

Safeguarding Public REDD+ Finance in Kenya

REDD+ Law Project - Briefing Paper

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

More information regarding this initiative is available at
<http://www.4cmr.group.cam.ac.uk/research/projects/reddpluslawproject>

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1. INTRODUCTION

This report outlines the current regulatory framework for managing public finance in Kenya, focusing on **how international grants paid to the Government (whether bilateral or multilateral) are managed**. Given that risks related to corruption are present in Kenya, the regulatory framework established to deal with **transparency issues** in public financial management is also addressed.

International finance for REDD+ could potentially adopt the form of debt swaps or other mechanisms, however, this report focuses on grants. This is because current capacity-building work is being funded through grants, and future results-based payments are also likely to involve this kind of financing mechanism. For present purposes, ‘public finance’ is therefore understood to be:

- International donor funds provided for capacity building purposes or as future performance-based payments (from either bilateral or multilateral sources), to either the Government or civil society directly; and
- Internal funds allocated to REDD+-related activities through the national budget of Kenya (for example, existing forest governance programmes will be relevant for REDD+ implementation, and might have a pre-existing budget allocation).

This report provides the following:

- An overview of public investments in REDD+ in Kenya;
- An overview of how international grants are managed;
- An overview of how money from the national budget is allocated and disbursed;
- How grants made directly to civil society are regulated; and
- An outline of the regulatory framework for managing corruption risks.

2. OVERVIEW OF PUBLIC INVESTMENTS IN REDD+ IN KENYA

2.1 What is public REDD+ finance?

REDD+ finance from public sources is one subset of climate finance. It can come from international sources, or internal sources.

In Kenya, climate finance could be managed as either ‘revenue’ (channeled via the National Treasury) or ‘appropriations in aid’ (going directly to a Ministry).¹ Kenya’s National Climate Change Action Plan (NCCAP) identifies three primary options for delivering public resources, and as a subset of climate finance it should be possible for REDD+ finance to utilise the same channels:

- 1) scale-up the current project-oriented, development partner-led approach;
- 2) enhance direct flows of international finance to the Government, to be disbursed using existing government structures and mechanisms; and
- 3) create a dedicated national fund for climate-related finance.²

It is important to note that climate change funding from international donors in Kenya is integrated into wider sectors such as energy, water, agriculture and forestry.³ The majority of climate-financed activities are implemented by the government and parastatals⁴ (in February 2012, approximately two thirds of government funding was utilized by parastatals).⁵ Given that REDD+ cuts across numerous sectors, it would be possible for REDD+ finance to be channeled through existing mechanisms.

REDD+ financing currently exists in Kenya through the engagement of both multilateral and bilateral donors, and could also be funded through the National Budget. These financing mechanisms are discussed below.

¹ National Climate Change Action Plan, *Finance: Annex B – Development Partner Climate Change Activities in Kenya* (February 2012), page 10.

² National Climate Change Action Plan, page 86, paragraph 2.

³ National Climate Change Action Plan, *Finance: Annex B – Development Partner Climate Change Activities in Kenya* (February 2012), page 6.

⁴ An agency or company owned, or controlled, wholly or partly by a government.

⁵ National Climate Change Action Plan, *Finance: Annex B – Development Partner Climate Change Activities in Kenya* (February 2012), page 10.

2.2 Multilateral investments by public agencies

2.2.1 UN-REDD Programme

The UN-REDD Programme was established in 2008 to assist developing countries build their capacity to participate in a future REDD+ mechanism. The UN-REDD Programme offers two categories of support: (1) financial support to sixteen partner countries who are building REDD National Programmes⁶, and (2) information, networking opportunities and preferences for future funding to another 30 countries.⁷

Kenya is one of several countries receiving non-national programme support, which includes opportunities to engage in unique knowledge-sharing opportunities, observer status at UN-REDD Programme meetings and invitations to submit funding requests for National REDD Programme support in the future.⁸ The UN-REDD Programme has provided US \$180,000 to Kenya to carry out the following⁹:

- Undertake a comprehensive gap analysis of forest-related legal frameworks relevant to REDD+, and provide assistance for drafting REDD+ provisions to clarify and regulate major REDD+ legal issues prioritised by the R-PP (with a focus on land tenure issues);
- Advance the knowledge base and national dialogue on key governance issues for REDD+ in Kenya, particularly anti-corruption, carbon rights and benefit sharing arrangements; and
- Support to workshops and high-level panel discussions on green economy investments in forests.¹⁰

⁶ Countries with national programmes include (in alphabetical order) Bolivia, Cambodia, Democratic Republic of the Congo (DRC), Ecuador, Indonesia, Nigeria, Panama, Papua New Guinea, Paraguay, the Philippines, Republic of Congo, Solomon Islands, Sri Lanka, Tanzania, Vietnam and Zambia.

⁷ Argentina, Bangladesh, Benin, Bhutan, Cameroon, Central Africa Republic, Chile, Colombia, Costa Rica, Ethiopia, Gabon, Ghana, Guatemala, Guyana, Honduras, Ivory Coast, Kenya, Lao PDR, Malaysia, Mexico, Mongolia, Morocco, Myanmar, Nepal, Pakistan, Peru, South Sudan, Sudan, Suriname and Uganda.

⁸ UN-REDD Programme, 'Partner Countries' at http://www.un-redd.org/Partner_Countries/tabid/102663/Default.aspx#, last accessed June 23 2014.

⁹ Forest Carbon Partnership Facility, 'REDD Readiness Progress Fact Sheet: Country Kenya' at http://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/PDF/June2012/Kenya%20FCPF%20Readiness%20Progress%20Sheet_June%202012.pdf, last accessed March 20 2013.

¹⁰ Workshop was held in November 2012 with the sole objectives of advancing and promoting the role of forestry and REDD+ in overall national economy. A roadmap for implementing recommendations from the workshop has been developed and will be implemented through close collaboration with UNEP and other stakeholders.

UN-REDD funding is managed by the Multi-Partner Trust Fund of the United Nations Development Programme (UNDP), which acts as the administrative interface with donors. The UNDP is considered to be the Administrative Agent¹¹ and as such is responsible for:

- Receipt, administration and management of contributions from donors;
- Disbursements of funds to the Participating UN Organisation, in accordance with the instructions of the UN-REDD Programme Policy Board;
- Provide support to the UN-REDD Programme in their reporting functions; and
- Compilation of consolidated narrative and financial reports to the Policy Board through the REDD Secretariat, national steering committees and to donors.¹²

Participating organisations of the UN-REDD Programme – the United Nations Food and Agricultural Organisation (FAO), UNDP and United Nations Environment Programme (UNEP) – participate in the design, ongoing programmatic implementation and oversight of UN-REDD National Programmes.¹³ Each participating UN Organisation is required to establish a ledger account for the receipt and administration of funds disbursed to it by the UN-REDD Programme. It is envisaged that activities supported by the UN-REDD Programme will take the form of ‘Joint UN Programmes’, which will involve multiple UN organisations collaborating around a mutual goal. The UN Resident Coordinators (responsible for coordination, design overview, programmatic oversight and consolidation of reports) along with national governments, NGOs and non-resident UN agencies are entrusted with the design and implementation of National Programme activities. The UN-REDD Programme has identified seven work areas as country priorities, which also reflect the core technical, implementation and capacity-building competences of the FAO, UNDP and UNEP:

1. Improving guidance on measuring, reporting, verification and monitoring;
2. Increasing engagement of stakeholders in the REDD+ agenda;
3. Increasing transparency and effectiveness in national REDD+ governance;
4. Strengthening national systems for managing REDD+ funding;
5. Promoting the multiple benefits of forests and REDD+;
6. Catalysing shifts to a green economy; and

¹¹ The Administrative Agent is entitled to charge a fee of 1% for fund administration and fiduciary responsibilities. Multi-Partner Trust Fund Office Gateway at <http://mptf.undp.org/factsheet/fund/CCF00>, last accessed 12 June 2013.

¹² Multi-Partner Trust Fund Office Gateway at <http://mptf.undp.org/factsheet/fund/CCF00>, last accessed 12 June 2014.

¹³ *Ibid*; further, participating UN Organisations are entitled to deduct their indirect costs on contributions received according to their own regulations and rules, taking into account the size and complexity of the particular programme.

7. Sharing knowledge to support REDD+ efforts at all levels.¹⁴

2.2.2 Forest Carbon Partnership Facility (FCPF)

The Forest Carbon Partnership Facility (FCPF) focuses on building capacity for REDD+ activities in numerous developing countries and tests some pilot programs on performance-based incentive payments schemes.¹⁵ The World Bank's FCPF supports REDD+ demonstration activities through two separate mechanisms: the Readiness Fund and the Carbon Fund.¹⁶ Kenya is a *REDD+ Country Participant* of the FCPF, having entered into a Participation Agreement with FCPF to participate in the Readiness Fund. A FCPF Formulation Grant for \$200,000 was disbursed to Kenya in September 2010.¹⁷ This money was given to assist Kenya in developing a Readiness Plan; the conditions of the grant agreement in Article 2 required the:

- a. Preparation of an assessment of land use and forest policies and governance in the forestry sector;
- b. Setting up of a multi-stakeholder national REDD working group responsible for following up on REDD activities;
- c. Preparation of a consultation and outreach plan to be implemented during the implementation phase of the Readiness Plan, including conduct of consultation among key stakeholders;
- d. Preparation of terms of reference for the development of national REDD strategy;
- e. Preparation of terms of reference for the design of a national REDD implementation framework;
- f. Preparation of a social and environmental analysis methodology and terms of reference for carrying out the analysis;

¹⁴ Multi-Partner Trust Fund Office Gateway at <http://mptf.undp.org/factsheet/fund/CCF00>, last accessed 12 June 2014.

¹⁵ Forest Carbon Partnership Facility (FCPF), *Information Memorandum 2008* at http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/FCPF_Info_Memo_06-13-08.pdf, last accessed 10 January 2013.

¹⁶ Forest Carbon Partnership Facility (FCPF), *Information Memorandum 2008* at http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/FCPF_Info_Memo_06-13-08.pdf, last accessed 10 January 2013, states that, 'Under the [readiness] mechanism, the [FCPF] intends to assist developing tropical and sub-tropical countries to prepare themselves to participate in a future, large-scale system of positive incentives for REDD. This will include, but is not limited to: (i) determining a national reference scenario based on historical emissions from deforestation and degradation and, where needed and feasible, an assessment of how these emissions would evolve in the future; (ii) preparing a national REDD strategy; and (iii) establishing a monitoring system for emissions from deforestation and forest degradation.'

¹⁷ A copy of the grant agreement is available on the FCPF website. See, Forest Carbon Partnership Facility (FCPF), Copy of the 'Grant Agreement for Readiness Plan: Readiness Fund of the FCPF, Grant No. TF094485 Confirmation Receipt' at https://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/PDF/Nov2009/Kenya_FCPF_R-PP_Formulation_Grant_Agreement.pdf, last accessed April 5 2013.

- g. Assessment of the investment and capacity building needs for the implementation of the national REDD strategy;
- h. Preparation of terms of reference for the development of the reference scenario for emissions from deforestation and forest degradation; and
- i. Preparation of terms of reference for establishing a monitoring, reporting and verification system for changes in forest cover and changes in carbon stocks at the national level.

The Formulation Grant was entered into between the International Bank for Reconstruction and Development (IBRD) and the Kenyan Office of Deputy Prime Minister and Ministry of Finance. The grant agreement in Article 1 stipulates that the ‘Standard Conditions for Grants Made by the World Bank Out of Various Funds dated July 1, 2008’ (hereafter, the “Standard Conditions”)¹⁸ constitute part of this agreement. The Standard Conditions require that the project is carried out with due diligence and efficiency in conformity with appropriate administrative, technical, financial, economic, environmental social standards and practices.¹⁹ Article 2 also sets out a number of requirements concerning record maintenance²⁰, project monitoring²¹ and financial management²². The Formulation Grant requires the delivery of a project report and completion report in accordance with Article 2 Standard Conditions.

Currently, Kenya is in the process of preparing a FCPF Readiness Grant. The Kenyan Readiness Preparation Proposal (R-PP) identifies the following four activities as prioritised REDD+ initiatives:

1. Reducing pressure to clear forests for agriculture and other uses;
2. Promoting sustainable utilisation of forests;
3. improving governance in the forest sector; and
4. and enhancement of carbon stocks.²³

¹⁸ The World Bank, ‘Standard Conditions for Grants Made by the World Bank Out of Various Funds’ (July 2010), available at <http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/STDGC-English-08.pdf>, last accessed April 01 2013.

¹⁹ *Ibid.*

²⁰ *Ibid.* §2.05 allows for the World Bank to request a copy of any project document up to 2 years after the closing date of the agreement.

²¹ *Ibid.* §2.06 creates an obligation for the recipient to maintain policies and procedures adequate to monitor and evaluate the project.

²² *Ibid.* §2.07 requires for a financial management system to be maintained and financial statements be prepared in accordance with accounting standards acceptable to the World Bank, both in a manner adequate to reflect the operations, resources and expenditures related to the Project.

²³ Kenya Forest Service, *REDD+ Readiness Preparation Proposal Forest Carbon Revised REDD Readiness Preparation Proposal Kenya: Submitted to Forest Carbon Partnership Facility* (August 2010), page 6.

This ‘readiness’ work in Kenya will start with a Strategic Environmental and Social Assessment (SESA) in response to existing tensions and conflicts between the Government and Kenya Forest Service (KFS) and Indigenous Groups.

According to Kenya’s June 2013 progress update to the FCPF, the REDD+ readiness work in Kenya is also linked closely to the Natural Resources Management Project (NRMP).²⁴ The World Bank has funded the NRMP US \$78 million,²⁵ of which \$1.8 million has been targeted for priority REDD+ Readiness activities.²⁶ The development objective of the NRMP is to enhance the institutional capacity to manage water and forest resources, reduce the incidence and severity of water shocks (such as drought, floods and water shortage in river catchments), and improve the livelihoods of communities in the co-management of water and forest resources.²⁷ The NRMP project has made start up funding available to the Ministry of Forestry and Wildlife (MoFW)²⁸ to launch the aforementioned SESA process.²⁹

2.3 Bilateral investments by public agencies

A number of significant forest conservation and restoration programmes in Kenya are financed through bilateral agreements. These include:

- The Miti Mingi Maisha Bora Programme, financed through a bilateral agreement between the Government of Finland and the Government of Kenya;
- The Forest Preservation Programme, financed through a bilateral agreement between the Government of Japan and Government of Kenya;
- The Laikipia Natural Resource Management and Biodiversity Conservation Program, the International Small Group Tree Planting Program, and ProMara, financed by the United

²⁴ Kenya REDD+ Readiness Progress Fact Sheet June 2013, <http://www.forestcarbonpartnership.org/sites/fcp/files/2013/june2013/Kenya%20progress%20Sheet%20June%20clean%202013_1.pdf> accessed 30 June 2013.

²⁵ See the World Bank’s overview of the project at <<http://www.worldbank.org/projects/P095050/kenya-natural-resource-management-project?lang=en>>.

²⁶ Kenya REDD+ Readiness Progress Fact Sheet June 2013, <http://www.forestcarbonpartnership.org/sites/fcp/files/2013/june2013/Kenya%20progress%20Sheet%20June%20clean%202013_1.pdf> accessed 30 June 2013.

²⁷ The World Bank, ‘Kenya-Natural Resource Management Project’ (May 2006) at <http://www.worldbank.org/projects/P095050/kenya-natural-resource-management-project?lang=en>, last accessed April 28 2013.

²⁸ Due to the reorganisation of many Kenyan ministries, the MoFW is now known as the Ministry of Environment, Water and Natural Resources.

²⁹ Kenya REDD+ Readiness Progress Fact Sheet June 2013, <http://www.forestcarbonpartnership.org/sites/fcp/files/2013/june2013/Kenya%20progress%20Sheet%20June%20clean%202013_1.pdf> accessed 30 June 2013.

- States Agency for International Development and Government of Kenya; and
- The rehabilitation of Meru National Park and Marsabit National Park, financed by the French Development Agency and Government of Kenya.

2.3.1 Governments of Finland and Kenya

The bilaterally funded *Miti Mingi Maisha Bora*³⁰ Programme is set to span the 2009 to 2014 period and has a budget of €22.7 million. The programme aims to:

- (1) provide support to forest sector policy, regulation and coordination processes;
- (2) provide support to implementation of Kenya Forest Service institutional change processes;
- (3) provide support to management and utilisation of gazetted forest reserves; and
- (4) improve livelihoods in arid and semi-arid lands through sustainable production and trade in bioenergy and other forest products.³¹

Kenya's Ministry of Forestry and Wildlife³² is primarily responsible for the implementation of the first objective listed above; the second and third are primarily implemented by the Kenya Forest Service; and the fourth is jointly implemented by the Kenya Forest Service and Kenya Forestry Research Institute (KEFRI).³³

2.3.2 Governments of Japan and Kenya

As a part of Japan's 'Fast-start Finance'³⁴ funding to developing countries, the Japanese International Cooperation Agency (JICA) financed the Forest Preservation Programme in Kenya through a contribution of \$9.57 million (USD).³⁵ This programme provides 'infrastructural support' to enable

³⁰ The translation of this phrase is 'many trees, good life.'

³¹ The Government of Finland is contributing €18.6 million, and the Government of Kenya is contributing €4.1 million. Embassy of Finland - Nairobi, 'Miti Mingi Maisha Bora (MMMB) – Support to the Forest Sector Reform in Kenya' <<http://www.finland.or.ke/public/default.aspx?nodeid=46392&contentlan=2&culture=en-US>> accessed 30 June 2013.

³² Due to the reorganisation of many Kenyan ministries, the MoFW is now known as the Ministry of Environment, Water and Natural Resources.

³³ The Government of Finland is contributing €18.6 million, and the Government of Kenya is contributing €4.1 million. Embassy of Finland - Nairobi, 'Miti Mingi Maisha Bora (MMMB) – Support to the Forest Sector Reform in Kenya' <<http://www.finland.or.ke/public/default.aspx?nodeid=46392&contentlan=2&culture=en-US>> accessed 30 June 2013.

³⁴ See more about Fast-Start Finance at <http://unfccc.int/cooperation_support/financial_mechanism/fast_start_finance/items/5646.php>.

³⁵ As of 31 December 2012. See UNFCCC, 'Projects/Programs of Japan's Fast-Start Finance for Developing Countries up to 2012' <http://unfccc.int/files/documentation/submissions_from_parties/application/pdf/cop_fsf_japan_annex_2013.pdf> accessed 21 July 2013.

the Kenya Forest Service to ‘tackle both forest destruction and climate change,’³⁶ and seeks to ‘enhance capability within the forestry sector in Kenya to carry out forest resource assessment and monitoring in support of REDD+ efforts.’³⁷

2.3.3 *Governments of United States and Kenya*

The United States Agency for International Development (USAID) has partnered with the Government of Kenya to provide funds for a number of environment projects in the country.³⁸ In 2012, the USAID/Kenya budget for environment projects totaled \$12 million (USD).³⁹ Projects relevant to REDD+, forest management, conservation and restoration in Kenya include:

- Laikipia Natural Resource Management and Biodiversity Conservation Program: This program commits \$US 2.4 million to efforts like the Forest Management Program – a program implemented by the Laikipia Wildlife Forum⁴⁰ that ‘builds capacity among forest users to actively participate in the management of their land through development of community organizations that design and implement forest management plans.’⁴¹
- TIST: The International Small Group Tree Planting Program: Spanning the 2006-2014 period and implemented by the Institute for Environmental Innovation,⁴² \$US 7.52 million has been dedicated to this program to support a Participatory Forest Management Plan and provide farmers with an annual stipend for each live tree they plant as well access to profits resulting from the sale of carbon credits.⁴³
- ProMara: Focused on the Mau Forest Complex in Kenya, this approximately \$US 7 million project seeks to improve the livelihoods of local people in an environmentally-friendly

³⁶ Kenya Forest Service, Annual Report 2010/2011, at 53, <<http://www.kenyaforestservice.org/documents/2012%20annual%20report%20final%20email-%2025th%20Oct%202012.pdf>> accessed 21 July 2013.

³⁷ Forest Carbon Partnership Facility, ‘REDD Readiness Project Fact Sheet: Kenya, March 2012’ 3 <http://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/Kenya%20FCPF%20REDD%20Readiness%20Progress%20Sheet_March%202012.pdf> accessed 21 July 2013.

³⁸ To see a list of current environment projects between USAID and Kenya, see USAID, ‘Environment Projects’ <<http://kenya.usaid.gov/programs/environment/projects>> accessed 19 July 2013. See past environment projects at USAID, ‘Archived Environment Projects’ <<http://kenya.usaid.gov/programs/environment/projects/archive>> accessed 19 July 2013.

³⁹ USAID supplied roughly \$221 million (USD) in total in 2012. USAID, ‘Budget for USAID Kenya’ <<http://kenya.usaid.gov/budget-usaid-kenya>> accessed 19 July 2013.

⁴⁰ Learn more about the Kenyan-based Laikipia Wildlife Forum at <<http://www.laikipia.org/>>.

⁴¹ USAID, ‘Laikipia Natural Resource Management and Biodiversity Conservation Program’ <<http://kenya.usaid.gov/programs/environment/1229>> accessed 19 July 2013.

⁴² Learn more about the Institute for Environmental Innovation at <<http://www.i4ei.org/>>.

⁴³ USAID, ‘TIST: The International Small Group Tree Planting Program’ <<http://kenya.usaid.gov/programs/environment/1573>> accessed 19 July 2013.

manner, raise public awareness around land rights, sustainable forestry and agriculture, and ‘serve as a test-case for applying the National Land Policy.’⁴⁴

2.3.4 Governments of France and Kenya

Over the past 10 years, the *Agence Française de Développement*’s (AFD, or French Development Agency) financing has reached approximately €800 million in Kenya. In partnership with the *Fonds Français pour l’Environnement Mondial* (FFEM, or French Global Environment Facility),⁴⁵ AFD provided an €8.2 million loan, complimented by an €1.86 million grant from the FFEM to the Kenya Wildlife Service, to aid in the rehabilitation of the Meru National Park.⁴⁶ A similar rehabilitation is now underway in the Marsabit National Park,⁴⁷ which is jointly funded by the AFD (€8 million) and Government of Kenya, with the project costing an estimated one billion shillings.⁴⁸ The funds will be predominantly used for ecosystem conservation, natural resource management and supporting local development.⁴⁹

2.4 Funding from the national budget

The National Climate Change Action Plan (NCCAP) estimates that as of February 2012 the Government of Kenya finances a variety of climate change activities using domestic resources (amounting to KSh 36.9 billion) because climate-related funding from the public sector is integrated into wider sectors, such as water, agriculture and forestry.⁵⁰ For example, 55.4 billion shillings were allocated from the national budget for environment, water, irrigation and housing (during the 2013-2014 period).⁵¹ Different counties allocated different sums of money to the environment and natural resources.

⁴⁴ USAID, ‘PROMARA: USAID’s Mau Forest Initiative’ <<http://kenya.usaid.gov/programs/environment/395>> accessed 19 July 2013.

⁴⁵ The FFEM was established by the French Government in 1994. See FFEM, ‘The FFEM’ <<http://www.ffem.fr/lang/en/accueil>> accessed 19 July 2013.

⁴⁶ AFD, ‘Sustainable Tourism in Meru National Park’ <http://www.afd.fr/webdav/site/afd/shared/ELEMENTS_COMMUNS/infos-projets/Telechargements/Parc-national-Meru-Kenya-en.pdf> accessed 19 July 2013.

⁴⁷ AFD, ‘AFD in Kenya: Promoting Strong and Sustainable Growth’ <<http://www.afd.fr/lang/en/home/pays/afrique/geo-afri/kenya/afd-kenya>> accessed 19 July 2013.

⁴⁸ Kenya Ministry of Forestry and Wildlife, ‘One Billion for Marsabit Wildlife Project’ <<http://www.forestryandwildlife.go.ke/?p=1619>> accessed 19 July 2013.

⁴⁹ *Ibid.*

⁵⁰ National Climate Change Action Plan, *Finance – Annex C: Government of Kenya Climate Change Activities* (February 2012), page 3.

⁵¹ The summary of the budget as well as the full text can be found at www.treasury.go.ke.

Moving forward, it is unclear what has been or will be allocated for environmental issues linked to REDD+ (such as forestry and climate change),⁵² or whether specific REDD+ interventions will be supported by the national budget.

One option for the Government of Kenya to **consider is the possibility of co-funding REDD+ initiatives with international donors**, similar to the initiative in the Marsabit National Park jointly funded by the AFD (French Development Agency) and the Government of Kenya [as discussed at 2.3.4 above]. Given that REDD+ implementation will cut across several sectors and is expected to have flow-on effects for natural resource management more generally, supplementing donor investments with internal revenue in this manner could provide a productive public investment strategy.

3. MANAGING PUBLIC FINANCE FOR REDD+ IN KENYA

3.1 Managing grants paid to the Government of Kenya

All public funding in Kenya is managed and regulated under the Consolidated Fund. All money raised or received by or on behalf of the national government is paid into this fund, except money that has been set aside by an Act of Parliament and will be paid into another public fund established for a ‘special purpose’ or is to be used to cover specified State expenses.⁵³ For REDD+ implementation, it might be necessary to disburse REDD+ finance to the County Governments (given the Constitutional requirement for equitable division of revenue within Kenya’s devolved government structure) via a formal mechanism. In addition, general rules regarding financial management and administration apply.

These issues are discussed, in turn, below.

⁵² Please see County budgets 2013/2014 available at the Commission on Revenue Allocation website or at www.icj-kenya.org.

⁵³ See Article 206 (1)(a) and (b) of the Constitution. See also Section 17 of the Public Finance Management Act, No. 18 of 2012.

3.1.1 Key laws applicable to the management of grants

3.1.1.1 Constitution

3.1.1.1a Consolidated Fund

Under Article 296, a **Consolidated Fund** is established into which all money that is raised by the government is remitted; it is also important to note that the Constitution allows for the creation of another type of fund for a special purpose⁵⁴ (discussed next). The funds that are taken to the consolidated fund include grants from donors. The Constitution also states that withdrawals from the Consolidated Fund requires an Appropriation Act except in exceptional circumstances where the Appropriation Act for a financial year has not been assented to by the beginning of the relevant financial year (and is not likely to be assented to). In such a situation, the National Assembly may authorise the withdrawal of money from the Consolidated Fund.⁵⁵

When it comes to specific funds that have been allocated for projects, some of which may coincide with REDD+ implementation activities, the government through the relevant Ministry may allocate funds. These funds, however, have to be approved by Parliament.

The general principles of public financing can be said to indirectly apply to donor funding. This is because, by implication, the principles and provisions of the Constitution apply to all money collected and/or received by the Government. This means that the following principles should apply to the management of donor funds:

- openness and accountability;
- equitable sharing of finances between county and national governments;
- the use of public money in a prudent and responsible way; and
- ensuring that fiscal reporting is clear.⁵⁶

3.1.1.1b Other ‘special purpose’ funds

As noted above, the Constitution allows for the creation of ‘special purpose’ funds [see Article 206 (1)(a) and (b)]. All money raised or received by or on behalf of the national government is paid into

⁵⁴ Article 208 of the Constitution establishes a Contingencies Fund. The fund caters for urgent and unforeseen expenditure for which there is no authority. Section 22 of the Public Finance Management Act No. 18 of 2012 gives examples of urgent and unforeseen circumstances.

⁵⁵ Article 222(1), Constitution of Kenya.

⁵⁶ Article 201 of the Constitution of Kenya 2010.

the Consolidated Fund, however, an Act of Parliament can exclude some money from being paid into the Consolidated Fund and, instead, direct it to ‘special purpose’ funds.

An example of a 'special purpose' fund could be a dedicated REDD+ fund resembling the prospective ‘Kenya Climate Fund’ envisaged in the National Climate Change Action Plan⁵⁷ (NCCAP). The NCCAP states that a ‘Kenya Climate Fund’⁵⁸ would have a number of advantages⁵⁹ (including clarity of purpose, facilitation of the development of Kenyan expertise and transparency on climate financing, and opportunities for alignment with national priorities, to a greater extent than the current project-based, donor-led approach).⁶⁰

3.1.1.2 *The Public Finance Management Act*

This is an Act of Parliament that provides for the effective management of public finances by both the national and county governments⁶¹. The Act defines key elements such as development partner, grants, public money, grant recipient, receivers and collectors of National Government Revenue and National Treasury⁶².

Public money is defined to include all money that comes into possession of, or is distributed by, a national government entity; money raised by a private body by virtue of a statutory authority; money held by national government entities in trust for third parties; and, any money that can generate liabilities for the Government. This Act establishes the National Treasury to administer such public funds.⁶³ It does so through formulation, implementation and monitoring of micro-economic policies involving expenditure and revenue, as well as other relevant economic and financial policies.⁶⁴ In addition, it designs and prescribes an efficient financial management system for the national and

⁵⁷ National Climate Change Action Plan, page 84.

⁵⁸ National Climate Change Action Plan, page 86: paragraph 3: The National Climate Change Action Plan suggests that a robust “Kenya Climate Fund” would have a number of key features: a focus on both mitigation and adaptation activities; a structure that would evolve in phases, beginning with grant financing and moving to a wider range of financial instruments; and, an aim to catalyse private sector investment by interacting with other financial intermediaries (such as commercial banks); and, a governance structure that would allow broad and equal representation from the government, civil society and the private sector (which would lead to improved capacity of the Government to absorb international public climate finance).

⁵⁹ National Climate Change Action Plan, page 86: paragraph 4.

⁶⁰ Absorptive capacity is identified as a key issue for public financing and this is provided as a justification for establishing a dedicated climate fund. National Climate Change Action Plan, page 87 @7.2.3.

⁶¹ Section 1 of the Public Finance Management Act No. 18 of 2012.

⁶² Section 2 of the Public Finance Management Act No. 18 of 2012.

⁶³ Section 11 of the Public Finance Management Act No. 18 of 2012.

⁶⁴ Section 12(a) and (b) Public Finance Management Act No. 18 of 2012.

county governments to ensure transparent financial management and standard financial reporting as contemplated by Article 226 of the Constitution.⁶⁵

A **development partner** means a foreign government, international organisations of States, or others that are prescribed by regulations under the Act.⁶⁶ By implication, this means that development partners can constitute both multilateral and bilateral donors. Section 47 and 48 stipulate the conditions for receiving grants and donations by the national government as well as regulations on grant administration. Article 47 (a) of the Act defines a donation as a gift or a contribution, and a grant is defined as:

“...financial or other assistance by a development partner which is not repayable and –

- (i) under which public money is paid to or used by a grant recipient;
- (ii) which is intended to finance or facilitate the development of projects or delivery of services or otherwise assist the grant recipient to achieve goals that are consistent with the policy objectives of the national government; and
- (iii) under which the grant recipient is required to act in accordance with any terms or conditions specified in a grant agreement”.⁶⁷

The National Government or a National Government Entity can receive a grant or donation from a development partner⁶⁸ with the approval of the Cabinet Secretary in charge of Finance, therefore, as soon as the recipient receives the funds, the Cabinet Secretary must be notified.⁶⁹ The recipient of the grant or donation should thereafter record the amount or value of the grant or donation in its accounts.⁷⁰

Section 48 (1) of the Public Finance Management Act No. 18 of 2012 provides for the development of regulations on grant administration which shall be approved by Parliament. The said regulations shall provide for the administration, control and management of grants, including:

- "(a) procedures to ensure that grants are spent on the basis of the integrated national development plan;
- (b) procedures for the allocation and disbursement of the grants;
- (c) requiring that grants be used only to finance programmes within the integrated development plan;
- (d) the publication of transparent criteria for the allocation of grants;
- (e) requiring specific terms and conditions in agreements to which grant recipients are subjected;
- (f) procedures for the budgeting, financial management, accounting and reporting of grants by grants recipients;

⁶⁵ Section 12(e) and (f) Public Finance Management Act No. 18 of 2012.

⁶⁶ Section 2 of the Public Finance Management Act No. 18 of 2012.

⁶⁷ Section 47 (1)(b) of the Public Finance Management Act No. 18 of 2012.

⁶⁸ Section 2 of the Public Finance Management Act No. 18 of 2012 defines a development partner as "a foreign government, an international organisation of states or any other organization prescribed by regulations for the purpose of this Act."

⁶⁹ See section 47(4) and (5) of the Public Finance Management Act, No. 18 of 2012.

⁷⁰ See section 47(8) of the Public Finance Management Act, No. 18 of 2012.

(g) procedures under which a third party may be authorised to receive, control or pay public money as a grant; and
(h) measures to ensure that a third party authorised to receive, control or pay public money as a grant, or responsible for any other aspect of administration of a grant, is subject to the same obligations as a public officer under this Act."⁷¹

In addition, the said regulations shall include measures to ensure public disclosure, accountability and participation in relation to the grants, including:

"(a) timely public disclosure to intended beneficiaries of the allocation and disbursement of grants to grant recipients;
(b) timely public disclosure by grant recipients to intended beneficiaries of expenditure and performance achieved in relation to the grant;
(c) measures to facilitate intended beneficiaries to participate in the design and management of projects or public services financed by the grant;
(d) measures allowing intended beneficiaries to report instances of non-compliance with the regulations or grant agreement;
(e) sanctions to be imposed on grant recipients for non-compliance with grant conditions by any grant recipient; and
(f) obligations of a public officer or third party authorised to receive, control or pay public money as grants."⁷²

3.1.1.3 The County Government Public Finance Management Transition Act 2003⁷³

The County Government Public Finance Management Transition Act was created pursuant to Section 15, Schedule 6 of the Constitution to establish Transition County Authority treasuries as the key management bodies for county revenues in the devolved government.

The act also provides for the modalities of the county budgets.

3.1.2 Allocating public monies between the national and county governments

Article 201 of the Constitution outlines the principles that guide all aspects of public finance. One of these principles is that any revenue raised nationally is to be shared equitably among national and county governments.⁷⁴ Article 215(1) of the Constitution establishes the Commission on Revenue Allocation. The main function of this commission is to make recommendations concerning the basis for the equitable sharing of revenue raised by the national government between the national and county governments as well as among the county governments.⁷⁵

⁷¹ Section 48(1) of the Public Finance Management Act, No. 18 of 2012.

⁷² Section 48(2) of the Public Finance Management Act, No. 18 of 2012. The said regulations are yet to be developed.

⁷³ The County Governments Public Finance Management Transition Act, No 8 of 2013.

⁷⁴ Article 201(b)(i) and Article 202(1).

⁷⁵ See Article 216(1) of the Constitution.

At least two months before the end of each financial year, the Division of Revenue Bill and the County Allocation of Revenue Bill are introduced in Parliament. The Division of Revenue Bill divides revenue raised by national government among the national and county levels of government while the County Allocation of Revenue Bill divides among the counties the revenue allocated to the counties.⁷⁶ If there is any deviation from the recommendations of the Commission on Revenue Allocation, an explanation for each deviation should accompany the Bill(s).⁷⁷ In addition, the Cabinet Secretary responsible for finance submits to the National Assembly estimates of the revenue and expenditure of the national government for the next financial year to be tabled in the National Assembly.⁷⁸ The estimates are first discussed by a committee of the Assembly who make necessary recommendations to the Assembly.⁷⁹ The committee is required to get representations from the public and consider the same in making its recommendations.⁸⁰ Once Parliament approves the estimates, they are included in an Appropriation Bill. The said Bill is thereafter introduced into the National Assembly to authorize the withdrawal from the Consolidated Fund.⁸¹

Devolved public funding mechanisms, or ‘sub-sovereign finance schemes’ have been established by both Acts of Parliament or presidential/ministerial executive orders and gazette notices.⁸² Devolved public funding mechanisms include the (i) Community Development Trust Fund, (ii) Poverty Alleviation Fund, (iii) Youth Enterprise Development Fund, (iv) Women Enterprise Development Fund, and the (v) Water Services Trust Fund.

How REDD+ revenue (whether in the form of grants or future performance-based payments) will be divided between the national government and the county governments involved in REDD+ implementation needs to be clarified, particularly where responsibilities for natural resource management have been devolved. **County governments will be an important stakeholder in REDD+ implementation, and choices regarding what is ‘equitable’ in this context (per Article 201 of the Constitution) will need to be made.**

⁷⁶ Article 218. The revenue raised by the national government in respect of the financial year 2013/2014 is divided among the national and county governments in accordance with the Division of Revenue Act, No. 31 of 2013.

⁷⁷ See Article 218(2)(c).

⁷⁸ Article 221 of the Constitution.

⁷⁹ Article 221(4) of the Constitution.

⁸⁰ Article 221(5) of the Constitution.

⁸¹ Article 221(6) of the Constitution. For purposes of the 2013/2014 financial year, the Appropriation Act 2013 No.33 of 2013 authorises the issue of a sum of money out of the Consolidated Fund.

⁸² National Climate Change Action Plan, *Finance: Annex C – Government of Kenya Climate Change Activities* (February 2012), page 10.

3.1.3 Oversight of fund management

The Controller of Budget and the Auditor-General provide oversight of public funds. A person appointed to the Office of the Controller of Budget shall hold Office for a period of eight years and shall not be eligible for re-appointment.⁸³ The function of the Controller of Budget is to oversee the implementation of the budgets of the national and county governments by authorising withdrawals from public funds.⁸⁴

A person appointed to the Office of the Auditor-General shall hold office for a period of 8 years and shall not be eligible for re-appointment.⁸⁵ The Auditor-General carries out an audit of the accounts of national and county governments; commissions and independent offices established by the Constitution; National Assembly, Senate and county assemblies; political parties funded from public funds; and any entity funded from public funds 6 months after the end of each financial year. The purpose of the audit is to confirm whether or not public money has been applied lawfully and in an effective way.⁸⁶ The audit reports are thereafter submitted to Parliament or relevant County Assembly for debate and appropriate action.⁸⁷

3.2 Allocating money to REDD+ from Kenya's national budget

3.2.1 How funds are allocated from the national budget

It is possible and usual for the Government of Kenya to allocate funds for activities that serve various national interests, and these are paid from the Consolidated Fund. While funding agreements related to REDD+ activities (such as an agreement specifying the activities to be funded and funding modalities⁸⁸) could be entered into with range of government bodies (for example, with the Ministry of Finance or Environment), all funds must first pass through the Consolidated Fund and then be disbursed to the relevant Ministry by an Appropriation Act.

⁸³ Article 228(3) of the Constitution.

⁸⁴ Article 228(4) of the Constitution.

⁸⁵ Article 229(3) of the Constitution.

⁸⁶ Article 229(6) of the Constitution.

⁸⁷ Article 229(7) and (8) of the Constitution.

⁸⁸ Regarding capacity to enter into a contract, the Government Contracts Act (Chapter 25 of the Laws of Kenya) states that the contract can be signed by the Accounting Officer, the Receiver of the Revenue of the Ministry for the Department of the Government concerned, or by such Public Officer duly authorised in writing by an Accounting Officer. Sections 47 and 76 of the Public Finance Management Act also speak to this point.

The Government Contracts Act Chapter 25 states in Section 2 that although the Constitution outlines that appropriation occurs during the Annual Appropriation Bill,⁸⁹ it is recognised that some expenditure may be authorised before the annual budget is passed⁹⁰ or that some supplementary appropriation⁹¹ may be necessary in certain instances. Supplementary appropriation may be used to inform Parliament of the authorisation by the Cabinet Secretary.⁹² The recipient of the grant must record the amount or value of the grant in its books of account and must administer the grant or donation using the government financial accounting and auditing law and administrative practices.⁹³ The Act foresees the creation of regulation outlining the procedures to ensure that grants are integrated into national development plans and procedures or the allocation and disbursement of grants.⁹⁴

3.2.2 *Financial management in the forest sector*

The National Environment Policy⁹⁵ outlines funding arrangements in objective 17, which aim to:

1. Provide adequate resources for forest management and conservation and tree planting through the annual Government budgetary allocation;
2. Broaden the revenue and funding base to ensure the financial sustainability of forest management and conservation of all types of forests;
3. Increase revenue from the improved management of gazetted plantations;
4. Promote the participation of the private sector and enhance revenue flows from the forest concessions, timber licences and other contractual agreements based on management agreements and performance and compliance indicators;
5. Mobilise resources from multilateral development agencies, development partners, private sector and foundation to support forest conservation; and
6. Negotiate climate change, watershed protection and biodiversity conservation funding agreements at the regional and international level.

The Forests Act⁹⁶ provides guidance on forest financial management. Section 6-8 of this Forests Act create the Forest Board which is responsible for managing, controlling and administering the assets of

⁸⁹ Constitution of Kenya 2010, s221.

⁹⁰ Constitution of Kenya 2010, s222.

⁹¹ Constitution of Kenya 2010, s223.

⁹² The Public Finance Management Act, 2012 s47(7).

⁹³ Section 47 (8) and (9) of the Public Finance Management Act, No. 18 of 2012.

⁹⁴ Section 48 (1(a) and (b) of the Public Finance Management Act, No. 18 of 2012.

⁹⁵ Ministry of Environment and Natural Resources, *The National Environment Policy: Revised Draft 4* April 2012). Available at http://www.theredddesk.org/sites/default/files/national-environment-policy-may-2012_1.pdf, accessed April 19 2013.

Kenya Forest Service ('KFS').⁹⁷ The Forest Board is composed of a number of persons: the Permanent Secretary from the Ministries responsible for Forestry, Water and Finance; Local Authorities; the Director of Kenyan Wildlife Service; the Director-General of the National Environmental Management Authority; the Director of Kenyan Forestry Research Institute; the Director of Kenya Forest Service and eight other persons appointed by the Minister of the Act.⁹⁸ Section 14 defines the funds of KFS as consisting of all money or assets accruing in or vesting in the KFS by an act or approval of parliament. The Forests Act requires the KFS to produce an annual statement of income and expenditure and an annual statement of assets and liabilities on the last day of the year.⁹⁹

There is a National Forestry (Conservation and Management) Bill 2014 currently in development. This Bill creates a new administrative body referred to as the Department for Responsible Forestry which would be given a legislative and policy mandate for a range of issues connected with sustainable forest management.¹⁰⁰ The Bill intends to preserve the existing KFS and the Board functions as outlined in the Forests Act.

4 MANAGING GRANTS PAID TO CIVIL SOCIETY

Donors may wish to pay a civil society organisation (such as a non-governmental organisation, or NGO) directly for the purpose of implementing REDD+ activities. This section addresses the following issues:

- 1) The legal structure of recipient;
- 2) The issue of government oversight of payments made by development partners/donors directly to civil society/individuals;
- 3) Integrity of recipient deposit account; and
- 4) Rights to reclaim funds in the event that donor-recipient contract has been breached.

⁹⁶ Forests Act 2005.

⁹⁷ Forests Act 2005, s8 (1)(b).

⁹⁸ Forests Act 2005, s6.

⁹⁹ Forests Act 2005, s17.

¹⁰⁰ National Forestry (Conservation and Management) Bill 2014, s11.

4.1 Legal structure of recipient

There is no specified legal structure of the recipient. Since the beginning of donor funding in Kenya, grants have been made to various organisations which include research institutions, universities, NGOs and so on. Examples of the legal structures used for these institutions include:

- Establishment under the NGO Act;
- Charitable organisation;
- Companies limited by guarantee under the Companies Act; or
- an Act establishing an organisation (such as the Kenyatta University Act).

The key regulations governing the relationship between the donor and the recipient are the agreement between them, and the terms of the agreement. In many instances, donors will specify the terms of operations, accounting and auditing structures. Any commission or omission which ordinarily qualifies as a civil offence or crime under Kenyan jurisdiction must, however, be subjected to the Kenyan legal system for redress. In the event of a dispute, the parties might have chosen the applicable law (such as the law of the United Kingdom); if they have not, Kenyan law will automatically be used.

4.2 Government oversight of payments made by development partners/donors paid directly to civil society or individuals

There is currently no government oversight donor funds paid to civil society under the subsisting NGO Coordination Act¹⁰¹. Traditionally, the management and operationalization of funds was only subject to the agreement between the donor and the recipient (as stated above). The recourse by the donor in case of mismanagement was withdrawal of the funding as per the terms of the agreement. The NGO Coordination Act, however, makes it mandatory for NGOs to make annual reports, including annual returns, to the management body under the Act (the NGO Board).

There is also the NGO council which plays a key supervisory role over NGOs. Upon breach of the code of conduct for NGOs, an NGO may face deregistration. Owing to various cases of mismanagement and corruption, there is currently a dialogue regarding subjecting the payments by development partners to some form of government scrutiny. This is mainly through the new Act, namely, the Public Benefits Organisations Act 2013¹⁰². This Act has already been passed by Parliament, but is yet to come into operation pending the notification of the commencement date by

¹⁰¹ NGO Coordination Act 1990.

¹⁰² Public Benefits Organizations Act, No. 18 of 2013.

the Minister in charge. The Act is an attempt, especially when it comes to funding, to provide auditing standards to NGOs and subject their operation to some government scrutiny.

4.3 Regulation of deposit accounts

There are several banks that offer services to NGOs and other organisations when it comes to the custody of grant money. Once again, the agreements between the funding organisation/development partner is key. Some donors specify which bank would be most convenient and what currency/banking system would be most convenient. As far as regulation of local banks is concerned, the key statutes are the Banking Act (Chapter 488 of the Laws of Kenya) and the Central Bank of Kenya Act (Chapter 491 of the Laws of Kenya).

4.4 Rights to reclaim funds in the event that the donor-recipient contract has been breached

Besides the instances when the breach of contract and incidental acts amount to offences under the Kenyan Law, e.g. corruption, bribery etc., the contract is discharged depending on its terms. There have been instances when donors have terminated projects after they have commenced on the grounds that the recipient had breached the terms of the contract, indicating the importance of the funding agreement's terms. Where possible, the general rules of Contract Law under the Law of Contract Act (Chapter 23 of the Laws of Kenya) and English Common Law of Contract apply.¹⁰³

5. TRANSPARENCY LAWS

5.1 REDD+ and corruption

Many of the countries that REDD+ targets because of their high volumes of deforestation are also those with some of the poorest World Bank governance indicator scores (which can indicate a vulnerability to corruption).¹⁰⁴ To address this risk, which threatens the success of REDD+ and may contribute to deforestation,¹⁰⁵ the UNDP is coordinating anti-corruption measures for REDD+

¹⁰³ The English Common Law of Contract is applicable in Kenya by virtue of the reception clause contained in Section 3(1)(c) of the Judicature Act (Chapter 8 of the Laws of Kenya) and Section 2(1) of the Law of Contract Act (Chapter 23 of the Laws of Kenya).

¹⁰⁴ See especially page 6, Table 1. Peter Bofin and others, 'REDD Integrity: Addressing governance and corruption challenges in schemes for Reducing Emissions from Deforestation and Forest Degradation' (U4 Report No. 1, U4 Anti-Corruption Resource Center and CMI 2011).

¹⁰⁵ See especially page 10, Table 2. Peter Bofin and others, 'REDD Integrity: Addressing governance and corruption challenges in schemes for Reducing Emissions from Deforestation and Forest Degradation' (U4 Report No. 1, U4 Anti-Corruption Resource Center and CMI 2011).

globally.¹⁰⁶ The UNDP defines corruption as the ‘misuse of entrusted power for private gain,’¹⁰⁷ and recognises a number of different forms of corruption.¹⁰⁸ During the readiness phase of funding, the UNDP predicts ‘state capture effected through grand corruption and political corruption in which powerful individuals and groups, such as politicians, logging companies, agribusiness and possibly the military might seek to influence the design of a country’s national REDD+ framework in order to benefit their private interests or to entrench their political power.’¹⁰⁹ During the implementation phase of REDD+, the UNDP predicts that grand and political corruption will continue, with the additional risks of embezzlement of funds meant for local stakeholders and petty corruption ‘in which low level public officials who are responsible for implementing REDD+ are bribed to ignore routine breaches of REDD+ laws (e.g. illegal logging), or are bribed to create fraudulent titles or carbon rights.’¹¹⁰

Other analyses of REDD+ echo concerns of multi-level corruption, as summarized below.¹¹¹

- At the national level, corruption risks include:
 - Agricultural or timber conglomerates bribe national politicians to undermine establishment of national REDD mechanism;
 - REDD project developers bribe national politicians or senior officials to promote fraudulent REDD schemes;
 - Public officials or politicians bribe technical staff to skew national baseline data;

¹⁰⁶ Fach, E. and Timilsina, A. (eds.), *Staying on Track: Tackling Corruption Risks in Climate Change* (United Nations Development Program, Nairobi, Kenya 2011), page 11.

¹⁰⁷ *Ibid*, page 27.

¹⁰⁸ *Ibid*: "Bribery refers to the act of offering someone money, services or other inducement to persuade him or her to do something in return. Bribes can also be referred to as kickbacks, hush money or protection money. Cronyism refers to the favourable treatment of friends and associates in the distribution of resources and positions, regardless of their objective qualification. Embezzlement is the misappropriation of property of funds legally entrusted to someone in their formal position as an agent or guardian. Extortion is the unlawful demand or receipt of property, money or sensitive information to induce cooperation through the use of force or threat. Fraud refers to an intentional misrepresentation, which is done to obtain an unfair advantage by giving or receiving false or misleading information. Grand corruption involves bribery or the embezzlement of huge sums of money by those at the highest levels of government. Nepotism is a form of favouritism that involves family relationships. Its most usual form is when a person exploits his or her own power and authority to procure jobs or other favours for relatives. Patronage refers to the support or sponsorship by a patron (a wealthy or influential guardian) to make appointments to government, jobs or to distribute contracts for work. Petty corruption also called bureaucratic corruption involves low-level contracts between citizens, businesses and officials and generally takes place where public policies are being implemented. It is common in service delivery, such as in health care, where people use public services. Political corruption is the misuse of political power for private gain for preserving or strengthening power for personal enrichment, or both. State capture is where the states is held captive to the actions of individuals, groups or firms who influence the formation of laws, rules and regulations to serve their own private interests. This is a way of ‘legalising’ corruption."

¹⁰⁹ Fach, E. and Timilsina, A. (eds.), *Staying on Track: Tackling Corruption Risks in Climate Change* (United Nations Development Program, Nairobi, Kenya 2011), page. 31.

¹¹⁰ *Ibid*.

¹¹¹ This list is adopted from page 12, Table 3 of Peter Bofin and others, ‘REDD Integrity: Addressing governance and corruption challenges in schemes for Reducing Emissions from Deforestation and Forest Degradation’ (U4 Report No. 1, U4 Anti-Corruption Resource Center and CMI 2011).

- Politicians and senior officials extract rents from REDD revenues;
- Officials responsible for reconciling REDD projects with national accounting take bribes from project developers to double-count projects; and
- Agricultural or timber conglomerates bribe national officials responsible for forest protection to ignore violations of conservation laws.
- At the sub-national level, corruption risks include:
 - Agricultural or timber conglomerates bribe sub-national politicians and public officials to opt-out of REDD implementation, or weaken REDD policies, in their areas; and
 - Agricultural or timber conglomerates bribe sub-national officials responsible for forest protection to ignore violations of conservation laws.
- At the local or project level, corruption risks include:
 - REDD project host bribes official monitors either to overstate avoided emissions or understate problems of permanence/additionality of the project;
 - REDD project host intentionally increases emissions in lead-up to implementation in order to benefit from higher credits; and
 - Local administrators extract rents from environmental service schemes aimed at benefiting local communities.

5.2 Corruption Risks for REDD+ in Kenya

Overt forms of corruption in Kenya fall predominantly into two categories: inducement and fraud.¹¹² An inducement is a reward that is irregularly offered to a public servant to attract him or her to perform an irregular or an illegal act for the benefit or advantage of the giver of the reward.¹¹³ Fraud relates to the irregular transaction in money, assets or services that in most cases targets public resources.¹¹⁴ Manifestations of such corruption may include the manipulation of tenders, payment of ‘ghost’ goods and services, or the irregular acquisition of public resources. In addition, the recently concluded Truth, Justice and Reconciliation Commission Report stated that corruption falls namely into the categories of grand corruption, petty corruption, or systemic corruption.¹¹⁵

¹¹² Ludeki Chweya, ‘Kenya government’s anti-Corruption Programmes, 2001-2004’ in *Control of corruption in Kenya: Legal-Political Dimensions 2001-2004* (Claripress 2005), page 3.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*, page 4.

¹¹⁵ Truth, Justice and Reconciliation Commission Report, Volume 2B, 346-7. The term **grand corruption** is used to describe cases where massive personal wealth is acquired from States by senior public officials using corrupt means. Systemic corruption or institutional or entrenched corruption is defined as ‘corruption brought about, encouraged or promoted by the system itself. It occurs where bribery is routine on a large scale. The causes are usually brought about by inefficiency, inadequacy, or undue laxity in the system.’ **Petty corruption** ‘may involve small amounts and junior officials but it also has a huge impact on people’s enjoyment of their basic rights like the rights to water, health, food, clothing and shelter.’

Some categories of corruption found to exist in Kenya are included in the table below¹¹⁶:

CATEGORIES OF CORRUPTION

Nature of Corruption	The form the corruption takes
Extortionate	This is the type of corruption where a person is compelled to pay illegal or irregular fees in order to prevent harm to self, friends or relatives. It normally takes place in the public sector, where operators are compelled to pay irregular fees to cartels, who in turn offer protection.
Defensive	This form of corruption normally impacts people who run small-scale business such as kiosks. This form of corruption means that a person is compelled to perform a corrupt act in order to avoid harm to his or her interests.
Transactive	This form of corruption is arrived at by mutual agreement of those involved. Both the giver and the recipient benefit at the expense of the public. This is common in government offices, especially during tender awards and procurement processes, and the procedures that are supposed to be followed are ignored.
Investive corruption	This is a form of corruption where an individual constantly favours someone in power in hope of future assistance preference from that person. For example, giving gifts to someone in a position of power such as a judge.
Nepotistic Corruption	This is where an individual grants irregular and unmerited favourable advantages to relatives and friends.
Autogenic Corruption	This involves making fraudulent claims, especially in accounting. An example could be where one takes funds from a place of work to attend a function that s/he she does not attend but is given allowances for it.
Supportive Corruption	This involves activities that do not necessarily directly involve money, but support other corruption practices. An instance of this would be where an individual is allowed to not pay a rate that s/he is supposed to, either by a relative or a friend who is in a position to assist (eg. at Kenya Revenue Authority or at the Lands Office).
Grand corruption	This form of corruption is undertaken by the government or sanctioned by officials in power. For example, the sale of houses or land below market rates. This is also simply defined as a situation where public officials confiscate wealth through corrupt means. ¹¹⁷
Looting	Involves the payment of monies for services or goods that do not exist. This is the equivalent of what is called 'air supply' in Uganda.

¹¹⁶ Cited and compiled by S. KichamuAkivaga, *Anti-Corruption in Post-KANU Era*, from Data from *Anatomy of Corruption in Kenya*, Nairobi: Claripress, 1996, Chapter 8, in *Control of corruption in Kenya: Legal-Political Dimensions*, 2001-2004, pages 250-252.

¹¹⁷ Report of the Anti-Corruption Working Group of the Society for Advanced Legal Studies *Banking on Corruption, The Legal Responsibilities of Those Who Handle the Proceeds of Corruption*, February 2002.

5.3 National legal framework for corruption

5.3.1 Constitution

Chapter 6 (Leadership and Integrity) and Chapter 15 (Commissions and Independent Offices) of the Constitution are relevant to corruption. The Constitution provides for the creation of the Ethics and Anti-Corruption Commission (EACC), which is primarily constituted to implement the Chapter 6 provisions on Leadership and Integrity.¹¹⁸

Chapter 15 relates to the commissions and independent offices created under the Constitution.¹¹⁹ This chapter is referred to in section 79, which states that the EACC shall have the powers and mandate assigned to other commissions under Chapter 15. However, chapter 15 fails to outline the EACC as one of the Constitutional Commissions,¹²⁰ resulting in a legal debate on whether or not the EACC is entitled to the same powers as other Constitutional Commissions. While some legal discourse may conclude that the details of chapter 15 apply to the EACC, the lack of clarity may weaken the anti-corruption framework in Kenya and leave the clarification the mandate of the EACC to future acts of parliament.¹²¹

5.3.2 Anti-Corruption and Economic Crimes Act

The Anti-Corruption and Economic Crimes Act¹²² (ACECA) replaced the Prevention of Corruption Act.¹²³ ACECA aims at providing an investigative, preventive and punitive mechanism for corruption.¹²⁴ ACECA is also indicative of the policies guiding the anti-corruption legal framework in Kenya.¹²⁵ Notably, ACECA brings in standards as recognised by key international legal instruments such as the United Nations Convention against Corruption (UNCAC)¹²⁶ and the African Union (AU)

¹¹⁸ Constitution of Kenya 2010, Section 79. This section states, 'Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter 15, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.'

¹¹⁹ Constitution of Kenya 2010, Section 248 (2, 3).

¹²⁰ Constitution of Kenya 2010, Section 248 (1, 2).

¹²¹ Constitution of Kenya 2010, Art. 248.

¹²² The Anti-Corruption and Economic Crimes Act (hereinafter ACECA), Act No. 3 of 2003.

¹²³ Section 70 of the ACECA repealed the Prevention of Corruption Act (Cap. 65).

¹²⁴ ACECA, preamble 'an Act of parliament to provide for the prevention, investigation, and punishment of corruption, economic crimes and related offences and for matters incidental thereto and connected therewith.'

¹²⁵ John Tuta, 'Kenya's Anti-Corruption Legal Framework' in Control of corruption in Kenya: Legal-Political Dimensions, 2001-2004, page 146.

¹²⁶ United Nations Convention Against Corruption (UNCAC), U.N.Doc A/58/422 (Oct. 7, 2003).

Convention on Preventing and Combating Corruption.¹²⁷ These standards include the creation of a varied category of offences, the establishment of special mechanisms for compensation and recovery of improper benefits,¹²⁸ and the inclusion of economic crimes.¹²⁹ This also incorporates steps towards the forfeiture of unexplained wealth¹³⁰. ACECA, while criminalising all other corruption related offences, has not criminalised illicit enrichment as one of the offences under the Act.¹³¹ The challenge to the crime of illicit enrichment is, however, subject to many constitutional challenges.¹³² Some of the specific crimes that are established by ACECA include bribing, secret inducement for advice, abuse of office, dealing with suspect property, and bid rigging.¹³³ The ACECA goes on to state that the penalty for committing an offence under this section is a fine of up to one Million Kenya Shillings or imprisonment for a term not exceeding 10 years.¹³⁴

ACECA goes over and above the offences created by the UNCAC and the AU Convention on Preventing and Combating Corruption, and creates the category of economic crimes.¹³⁵ The act defines economic crimes as crime involving dishonesty under any written law providing for maintenance or protection of public revenue.¹³⁶

ACECA previously created an institutional mechanism for the overall fight against corruption.¹³⁷ However, this body was disbanded after the passing of the Ethics and Anti-Corruption Commission Act, which established the Ethics and Anti-Corruption Commission.¹³⁸ It is important to note that even after the passing of the Ethics and Anti-Corruption Commission Act, the other provisions of the Anti-Corruption and Economic Crimes Act remain as they were (with the exception of Chapter III, Part A, which addressed the defunct Kenya Anti-Corruption Commission (KACC)).

¹²⁷ AU Convention on the Preventing and Combating Corruption Adopted on 11th July, 2003, 43 I.L.M. 5. This Convention was ratified by Kenya on 3rd February, 2007.

¹²⁸ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Part VI.

¹²⁹ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Art 2 & 45.

¹³⁰ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Section 55.

¹³¹ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Part V.

¹³² Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Part VI.

¹³³ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Part V.

¹³⁴ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Section 48.

¹³⁵ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Section 2 & Section 45.

¹³⁶ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Section 2, Section 45.

¹³⁷ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Part 3A.

¹³⁸ The Public Officer Ethics Act, No 4 of 2004.

Prosecution remains one of the key challenges of implementing the anti-corruption legal framework. This issue arose in the case of *Gacheiengo*,¹³⁹ which stated that the (now defunct) Kenya Anti-Corruption Commission was unconstitutional because only the Attorney-General under section 26 of the Constitution could prosecute. This ruling still affects the present Ethics and Anti-Corruption Commission, as it still does not have inherent prosecutorial powers. Additionally, the Cabinet failed to allow the passing of a draft that would have provided the Commission with prosecutorial powers if the Director of Public Prosecutions (DPP) failed to take action in a corruption offence. The Anti-Corruption and Economic Crimes Act created special magistrates under the judiciary to specifically deal with issues relating to corruption.¹⁴⁰ However, these courts only act as courts of first instance,¹⁴¹ and appeals from them lie in the higher courts (High Court, Court of Appeal, and the Supreme Court).

Prosecution of corruption and corruption related offences is conducted by the Director of Public Prosecutions (DPP).¹⁴² This is also another consequence of the *Gachiengo Case*,¹⁴³ which emphasized that prosecutorial powers are vested in the government through the office of the Attorney-General. In this regard, the Anti-Corruption and Economic Crimes Act requires that once the investigations have been conducted, the subsequent report shall be forwarded to the Attorney-General with a recommendation for any action to be taken (including prosecution).¹⁴⁴

5.3.3 *The Public Officer Ethics Act*

The Public Officer Ethics Act¹⁴⁵ is aimed at advancing the ethics of public officers through steps such as requiring asset and financial declaration.¹⁴⁶ This act contributes to the legal system of anti-corruption by prohibiting some overt forms of corruption. These include inducement through nepotism and improper enrichment.¹⁴⁷ The act also creates sanctions under Part III, which include investigations and recommendations for disciplinary, criminal or civil sanctions.¹⁴⁸

¹³⁹ *Stephen Mwai Gacheiengo and Albert Muthee Kahuria v Republic*, NRB HC MISC APP.NO. 302 of 2002.

¹⁴⁰ The appointment of these special Magistrates by the Judicial Service Commission is stated under Section 3(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003.

¹⁴¹ See *Raphael A. Aligana, Samuel Muhoro & Susan W. Maina* where the Chief Magistrate ruled that his court could not try an offence under the Anti-Corruption and Economic Crimes Act because the court did not have the special jurisdiction of a Special Magistrate's Court.

¹⁴² Section 37(1), Anti-Corruption and Economic Crimes Act, No. 3 of 2003.

¹⁴³ *Stephen Mwai Gacheiengo and Albert Muthee Kahuria v Republic*, NRB HC MISC APP.NO. 302 of 2002.

¹⁴⁴ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Sections 35 and 36.

¹⁴⁵ The Public Officer Ethics Act, Act No 4 of 2004.

¹⁴⁶ The Public Officer Ethics Act, Act No 4 of 2004, Preamble.

¹⁴⁷ See Part III, The Public Officer Ethics Act, No 4 of 2004.

¹⁴⁸ See Part V, The Public Officer Ethics Act, No 4 of 2004.

5.3.4 Ethics and Anti-Corruption Commission Act

The Ethics and Anti-Corruption Commission Act¹⁴⁹ provides for the establishment of the key anti-corruption body in Kenya pursuant to Article 79 of the Constitution. It also provides for the powers, functions and the general management of the Ethics and Anti-Corruption Commission.¹⁵⁰ This act states that, in addition to the powers granted to the Commission under Article 253 of the Constitution, the Commission shall be entitled to specific powers outlined in section 3 of the Ethics and Anti-Corruption Commission Act. These powers include the authorisation to do all that is required or necessary for the Commission to perform its functions, as long as such is authorised by an Act of Parliament and the Constitution.¹⁵¹

5.3.5 Leadership and Integrity Act

The Leadership and Integrity Act¹⁵² is created pursuant to the principles established under Chapter 6 of the Constitution. The Act and specifically Chapter 6 are important as they create a foundation for reducing corruption and incidences of abuse of office.¹⁵³ If the Act is breached, disciplinary action could follow.¹⁵⁴ However, if the conduct that breaches the code of conduct under the act also gives rise to criminal or civil liability, a referral may be made to the relevant state entity for the commencement of civil or criminal proceedings¹⁵⁵. One of the actions that could yield criminal sanctions under the Act is an instance when a public official opens and maintains foreign bank accounts.¹⁵⁶

5.3.6 The Penal Code

The Penal Code¹⁵⁷ is the main law that establishes crimes under the Kenyan Law.¹⁵⁸ With regard to corruption, the Penal Code creates the crime of abuse of office,¹⁵⁹ the offence of stealing by persons in

¹⁴⁹ The Ethics and Anti-corruption Commission Act, No. 22 of 2011.

¹⁵⁰ See Preamble, The Ethics and Anti-corruption Commission Act, No. 22 of 2011.

¹⁵¹ The Ethics and Anti-corruption Commission Act, No. 22 of 2011, Section 3.

¹⁵² Leadership and Integrity Act, No. 19 of 2012.

¹⁵³ See Constitution of Kenya 2010; and, Leadership and Integrity Act, No. 19 of 2012.

¹⁵⁴ Leadership and Integrity Act, No. 19 of 2012, Section 42.

¹⁵⁵ Leadership and Integrity Act, No. 19 of 2012, Section 43.

¹⁵⁶ Leadership and Integrity Act, No. 19 of 2012, Section 19.

¹⁵⁷ Penal Code, Chapter 63.

¹⁵⁸ Penal Code, Chapter 63, Preamble.

¹⁵⁹ Penal Code, Chapter 63, Section 101(1).

public office,¹⁶⁰ fraudulent false accounting,¹⁶¹ and conspiracy to defraud, *inter alia*.¹⁶² Section 102 of the Penal Code defines abuse of office and categorise it as a felony, although no penalty is given.

5.3.7 *The Criminal Procedure Code*

The procedure for the prosecution of crimes in Kenya is outlined in the Criminal Procedure Code.¹⁶³ The statute complements the Penal Code, which outlines the principles of criminal prosecution and a number of crimes recognized in the Kenyan Courts. Besides those crimes that are outlined in the Penal Code, the Criminal Procedure Code also caters for crimes that are created by other laws. This includes all of the crimes created by corruption and anti-corruption related offences in the corruption-related acts noted above. It is important to note that the Constitution gives prosecutorial powers to the Director of Public Prosecutions (DPP), who has the power to direct the Inspector of the National Police Service to investigate any allegations of Criminal Conduct.¹⁶⁴ This provision gives the government power to institute criminal proceedings. The ordinary course of proceedings in Kenya is that proceedings will be commenced by a complainant and the State takes over to prosecute the case on their behalf.

5.3.8 *Proceeds of Crime and Anti-Money Laundering Act*

The Proceeds of Crime and Anti-Money Laundering Act¹⁶⁵ provides for the offence of money laundering and measures to combat it. In part, the act is a response to instances where funds that are accumulated from corrupt activities are concealed in genuine businesses. Furthermore, the act is intended to provide for the identification, tracing and freezing, seizure and confiscation of the proceeds of crime and for connected purposes¹⁶⁶. Thus, proceeds of corruption are a major target of this law. Additionally, failure to report the crime by someone who has knowledge of its commission is a crime in itself.¹⁶⁷ This allows the act to combat corruption by discouraging people from being paid to keep quiet about corrupt activities. Following the provisions of part XII of the act – International Assistance in Investigations and Proceedings – a suspect may not escape the law by residing in another country.

¹⁶⁰ Penal Code, Chapter 63, Section 280.

¹⁶¹ Penal Code, Chapter 63, Section 330.

¹⁶² Penal Code, Chapter 63, Section 317.

¹⁶³ The Criminal Procedure Code, Cap 75.

¹⁶⁴ Constitution of Kenya 2010, Article 157(2).

¹⁶⁵ Proceeds of Crime and Anti-Money Laundering Act, No 9 of 2009.

¹⁶⁶ Proceeds of Crime and Anti-Money Laundering Act, No 9 of 2009, Preamble.

¹⁶⁷ Proceeds of Crime and Anti-Money Laundering Act, No 9 of 2009, Section 5.

5.3.9 *The Public Finance Management Act*

The Public Finance Management Act¹⁶⁸ was enacted by Parliament to provide for the effective management of public finances by both the national and the newly formed county governments.¹⁶⁹ This act provides for transparency in the management of public funds and recognises the devolution of national and county governments. With regard to devolution, it provides for the management of funds at both the national¹⁷⁰ and county¹⁷¹ level.

5.3.10 *Public Procurement and Disposal Act*

The Public Procurement and Disposal Act 2005¹⁷² establishes procedures for efficient public procurement, for the disposal of redundant and unusable assets and equipment by public entities, and other related matters.¹⁷³ It contains penalties against persons who breach the regulations of the act.¹⁷⁴ The act is relevant for corruption as the absence of a regulatory mechanism for procurement and disposal allowed for the un-procedural and irregular acquirement of government service and goods contracts. The act also creates the Public Procurement Oversight Authority (PPOA),¹⁷⁵ which aims to ensure compliance with the provisions under the act. The act also creates other bodies, such as the Public Procurement Administration Review Board.¹⁷⁶

5.3.11 *The Banking Act*

The Banking Act¹⁷⁷ was enacted by Parliament to regulate the business of banking. Since banking involves the depositing, lending and withdrawal of public money, it is prudent that the banking business be carried out in a transparent manner. Consequently, section 4(3) of the act requires that any person proposed to manage or control banking institutions be both professionally and morally suitable. The Banking Act is also relevant when it comes to corruption, since some of the stages during the laundering process involve banks and banking transactions. This is particularly relevant,

¹⁶⁸ Public Finance Management Act, No. 18 of 2012.

¹⁶⁹ Public Finance Management Act, No. 18 of 2012, Section 3.

¹⁷⁰ Public Finance Management Act, No. 18 of 2012, Part III.

¹⁷¹ Public Finance Management Act, No. 18 of 2012, Part IV.

¹⁷² Public Procurement and Disposal Act, no. 3 of 2005.

¹⁷³ Public Finance Management Act no. 18 of 2012, Preamble.

¹⁷⁴ Public Finance Management Act no. 18 of 2012, Sections 135, 136.

¹⁷⁵ Public Finance Management Act no. 18 of 2012, Section 8.

¹⁷⁶ Public Finance Management Act no. 18 of 2012, Section 25.

¹⁷⁷ Banking Act, Cap 488.

where launderers in a bid to conceal their funds, engage in networks of bank deposits, withdrawals and transfers. In this regard, the Banking Act and other banking regulations in Kenya provide for suspicious transaction reporting (STR) among other mechanisms to monitor the likelihood of laundering activities¹⁷⁸.

5.3.12 *The Foreign Judgment (Reciprocal Enforcement) Act*

The principle of reciprocity under international law requires that countries cooperate with each other in the enforcement of judicial decisions. The Foreign Judgment (Reciprocal Enforcement) Act¹⁷⁹ provides for enforcement by Kenyan authorities of judgments rendered by other countries on a reciprocal basis.¹⁸⁰ For example, a person would not escape the enforcement of a judgment issued outside of Kenya simply by establishing a residence within Kenya. This act is intended to ensure that there is assistance and cooperation in terms of enforcing cross-jurisdictional judgments relating to corruption and other incidental matters.¹⁸¹

5.3.13 *The Civil Procedure Act*

The Civil Procedure Act¹⁸² establishes the procedure to be followed in civil litigation. Coupled with the Civil Procedure Rules, it helps outline what is expected of litigants. As the act establishes the procedure to be observed for civil proceedings, it is relevant to anti-corruption measures that may give rise to civil proceedings, including asset recovery (for property that is declared to have been acquired corruptly) and abuse of office.

5.3.14 *Anti-corruption in the forest sector*

The Forests Act 2005 helps address corruption as it created harsh measures concerning the de-gazetting of forestland and increased penalties against illegal logging and other crimes.¹⁸³ The Forest (Charcoal) Rules 2009 supplement the Forests Act and regulate sustainable charcoal production,

¹⁷⁸ See for instance Regulations under the Central Bank of Kenya Act.

¹⁷⁹ Foreign Judgment (Reciprocal Enforcement) Act, Cap 43.

¹⁸⁰ Foreign Judgment (Reciprocal Enforcement) Act, Cap 43, Preamble.

¹⁸¹ Foreign Judgment (Reciprocal Enforcement) Act, Cap 43, Preamble.

¹⁸² Civil Procedure Act, Cap 21.

¹⁸³ World Bank, 'Forest Strategy: Review of Implementation' (2007) at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTARD/EXTFORESTS/0,,contentMDK:21564626~pagePK:210058~piPK:210062~theSitePK:985785,00.html>, last accessed April 18 2013.

transportation and marketing.¹⁸⁴ The penalty for breaking these regulations is a fine of ten thousand shillings or up to three months in prison¹⁸⁵, although the Forests Act imposes a higher penalty.¹⁸⁶ The regulations do not, however, specifically address corruption offences related to logging. This is a problem as cartels often bribe forest guards and officials in order to gain unlicensed access to forests and illegally fell trees for economic gain. In 1999, Kenya temporarily banned all logging activities and only gave permission to 4 sawmill companies to log and replenish the forests through an afforestation programme. This policy was ended after suggestions that there was continued black-market logging activity. At present, corruption related to felling or logging is prosecuted under the normal anti-corruption laws (discussed above).

5.4 International legal framework for corruption

Under the Constitution, international treaties ratified by Kenya become part of Kenyan Law. When considering anti-corruption regulation, it is therefore important to take note of the key international legal instruments in this area.

5.4.1 *The AU Convention on Preventing and Combating Corruption*

The AU Convention on Preventing and Combating Corruption¹⁸⁷ is the main legal mechanism for the prevention of corruption in the African Union. The main objectives of the Convention are to¹⁸⁸:

- promote and strengthen the development in Africa of mechanisms to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors;
- promote, facilitate and regulate cooperation among states of effective measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa;
- coordinate and harmonize the policies and legislation among African states that would prevent, detect, punish and eradicate corruption on the continent;
- promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights; and
- establish the necessary conditions to foster transparency and accountability in the management of public affairs.

¹⁸⁴ See the Forest (Charcoal) Regulations 2009, Legal Notice No. 186 of 24th December 2009.

¹⁸⁵ *Ibid.*

¹⁸⁶ Section 52(2) imposes a penalty of 50,000 Ksh or up to 6 months in prison.

¹⁸⁷ AU Convention on Preventing and Combating Corruption, Adopted on 11th July, 2003, 43 I.L.M. 5. This Convention was ratified by Kenya on 3rd February, 2007.

¹⁸⁸ AU Convention on Preventing and Combating Corruption, Article 2.

5.4.2 *United Nations Convention Against Corruption (UNCAC)*

The United Nations Convention Against Corruption (UNCAC)¹⁸⁹ has been said to be a universal legal instrument that is more comprehensive than many of the other regional instruments,¹⁹⁰ and introduces a number of measures, standards and rules that countries can enforce to fight and regulate corruption. However, in its domestic law, Kenya has not criminalized all the offences that are provided by UNCAC, including bribery in the private sector.¹⁹¹

5.4.3 *The African Charter on Democracy, Elections and Governance*

The African Charter on Democracy, Elections and Governance¹⁹² addresses the issue of corruption by calling for the promotion of anti-corruption measures in conformity with the AU Convention on Preventing and Combating Corruption.¹⁹³ State parties to this convention are obligated to commit themselves to political, economic, and social governance through improving effectiveness of social services and combating corruption.¹⁹⁴ Further, this convention obligates states to institutionalize good economic and corporate governance through preventing and combating corruption.¹⁹⁵

5.4.4 *International Policy and Structural Mechanisms*

A programme under the African Union, the New Partnership for African Development (NEPAD) has established an Anti-Corruption Plan¹⁹⁶ that calls for the promotion of transparency and measures to address corruption across Africa. According to this Action Plan, NEPAD urges states to work towards the eradication of corruption through the ratification of the AU Convention on Preventing and Combating Corruption, judicial cooperation, effective and functioning anti-corruption boards, establishment of national anti-corruption commissions and through participatory processes in budget formulation¹⁹⁷.

¹⁸⁹ United Nations Convention against Corruption (UNCAC), U.N.Doc A/58/422 (Oct. 7, 2003).

¹⁹⁰ Snider T. & Kidane W., 'Combating Corruption through International Law in Africa: A comparative Analysis' *Cornell International Law Journal* (2006), at 706.

¹⁹¹ See Anti-Corruption and Economic Crimes Act, No. 3 of 2003.

¹⁹² African Charter on Democracy Elections and Governance, adopted on 30th January 2007.

¹⁹³ *Ibid*, Article 2(9).

¹⁹⁴ *Ibid*, Article 27.

¹⁹⁵ *Ibid*, Article 33(3).

¹⁹⁶ NEPAD Anti-Corruption Plan, 10th Africa Partnership Forum (APF), Tokyo, Japan: 7 – 8 April 2008.

¹⁹⁷ NEPAD Anti-Corruption Plan, page 19.

To help achieve these goals, NEPAD has created the African Peer Review Mechanism (APRM). The APRM is an instrument for fostering good political, economic and corporate governance, improving the efficiency and effectiveness of governments in delivering goods and services to their citizens and creating confidence in target countries to attract support and investment.¹⁹⁸ Corruption is one of the key priority areas expressed in the objectives, standards, criteria and indicators of the APRM.¹⁹⁹

Another mechanism for preventing and combating corruption is the advisory body established under the African Charter on Democracy, Elections and Governance.²⁰⁰ This body is aimed at promoting anti-corruption work, collecting information on corruption and on the behaviour of multinational corporations operating in Africa, developing methodologies, advising governments, developing codes of conduct for public officials, and building partnerships. This body is required to submit a report to the Executive Council of the African Union on a regular basis on the progress made by each State Party in complying with the provisions of the AU Convention.²⁰¹

6. CONCLUSION

REDD+ finance from public sources (multilateral and bilateral) is already flowing into Kenya, mainly for capacity-building purposes. In order to attract and manage further grants, and also to prepare for future performance-based payments for REDD+ outcomes, it is important to clarify how funds will be managed. Given acknowledged risks regarding corruption, transparency safeguards should form part of this preparation. In order to comply with the requirements of the UNFCCC framework (discussed in Part A), understanding the relationship between existing anti-corruption measures and REDD+ will be essential.

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

¹⁹⁸ See W.L Nkuhlu, "The New Partnership for Africa's Development – The Journey So Far", NEPAD Secretariat, June 2005 - <http://www.nepad.org/2005/files/documents/journey.pdf>, accessed July 03 2013.

¹⁹⁹ NEPAD/HSGIC-03-2003/APRM/*Guideline*/OSCI 9 March 2003.

²⁰⁰ African Charter on Democracy Elections and Governance, Adopted on 30th January 2007, Art. 22.

²⁰¹ African Charter on Democracy Elections and Governance, Adopted on 30th January 2007, Article 49.

should be explored. Further, whether greater oversight over grants paid directly to civil society should be considered – even if only to create a centralised database of REDD+ implementation activities and development partners in order to ensure efficiency in the use of REDD+ funds and coordination between different initiatives.



Public access road joining villages to a main highway (Great Rift Valley region).