conference of Parties
DNA	Designated National Authority
EB	Executive Board
ESCONET	Escarpment Environment Conservation Network
ERPA	Emission Reduction Purchase Agreement
ETS	Emission Trading Scheme
FCPF	Forest Carbon Partnership Facility
FIP	Forest Investment Programme
FLEGT	Forest Law Enforcement, Governance and Trade
FPIC	Free and Prior Informed Consent
FSC	Forest Stewardship Council
GBM	Green Belt Movement
GGAS	New South Wales Greenhouse Gas Reduction Scheme
GoK	Government of Kenya
IIED	International Institute for Environment and Development
IGR	Imbirikani Group Ranch
IPCC	international Panel on Climate Change
IRR	Internal Revenue Rate
IUCN	International Union for the Conservation of Nature
KMFRI	Kenya Marine and Fishery Research Institute
KFS	Kenyan Forest Service
KSh	Kenyan Shilling
LCC	Locational Carbon Committee
LDC	Least Developing Country
MRV	Measuring, Reporting and Verification
NACOFA	National Alliance of Community Forest Associations
NCCAP	National Climate Change Action Plan
NCCRS	National Climate Change Response Strategy
NGO	Non-Governmental Organisation
NLC	National Land Commission
NPBMF	National Performance and Benefit Measurement Framework
NTFP	Non Timber Forest Product
PDD	Project Design Document
PES	Payment for Environmental Services
PFM	Participatory Forest Management
PIN	Project Idea Note
REDD+	Reducing greenhouse gases Emissions from Deforestation and forest Degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries
RGGI	Regional Greenhouse Gas Initiative
RPP	Readiness Preparation Proposal
SALM	Sustainable Agriculture Land Management
SESA	Social and Environmental Strategic Assessment
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Conference on Climate Change
USD	United States Dollar
VCS	Voluntary Carbon Standard
VPA	Voluntary Partnership Agreement
WWC	Wildlife Works Carbon
WWCT	Wildlife Works Carbon Trust

1. Context: terms of reference and key-concepts of the study

1.1. Terms of reference

The Government of Kenya (GoK) has been engaged in a number of activities to prepare the country for a REDD+ mechanism, mostly with support from the World Bank's FCPF. The country is also a partner member of UN-REDD. To advance and complement these current efforts in REDD+ readiness, the GoK has recently requested the UN-REDD Programme to provide targeted assistance for developing capacities on REDD+ governance, with a focus on two critical areas:

(i) How to identify and respond to corruption risks in REDD+;

(ii) Scoping of carbon rights and benefit-sharing arrangements in REDD+ (in anticipation of investment opportunities).

Within the UN-REDD partnership, UNDP has the lead in these areas of work, and has accordingly been working with the GoK and other country stakeholders on a proposal for work to be carried out. These terms of reference (see **Annex 1** infra) relate to work to be carried out under the second area.

The REDD+ Governance proposal will launch analysis and national dialogue on carbon rights and benefit-sharing in REDD+, which are fundamental to creating a conducive environment for investments in forests and carbon finance in general, with due recognition of community rights and expectations, and a clear role for GoK and public institutions.

The outputs will serve two important purposes: 1) they will be an important resource for the government and for people wanting to develop, or involved in, carbon projects; and 2) they could be converted into guidelines or other similar instruments in future policy processes.

According to the terms of reference and the list of questions/issues prepared by UNDP Headquarters to precise these terms of reference (see **Annex 2** infra), the objectives of this study are to:

(iii) "*Develop an overarching framework to look at carbon rights/benefit sharing situations that may exist in a future Kenyan REDD+*[1] *strategy under different situations*", taking into account "*latest international thinking […], effectiveness/efficiency/equity […], devolution process underway in Kenya […], Government priorities (esp. carbon investment framework and interest in market-based approach) […], existing policies and laws of relevance*";

(iv) "*Conduct a brief analysis of existing policies and laws relevant to carbon rights and benefit sharing in REDD+*", taking into account the "*work on a REDD+ legal framework being supported by FAO*";

(v) "*Use the framework for an analysis of existing carbon projects or other projects relevant to REDD+ (at least three projects)*";

(vi) "*Develop recommendations in a form that can be fed into the National REDD+ Strategy*";

(vii) "*Develop a work plan for follow-up of the current work stream",* including a *"work plan for consulting stakeholders*";

These terms of reference mention various key-concepts that should be defined: REDD+ rights, benefit-sharing of REDD+ actions, links to effectiveness/efficiency/equity, and forest carbon markets. It is worth noting that, even if the issues of REDD+ right and REDD+ benefit-sharing can be assessed independently of the issues related to the funding channels (fund-based vs market-based), there are cross-cutting issues. Therefore, it appears useful to highlight the specificities of forest carbon markets, given the fact that the Government of Kenya (GoK) is interested in a market approach.

[1] Editor's note: REDD+ = Reducing greenhouse gases Emissions from Deforestation and forest Degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries, as defined in the Bali COP Decision 4/CP.15, see http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf

1.2. Concepts of “REDD+ benefit-sharing” and “REDD+ right”

There are two levels of legal arrangements, one is the offset (REDD+ right) issuance rules and the other is the benefit sharing plan. Benefit sharing can involve a stakeholder receiving something of value that is financially managed/controlled by a third party. This benefit will be provided based on a benefit sharing plan that may or may not be performance based (i.e. performance of the project) while the actual asset continues to be owned by the right holder.

The concept of “Benefit-sharing” is used in many ways in the literature (see **part 2.2** infra). A house-made definition to broadly define this concept could be the following: “*rules and modalities for sharing merchant and/or non-merchant value(s), indirectly and/or directly created by the production and/or trading of any good or service*”.

This concept is therefore not a new one. Benefit sharing arrangements exist for diverse goods (agriculture commodities, timber, and “tangible” Non Timber Forest Products (NTFP), etc.) or services (tourism, hunting, etc.). Attempts to “improve” benefit-sharing arrangements are also not new: fair trade or organic products, Forest Stewardship Council (FSC) labelled timber, eco-tourism, community-based hunting reserve management, etc.

One could wonder why REDD+ benefit sharing should be handled differently. One of the main reason is that REDD+ carbon right is a *sui generis* instrument (instrument which is unique in its nature and not legally defined), in legal terms, contrary to other types of forest carbon credits: Afforestation/Reforestation (AR) Clean Development Mechanism (CDM) credits (namely “tCERs” and “lCERs”):

- AR CDM credits have a legal nature, defined by the Kyoto Protocol (See Decisions 19/CP.9 for AR CDM projects and 14/CP.10 for Small-Scale AR CDM projects). In Kenya, the CDM Designated National Authority (DNA) is in place and the forest definition has been sent to the CDM Executive Board (EB): thus AR CDM credits are legally defined, as - like in many countries - international law and treaties ratified by Kenya are part of the country’s law. Three AR CDM projects are even already registered in Kenya: Aberdare Range / Mount Kenya SS AR CDM Projects, in Kamae-Kipipiri, Kirimara-Kithithina, and Kibaranyeki;
- REDD+ right do not have yet an internationally agreed legal definition, despite of many REDD+ Decisions (2/CP.13, 4/CP.15, 1/CP.16, and 1/CP.17). Actually, ad hoc REDD+ rights are thus created by private voluntary initiatives. But, these initiatives, falling under the private sphere, cannot be substituted to the legislator and define the legal status of rights.

To date, the legislation of most developing countries does not define the legal status of REDD+ rights and does not attribute the benefits of emissions reduction or sequestration to a given entity (see **part 1.3** infra). Furthermore, in most developing countries, especially in Africa, there are few existing CDM or voluntary carbon projects from which lessons can be learned to assess the legal status of REDD+ rights and their legal ownership. Given the absence of both international and national legislations, the REDD+ right appears as a *sui generis* instrument. In that context, two extreme options can be considered to frame the legal nature of avoided/sequestrated carbon (WEMAERE, 2011):

Option 1 ➔ The State is the only owner of carbon rights

Law will consider avoided/sequestrated carbon as a natural resource, a part of the national public domain and heritage. This status, regardless of tenure or access rights to forest resources, would grant the State full ownership of sequestrated/avoided carbon. The State is the sole holder of a title, potentially transferable to others.

Under this option, the State would be the sole authorized entity to carry out transactions on REDD+ rights. However, this option does not exclude the possibility of granting this authority to local and territorial authorities, considered as decentralized entities of the State (as it could be the case in Kenya, under devolution process. See **part 2.3** infra).

This is for instance the option selected by New Zealand in 2002 for the so-called “Kyoto forests” (planted after 1990), by considering the sequestrated carbon as a public asset. If the State follows this option, the applicable law would also specify the distribution mechanisms of carbon revenues to all entities directly or indirectly involved in the implementation of REDD+ activities (regardless of whether these activities are regulated or developed under a voluntary market mechanism).

Such people include landowners (including the State), holders of access rights (including customary rights on resources) such as concessions holders, local populations, or community forests managers. This means that carbon right and land tenure right are closely linked and the latter should be clearly identified and guaranteed.

In practice and for most cases in Africa, due to lack of awareness of the land registration process (under "positive" law), its complexity, red tape/bureaucratic process, or even the high taxes and fees incurred, local populations usually invoke their customary rights to lands without any entitlement or consultation of relevant services. On the other hand, the State may invoke "the principle of State ownership of lands", and, in the absence of land registration, the presumption of public domain will prevail.

The lack of clarity on land tenure may then translate into conflicts upon the property of carbon rights. But, in most cases, the State tolerates this type of informal tenure if no general-interest project is planned for the area. The occupier will only have the usage of the land. In general, customary rights constitute the only method of property acquisition and lands are sold and bequeathed based on the right of use.

Option 2 ➔ Ownership of carbon rights is proportionate to efforts and owned by entities other than the State

Sequestrated/avoided carbon can be viewed as an industrial or natural asset depending on whether the effort aimed at increasing carbon stocks (afforestation and reforestation) or at maintaining or preserving these stocks (sustainable management, conservation).

Therefore, the result (sequestrated/avoided carbon) is linked to the service. Entities contribute either directly (through material or capital input) or indirectly (waiver of their rights to exploit resources) to REDD+ activities and therefore to the provision of this service.

The landowner, who makes the land available for this service, could be considered as the main recipient of payments for ecosystem services. It is also possible to consider that sequestrated/avoided carbon cannot be detached from forests. Therefore, holders of the usage rights, including recognized customary rights, could be viewed as the recipients of payments for ecosystem services.

Under this option, especially in countries traditionally influenced by the Roman Law, such as the neighbouring French-speaking countries of Central Africa, a carbon right could be considered as an intangible personal property as it cannot actually be moved, touched or felt, but instead represents something of value such as negotiable instruments. Its holder has the right to transfer the carbon right to a third party without any public legal constraint.

This asset is subject to private ownership (including for the benefit of entities governed by public Law such as the State, to manage their private heritage). As an example, the Civil Code rationale was applied in France to consider CDM credits as personal assets (See Article L.229-22 of the French Environmental Code[2]).

Under this option, owners of carbon credits would not necessarily be identified by law, but potentially by the parties in a transaction based on several criteria or indicators (specified by law if needed):

- Tenure rights, including recognized and registered customary rights,
- Resources usage rights, including for forest concession-holders contributing to removals/emissions reduction,
- User rights in the activity area (including recognized rights of indigenous people), and
- Capital or material inputs contributing to the increase of removals or to the reduction of emissions.

Without any specific regulations on the attribution of ownership rights of carbon rights, sharing and distribution can be proportionate to inputs or efforts by all involved in the relevant activity.

[2] See http://www.legifrance.gouv.fr/affichCode.do;jsessionid=D6408CE377C5B39614A30419B7B6658A.tpdjo07v_2?idSectionTA=LEGISCTA000022964354&cidTexte=LEGITEXT000006074220&dateTexte=20130529

1.3. REDD+ rights and benefit-sharing: issues to be addressed

In February 2013, the International Institute for Environment and Development (IIED) released the main findings of a meta-analysis of REDD+ rights and REDD+ benefit-sharing in more than 100 REDD+ projects in Africa, Asia and Latin America. This meta-analysis summarised most of the findings already highlighted on the literature on REDD+ rights and benefit-sharing (see **part 2.2** infra):

- No country had clear legislation on what carbon rights are, why they should be bundled with land & forest rights, or the conditions/prerequisites for acquiring/transferring those rights to the private sector. Without consistent legislation, private sector REDD+ actors are reinterpreting land & forest legislation to establish rights over this new commodity;
- Sharing mechanisms are often unclear, suggesting that most benefits accrue to the private sector, not to communities or States. A few countries have introduced project-specific taxation, most are missing the opportunity to generate revenues from private sector carbon credits;
- Experience in logging and other sectors suggests promised that community benefits may not be materialised without binding agreements;
- Governments need to put a move from opportunistic to long term legislation on carbon rights on top of strategic development agendas. The private sector experiments cover vast areas and span decades. Mistakes made today could take generations to put right;

As many other reports, the IIED report stresses the fact that the Governments in developing countries have to design their REDD+ rights and benefit-sharing arrangements in a balanced manner, considering the three criteria below:

- Efficiency: To get the maximum of sequestrated/avoided carbon,
- Effectiveness: …at the lowest abatement costs possible (harvesting the “low hanging fruits”),
- Equity: …rewarding those who effectively change/improve their practices, as well as those who have continuously been good forests stewards.

In addition to these criteria, it is worth considering transparency, to provide insights on the risk of corruption in REDD+ schemes.

Practically, it thus means that Governments in developing countries have to:

- Legally define the REDD+ rights: natural resource, intangible private asset or mixed definition? (see **part 1.2** supra)
- Legally define guidelines/rules/modalities for the REDD+ benefit-sharing:
  - Scope: Carbon only vs. other co-benefits, like timber (firewood, service wood, etc.), NTFP, grazing areas, environmental services (protection of watershed, biodiversity, microclimate, limitation of erosion, etc.), jobs, alternative Income Generating Activities (IGAs), social services (health centres, schools), etc.;
  - Estimation of costs, benefits and risks: Opportunity costs vs. full range of costs? Risk valuation? Share of net margin (=carbon revenues less full range of costs)?
  - Nature: In-kind or cash? Most of the co-benefits are generally in-kind (timber, social services, etc.), but carbon benefits and some co-benefits can be distributed in cash;
  - Beneficiaries: Who is to receive benefits (State, project developer, communities, households, other stakeholders)? What are the bases for the benefit-sharing? How are these decisions made?
  - Timing: Up-front benefit-sharing, result-based benefit-sharing, mix of the two? One-off or regular benefit-sharing?
  - Oversight and monitoring: Criteria to be taken into account, to make sure the benefit-sharing is effective, efficient, equitable and transparent?
  - Docking: How to harmonise practices among project developers if the REDD+ projects have to be included in a national REDD+ strategy?
  - Transparency: How to publicly disclose REDD+ benefit-sharing arrangements?

- Redress mechanism: Is there an independent entity able to intervene in case of claim?

All these issues will be assessed in the following parts and it will lead to practical recommendations (see **part 3.1** infra).

1.4. Forest carbon market: state of the art, and implications for the study

The issues surrounding REDD+ rights and REDD+ benefit-sharing arrangements can be influenced by the REDD+ financing options. Since the GoK expressed interest in market-based options (see **part 2.6** infra), it appeared useful to recall the key-principles of the carbon markets, and the specificities of the AR CDM credits, in order to assess the perspectives of REDD+ credits in voluntary carbon markets or (eventually) a post-2020 regulated market (see **Annex 3** infra).

One of the main differences between the two approaches is the price signal: (i) in a fund-based mechanism, the project/programme promoter is price setter while (ii) in a market-based mechanism, the project/programme promoter is price taker. Therefore, the main consequences of opting for market-based options are the following:

- If the carbon price is low: (i) the targeted agents will not participate (carbon revenue poorly attractive if deforestation activities are profitable) or (ii) they will participate but their opportunity cost will not be covered, thus maintaining poverty and future risks of deforestation;
- If the carbon price is fluctuant, long-term investments to promote local developments are uneasy to forecast.

The outlook is not very encouraging for the Kyoto market. The recent Doha Climate Conference adopted the principle of a fragile post-2012 Protocol (2013-2020), comprising 35 countries: 27 EU member States and some few middle or even minor economies…While Canada, Japan, Russia and New Zealand are leaving the Kyoto Protocol. The USA are not showing interest to enter in this Protocol.

This post-2012 Protocol covers 15% of current global greenhouse gases (GHG) emissions (against 55% - basis 1997 - for the Kyoto Protocol). Country commitments are heterogeneous (from -20% by 2020 compared to 1990 for the EU to -0.5% compared to 2000 for Australia) and collectively very poor compared to what advocates the Intergovernmental Panel on Climate Change (IPCC): -25/-40% cut from 1990 emissions for developed countries by 2020.

In addition, some countries of the former Soviet bloc reject any idea of cancellation, even partial, of the "hot air", which represents some 13 GteCO2. Potentially useful in the post-2012 Protocol, it would result in a complete dilution of the low demand for post-2012 Kyoto credits. At least, the Decision 5/CMP.8 of Doha extends the CDM over the period 2013-2020.

At European level, the Emission Trading Scheme (ETS) Directive from the Climate and Energy Package[3] plans to restrict the use of post-2012 carbon credits only to credits generated by the Least Developed Countries (LDCs). In the USA, the adoption of a Climate and Energy Bill seems back on the agenda[4], which could open interesting perspectives for carbon projects, knowing that the previous draft Bills (WAXMAN-MARKEY Bill and KERRY-BOXER Bill in 2009, then KERRY-LIEBERMAN Bill in 2010) provided for a massive use of credits from projects, including forestry.

With regard to voluntary markets, the impact of the economic crisis could persist, which would reduce the demand for voluntary credits, demand which is already very marginal compared to the demand of regulated markets.

Above are various reasons to design REDD+ rights and REDD+ benefit-sharing arrangements manageable under different mechanisms (fund-based, market-based, mix of the two).

[3] See the articles 31 and 32 of the Directive 2009/29/CE « ETS » at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009L0029:FR:NOT

[4] Early 2013, President OBAMA said he would move unilaterally if Democrats and Republicans do not reconcile their views. See http://tpmdc.talkingpointsmemo.com/2013/02/climate-bill-supporters-urge-obama-to-move-unilaterally----and-fast.php

2. Desk review: international thinking and Kenyan context

2.1. International guidelines on REDD+ rights and benefit-sharing?

➔ United Nations Framework Convention on Climate Change (UNFCCC) & REDD+ negotiations

The REDD+ mechanism is under negotiations since COP11 (Montreal). So far, four Decisions were adopted, in particular the Decision 1/CP.16 (Cancun)[5] which defines the REDD+ safeguards, esp. in c) and d) of §2 of Annex 1 to this Decision "*c) Respect for the knowledge and rights of indigenous people and members of local communities, by taking into account relevant international obligations, national circumstances and laws […] d) The full & effective participation of relevant stakeholders, in particular, indigenous people and local communities, in actions referred to in §70 and 72 of this decision*".

These safeguards are useful indications for the setting of REDD+ rights and REDD+ benefit-sharing arrangements, but they need to be operationalised by the host country of any REDD+ activity. In addition, out of these few indications, the COP Decisions on REDD+ do not give further guidance on REDD+ rights and REDD+ benefit-sharing arrangements.

➔ REDD+ Partnership[6]

It was established after the Paris and Oslo High Level Summits on tropical forests (early 2010). The main objectives of this Partnership are to exchange ideas, data and lessons learnt among REDD+ participating countries and REDD+ donor countries. So far, it includes 75 member countries (as of August 2012), incl. Kenya, on a voluntary basis.

Exchanges on "Readiness activities" and "Result based actions" are part of the 2013-2014 work plan, but so far, the discussion focus mainly on the mapping of REDD+ financing. In addition to that, even if the REDD+ rights and REDD+ benefit-sharing arrangements were discussed extensively in this Partnership, it is unlikely that these discussions would convert into consensual and detailed guidelines, as the Partnership is not expected to produce Decisions or Guidelines (it is not an arena of negotiations).

➔ UN-REDD[7] and Forest Carbon Partnership Facility (FCPF)[8]

These are the two major multilateral initiatives on REDD+: UN-REDD was established in 2008 and currently gathers 46 partners countries (incl. Kenya); FCPF was also established in 2008 and currently gathers 36 participants countries (incl. Kenya).

The two initiatives agreed on a joint Readiness Preparation Proposal (RPP) format (V6, August 2012)[9] with guidelines on REDD+ rights and benefit-sharing: components 2c (REDD+ implementation framework), 2d (Social and Environmental Strategic Assessment -SESA), and 4b (Monitoring Reporting and Verification – MRV - of other impacts/co-benefits). But these guidelines are indicative, not prescriptive.

For instance, it is highlighted in the guidelines for component 2c (where the submitting country is expected to state how it will define REDD+ rights and REDD+ benefit-sharing arrangements) that "*Countries have flexibility in deciding how best to explain their approaches to REDD+ interventions in the context of their socioeconomic conditions, drivers of deforestation, and development paradigm*".

The guidelines are therefore more similar to a list of "control questions" than prescriptive guidelines. For instance, question two of the component 2c guidelines is the following: "*Who owns or uses the forest under statutory or customary law? Is there regulatory or legal clarity on and who owns carbon benefits generated by REDD+ activities? Is there a relationship between carbon ownership and land tenure? How would any land tenure, or carbon ownership, issues that arise be resolved or mediated?*". At the end of the day, each REDD+ participating country is free to decide on its own arrangements.

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[5] See http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=2

[6] See http://reddpluspartnership.org/

[7] See http://www.un-redd.org/

[8] See http://www.forestcarbonpartnership.org/

[9] See https://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/Apr2012/FCPF%20UNREDD%20R-PP%20Template%20Version%206%20-%20April%2020%2C%202012-FINAL.docx

➔ Forest Investment Programme (FIP)[10]

The FIP was established in 2009, as part of the World Bank Climate Investment Funds (CIF). There are currently eight pilot countries (incl. three in Africa: Burkina-Faso, Democratic Republic of Congo, and Ghana). The general aim of the FIP is to "*up-scale REDD+ investments for transformational changes*". There is no specific guideline on REDD+ rights and REDD+ benefit-sharing: the FIP relies on RPP guidance for these issues.

➔ Voluntary carbon markets

There are numerous standards: Voluntary Carbon Standard (VCS), Gold Standard, Carbon fix (now included in the Gold Standard), Chicago Climate Exchange (CCX), Regional Greenhouse Gas Initiative (RGGI), Plan Vivo, New South Wales Greenhouse Gas Reduction Scheme (GGAS), American Carbon Registry (ACR), etc. In addition to that, Social Carbon and Community Carbon and Biodiversity Standard (CCBS) do not issue « credits » but « superimpose" a CCB label on VCS credits (see **Annex 3** infra – Issues at stake with carbon markets and REDD+, part "➔ States of carbon markets: regulated and voluntary")

Voluntary carbon markets are very reduced: 1.1 % of the total global carbon markets (mandatory and voluntary) and 0.3 % of its total value (Ecosystem Market Place, 2009). But, voluntary carbon markets are well developed in the REDD+ sector, especially VCS and CCBS.

Their objectives, rules and methodologies are quite heterogeneous. Generally speaking, there is no specific guidance on REDD+ rights and REDD+ benefit sharing, rather minimum requirements to reach (consultations, respects of national laws and regulations). The three exceptions are:

- Social Carbon[11]: innovative social safeguards, but it is not developed outside of Brazil, so not very relevant for the Kenyan situation;
- Plan Vivo[12]: 60% minimum of carbon revenue to be shared with local stakeholders;
- CCBS[13]: three criteria to be monitored, i.e. CM1. Net Positive Community Impacts, CM2. Offsite Stakeholder Impacts, and CM3. Community Impact Monitoring. However, if an ex-post assessment of the impacts on local livelihood is foreseen, there is no clear guidance on how to set the benefit-sharing arrangements ex-ante.

➔ REDD+ carbon private equity funds

There are few: BioCarbon Group Pte Limited[14] (Macquarie Group, Fauna and Flora Int., International Finance Corporation, Global Forestry Partners), Moringa Fund[15], Althelia Climate Fund GP[16], CI REDD+ fund[17], etc.

On the one hand, most of them have an Environmental and Social Strategy / Code of Conduct / Rules-Modalities on social and environmental aspects which have to be followed by project developers they support. On the other hand, the General Partners and Limited Partners of these Funds are usually looking for a minimum net Internal Revenue Rate (IRR), e.g. above 10%, and they often have a hurdle rate, under which they would not invest.

These facts have two consequences: (i) the REDD+ carbon private funds are risk-adverse and for-profit entities: they will not invest in countries or areas where the governance is poor or land tenure is unclear, creating bias in the benefit-sharing, (ii) there are trade-offs between benefits to be served to the Partners and benefit to be devolved to the local communities… Win-win situations are not self-evident: since Partners are usually contractually guaranteed a minimum IRR and local communities are not, the last will see their share of carbon revenue decreasing when carbon price is getting down (which has been the case for the last months).

[10] See https://www.climateinvestmentfunds.org/cif/node/5
[11] See www.socialcarbon.org
[12] See www.planvivo.org
[13] See http://www.climate-standards.org/
[14] See http://www.forestcarbonportal.com/content/macquarie-and-partners-build-25-million-partnership-find-redd-projects
[15] See http://www.africa-assets.com/data/funds/moringa-fund
[16] See http://www.ecospherecapital.com/
[17] See http://www.conservation.org/global/carbon_fund/Pages/partnerlanding.aspx

2.2. Literature review on carbon rights/benefit-sharing

As stated in the IIED report (see **part 1.3** supra) on a meta-analysis of REDD+ projects, "*No country had clear legislation on what carbon rights are […]. Sharing mechanisms are often unclear*". However, punctual case studies were carried out abroad of Kenya on these two issues and their main findings could be useful in the scope of this study. Here below are the summaries of questions, findings, and recommendations of three key reports:

➔ Report "*Benefit-sharing in REDD+: exploring the implications for poor and vulnerable people*" by L. PESKETT, 2008[18]

Key questions:

- What does benefit-sharing means in the context of REDD+?
- What are the options for establishing benefit-sharing systems in different REDD+ approaches?
- What are the implications of different benefit-sharing arrangements for poor people?

Key findings:

- Even where costs are broken down at project level, there is very little data available of how costs balance with incomes (REDD-Net/DfID, 2010; ELIASCH, 2008; IDESAM, 2009);
- There are different interpretations of the types of benefits that could accrue through REDD+, such as financial (e.g. direct cash payments) vs. non-financial (e.g. clarification of property rights) benefits. Within the financial category, the distinction between direct "cash in hand" payments for carbon and other indirect payments such as employment is also often unclear (PESKETT, 2008);
- Carbon revenue [should] include compensation for opportunity costs, funding for productive activities, REDD+ rent (difference between the average global carbon price and the two precedent costs) (IUCN, 2009);
- At the national level, existing legislation, for example referring to land tenure and forest revenues management, will probably be one of the most fundamental determinants of how benefits from REDD+ are distributed (COTULA and MAYERS, 2009);
- Private or State tenure is often associated with being easier for establishing benefit-sharing systems in existing carbon forestry projects as the beneficiaries are often single entities (individuals, companies or Government), investment risks are lower and management is easier. Emerging REDD+ projects and existing carbon projects often appear to be implemented on private or State land, highlighting a possible bias in benefit-sharing towards these tenure categories (MYERS-MADEIRA, 2009);
- Drive to formalize land tenure to develop REDD+ projects has led to concerns where there is an history of less powerful claimants losing out (LARSON et al., 2008; CRONKLETON et al, 2009);
- At the local level, the question of who is eligible for carbon finance benefits is unclear in most existing carbon forestry projects (BOZMOSKI and HULTMAN, 2009; BOYD et al., 2007a) However, such projects often work with new or existing community groups in order to manage activities as this reduces the transaction costs for project developers (BRODNIG, 2009);
- Opportunity costs estimates have been the main approach used for establishing the global and local costs of REDD+. In practice, such estimate may not represent the real costs for different actors, especially when REDD+ is not implemented in the context of a functioning market system, e.g. slash and burn. These systems may be hard to value in economic terms and run the risk of extremely low opportunity costs estimates. Transfers to forest dependent people in particular would need to significantly exceed opportunity costs for this reason (GREGERSEN, 2010).

Key recommendations (PESKETT, 2008):

1. Early analysis of rights to REDD+ benefits and their links to tenure,
2. Supporting institutions to administer benefit-sharing systems,

[18] See http://redd-net.org/resource-library/Benefit+sharing+in+REDD%2B%3A+Exploring+the+implications+for+poo...

3. Development of clear national REDD+ regulations (to be informed by detailed and realistic cost-benefit analysis associated with programs and projects. Clarity will also be needed in definitions included in regulations, such as how “affected stakeholders” or “communities” are defined”),
4. Use of mechanisms to isolate vulnerable beneficiaries from risks,
5. Introducing criteria to enhance the “pro-poor” targeting of benefits,
6. Use of rigorous consultation and social impact assessment processes,
7. Development of monitoring to assess the impacts of benefit-sharing systems on communities,
8. Development of social standards.

➔ Report “*Pro-poor benefit distribution in REDD+: Who gets what and why does it matter?*” by M. ESSAM YASSIN, 2011[19]

Key questions:

- Are benefits provided to communities or directly to households?
- Are benefits provided in cash or in kind or as a combination of different types?
- What should the provision of benefits be based on – landholding size, actual emission reductions, demography of the community – to ensure that equitable design criteria are met?
- How can it be ensured that more vulnerable groups such as ethnic minorities, the landless poor and children do not lose out?
- What impacts would the type of benefit transferred have on the well-being of the communities and the local community?

Key findings:

- There are three advantages of investing in community infrastructure – whether this is decided by communities or through pre-determined development programmes: (i) it reduces transaction costs, which are a major barrier for the participation of the poorest in Payment for Ecosystem Services (PES) schemes, (ii) it builds the institutional capacity of local communities and thereby strengthens their social capital, (iii) it establishes longer-lasting foundations for the improvement of local livelihoods (TACCONI, 2009),
- Benefit provision to the communities as a whole and investing in community infrastructure could potentially ensure that the entire community has the opportunity to access the benefits, and may avert benefit capture by small elite groups and guarantee access to the poor (SOMMERVILLE et al., 2010),
- Although many proponents of direct payments to households argue that this requires less institutional capacity and no sustained flow of funds for maintenance, it is believed that investing in community infrastructures through payments to communities is arguably less vulnerable to elite capture (ESSAM YASSIN, 2011),
- Cash payments are finely divisible and do not violate consumer sovereignty, but in-kind payments can trickle down to non-participant landless farmers (ESSAM YASSIN, 2011).

Key recommendations (ESSAM YASSIN, 2011):

1. Whether the distribution of benefits associated with REDD+ is based on proportionality (in proportion to input or output), equality (equal payments to all) or need (social safety net) will have implications for making REDD+ project pro-poor,
2. Equitable benefit distribution could be achieved by systematically favouring the landless and small landholders,
3. The decision on whether to transfer benefits to communities or directly to households should be done through community consultation (careful assessment of their preferences),
4. The decision on whether to transfer benefits to communities as a whole or directly to households should be based on both economic feasibility and local capacity and governance structures,

[19] See http://pubs.iied.org/16508IIED.html

5. The decision on whether to make payments in cash or in kind should 'in principle" be based on participants' preferences. If participants have no any particular preference for one payment over another, then the benefits associated with both cash and in-kind payments need to be carefully weighed and assessed.

➔ Report "*REDD+ benefit-sharing: A comparative assessment of three national policy approaches*" by J. COSTENBADER, 2011[20]

<u>Key questions:</u>

Survey made of three approaches in order to draw on potential lessons for REDD+ benefit sharing: PES, Participatory Forest Management (PFM), and forest concession revenue-sharing arrangements. For each one, a consideration of vertical and horizontal allocation of benefits is made:

(i) Vertical benefit sharing issues concern methods for receipt of fund inflows from donors or markets into national funds or other financial mechanism, and transmission via various domestic government agencies or other entities to local-level actors;

(ii) Horizontal allocation concerns the internal distribution of benefits among groups responsible for REDD+ activities.

<u>Key findings and recommendations:</u>

- As regard "Design of costs/benefit sharing schemes": Under any REDD+ benefit sharing policy approach chosen, Governments will need to inform their payment schemes with locally specific opportunity and transaction cost considerations (as well as include extra initial benefits for a transition to alternative activities) […] it seems critical that implementing Governments have the capacity and tools to determine opportunity costs in local communities and to design and implement effective contract mechanisms that can flexibly respond to changes in those costs […] Government in-kind benefits could prove attractive to both parties, given the wide array of policy options allowing for low state costs (e.g., loans, debt swaps, tax relief, employment opportunities, NTFPs, public services, and infrastructure) […] Continuous cash flow will be needed in order to reflect performance based aspects of PES/REDD+ (COSTENBADER, 2011);
- As regard "Eligibility to receive benefits": The eligibility to receive benefits can be thought as including either or both (in a legal sense) those who have "carbon rights" and (in an economic sense) those who have "opportunity costs" […] Carbon rights may be considered as a fundamental threshold question to determining a class of carbon rights holders eligible for benefits, but not necessarily excluding those without such rights […] Benefits could be spent indirectly on those without carbon rights but with (legal or illegal) opportunity costs, such as in the form of programs to provide alternatives to illegal deforestation (COSTENBADER, 2011);
- As regard "Equity": Due to the high transaction costs in registering, monitoring, and distributing benefits to many small landholders; bundling, streamlining, and simplifying procedures and legal hurdles seem essential strategies for PES and PFM-based approaches. Similarly, increasing prices paid per hectare as landholding sizes decrease could help ensure payments are adequate to meet transaction and opportunity costs. Finally, elite capture may be avoided by prioritizing eligible benefit recipients (COSTENBADER, 2011);
- As regard "Tenure and exclusivity": Many PES and REDD+ pilot schemes developed to date have made payments to individuals with secure land tenure (i.e., land and/or forest ownership, access or use rights). […] REDD+ presents a thorny dilemma of how to equitably, yet efficiently, resolve tenure at a wider scale, given that some 80% of tropical forests are officially owned by States. Underneath such *de jure* ownership is typically found a complex, at times conflicting web of *de facto* customary ownership, access, or use claims of local and indigenous forest dwellers or communities […] Given the political and administrative difficulties of land tenure reform, some scholars have argued for a simpler solution of new legislation to allocate carbon in State forests to local and indigenous communities (although this may beg further the question of which communities should receive carbon rights). (COSTENBADER, 2011).

[20] See http://www.google.fr/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CDYQFjAA&url=http%3A%2F%2Fwww.unredd.net%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D5577%26Itemid%3D53&ei=476lUe6XM-GM7Qb-9YDABg&usg=AFQjCNFxZ9Ar0v8L_D74Zs0UQhnhvxtpFQ&sig2=r1LrV3Tbz7PW-fy-EvNotw&bvm=bv.47008514,d.d2k

2.3. Relevant Kenyan laws and policies: General

Over the years, Kenya has developed an extensive and comprehensive legal policy and legislative framework for the conservation of natural resources, some of which have specific provisions on rights of access and benefit sharing in their exploitation. Below (see **part 2.3.** General, **part 2.4.** Land, **Part 2.5.** Forest, **Part 2.6.** Climate) is a review of the existing and proposed legal policy and legislative frameworks relevant in carbon rights and benefit sharing in REDD+:

➔ The New Constitution (2010)

The 2010 Constitution supports management arrangements that ensure equitable sharing of benefits accruing from exploitation of natural resources. This is enshrined in article 69 (1) of the Constitution which provides that 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.

In addition to that, the Fourth Schedule of the Constitution providing the distribution of functions between the National Government and the County Governments gives the County Governments powers to ensure and coordinate the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.

➔ Kenya Vision 2030 (2008)

It is the country's new development blueprint covering the period 2008 to 2030. It aims to transform Kenya into a newly industrializing, "middle-income country providing a high quality of life to all its citizens by the year 2030". The Vision is based on three "pillars": the economic, the social, and the political. It is worth noting that environment is quoted as part of the social pillar ("A just and cohesive society enjoying equitable social development in a clean and secure environment").

Apart from that, there are few elements relevant for the present study, apart the fact that "land reform" is presented as one of the basis on which the Kenya Vision 2030 is anchored: if land tenure rights are clarified and better defined, it would also facilitate the identification of carbon rights.

➔ County Governments Act (2012)

There are three relevant objectives in this Act: (i) to give effect to the objectives and principles of devolution as set out in the Constitution, (ii) to prescribe mechanisms to protect minorities within Counties, and (iii) to enact County legislations, which may (or not) include specific legislation on carbon rights and benefit-sharing (functions to be devolved not specified in the Transition to Devolved Government Act, see below).

The Act also promotes the following principles of citizen participation: (i) timely access to information (important in terms of benefit sharing), (ii) access to process of formulating and implementing policies, laws and regulations, and (iii) protection and promotion of the interests and rights of minorities, marginalized groups and communities and their access to relevant information.

➔ Transition to Devolved Government Act (2012)

This Act establishes the authority to oversee transition to devolved government pursuant to section 15 of the Constitution; this includes identification of functions which may be transferred to County Governments. These functions are not specified in the Act. Devolution of Central government management functions especially those on forest resources might have implications on distribution of rights and benefit sharing between the Central and County governments.

Key-points:

The New Constitution (2010) supports management arrangements that ensure equitable sharing of benefits accruing from exploitation of natural resources. It also gives County Governments powers to ensure and coordinate the participation of communities and locations in governance at the local level.

In the Kenya Vision 2030 (2008), "Land reform" is presented as one of the basis on which the vision is anchored. It explains why land laws and policies are currently being renewed (see **part 2.4** infra)

The County Governments Act and the Transition to Devolved Government Act (2012) give effect to the objectives and principles of the devolution, guidance on minority protection and citizen participation in the Counties, and general guidance in terms of enactment of County legislation. However, functions to be devolved from the Central Government to the County Governments are not specified in the Transition to Devolved Government Act: one cannot say at what level the carbon rights and benefit-sharing arrangements will have to be defined.

2.4. Relevant Kenyan laws and policies: Land

➔ National Land Policy (2009)

Among other, the National Land Policy recognizes and protects the rights of forest dependent or other natural resources dependent communities and facilitates their access, co-management and derivation of benefits from the resources. Of importance for our study, it states that the Government shall:

- Align, to the greatest extent possible, tenure to land based natural resources to the different land categories namely public, community, and private (instead of Government, trust, and private, as previously defined) and (ii) establish legal frameworks to recognise community and private rights over renewable and non-renewable land-based natural resources, and incorporate procedures for access to and sustainable use of these resources by communities and private entities,
- Put in place legislative and administrative mechanisms for determining and sharing of benefits emanating from land based natural resources by communities and individuals where applicable,
- Make benefit-sharing mandatory where land based resources of communities and individuals are managed by national authorities for posterity, and
- Ensure the management and utilization of land-based natural resources involves all stakeholders.

In addition to that, to protect and sustain the land rights of vulnerable and minority communities, it states that the Government shall:

- Undertake an inventory of the existing minority communities to obtain a clear assessment of their status and land rights,
- Develop a legislative framework to secure their rights to individually or collectively access and use land and land based resources.

➔ Land Acts (2012)

To implement the National Land Policy, three land laws were enacted, namely the Land Registration Act, the National Land Commission Act, and the Land Act. These acts have provisions that are very relevant to carbon rights and benefit sharing.

⇨ Land Registration Act (2012)

It requires registration of Community land and issuing of a certificate of title to owners and upholds their rights or interest on the land (article 8 (3)). Overriding rights are also safeguarded for light, air, water and support for registered land including private land (article 28). But these rights or interest are not upheld on trust land that is not registered by County Government though the land is managed by the County Government on behalf of the Community (article 8(4)).

In line with the Constitution, any Community land that is not registered will be managed by the County Government in trust of the communities it is held on. Arising from this is the following question: who has carbon rights for unregistered Community forest land? It is however good to recognize that carbon rights are different from property rights and it can be urged that carbon rights can be guaranteed by the Constitution Bill of rights.

⇨ The National Land Commission (NLC) Act (2012)

The functions of the Commission include management of public land on behalf of the National and County Governments, making recommendations on a National Land Policy to the National Government and to monitor and have oversight responsibilities over land use planning throughout the country.

This Act charges NLC to investigate and recommend appropriate redress for historical land injustices. NLC is charged with developing legislation on historical land injustices within two years. This provision may confer rights to Communities who may have been deprived of their land.

This Act provides NLC to implement settlement programmes through a settlement fund to be created by NLC. Land is a finite resource and settlement land for thousands of squatters in areas such as Mt. Kenya, Mau, Cherangani and Mt. Elgon among other areas: this Act will give these people some rights that currently they do not have in areas where they are occupying.

⇨ **The Land Act (2012)**

On conservation of natural resources (article 19), the Land Act states that the NLC will provide:

- Incentives for communities and individuals to invest in income generating natural resource management programmes,
- Measures to facilitate the access, use and co-management of forests, water and other resources by communities who have customary rights to these resources,
- Procedures on the involvement of stakeholders in management of land based natural resources,
- Rules and regulations as measures to ensure benefit sharing to affected communities.

Of particular importance in this Act is the issue of gender equity vis-à-vis carbon rights:

The Land Act in its list of guiding values and principles includes "*equitable access*" and "*elimination of gender discrimination in law, customs and practices related to land property in Land*". Gender equity protections thus appear in the compulsory acquisition provisions of the Land Act.

The Land Registration Act also establishes that spouses hold matrimonial land in joint-tenancy, provides that spousal rights to matrimonial property are an overriding interest in land, and establishes that the transferee in a land transaction has a duty to inquire about any spousal interests.

Arising from this, is whether and to what extent local communities are able to reconcile customary land governance practices – which in most cases discriminate against women rights pertaining to land management, use, transfer, and inheritance – with constitutional standards for gender equity in land matters?

The Land Act does not incorporate clear direction on the interplay between formal and customary land governance systems. How customary and formal land governance systems interact, and what recourse women will have to justice in either system, will be fundamental to implementation of the New Constitutional rights on gender equality in land matters. In devising the community land system, it will be essential to balance community autonomy in land governance with assurance of gender equity rights related to land, as embedded in the Constitution.

➔ **Draft Community Land Bill (under preparation)**

Community Land Bill was given a timeline of five years. This delay expired and this bill is still under preparation. Although there were many reasons why it made sense for Kenya to extend the time for the development of its Community Land Bill, given the key importance and delicate nature of the subject in Kenya, the fact that this Bill is not now in place creates additional vulnerabilities for community land, more vulnerable to encroachment by public or private land rights.

Key-points:

The National Land Policy (2009) has to (i) recognise community and private rights over renewable and non-renewable land-based natural resources, (ii) put in place mechanisms for determining and sharing of benefits emanating from land based natural resources, (iii) make benefit-sharing mandatory where land based resources of communities and individuals are managed by national authorities for posterity, (iv) ensure the management and utilization of land-based natural resources involves all stakeholders (especially it has to protect and sustain the land rights of vulnerable and minority communities, after a clear assessment of their status and land rights);

The Land Registration Act (2012) requires registration of Community land and issuing of a certificate of title to owners and upholds their rights or interest on the land. Any Community land that is not registered will be managed by the County Government in trust of the communities it is held on, which raise an issue: who has carbon rights for unregistered Community forest land?

The National Land Commission Act (2012) charges the National Land Commission (NLC) to investigate and recommend appropriate redress for historical land injustices. NLC is charged with developing legislation on historical land injustices within two years. This provision may confer rights to Communities who may have been deprived of their land, and, consequently, may facilitate their access to potential REDD+ benefit-sharing.

The Land Act (2012) states that the NLC will provide (i) measures to facilitate the access, use and co-management of forests, water and other resources by communities who have customary rights to these resources, and (ii) Rules and regulations as measures to ensure benefit sharing to affected communities.

The draft community bill is still under preparation, which creates additional vulnerabilities for community land.

2.5. Relevant Kenyan laws and policies: Forest

➔ Forests Act (2005)

It establishes the Kenya Forest Service (KFS). It stipulates that all forests in Kenya - be the State, local authority, private or provisional forests - are to be managed under the provisions of the Forests Act. The Forests Act strongly supports the participation of stakeholders in the conservation and management of the forest resources through collaborative management.

The recognition of forest adjacent communities as key stakeholders and users of natural resources is considered vital if successful management is to be attained. The Act provides for communities living adjacent to forests to enter into collaborative management agreements with KFS through Community Forest Associations (CFAs).

Section 47 (1) confers the CFA with the following forest user rights: collection of medicinal herbs, harvesting of honey, harvesting of timber or fuel wood, grass harvesting and grazing, collection of forest products for community based industries, ecotourism and recreational activities, scientific and education activities, plantation establishment through non-resident cultivation, contracts to carry out silvicultural operations and development of community wood and non-wood forest based industries.

The Act provides for preparation and gazettement of Rules to enforce the law. Currently, three Rules relevant to the engagement of local communities in forest management have been gazetted: the Forests (Participation in Sustainable Forest Management) rules - 2009, the Forests (Charcoal) rules - 2009 and the Forests (Harvesting) rules - 2009.

➔ Forests (Participation in Sustainable Forest Management) Rules (2009)

The Forests (Participation in Sustainable Forest Management) Rules, 2009 were gazetted via Legal Notice No. 165 of 2009. The Rules apply to participation of the private sector and forest communities in sustainable management of State forests and may, with the necessary modifications, be applied by a Local Authority, with the consent of the Minister responsible for Local Authorities, to the participation of the private sector and forest communities in the management of Local Authority forests.

Under the rules, KFS may issue authorisations for forestry activities in the form of a permit, timber license, special-use license, contract, joint management agreement or concession agreement of a specified forest area. A concession agreement is a long term agreement that may be issued for the management of a specified forest area at a price determined after forest valuation and bidding. Concessions are mostly applicable to eco-tourism or large-scale plantation management but may also apply to REDD+ projects. The procedure process include pre-qualification, offering and advertisement and bidding.

KFS may enter into a joint management agreement in the management of State forests. The primary purpose of a joint management agreement is to conserve the forest and allow non-consumptive uses. However, an agreement may also allow limited consumptive use of forest resources if sustainable.

For purposes of community participation, the rules provide management unit for a forest to comprise of the forest area under the jurisdiction of one forest station or where geographical factors make separation of the unit into blocks more practical, individual forest blocks within the jurisdiction of one forest station. Each management unit will be under a separate CFA.

This is therefore the most relevant rule for local community participation. It provides for preparation and enforcement of forest management agreements between CFAs and KFS once a forest management plan has been prepared and approved. Some of the KFS/CFA agreements have provisions in relation to REDD+. For instance, the Green Belt Movement (GBM) has an agreement with KFS that allows CFA and GBM to share benefits accruing from carbon credits in Abedares Forest.

➔ Draft National Forestry Bill (under preparation, foreseen in 2013)

A 50+-page draft National Forestry Bill is under preparation and is very relevant for our study, since it stresses a lot the importance of designing fair, efficient and cost-effective benefit-sharing arrangements of wood and non-wood forests products, including carbon. This draft bill has been deeply commented by the National Alliance of Community Forest Association (NACOFA), who published a Memorandum on the draft Bill in November 2012 and a report on benefit-sharing within the forests bill in February 2013.

NACOFA says in its memo that “need to develop the benefit sharing policy started when complaints were received from Community members that management agreements do not reflect cost and benefit sharing formula. Forests Act 2005 does not explicitly state what the agreements should contain”.

Therefore, NACOFA organised County forums, followed by a first stakeholders’ meeting in August 2012 at Brackenhurst, Limuru. The benefit sharing policy was presented, as well as the draft forests bill. It was then suggested that tools or model on cost and benefit sharing should be added to the policy and that gaps in terms of benefit-sharing should be filled in the Forests bill.

After that, two consultants reviewed the draft Bill and draft management plans guidelines, and a second stakeholder meeting was held in November 2012 at Hilton hotel, Nairobi, where the memo was prepared. A third stakeholder meeting was then organised in February 2013 where a revised draft Bill which had addressed the issues raised, was presented by the Ministry.

The memorandum is very rich and it is not possible to summarize it completely in this report. Among other things, it is worth noting the following facts:

- The types of benefits to be shared are listed: “These may be monetary or non-monetary and may include license fees; upfront payments; milestone payments; royalties; research funding; joint ownership of intellectual property; employment opportunities; etc.” (p5),
- “Regulations to be enacted should accommodate the interests of all groups that have a legitimate stake in how the system is designed, and not just the most economically-dominant groups. This is not just a matter of justice but also of effectiveness.” (p5),
- “KFS, in consultation with the land owners, the NLC, the Commission on Revenue Allocation and in liaison with the Stakeholders, shall formulate regulations and guidelines on access, incentives and benefit sharing and the nature and manner in which the same shall be distributed.” (p6),
- “Rules and regulations shall be subjected to public scrutiny at every stage of their formulation within the framework of the laws on devolution and land management.” (p6),
- “Benefits accrued may be shared among relevant parties on a case by case basis, whether county, conservancy or individual land owner.” (p6);
- “Need for detailed subsidiary rules developed to guide a) management plans and agreements development and b) cost and benefit sharing for forest resources” (p6).

Textual amendments to the draft Bill are also provided for, in particular:

- Clause 5 (3) (e): The rights and responsibilities of communities and private land owners to manage and utilize forest and forest resources shall be recognized and upheld,
- Clause 36 (2): The net proceeds and net benefits from the sale of trees or other forest products and environmental services derived from a community forest shall belong to the community,
- Clause 70 (4): Any further allocation of benefits with the community will be based on stakeholders input in the production of the benefit […] For the sharing of environmental (quantifiable) benefits (like carbon) and as done with the wood products above, 30% should be ploughed back to communities and the production cost paid to the stakeholders by the County governments“.

➔ High level national dialogue on water towers, forests and green economy

It is not a law or a policy, but it appears useful to present it here, since this dialogue, supported by United Nations Environment Programme (UNEP), "calls on all political leaders to ensure that the emerging forest sector transformation [...] remain a high priority for the country, to be championed by the highest political level".

The dialogue held its first meeting in Nairobi in November 2012 and gathers public and private entities[21]. Outcomes of this dialogue are broad political statements and not detailed into practical guidelines, but it is worth noting that the participants want to establish PES and that the dialogue on opportunities and modalities for PES in Kenya should be intensified in coming months.

Key-points:

The Forest Act (2005) regulates all types of forest in Kenya and establishes the concept of CFA and their user rights.

The Forests (Participation in Sustainable Forest Management) Rules (2009) are relevant for local community participation. It provides for preparation & enforcement of forest management agreements between CFAs and KFS once a forest management plan has been prepared and approved.

The draft National Forestry Bill (foreseen in 2013) and the amendments made on it by NACOFA are very relevant for our study. It provides clear explanations/elements on the types of benefits to be considered, the trade-offs between effectiveness and equity, the roles of KFS, NLC and others to formulate ad hoc guidelines, the public consultations to be carried out when defining benefit-sharing arrangements, the flexibility ("case-by-case" principle) when defining the guidelines, the need for detailed tools and rules for the assessment of cost/benefit-sharing for forest resources.

The High level national dialogue on water towers, forests and green economy gathers pirvate and public entities and is aiming at feeding policy-makers with recommendations to safeguard forest and water resources. The dialogue on opportunities and modalities for PES in Kenya should be intensified in coming months.

2.6. Relevant Kenyan laws and policies: Climate

➔ National Climate Change Response Strategy (NCCRS) (2010)

Under part 7 - Research, Technology Development, Absorption and Diffusion, it is foreseen the following: "In the forestry sector, […] evaluating the potential for remunerating natural resource users for natural forests conservation and restoration with funds from carbon markets (e.g. under a REDD+ scheme)". Nowhere else in this document are raised the issues of REDD+ right and benefit-sharing.

➔ Revised REDD Readiness Preparation Proposal (RPP) for Kenya (2010)

In the Component 2c of the RPP[22], future assessments/studies related to REDD+ rights and benefit-sharing are foreseen, in particular:

- "Defining a clear set of procedures and rules for carrying out carbon credit generating activities once the national REDD+ Strategy is in place […] During the R-PP Implementation phase, testing via officially endorsing subnational activities and establishing transparent rules on the allocation of carbon rights […]" (p47),
- "Adopting and developing a set of standards for REDD+ strategies and for public and private actors in Kenya will bring credibility and rigor to activities" (p48),
- "Define the rules and criteria that the activities will have to meet to be authorized by national and eventually international entities […]" (p48),

[21] among which are Finlays, African Development Bank, Equity Bank, Barclays Bank, Ecobank, East African Development Bank, Unilever East Africa Tea, KenGen, Kenya Power and Lighting Company, East Africa Breweries ltd, East African Portland Cement, Better Globe Forestry Ltd, Ecotourism Kenya, Kenya Bankers Association

[22] See https://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/Oct2010/Revised%20RPP%20for%20Kenya.pdf

- "How benefit sharing rules will apply to REDD+ activities: helping to operationalize the rules in place in the Forest Act" (p49),
- "For REDD+ site level projects: Define where the authority to transact international carbon credits sits. Analyse options for enabling local actors to directly carry out carbon finance activities on private lands, according to defined national standards." (p50),

As noted in the last Country Progress Sheet, as of March 2013[23], the implementation of these assessments/studies is still to be done.

➔ National Performance and Benefit Measurement Framework (NPBMF) (2012)

The framework is divided into four main sections[24], where the issues linked to mitigation and adaptation costs and benefits are discussed, but this framework does not address specifically the issues of REDD+ right and benefit-sharing.

➔ National Climate Change Action Plan (NCCAP) 2013 -2017 (2013)

In the Subcomponent 6 - National Performance & Benefit Measurement of the NCCAP, it is foreseen "to develop a national performance and benefit measurement framework for measuring, monitoring, evaluating, verifying and reporting results of mitigation actions, adaptation actions and the synergies between them". No details are given in the document about this framework, yet to be designed.

Under the mitigation actions MITI-1 "Restoration of Forests on Degraded Lands" (estimated cost to 2030: 186-290 GKSh) it is plan "to undertake a programme of work to restore forests on 960,000 hectares up to 2030 including […] testing and application of compensation and benefit-sharing mechanisms". Here again, no details are given about these benefit-sharing mechanisms.

➔ Kenya's National Policy on Carbon Investments and Emissions Trading (2011)

The Ministry of finance has developed a policy that is aimed at providing a national policy framework to guide and support carbon inflows and management, clean technologies, and carbon trading in the country so as to allow Kenya to become a competitive carbon finance destination. The goal of the policy seeks to develop a strong carbon market to benefit all people at all levels, reduce the Country's overdependence on foreign economic assistance, and guarantee resource mobilization for recapitalizing investments in the country.

Under the parts 1.8.2 – Forestry (p18) and 2.4.3.2.- Strategic interventions (p30), a specific objective is "to promote the development, and sustainable management and conservation of forestry resources by tapping into the carbon markets". Apart from that, the issues of REDD+ right and benefit-sharing are not specifically addressed.

Key-points:

The NCCRS (2010) and the Kenya's National Policy on Carbon Investments and Emissions Trading (2011) both state that carbon market is a valuable option to reward REDD+ activities, but they do not specify how it related to REDD+ rights and benefit-sharing.

The RPP (2010) and the NCCAP 2013-2017 (2013) both foresee future assessments/studies or field testing in terms of REDD+ rights and benefit-sharing, but these activities are still to be carried out.

The NPBMF (2012) is a heavy document where issues linked to mitigation and adaptation costs and benefits are discussed, but issues of REDD+ right and benefit-sharing are not specifically addressed.

[23] See http://www.forestcarbonpartnership.org/sites/fcp/files/2013/Kenya%20Progress%20Sheet%20March%202013.pdf

[24] Section A: NPBMF and MRV+ System Design, Roadmap and Guidance, Section B: Selecting and Monitoring Adaptation Indicators, Section C: Tools To Measure, Report and Verify Synergistic Mitigation and Adaptation Actions, Section D: Capacity Development Plan.

3. Field study: Kenyan projects and carbon rights/benefit-sharing

3.1. Questions sent to 8 Agriculture, Forestry & Land Use (AFOLU) projects

Eight AFOLU projects (or group of projects) were initially identified:

Project (name, type)	Standard	Location	Proponents	Status
Kasigau Corridor REDD+ Project	VCS / CCBS	Rukinga Sanctuary	Wildlife Works	Implementation
Mbirikani REDD+ Project	(VCS)	Mbirikani Group Ranch	African Wildlife Foundation	Feasibility study completed
Mikoko Pamoja REDD+ project	(Plan Vivo)	South Coast, Kwale	Kenya Marine & Fisheries Research Institute	Design
Mt. Kenya / Aber-dares AR project	CDM	Mt. Kenya and Aberdare forests	Green Belt Movement	Implementation
TIST AR Projects	VCS	Meru, Laikipia, Nyeri, Buret, Trans Nzoia	TIST	Implementation
Kakamega Com-munity AR project	CCBS	Kakamega forest	Forest Again	Implementation
Escarpment AR Project	?	Kiambu Escarpment	ESCONNET	Implementation
Western Keny SALM Project	?	Bungoma, Kisumu and Siaya	Swedish Cooperative Centre & Vi agroforestry	Implementation

The terms of reference (see **Part 1.1** supra) recommended focusing on three projects. But, since it appeared useful to collect a maximum of field information, a set of questions was sent to all the project developers early April, in order to gather responses before the inception workshop of the study on the 22nd of April and the field visits to be undertaken the days after:

- Please send us your PDD, Emission reduction purchase agreement (ERPA), verification reports if carbon credits are yet issued, activity reports, etc. so that we can understand your project.
- Where is the project taking place precisely (maps would be appreciated), and how many local people are included in the project area and its surrounding?
- What are the activities carried out to increase removals/decrease emissions and what are the task/responsibilities for each one in the project: State/public administration, project proponent, carbon fund/private company/donor buying all or part of the carbon credits, local partners of the project proponent (NGOs, Associations, private for-profit company, etc.), local people?
- What is the business model of the project: (i) estimated amount of carbon credits and carbon revenues to be generated each year over the lifespan of the project (NB: carbon revenues = quantity of carbon credits generated x sale price to a carbon fund, a private company or a donor) + (ii) estimated non-carbon revenues (timber, NTFPs, agriculture commodities, others) to be generated each year over the lifespan of the project VERSUS (iii) investment costs (PIN and PDD elaboration, validation and verification, investments in land, plantations, equipment, etc.), and (iv) running costs (salaries of field staffs, maintenance of plantations, equipment, regular monitoring of project activities, etc.)?
- What are the arrangements made in terms of benefit-sharing of carbon revenues and others revenues: (i) What are the shares of each stakeholders involved, (ii) What were the reasons for choosing these shares (costs supported, risks taken, property of the land, concerns for local development, others?), (iii) How is the local people' share distributed (individually/by household, through investments in collective goods or services – schools, health centres, promotion of alternative livelihood activities, other), and (iv) What are the net effect of carbon/non-carbon revenues on households' revenues?

Although we contacted the Swedish Cooperative Centre & Vi agroforestry several times (by phone and by email), this project developer never responded. Green Belt Movement finally reacted an sent us its three PDDs on June 13, without responding to our questions.

3.2. Carbon rights and benefit-sharing systems in place in six projects

Project	**Kasigau Corridor REDD+ Project (P1 - Rukinga and P2 - Community ranches)**
Area	200 000 ha
Main stakeholders	- Project developer: WW Sanctuary Limited (Kenyan society) under the umbrella of WW Carbon LLC (private sector for-profit company) - Private investors: NedBank (seed capital), BNP Paribas (capital for extension), Allianz (equity share), and PPR (equity share) - Public partners: KFS and KWS (assisted with enforcement support) - Local landowners: 4,300 shareholders in 14 ranches (1 to 2,300 per ranch) - 6 CBOs adjacent to the projets areas with approx. 100,000 peoples
Land tenure	Private land (ranches)
Carbon rights	Granted to WWS by the private landowners
Standards	VCS and CCBS
Credits issued	Roughly 1,3 MteCO2/yr, 0,2 MteCO2/yr in P1 + 1,1 MteCO2/yr in P2 (Interview, April 24)
Carbon revenue	In 2012, around 7 MUSD (Interview, April 24)
Operating costs	In 2012, around 0,7 MUSD (Email Adkins, June 3)
Benefit sharing of carbon revenue	- Land owners: 1/3 of carbon revenue in cash via quarterly payments (payment proportionate to carbon stocks per ranch) = 1 MUSD in 2012 (Interview, April 24) - Adjacent communities: collective grant (for bursaries, school building, etc.) through the WWC trust (trust managed by WW, projects selected by "Locational Carbon Committees" - 1 LCC per CBO): "The WWCT is funded through carbon revenues receiving roughly 1/3 of net revenue" (p2 of the Memo for the WB). In reality, 0,3 MUSD in 2012 (Interview, April 24), less than 5% of carbon revenue. If divided by the population: 3 USD/yr/person...(a bag of charcoal is sold around 8-10 USD) - other stakeholders (WW, equity investors, other investors): not public information (Email Adkins, June 3) - No specific targeting of marginalised groups yet, but desire to allocate a bigger part of carbone revenue to illegal charcoal producers...But no precise idea of how it could be done (Interview, April 24) - In % (considering a net carbon revenue of 7 - 0,7 = 6,3 MUSD) : 16% for ranchers, 5% for CBOs, 79% for other stakeholders (WW, investors)
Other co-benefits	- Jobs: 400 according to p1 and p4 of the memo for the WB vs 203 according to information sent: 10 Management, 82 Rangers, 21 Watchmen, 35 Workshop/Housekeepers, 15 Greenhouse, 16 Carbon Stock Monitoring Team, 3 Community Engagement, 4 Jr. Admin, 2 Biodiversity Monitoring, 8 Eco-charcoal, 4 Recyclers, 3 Local Printing Factory (Email Adkins, May 31) NB: Seamstresses considered part of the 400 jobs in the memo for the WB, while these jobs depend on WWC-IPZ, a for-profit company (T-shirt industry) established in a tax free area in 2003, before the start of the REDD+ project (interview, April 24)
Method to set the benefit-sharing	No detailed costs/benefits analysis. 1/3 for private landowners decided by WW since the beginning. Share for the CBOs estimated after deduction of private landowners share, WW share and other investors' shares (Interview, April 24)
Household revenues	Not monitored. Expected to be done in 2013
Transparency of operations	- Known (and checked by third party): volume of credits issues (VCS database) - Known (communicated by the project developer): quartely payments made to the private landowners based on the sales of 2010 credits P2, buyers' name and credit price per buyer for the 2010 credits P2, amount of grants disbursed to the CBOs via the WWCT, operational costs and jobs/salaries (NB: 400 jobs vs 203? Do WW consider WWC-IPZ jobs as "co-benefits", even if these jobs were created before the REDD+ projects?) - Not known: amount of credits sold for P1 and associated carbon revenue, shares of other stakeholders (WW, equity investors, other investors)
3E?	- Effectiveness: with roughly 1,3 MteCO2/yr of avoided emissions compared to a projected scenario, the project is effective - Efficiency: using WW estimates (1,3 MteCO2/yr in 2012, with 0,7 MUSD of operating costs...very rough estimate, not taking into account investment costs or other costs), the abatment cost appears low (0,5 USD/teCO2)...But, 79% of the net carbon revenue (after discounting WW operational costs, ranchers and CBOs payments) is exported out the project area, as profit. The efficiency would be much better if part of this net carbon revenue was re-invested in field operation. In other word, at equal cost, the mitigation potential could be multiplied - Equity: figures speak for themselves...(i) the main deforestation agents are the adjacent communities to the ranches (charcoal production, slash-and-burn) but their opportunity cost are not estimated and carbon payments seem to be far too low (i.e. 3 USD/yr/person vs 8-10 USD/bag of charcoal), (ii) ranchers receive carbon revenue while their activities are down (tse-tse fly) and there is no clear link between their activities and deforestation (economic rent?), (iii) 4/5 of net carbon revenue goes back to WW and investors

Project	**TIST AR Projects (7 VCS/CCBS AR projects)**
Area	? 35 000 project areas (5 million trees)
Main stakeholders	- Project developers: TIST and Clean Air Act Corporation (CAAC), the private sector partner of TIST in charge of carbon components - Small scale farmers
Land tenure	Private land (individual farms, a majority < 1ha)
Carbon rights	Granted to CAAC
Standards	VCS and CCBS
Credits issued	4,1 MteCO2 from 2004 to 2033 (Email Naitore, April 13). 360,978 teCO2 up to now, according to the VCS database
Carbon revenue	42 MUSD from 2004 to 2033. Assumptions: carbon price to increase to 12 USD/teCO2 by 2018 and stay constant till 2033 (Email Naitore, April 13)
Operating costs	30-32 MUSD from 2004 to 2033 (Email Naitore, April 13)
Benefit sharing of carbon revenue	- CAAC: 30% = 3-3,6 MUSD from 2004 to 2033 - TIST: ? - Farmers: Advance payment (0,02 USD/tree/yr, around 20 USD/ha with 1,000 trees/ha) + 70% of net carbon revenue when project breaks even (when?) - Specific targeting of small-scale farmers - In % (Email Naitore, April 13) : 30% for CAAC, 70% for small-scale farmers. What about TIST: operational costs covered only?
Other co-benefits	- Farmers: soil fertility + pruning/thining/collecting of dead wood, estimated at 2 billion KSh compared to 28 million Ksh in carbon payments (Email Naitore, April 13): 71 times more co-benefits than carbon benefits. It appears enormous and it woul be worth cross-checking the assumptions/calculations made
Method to set the benefit-sharing	"70% was the most the project could afford"
Household revenues	Not monitored.
Transparency of operations	- Known (and checked by third party): volume of credits issues (VCS database) - Known (communicated by the project developer): shares of CAAC and small-scale farmers, TIST operational costs...But all these figures should be cross-checked based on contracts, official statements, banking situation, etc. - Not known: amount of credits sold, credit sale prices, and associated carbon revenue
3E?	- Effectiveness: the 7 projects are expected to remove 4,1 MetCO2 in 30 years, which gives an average of 137,000 teCO2/yr. With 360,978 teCO2 after 10 years, the project is on track to reach 25% of its target...This can be explained by the fact that the inception of the projects took longer than expected or the fact that removals are low at the start of an AR project...but it can also be the consequence of a poor attractiveness of carbon payment offered to the farmers, whchi would mean that the benefit-sharing system is not very efficient - Efficiency: using TIST estimates (4,1 MteCO2 from 2004 to 2033, with 30-32 MUSD of operating costs), the abatment cost appears moderate (7,5 USD/teCO2). - Equity: if 70% of net-carbon revenues are effectively paid to small-scale farmers, it seems equitable and even impressive, compared to all the other projects assessed

Project	**Mikoko Pamoja REDD+ project**
Area	112 ha
Main stakeholders	- Project developer: Kenya Marine and Fisheries Research Institute - Foreign public partners: Edimburgh, Edimburgh Napier, and Bangor Universities (scientific and technical support through the Tidal Forests of Kenya Project) - Foreign private partners: Eartwatch Institute (contribution in terms of volunteers), and Aviva Plc (contribution to validation and coordination costs, in exchange of future credits. See p27 of PDD) - Public partner: KFS, who hold the forest management agreement with the Gogoni-Gazi CFA. The KFS was not consulted extensively during the elaboration of the PDD - Local stakeholders: Gogoni-Gazi CFA and Mikoko-Pamoja CBO
Land tenure	Gazetted forests
Carbon rights	Granted to CFA by KFS
Standards	Plan Vivo
Credits issued	Estimated at 2,200 teCO2/yr (PDD)
Carbon revenue	Estimated at 12,0000 USD/yr (PDD)
Operating costs	Estimated at 66% of carbon revenue: 8,000 USD/yr (PDD)
Benefit sharing of carbon revenue	As presented in the PDD: - Project managament: 66%, included 33% for the salary of the project coordinator - Mikoko Pamoja CBO: 33%, But, many problems/inconsistencies: - Plan Vivo requests a minimum of 60% to be allocated to communities. To reach this threshold, the salary of the project coordinator is considered as "income allocated to communities", which is not self-evident and may be refused by the Plan Vivo Standard - The Mikoko Pamoja CBO is officially presented as the beneficiary (in the PDD), but the project team wants to work exclusively wit the Mikoko-Pamoja CBO, who is one of the 16 user groups under the CFA. The CFA Chairman himself is not sure whether the 15 other user groups will understand anc accept that (Interview, April 25) - The KFS was not extensively consulted during the elaboration of the PDD and the project team does not know whether they will have to share 20% of carbon revenue to the KFS (as done for instance by the Kakamega project, which has the same institutional design) - The CFA and CBO members believe the carbon revenue would be around 17,500-20,000 USD/yr and that they would get 80%, 15% would go to operating costs, and 5% to the salary of the project coordinator (Interview, April 25) - There is no list of the Mikoko-Pamoja CBO members, which mean no clear targeting of payments among the 5,400 inhabitants of the two villages: Gazi, Gogoni ((Interview, April 25) - Since deforestation drivers are not well identified - no charcoal production, no fish/shell smoking, no mangrove rice cropping, etc. - it appears difficult to target the payments on deforestation agents (Interview, April 25) - The agreements made with Earthwatch and Aviva are not known by the project team: will they also be part of the benefit-sharing (prior access to carbon credits under an ERPA, other)?
Other co-benefits	600 poles/yr of Casuarina (for the Mikoko Pamoja CBO)
Method to set the benefit-sharing	It is fully described in pp. 16-17 of the PDD and future guidelines for community expenditures are even detailed. But, looking at the problems/inconsistencies pointed above, it seems clear the beenfit-sharing arrangements have not been discussed extensively among the stakeholders and no common arrangements are agreed yet.
Household revenues	Monitoring not foreseen (according to the PDD)
Transparency of operations	Project not yet started, so impossible to respond to this question
3E?	It is difficult to say anything about the efficiency and effectiveness of the benefit-sharing arrangements, since the project did not start. As for the equity aspect, since equity starts with a balanced access to information, the situtation is not good. During the field visit, it was recommended to undertake a full consultation process and to review the PDD accordingly, instead of rushing for a validation of the current version that does not reflect the views of the main stakeholders (CFA, MP CBO, and KFS among others)

Project	**Kakamega Community AR project**
Area	150 ha (foreseen: 490 ha)
Main stakeholders	- Project developer: Eco2librium (US-based for-profit company) - Public partner: KFS, who hold the forest management agreement with the Mulieshi CFA. - Local stakeholders: Mulieshi CFA
Land tenure	Gazetted forests
Carbon rights	Granted to CFA by KFS
Standards	CCBS
Credits issued	0 up to now. 420,000 teCO2 foreseen over 40-50 years
Carbon revenue	2 MUSD foreseen over 40-50 years
Operating costs	So far, 150,00 USD spent (CCB certification and validation, income to communities to restore 150 ha, project monitoring)
Benefit sharing of carbon revenue	- Mulieshi CFA keeps 40% of net carbon revenue + 2 KSh/surviving tree/month paid to family planting/taking care of trees (payment every quarter) (2 KSh/month = 0,29 USD/yr, which is 15 times more than what is paid by TIST). To date: 100,000 USD have been paid to the CFA - Eco2librium gets 20% from the CFA - KFS gets 40% from the CFA
Other co-benefits	- Farmers: soil fertility and other environmental services, but no detail about pruning/thining/collecting of dead wood
Method to set the benefit-sharing	Not stated
Household revenues	Monitoring not foreseen (according to the PDD)
Transparency of operations	Project not yet started, so impossible to respond to this question
3E?	Idem

	Mbirikani REDD+ Project (in preparation. PDD not yet finished)
Area	22,000 ha
Main stakeholders	- Project developer: Imbirikani Group Ranch (IGR - private company) - Private partners: African Wildlie Foundation (NGO), CAMCO (private company), Centre for Livelihood Opportunities Unlimited and Technologies (CLOUT), Masaï Preservation Trust - Public partners: KFS and KWS (assisted with enforcement support) - "30,000 squatters living adjacent to the Chyulu Hills National Park in addition to squatters living illegaly inside the National Park and a growing population inside the IGR" (see p42 of the draft V3.0 PDD) and "15,000 Maasai people living in IGR" (see slide 2 of the ppt presented at the inception workshop)
Land tenure	Private land (group ranch)
Carbon rights	Granted to IGR
Standards	VCS and CCBS foreseen
Credits issued	na
Carbon revenue	na
Operating costs	na
Benefit sharing of carbon revenue	na
Other co-benefits	na
Method to set the benefit-sharing	na
Household revenues	na
Transparency of operations	na
3E?	na

	Escarpment AR Project
Area	300 ha
Main stakeholders	- Project developer: Carbon footprint Ltd (UK-based for-profit private company) - Public partners: KFS - Private partner: Escarpment Environment Conservation Network (ESCONET)
Land tenure	Not clear (Email Waiganjo, May 22)
Carbon rights	Not clear (Email Waiganjo, May 22)
Standards	No standard
Credits issued	No exact accounting: " estimated amount of carbon credits is not properly known but according to our agreement with Carbon Footprint Ltd each tree when fully grown, will offset a ton (1 ton) of carbon dioxide. [...] the tree orders from our partners is not regular but subject to the orders that they manage to get from their clients" ((Email Waiganjo, May 22)
Carbon revenue	Not stated (Email Waiganjo, May 22)
Operating costs	Not clear: "Our activities offsets more of the KFS cost of forest rehabilitation which could be upward of Ksh. 60,000 per hectare not including the cost of maintaining the same including patrols to check" (Email Waiganjo, May 22)
Benefit sharing of carbon revenue	Not stated
Other co-benefits	Salaries, sale of seedlings, milk, honey (Email Waiganjo, May 22)
Method to set the benefit-sharing	Not stated
Household revenues	Not stated
Transparency of operations	Hard to reach this project developer (many phone calls and emails)
3E?	Considering the poorness of information sent, it is impossible to conclude on these 3 aspects.

3.3. Key findings

- Openness: two out of the eight projects did not respond to our questions, although we did several attempts by phone or email. Others responded, but the responses were not always clear enough to understand some key issues. In particular, it proved difficult to have access to certain data, like volume and amount of carbon sales, credit price, share of certain stakeholders (like project developer or private investors);
- Incompleteness: As a direct consequence to the above, if key information is missing, the only ways to understand the situation are to triangulate data sources or to do assumptions. It made our work very difficult;
- Information asymmetry: If information is difficult to access for outsiders (such as we), it appears to be the same for local stakeholders involved in some of the projects assessed (or even worst, if you are illiterate and do not have any official mandate from the KFS or UNDP to ask questions). The local communities we met (see **Annex 4** infra) do not have clear ideas in terms of costs/benefits/risks associated with each one in their project and lack of precise and accurate figures to understand the choices made by the project developer in terms of benefit-sharing;
- Heterogeneity: Benefit-sharing arrangements are very diverse, in terms of identification of carbon rights (depending if the project is implemented on private land or gazetted land), scope (carbon only or carbon and co-benefits: jobs, wood), timing (ex-post payment for Kasigau or Mikoko, ex-ante and ex-post payments for TIST and Kakamega), disbursement procedures (to individuals like TIST, to households like Kakamega, to CBO like Kasigau or Mikoko), shares (esp. for the local communities: from 7% in the case of Kasigau to 70% in the case of TIST).
- 3-Es: According to the data mentioned in the PDD of the projects considered, all of them – in a more or less pronounced manner – will reduce emissions or increase removals, and can therefore be considered as “effective”. In terms of efficiency, it is hard to conclude, since none of the projects provided the necessary data to allow comparing abatement costs, opportunity costs and transaction costs. Last but not the least, in terms of equity, the situation looks very different from one project to another, with a difference of one to 10 for the share of benefits to the local communities.

4. Recommendations and way forward

4.1. Key recommendations in terms of definition of REDD+ right

As outlined in the IIED meta-analysis (see **part 1.3** supra), in Kenya like in many other countries, in the absence of legal definition of such right, project developer are reinterpreting forest and land legislation. It is for instance the case with REDD+ projects implemented on private ranches, where private landowners are supposed to be the "owners" of the carbon rights and identified as such in the PDD. This is not in line with the Land Registration Act and the Forests Bill, which both recognize the rights of all types of local stakeholders (not only private landowners) to take their part in benefit-sharing emanating from land based natural resources, e.g. carbon.

It is especially worrying, since Kenya, at the contrary to many other sub-Saharan African countries, is far advanced in terms of land and forests legislation. Indeed, in most of these countries, there is a lack of clarity in terms of land tenure (customary vs positive), communities' rights are often not recognised, and the presumption of public domain often prevails. The same applies in the forest sector, with the State often being recognised as the forests owner, and community-based forest management being poorly developed. For instance, in the Congo basin, among the ten countries of the *Commission des Forêts d'Afrique Centrale* (COMIFAC), operational experiences of community-based forest management can only be found in Cameroon (25 pilot sites), and some few ones in Gabon (two pilot sites) and DR Congo (two pilot sites)[25].

Even if there are still work to be done, especially to enact the secondary or delegated legislation of the newly published Land Acts and to finalise the Draft Forests Bill, the basis are there to clarify REDD+ right. In the context of the Kenyan legal architecture, the option 2 – "Ownership of carbon rights is proportionate to efforts", presented in **part 1.2** supra, seems to be more adequate, as it shares the spirit of the land and forest legislation. An ad hoc legal text (level of enactment to be further discussed during the consultations) could list the criteria or indicators to be taken into account to identify the REDD+ right holder, especially the following two:

- Tenure rights, including recognized and registered customary rights: The newly published Land Registration Act and Land Act provide a strong basis for that (see **part 2.4** supra). However: (i) the status of unregistered community land should be clarified since the Land Registration Act does not detail this case, (ii) the finalisation of the draft Community Land Bill would help to secure local stakeholders right on such land, and, by extent, their access to potential REDD+ right;
- Resources usage rights, including for forest concession-holders or CFAs contributing to removals and/or emissions reduction. The Forests Act already provides for communities living adjacent to forests to enter into collaborative management agreements with KFS through CFAs. The draft Forests Bill under preparation may go further and aim, among other things, to clarify the types of benefits to be shared and the main rules to do it. Therefore, the Forests Bill could serve as a basis for defining criteria or indicators in terms of resources usage rights, which in turn will be used to define REDD+ right.

Last but not the least, the implication that may have the on-going devolution process on the issue of the legal definition of REDD+ right is hard to know. Indeed, as said earlier (see **part 2.3** supra): "functions to be devolved from the Central Government to the County Governments are not specified in the Transition to Devolved Government Act: one cannot say at what level the carbon rights and benefit-sharing arrangements will have to be defined." In the absence of specification from this Act, one could assume that REDD+ right has to be defined at Central Government level, and later on transposed at County Governments level if need be, but this has to be further discussed.

4.2. Key recommendations in terms of definition of REDD+ benefit sharing

Benefit-sharing of forest resources is one of the key-issue being discussed in the draft Forests Bill, and carbon, as one of the forest resources, is quoted in the draft Bill. In practical terms, the most effective and fastest would be to address the issues of REDD+ right and REDD+ benefit-sharing in the frame of this broader discussion on the setting-up of forest resources benefit-sharing in the draft Bill, with REDD+ right considered as one of the benefits (along with timber, NTFP, jobs, etc.)..

[25] See http://www.comifac.org/plan-de-convergence/etat-des-forets-du-bassin-du-congo

In the view of the consultants, based (i) on the draft Forests Bill and the memo sent by NACOFA (see esp. p6 “Need for detailed subsidiary rules developed to guide […] cost and benefit sharing for forest resources”), (ii) our assessment of the on-going Kenyan AFOLU projects, and (iii) lessons learnt from other studies on benefit-sharing systems (see **part 2.2** supra: PESKETT, 2008, ESSAM-YASSIN, 2011, and COSTENBADER, 2011), the first measure would be to make mandatory a costs/risks/benefits assessment of the on-going and future AFOLU projects, using common tools and methodologies, in order to facilitate comparisons among projects and to have a collective understanding among GoK, local communities, private project developers, donors, etc.

This assessment should be mandatory and non-compliance with this could lead to the revocation or non-renewal of the letter of approval granted by the GoK (if it is possible. NB: such a letter is requested by the CDM and by most of the voluntary carbon standards to register the project) in case of an already approved AFOLU project, or the refusal of such letter in case of a new AFOLU project.

Raw data and methodologies used, assumptions made, results obtained should be made public, open to comments, and could be cross-checked by an Independent Observer (for which no conflict of interest has been reported), as it is the case in the forest industry for countries that signed a Voluntary Partnership Agreement (VPA) with the UE in the frame of the Forest Law Enforcement, Governance and Trade (FLEGT).

The idea that carbon sales should remain secret, because they involve private investors related to the project developer by confidentiality agreements do not make sense: all the projects developers we met agreed that a certain share of the carbon-benefits and/or co-benefits should be devolved to other stakeholders, esp. the local communities. Following this logic, if the project developers are willing to surrender a certain percentage of the benefits to other stakeholders, they should be agreed that benefits can be transparently estimated and known by all.

In practical terms, tools and methodologies should be simple and robust enough to encompass all the diverse situations encountered on the ground and, also, to allow for a good social and economic valuation of certain types of co-benefits (firewood, jobs, soil fertility, etc.) or costs (monitoring, overhead costs, etc.) which are put forward by projects developers, but proved difficult to be quantified.

This being said, in addition to making a costs/risks/benefits assessment of any AFOLU project mandatory, the following issues could be defined and made mandatory:

- <u>Clear definition of the scope of the benefit-sharing:</u> In order to avoid situations where some stakeholders benefit from valuable goods (such as carbon) and put forward other goods or services difficult to evaluate (such as protection of grazing areas, watershed, biodiversity, microclimate, limitation of erosion, provision of collective social services such as health centres, schools, etc.) to justify the equity of the proposed benefit-sharing, a proposal would be to limit the scope of the costs/risks/benefits assessment, and consequently the benefit-sharing system, to what can be reasonably economically evaluated. It is may be not the best, but at least it avoids comparing apples and oranges in the short term. In addition, if non-merchant benefits are not taken into account, it will a priori not be at the expense of local communities. In the medium to long term, the definition could be refined, taking into account the work carried out in the frame of the UN-REDD toolkit on multiple benefits;
- <u>Minimum thresholds:</u> To be accepted, any proposed benefit-sharing system should at least demonstrate (through the cost-risks/benefits assessment) that opportunity costs + extra initial benefits for a transition to alternative activities of each stakeholder are more than duly covered. NACOFA even goes further and defends the idea of having 30% of environmental net-benefit (like carbon) ploughed back to the communities (see **part 2.5** supra: NACOFA comment made on art. 70(4) of the draft Forest Bills). This has still to be discussed;
- <u>Beneficiaries:</u> To be accepted, any proposed benefit-sharing system should clearly present all the stakeholders involved, describe their rules/responsibilities, evaluate the costs and/or risks they support and link it with the overall costs/risks/benefits assessment. In particular, in line with the land and forest legislation, usage rights on land and forest resources of local communities have to be identified and the project developer should not be the one to decide whether or not to work with some particular communities, CFAs, or CBOs. This has to be decided collectively (project developer, Kenyan administration, local communities and private landowners in the project area or surrounding the project area) with ensuring real, effective and documented engagement of stakeholders;

- MRV of forest carbon and other multiple benefits: These MRV systems are foreseen in the Kenya RPP, but not yet in place. To facilitate comparisons among projects and the docking of AFOLU projects in a future national REDD+ strategy, each AFOLU would have to make its own MRV systems compliant with the future national MRV systems. If a project's actual benefit distribution scheme does not comply with what was certified (based or not on a complaint from affected parties) proper sanctions should be used such as warning, suspension, revocation of government licenses, exclusion from REDD+ registries etc. to either enforcement compliance or make the sale of credits impossible;
- Free and Priori informed Consent (FPIC): Stakeholders clearly lack information (see above on information asymmetry). Information sharing, consultations and consent procedures should be used similar to FPIC to make sure that affected communities are informed, they understand the stakes, accept the arrangements, and that this is properly documented;
- Grievance mechanism: The presence of an Independent Observer aims at avoiding problems and complaints. However, if problems and complaints arise, they could be dealt with and an appropriate grievance mechanism should be in place[26].

As for local stakeholders and the choices in terms of distribution of benefits (i) at community level, household level or individual level, (ii) in cash or in kind, and (iii) up-front, result-based, mix of the two: these choices can left up to the project stakeholders, because they have implications in terms of effectiveness, efficiency, and equity that can only be assessed on a case by case basis.

4.3. Work plan for the follow up, incl. stakeholders presentations

As mentioned several times (see **parts 4.1 and 4.2** supra), the on-going discussions to finalise the draft Forests Bill have a great focus on benefit-sharing of forest resources (incl. carbon) and already gathers most of the stakeholders involved in the REDD+ process in Kenya (KFS, National Land Commission, Commission on Revenue Allocation, NACOFA, donors, AFOLU projects developers, etc.). Since the first stakeholders' meeting in Brackenhurst (August 2012), they already gathered three times and seem willing to progress the debate in the short-term.

In order (i) not to lose this political momentum, and (ii) to avoid duplication of efforts and processes, it is proposed a simple way forward:

- Presentation of the findings/recommendations of this study during an ad hoc workshop early July.
- If accepted by all at the end of this workshop, enrichment of the current negotiations on the draft Forests Bill with ad hoc elements on REDD+ right and REDD+ benefit-sharing contained in this report.

[26] A UNDP-funded study on REDD+, transparency, and anti-corruption measures should come with proposals in that view

Annex 1 – Terms of reference

Background

The Government of Kenya (GoK) has been engaged in a number of activities to prepare the country for a REDD+ mechanism, mostly with support from the World Bank's FCPF. The country is also a partner member of UN-REDD. To advance and complement these current efforts in REDD+ readiness, the GoK has recently requested the UN-REDD Programme to provide targeted assistance for developing capacities on REDD+ governance, with a focus on two critical areas:

- How to identify and respond to corruption risks in REDD+; and
- Scoping of carbon rights and benefit-sharing arrangements in REDD+ (in anticipation of investment opportunities).

Within the UN-REDD partnership, UNDP has the lead in these areas of work, and has accordingly been working with the Government and other country stakeholders on a proposal for work to be carried out. These TORs relate to work to be carried out under the second area.

The REDD+ Governance proposal will launch analysis and national dialogue on carbon rights and benefit sharing in REDD+, which are fundamental to creating a conducive environment for investments in forests and carbon finance in general, with due recognition of community rights and expectations, and a clear role for government and public institutions.

The outputs will serve two important purposes: 1) they will be an important resource for the government and for people wanting to develop, or be involved in, carbon projects; and 2) they could be converted into guidelines or other similar instruments in future policy processes.

Activities

- Develop an overarching framework (possibly using different tenurial systems as a basis), to look at carbon rights/benefit sharing situations that may exist in a future REDD+ strategy under different situations[27]. This should be constructed in a way that covers all of the most likely situations, that feeds from existing experiences in related domains, and in a way that can feed into the REDD+ strategy. The framework should:
  - Draw on the latest international thinking on definitions and practical approaches to understanding both carbon rights and benefit sharing in REDD+.
  - Consider effectiveness (especially environmental effectiveness), efficiency (economic efficiency and promotion of investment) and equity implications of carbon rights and benefit sharing systems.
  - Take into account key developments that may result from the devolution process that is underway (e.g. through using scenarios to understand the impacts of this).
  - Take into account key-entry points into on-going policy processes and government priorities, such as the carbon investment framework and interest in market based approaches.
- Conduct a brief analysis of existing policies and laws relevant to carbon rights and benefit sharing in REDD+. This could draw on other on-going activities such as work on a REDD+ legal framework being supported by FAO under the UN-REDD umbrella.
- Use the framework for an analysis of existing carbon projects or other projects relevant to REDD+ (at least 3 projects) to understand how carbon rights and benefit sharing arrangements have been worked out so far.
- Guide the national consultant on the fieldwork to be carried out as part of the above analyses.
- Develop recommendations in a form that can be fed into the National REDD+ strategy or other relevant policy/legal processes (e.g. Forest Policy; benefit sharing rules that are being developed etc.).
- Develop a work plan for follow up of this current work stream.

[27] This framework must clearly define carbon rights and benefit sharing in the Kenyan context

- Develop and implement a work plan for consulting stakeholders on the analytical outputs. This should include an initial expert workshop and a final stakeholder validation workshop with key stakeholders in the Kenya REDD+ process.

Outputs

- Analytical report compiling information and analysis gathered, and proposing a framework
- A document providing recommendations and/or framework guidelines that can be integrated into REDD+ strategy
- A work plan for follow up of the work stream

Competencies

The contracted organization/individual should have at least an advanced degree in forestry, forestry governance, environmental economics or related field. Priority will be given to an entity with relevant experience in research in the area of forest governance and financial management in the natural resource sector, combined with experience in facilitating multi-stakeholder consultations at national and local levels. Demonstrated ability in assessing laws and policies related to fiscal management, economics, governance and social impacts of forest and natural resource management is highly desirable.

Work plan

Milestone	**Indicative date**
Analytical report compiling information and analysis gathered, and proposing a framework	15 April 2013
A work plan for follow up of the work stream	22 April 2013
A document providing recommendations and/or framework guidelines that can be integrated into REDD+ strategy	6 May 2013

Required Qualifications and Experiences

- Masters in a relevant discipline, such as Political Science, Development Studies Sociology or Natural Resource Management;
- Demonstrated knowledge and experience working on issues of benefit sharing in forestry based carbon projects in developing countries;
- Knowledge and experience of working in Kenya preferred;
- Understanding of the work of the UN-REDD Programme and FCPF;
- Good command of English (both speaking and writing).

Annex 2 – Questions/issues on benefit sharing to be addressed

➔ Three criteria have been proposed to assess the merits of various REDD+ approaches (3Es):

- Effectiveness: contribution of the benefit sharing arrangement to reducing emissions
- Efficiency: ability to minimize transaction costs associated with benefit generation and delivery
- Equity: perception of domestic stakeholders as fair

There are tradeoffs between the 3Es, for example a household level benefit sharing arrangement may be considered as fair and even as effective but may have too high transaction costs. Benefit sharing arrangements could thus be analyzed to show how they have managed to strike a balance among the 3Es.

➔ Designing benefit sharing arrangements

- How to target benefits – this includes questions such as:
  - Prioritization of key actors whose land use behaviours will need to change in order to achieve emission reductions,
  - Identification of actors who do not play a major role in future emission reductions but should be compensated on an equity basis (for example those who have been historically good forest stewards) – land tenure and carbon rights are key issue here,
  - Reconciliation of trade-offs between the 3Es,
- How to tailor benefits? i.e. how to create incentives to motivate desired behaviour (form, scale and timing),
- How to deliver benefits (governance and financial structures used and what types of rules and institutions underpin them),
- How to ensure overall legitimacy (how it is perceived by both beneficiaries and non-beneficiaries and how beneficiaries are involved in developing, monitoring and overseeing the performance of the BS system and the flow of benefits.

➔ Questions to address during analysis of land based carbon projects:

- Design of BSS with the participation and consent of all relevant stakeholders
  - Was a transparent and participatory process used to identify potential beneficiaries and their interests as well as actors whose behaviour needs to change to address drivers of deforestation?
  - Is there a transparent and participatory assessment of predicted and actual benefits, costs and risks of the REDD+ program for relevant right holders and stakeholder groups at all levels, with special attention to women and marginalized and or vulnerable people?
  - Are the criteria for the distribution of benefits developed through a transparent and participatory process that takes into account the following factors: customary rights to land and forests, the full range of costs (not just opportunity costs), the trade-offs between the 3Es?
  - Is the final design of the benefit sharing system (including how costs and benefits are shared) undertaken with free, prior, informed consultation leading to a broader community support and the full participation of all relevant stakeholders and actors?
- The BSS clearly defines the basis for distributing costs and benefits and pays particular attention to the needs of marginalized groups:
  - Does the BSS clearly define the criteria and rationale for targeting specific beneficiaries, including criteria related to land tenure and property rights (including carbon rights)?

- Does the BSS prioritize those actors directly responsible for deforestation and forest degradation?
- Does the BSS find ways to reward or incentivize those who have historically been good forest stewards or who currently live in low-deforestation areas (such as the “stock and flow” approach)?
- Does the BSS give special consideration to marginalized groups (such as women and indigenous peoples)?

- The operations of the BSS are transparent, legitimate and monitored by relevant stakeholders:
  - Are the operations of the benefit delivery mechanisms (i.e. financial and institutional structure) are overseen by a multi-stakeholder management body representing key stakeholders involved in REDD+?
  - Are financial statements and other routine monitoring reports (including compliance with standards) fully disclosed in the public domain?
  - Are the operations of the benefit delivery mechanism subject to an external and independent audit, the findings of which are publicly disclosed?
  - Is an independent redress mechanism established and operational to serve stakeholders with an interest in the benefit sharing system?
  - Are the results and impacts of benefit sharing, including actual distribution of benefits, routinely monitored in a participatory manner?

Annex 3 – Issues at stake with carbon markets and REDD+

➔ Genesis of the carbon market, one of the pillars of the Kyoto Protocol

Based on their experience of the SO2 market, created in 1990 through the Clean Air Act to fight against acid rain, the USA campaigned for the articles 3-10, 3-11, 3-12 and 17 of the Kyoto Protocol that created the carbon market. Articles 6 and 12 followed and gave birth to the Joint Implementation (JI) and Clean Development Mechanism (CDM).

The idea is simple: it is "*to internalize externalities*" (PIGOU, 1920), i.e. to give a price to something (greenhouse gases emissions) that did not have, in order to change the behaviour of economic agents. It turns out that this internalization is quite easy for GHG emissions: they are relatively easy to measure (which is not the case of biodiversity, for example) and one tCO2e produced anywhere on the surface of the earth has the same impact on the global climate.

By putting a price on GHG emissions, economic efficiency is improved: it allows lowering marginal abatement costs of GHG emissions (low hanging fruit) rather than fixing regulatory constraints that would create uniform abatement costs for some countries or sectors.

To understand this choice to use a carbon market, it is interesting to get back into economic thinking of the 1980s, dominated by the "3D", "*Disintermediation, Decompartmentalisation, Deregulation*" (BOURGUINAT, 1997), popularised by REAGAN and THATCHER Administrations.

While recognising the three pillars of sustainable development (BRUNDTLAND, 1987), the neo-classical economics in general and the 3D theory in particular are betting that the economic policies alone can ensure social development and the protection of environment.

The creation of the carbon market is a reflection of this vision, as will the decisions of the Uruguay Round (1986-1994) which will lead to the creation of the World Trade Organization (WTO), whose main purpose is to dismantling tariff and non-tariff barriers to trade, regardless of environmental and social aspects. The Millennium Round, which was expected to address environmental and social standards, aborted in 1999, and these issues were later on addressed marginally in the WTO negotiations.

The Kyoto Protocol in 1997 raised the basis of the carbon market, but negotiations between the COP4 Buenos Aires in 1998 and COP7 Marrakech in 2001 would oppose the USA (followed by the countries of the Umbrella Group) and the EU. The USA supported a carbon market with Kyoto units freely allocated to the concerned States (and also including CDM and JI credits). The EU was divided, some member States agreeing with the USA, others, on the contrary, supporting an ambitious and coercive system, with payment of Kyoto units when granted.

This last approach, which is equivalent to applying a carbon tax, will be defended in particular by Germany, whose Government was jointly managed at that time by a "red-green" alliance. Despite the opposition of certain countries and environmental NGOs (which would quickly rename Kyoto units "rights to pollute"), the USA won the game in Marrakesh in 2001, however, giving certain guarantees, including: (i) the possibility to gradually pay allocation Kyoto Units (by setting a uniform price or by auctioning – which creates ultimately the same economic signal than a tax. This idea was quickly buried), (ii) the design of environmental and social safeguards for the implementation of CDM projects, and (iii) the separate treatment afforestation/reforestation of CDM.

➔ States of carbon markets: regulated and voluntary

The Kyoto market, universal, is embodied in the EU Emissions Trading Systems (EU-ETS, which covers 40% of EU GHG emissions and drains nearly 80% of Kyoto carbon credits, or about 70 million credits traded daily in 2011) and some other regulated domestic markets more hidden (in Norway, Japan, New-Zealand and the UK).

CDM credits are traded on this Kyoto market: until now, 212 methodologies of CDM projects have already been approved and 330 have been submitted (Source: http://cdmpipeline.org) in 15 sectors, 5,623 projects have been registered and 1.167 MtCO2e of avoided GHG emissions have been generated (Source: http://cdm.unfccc.int). Finally, since recently, it is possible to aggregate CDM projects under Programme of Activities (PoA CDM).

Voluntary markets and voluntary carbon standards are very numerous. The main ones are the following: Voluntary Carbon Standard (VCS - www.vcs.org) set up in 2006 by private companies, Gold Standard (www.cdmgoldstandard.org) established in 2003 by WWF and "over-accredits" CDM projects or accredits voluntary projects, Carbon fix (www.carbonfix.info) recently acquired by the Gold Standard, Chicaco Climate Exchange (CCX - www.chicagoclimateex.com) set up in 2003 by private actors, Regional Greenhouse Gas Initiative (RGGI - www.rggi.org) established in 2008 by the States of North Eastern United States, Plan Vivo (www.planvivo.org) established in 2003 by a Scottish Foundation, Social Carbon (www.socialcarbon.org) established in 2003 by a Brazilian company, the New South Wales Greenhouse Gas Reduction Scheme (GGAS - www.greenhousegas.nsw.au) established in 2003 by the Australian State of New South Wales etc. It is sometimes difficult to find among all these markets and standards, which have different objectives, methodologies and procedures.

Regulated and mandatory markets strongly dominate the global carbon market, with 98.9% of its total volume and 99.7% of its total value in 2009. However, the voluntary market has experienced significant growth in recent years: the volume of trade has increased from 12 in 2005 to 130 MtCO2e in 2010. In 2011, trade fell to 90 MteCO2e, largely due to a decline in trade within the CCX. The total cumulative value of voluntary carbon credits reached 2.5 GUSD in 2011 (source: www.ecosystemmarketplace.com).

➔ The three objectives of the CDM and limitations of this tool

The CDM has three objectives:

(I) To reduce GHG emissions or to increase GHG removals

To achieve this goal, we must create a "scarcity" of Kyoto units ... but supply and demand are far from being balanced: colossal amount of "hot air" - 13 GteCO2 – at the end of 2012 (twice the annual GHG emissions in China!), abandonment of their Kyoto targets by some countries (Canada, Japan, Australia, etc..) and therefore lower demand, influx of CDM credits from "HFC" projects and therefore offer up, etc. The same phenomenon is observed at the EU-ETS level and led to intense discussions, late 2012 - early 2013, on the opportunity to have a backloading of 900 MtCO2e of credits.

The outlook is not very encouraging if we consider that firm commitments to reduce GHG emissions are ridiculous (from -20% compared to 1990 for the EU and Norway, to -0.5% compared to 2000 for Australia) and no satisfactory solution has been found to purge the hot air. This context does not encourage the development of CDM projects.

More generally, for all the reasons stated above, there is an enormous gap between the observed price in the Kyoto market (especially in recent months: record low of 2.81 €/tCO2e on EU-ETS the 24/01/2013) and the shadow price of carbon, estimated at a little over 35 €/tCO2e in France in 2012 and 100 €/tCO2e in 2030 (recommended value for the achievement of policy objectives: European commitment of -30% in 2030 compared to 1990 and a French commitment "*Factor 4 by 2050*". QUINET, 2009).

(ii) To facilitate the transfer of clean technologies

As we saw just before the Kyoto units are surplus, so the CDM is not as developed as it could be. Some believe that, because of this, "*CDM and JI are dying*" (BELLASSEN, December 2012). Beyond that, there is a strong disparity in terms of sectors - the HFC/PFC/SF/N2O destruction projects represent 2% of CDM projects but generate 29% of CDM credits - and in terms of countries - 3.6% of CDM credits come from Africa and 75% from Mexico, India, China and Brazil (Source: www.cdmpipeline.org/cdm-projects-region.htm).

The low share of African CDM can be explained by the fact that (i) the industrial and energy sectors are – in most African countries - underdeveloped (hence difficulty in proving the additionality of CDM projects, unless the projects use a "suppressed demand" baseline, as advocated by some project developers), (ii) the CDM transaction costs are high (technical and economic studies such as kitchen survey or analysis of the eligibility of land for afforestation, elaboration of PIN and PDD, validation, verification, monitoring costs, etc.) and not necessarily affordable for local project developers, (iii) the business climate is often poor and inhibits foreign investment, (iv) human skills are not always available locally, etc.

<u>(iii) to strengthen local development</u>

The Kyoto market is imperfect and its course is subject to fluctuations and uncertainties, thus making problematic the co-financing of local development activities in the mid- to long-term. Beyond that, CDM buyers are sometimes in an oligopsony situation in some areas and there is an information asymmetry between investors, developers and local populations, which does not ensure transparency and fairness in Emissions Reduction Purchase Agreements (ERPAs).

Finally, some States are simply not ready to administer carbon transactions that may appear complex (carbon credit - *sui generis* object - not defined in legal procedures, rules and procedures of the Designated National Authority not detailed, untrained human resources, etc. .). In short, there are few CDM projects under implementation in Africa and LDCs in general and when this is the case, the carbon revenue does not always benefit the local population.

➔ Specificities of AR CDM credits and perspective for REDD+ markets

If the general architecture of CDM was drafted in 2001 (COP Decision 17/CP.7 on the modalities and procedures of CDM made effective through COP/MOP Decision 3/CMP.1), then refined in 2002 and 2003 (COP Decision 21/CP.8 and 18/CP.9 on CDM guidelines, that came into force via COP/MOP Decision 4/CMP.1), the AR CDM had to wait two more years (COP Decision 19/CP.9 on modalities and procedures for CDM AR, made effective through COP/MOP Decision 5/CMP.1).

It will even take another year to have guidelines for small-scale AR CDM, with simplified rules and modalities more adapted to the context of Least Developed Countries (LDCs) in general and African countries in particular (COP Decision 14/CP.10, made effective through COP/MOP Decision 6/CMP.1).

This is explained by a number of technical challenges posed by these AR CDM projects:

- <u>Additionality:</u> The COP Decision 11/CP.7 on Land Use, Land Use Change and Forestry (LULUCF), made effective through COP/MOP Decision 16/CMP.1, recommends in its preamble to differentiate “direct-human” induced removals of those related to the increase of atmospheric CO_2, nitrogen deposition or due to age-class effects. This recommendation has been referred to as "factoring out" in the negotiations and is, up to now, an insoluble problem: AR CDM projects have often been criticised as little additional projects and, in any case, not comparable to “fossil” CDM projects;
- <u>Permanence:</u> Carbon stored in a plantation today may disappear tomorrow, because of a human-induced action (e.g. illegal logging), or an indirect-human induced action (e.g. wildfire) or even natural events (e.g. drought and decay). To counter this problem, it was decided to grant temporary credits to AR CDM projects: short-term temporary credit (tCERs) or long term temporary credits (lCERs) ... Which proved difficult to use, as discussed below;
- <u>Leakage:</u> An AR CDM project, by blocking access to agricultural land for example, may cause displacement of populations likely to go elsewhere and clear forests by slash-and-burn, causing GHG emissions. The risk is even more important that tenure is often not secure in LDCs;
- <u>Biodiversity:</u> A long debate took place on the possibility to ban fast-growing exotic plantations, albeit powerful as carbon pumps, but potentially dangerous to local biodiversity (loss of local biodiversity or even risk of invasive species).

As a result of all these difficulties, the AR CDM took a lot of time to develop and forestry credits have till now been excluded from the EU Emission Trading Scheme (EU-ETS), together with credits from nuclear projects! Not talking of other concerns, the risk of transfer of responsibility is constantly put forward by the European Commission to explain the ban of AR CDM credits in the EU ETS. Indeed, the main weakness of temporary credits is related to the fact that they must be replaced periodically: if a European company subject to carbon quotas has used forestry credits and goes bankrupt, the Member State in which the company is set must replace himself these credits.

The same questions (additionality, permanence, etc.) are discussed in regards to REDD+ credits, whether at international level (some countries in favour, such as the United States and Papua New Guinea; others fiercely against, such as Brazil and the countries of the Bolivarian Alliance - ALBA) or in Europe (the European Council conclusions on environment of December 2009 evoke with extreme caution the fact that such REDD+ credits could be used in the EU-ETS in the future).

Compared to AR CDM credits, a new fear is grafted on REDD+ credits: the possibility that these (said) low-cost credits could flood the carbon market and cause a massive delay of efforts to reduce domestic GHG emissions in developed countries. This fear was reinforced with an examination of three draft US Climate Bill (a Democrat one - WAXMAN-MARKEY, then a Republican one - KERRY-BOXER in 2009, and a synthesis - KERRY-LIEBERMAN - in 2010), which would have allowed the use of huge volumes of offsets, incl. from REDD+ (0.5 GteCO2 international credits in the final draft bill).

As for the voluntary markets and unlike the CDM, AFOLU projects of all types are allowed (AR, REDD, Improved Forest Management, Sustainable Agriculture Land Management, Wetland Restoration, etc.). Indeed, the VCS, the main voluntary carbon standard for the AFOLU sector, managed to circumvent the problem of temporary credits from AR CDM by implementing a system of setting aside credits (buffer) for each project. This makes the use of credits VCS AFOLU much less risky.

As a result of the foregoing and due to the fact that the forest is well suited to business communication, the forest has always been a key segment of the international voluntary carbon market. The forest carbon credits represented 45% of voluntary carbon before 2002 and still 20% in 2009 (8.5 MtCO2e).

Annex 4 – Minutes of interviews during the mission

22/04/13 – 09:30 am – Laico Regency, Nairobi - Inception Worksop

Participants:

Alfred GICHU (REDD+ Focal Point – KFS), J. G. MBUGUA (KFS), Philip KISOYAN (FAO), Anne MARTINUSSEN and Koji FUKUDA (UNDP), Gerald NGATIA (NACOFA), Dr. Sophie CHAPMAN (Cambridge Centre for Climate Change), Dorothy N. MURIUKI (TIST Kenya), Georges OKWARO (AWF), Rob DODSON and Christina ENDER (Wildlife Works), Francis MITALO (Forest Again), Michael GACHANJA and Olivier BOUYER (UNDP Consultants).

Topics discussed:

The aim of the workshop was to present the international state of the art in terms of REDD+ benefit sharing and domestic case studies. Eight presentations have been made:

(i) Kenyan REDD+ readiness progress by Alfred GICHU,

(ii) Rationale and objectives of the UNDP-funded study by Olivier BOUYER,

(iii) Study on REDD+ law by Dr. Sophie CHAPMAN,

(iv) Study on legal preparedness of REDD+ in Kenya by Alfred GICHU,

(v) Kasigau Corridor REDD+ Project – overview and key-elements of the benefit sharing mechanism by Rob DODSON,

(vi) Mbirikani REDD+ Project – Overview and key elements key-elements of the benefit sharing mechanism by Georges OKWARO,

(vii) TIST AR Project – Overview and key elements key-elements of the benefit sharing mechanism by Dorothy N. MURIUKI,

(viii) Community AR Project in Kakamega – Overview and key elements key-elements of the benefit sharing mechanism by Francis MITALO.

Each of these presentations was followed by questions and answers. A full report has been prepared and is available on request at gachanja2000@yahoo.com or o.bouyer@salvaterra.fr, as well as the power point presentations.

Key conclusions:

International experiences in terms of REDD+ benefit sharing remain scarce.

The benefit sharing mechanisms adopted by the AFOLU project developers in Kenya are very different, both in terms of modalities for sharing the benefits and in terms of % of the shares.

24/04/13 – 09:00 am – Kasigau project / WWC HQ, Voi - Interview

Participants:

Bryan ADKINS (Conservation Landscape Manager, WWC), Rob DODSON (VP African Field Operations, WWC), Christina ENDER (Strategic REDD+ Policy Advisor, WWC), Cara BRAUND (Conservation Office Manager, WWC), Laurian Lenjo MWANDOE (Community Relations & Personnel Manager, WWC), Michael GACHANJA and Olivier BOUYER (UNDP Consultants).

Topics discussed:

Credit issued: see VCS database.

Carbon price and revenue in 2012: 5,7 US$/credit in average (4 US$/credit for BNP Paribas). Around 7 MUS$.

C benefit sharing in 2012: 0,7 MU$ for the project operating costs, 0,3 MUS$ for the CBOs, 1 MUS$ for the private landowners. Total of share = around 2,5 MUS$. Gap revenue/share = 4,5 MUS$?

Private landowners: 4 300 shareholders in total, in 14 ranches (from 1 shareholder to 2 300 shareholders per ranch). They receive collectively 1/3 of C revenue, distributed among them depending on the carbon stock per ranch (NB: contradictory with the 1 MUS$ vs 7 MUS$ above).

CBOs: 5 now (100 000 peoples), 6 very soon. They receive their share of the C revenue through subsidised projects (school bursaries, collective equipment, etc.) which are selected by Locational Carbon Committees, the WWC trust operations being managed by WW. Roles and responsibilities of each entity (CBOs, LCCs, WW) are spelt out in Standard Operating Procedures. Average C revenue: 3 US$/person/year. Some CBOs (like the Kasigau Development Trust) were in existence before the start of the project. Others were created after. Each CBO encompasses around 20 000 inhabitants, so they decided to divide the CBOs share by 5. If the 6th one is created, they will divide the CBOs share by 6, even if it encompasses only 12 000 people: pressure on forests in higher for the 6th one. Some private landowners wanted to extend the payments to some CBOs “far” from the project area, but WW refused.

Non C revenues: T-shirt industry (managed through WW-IPZ, a for profit company established in 2003, before WWC and the Kasigau project in this tax-free area)

Estimation made for the benefit-sharing: 1/3 for private landowners decided since the beginning. Difficult to review it now. Share for the CBOs: “deduction of private landowners share and project developer share”…NB: figures do not match (gap of 4,5 MUS$ in 2012. See above).

Benefit-sharing system for the Chyulu REDD+ project: not decided yet. More difficult because the State (KFS) will be around the table. Assessment of opportunity costs not planned.

Benefit-sharing for the Maï Ndombé REDD+ project in DRC (operated by WW): 50% of the share for the DRC Government. For the Communities: 0,5 US$/credit/year for the 3 first years, and 1,5 US$/credit/year for the 27 following years + Building of schools.

Discussion about audit procedures: every year, an activity report has to be submitted to the VCS, but it does not capture the benefit-sharing arrangements. The WW team is OK with the idea of having a “programme-based audit” of benefit-sharing arrangements that could be handled by an independent observatory.

Key conclusions:

Figures to be precised by the WW team: volumes of credits sold per year, running costs, shares of the project developer, the CBOs and the project investors.

Estimate of the share of CBOs not based on an opportunity costs assessment, but rather defined by the project developer without clear criteria.

24/04/13 – 11:30 am – Marungo Hill Conserv. CBO & LCC, Voi - Interview

Participants:

Margaret KASYOKA (LCC member), Wilson MAMBO (LCC member), Donald KONDE (LCC member and CBO Chairman), Andrew MWANHOLO (LCC Chairman and CBO Secretary), Dorine NGEYI (CBO Project Coordinator), Laurian Lenjo MWANDOE (Community Relations & Personnel Manager, WWC), Michael GACHANJA and Olivier BOUYER (UNDP Consultants).

Topics discussed:

107 active members in the CBO, for around 8 000 peoples in the Community. The CBO has been created by the project. There are 9 other CBOs in Marungo Hill. Peoples are reluctant to join the CBO because (i) they do not see the interest of it, (ii) the annual fee is considered high (500 KSh, around 5 US$) and, if you want to join now, you have to pay all the annual fees called for since the creation of the CBO. Peoples are poorly attracted by the CBO, even if the CBO organises general assembly or barazas (public meetings) and makes information available on a notice board.

Activities of the CBO: computer-training lessons, garbage collection, tree nursery, construction or renovation of school and other collective buildings (with support from the Kasigau project).

Share for the CBO: not discussed with the CBO, but decided by the project developer. LCC Chairman “what should be the share for the CBO? What is the view of the KFS on this point?”. The quarterly statements Oct-Dec 2012 sent to the CBO by the WWC team gives the total tonnes sold for 2010 (OK), but the total money made for 2010 credits corresponds only to the share paid to the private landowners (1/3): it makes difficult for the CBO members to estimate the total carbon revenue with this information, and, further on to estimate their share.

Lastly approved projects: 4 were selected last week (construction of the Amiran greenhouse for 3 000 US$, construction of the Marungo Secondary School for 20 000 US$, construction of the Mayeni Secondary School for 12 000 US$, renovation of the Marungo Primary School for 15 000 US$) and 2 rejected (one for the building of a school which was not considered as a priority, one for supporting a private business which was not considered beneficial for the community).

Ideas about ways to improve the system? (i) to set aside a % on the credit sales, in order to support the CBO's running costs (Dorine), (ii) to get sitting allowances for the LCC members (Margaret), (iii) to deal directly with the community members instead of the CBO (Margaret), (iv) to strengthen the CBO in order to be self-sustainable and not to depend on projects (Andrew).

Key conclusions:

Few people in the CBO (around 1% of the total population) and difficulty faced by the CBO to attract more people: annual fee considered too high, interest to be in considered too low.

Share not discussed by the CBO but decided by the project developer. % of carbon revenue paid to the CBOs to be reviewed and compared with the 33% announced by the project developer.

24/04/13 – 02:30 pm – Kasigau - M&E unit, Voi - Interview, Voi - Interview

Participants:

Mwangi GITHIRU (Director of Biodiversity Monitoring, WWC), Laurian Lenjo MWANDOE (Community Relations & Personnel Manager, WWC), Michael GACHANJA and Olivier BOUYER (UNDP Consultants).

Topics discussed:

M & E system: two groups of stakeholders, private landowners (ranch shareholders) and local communities. The M & E system focuses on important aspects for both the project and the communities: governance, education, environmental degradation, etc. at both household level and external level. So far, the M & E is still under construction: the baseline survey was carried out in April 2012 and validated in April 2013. Now, it is planned to carry out an annual inventory on 180 households, with impact assessment in 5 areas: physical, natural, financial, human, and social. It is not planned to carry out household surveys out of the project area, "in order not to create false expectations" (NB: which mean no comparison between households in and out of the project).

Poverty lines and opportunity costs: the poverty line is around 1 500 KSh/month/person (around 0,5 US$/day/person). Opportunity cost have not been assessed and "we are not sure the project has a real impact in terms of behaviour change" (Mwangi).

Occasional charcoal producers: "These are some of the poorest in the communities. They face difficulty to pay the school fees for instance and they produce charcoal to face these expenses. We want to target these peoples and LCCs are OK with that" (Mwangi). The idea would be to target C payments to these peoples, but the practical way of doing it is not yet defined.

CBOs: "Members are few, but benefits are shared even outside the CBO (school building for instance)" (Laurian). "We try to expand the membership of the CBOs, but it is difficult because the annual fee is often considered too high" (Laurian). "No need to work with more people: even if only 107 out of 8 000 peoples are active members, it is enough" (Mwangi).

Key conclusions:

M & E system not yet in place and opportunity costs not calculated, which make it difficult to estimate the level of the CBOs share and be able to change behaviour.

25/04/13 – 10:00 am – Mikoko project - HQ, Mikoko Pamoja- Interview

Participants:

Noël MBARU (Mikoko Pamoja Project Coordinator), Michael NGOROGE (Swahili sea project – logistic officer), Caroline WANJIRU (Research Officer, Kenya Marine and Fisheries Research Institute), Michael GACHANJA and Olivier BOUYER (UNDP Consultants).

Topics discussed:

State of the project: PDD (under Plan Vivo Standard) already finalised. Validation and registration forecasted in May 2013: a Plan Vivo validator is to come on the 29th of May. Before that, the KFS Director will visit the project on the 8th of May, in order to do a follow up of the management plan (which was approved in January 2013). So far, there was no in-depth exchange with the KFS on the project, reason why the issue of the 20% of share to be paid to KFS (as it is the case for the Kakamega project) was not discussed.

Organisational chart: The Community Forest Association (CFA) of Gogoni-Gazi manages the Gogoni terrestrial forests and the Gazi mangrove forests, under the supervision of the KFS (the forests are gazetted ones) and following a management agreement signed between the CFA and the KFS. Under the CFA, there are 16 "users group", which are also CBOs. These CBOs have different coverage and activities. One of them is the Mikoko Pamoja CBO: the Project Team encouraged its creation in June 2012 and intends to work exclusively with this one (NB: while the only entity recognized by KFS is the CFA). The project management team does not know precisely how many members there are in this CBO, but they assume the benefit-sharing will be done adequately, since "members of the Mikoko-Pamoja CBO are spread all over the project area".

Shares: The initially identified benefit-sharing is as follows: 33% for the operational costs (excluding the salary of the Project Coordinator), 33% for the MP CBO, 33% for the salary of the Project Coordinator). This sharing was decided without estimating C and non C revenues vs opportunity costs and other costs supported by the project stakeholders. The project team (i) is aware of the fact that Plan Vivo requests at least 60% of the C revenue to be shared with the local communities, (ii) did not consult the Plan Vivo Executive Secretary to check whether it is valid to consider that the salary of the Project Coordinator can be considered as part of the share of local communities (NB: it appears highly questionable), and (iii) did not discuss with the KFS to see whether there is the need to share part of the C revenue with them (as it is the case with the Kakamega Project: 20% of the C revenue goes to the KFS). The Project Team is of the view that this last issue should be discussed between KFS and NACOFA, at national level, in the frame of the preparation of the Forest Bill.

Stakeholders targeted: The deforestation was massive in the 70s' and 80s' (burning of mangrove wood to produce limestome), and since then it looks as if degradation and deforestation are very limited: no charcoal production, no fish/shell smocking, no mangrove rice production, etc. Therefore, the Project Team does not seem to have a clear idea of the peoples to be targeted.

Role of carbon investors (Aviva and Earthwatch): The Project Coordinator is unable to present the relationships these organisations have with the project. In particular, he does not know whether some future sale of REDD+ credits were concluded with them. In that case, it would have consequences on the benefit-sharing arrangements presented above.

Assumption on the carbon price: For all the calculations, a price of 7 US$/credit has been used. The Project Coordinator does not know on which basis this assumption has been chosen. Once again, a lower price would have consequences on the benefit-sharing arrangements presented above, since the operational costs (incl. the salaries) are more or less fixed: a lower price would lower the share of the MP CBO;

Key conclusions:

Lack of quantitative analysis (C and non C revenues vs opportunity costs and other costs supported by the Project, the KFS, the CFA and the local communities) and lack of consultation with the Plan Vivo Executive Secretary, the KFS, the local communities, etc. which render the benefit-sharing arrangements quite uncertain.

25/04/13 – 01:00 pm – Mikoko project - CFA, Mikoko Pamoja- Interview

Participants:

Noël MBARU (Mikoko Pamoja Project Coordinator), Michael NGOROGE (Swahili sea project – logistic offer), Caroline WANJIRU (Research Officer, Kenya Marine and Fisheries Research Institute), Souleymane ADUMANI (Chairman of the Gogoni-Gazi CFA), Mohammed HAFSA (Treasurer of the MP CBO), Anusi DJUMANI (Committee member of the MP CBO), Mona KOMBO (Project Assistant), Michael GACHANJA and Olivier BOUYER (UNDP Consultants).

Topics discussed:

CBO: 13 Committee members (6 from Makogani, 7 from Gazi). No list of CBO members: “everybody is in” (?). When the benefits will come, “people will gather and decide on the projects they want to set up”. The Project Assistant raises the fact that the other CBOs (fish pond CBO, bee-keeping CBO, etc.), that are also protecting the mangrove area in their way, will not agree with the benefits going only to the MP CBO…

Roles/responsibilities: The CBO is the direct beneficiary but the CFA “will help in case of problems”. The CFA Chairman says he did not explain to the 15 other CBOs why the C revenue is expected to go directly to the MP CBO.

Amount of C revenue to be generated: The CBO and CFA members expect 1,5 to 1,7 MKSh per year and they believe 80% of it would benefit to them (15% going for the operational costs excluding the salary of the Project Coordinator and 5% going for the salary of the Project Coordinator). In the PDD, the C revenue is estimated at 1,2 MKSh per year and the share of the MP CBO is set at 33%.

Field visit in the project area with all the meeting participants.

Key conclusions:

One again, lack of consultation with the local stakeholders which render the benefit-sharing arrangements quite uncertain, with the risks that high expectations are not met and local stakeholders get discouraged.

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