

# CARBON CREDIT SCHEMES AND INDIGENOUS PEOPLES IN KENYA: A COMMENTARY

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## I. INTRODUCTION

Governments, industry, and private individuals are increasingly using carbon credit schemes to offset the damaging carbon emissions they generate. This trend is likely to project upwards if an attractive carbon price is agreed to as a necessary and effective measure to tackle the climate change challenge. At the recently concluded United Nations (U.N.) Secretary General’s Climate Summit,<sup>1</sup> there was agreement that:

mobilizing finance for climate action is a priority, and a robust price on carbon is one of the most effective strategies to unlock private investment. A strong price signal in all major economies—in the form of emissions trading systems, carbon taxes or other mechanisms—will direct financial flows away from fossil fuels and advance the growing global market for energy efficiency and clean energy.<sup>2</sup>

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<sup>1</sup> United Nations Climate Summit, Sept. 23, 2014, *Economic Drivers Action Statement: Caring for Climate Business Leadership Criteria on Carbon Pricing*, available at <http://www.un.org/climatechange/summit/wp-content/uploads/sites/2/2014/09/FINANCING-CARBON-PRICING-Caring-for-Climate-Carbon-Pricing.pdf>.

<sup>2</sup> *Id.*

An agreement on a carbon price is envisioned as part of an international climate agreement in December 2015.<sup>3</sup>

However, forest carbon projects are increasing globally. In 2012, for example, “businesses around the world financed the management, conservation or expansion of 26.5 million forested hectares by purchasing a near-record 28 million tonnes (MtCO<sub>2</sub>e) of carbon offsets from forestry projects, valued at \$216 million.”<sup>4</sup> “Cumulative market value for carbon topped US \$1 billion in 2013” with “voluntary offset buyers purchasing the majority (89%) of forest carbon offsets in 2013, led by energy utilities and food and beverage companies seeking to meet corporate social responsibility commitments or demonstrate industry leadership on climate change. Compliance buyers in California and Australia sought forestry offsets to meet carbon regulations.”<sup>5</sup>

And if recent commitments at the U.N. Secretary General’s Climate Summit can be an indicator, forest carbon projects are expected to increase. The commitments made at the Summit included cutting by half the rate of natural forest loss globally by 2020 and to strive to end natural forest loss by 2030. 150 million hectares of degraded landscapes and forestlands are to be restored by 2020. Efforts will also be directed towards significantly increasing the rate of global forest restoration thereafter, specifically, to restore at least an additional 200 million hectares by 2030. The commitments to reduce deforestation will be in accordance with internationally agreed rules and will be consistent with the goal of not exceeding 2°C warming.<sup>6</sup>

Addressing climate change is a priority for Africa. Consequently, Africa is engaged in the international climate change negotiations, although the continent has historically contributed the least to global warming and climate change. The

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<sup>3</sup> At the UNFCCC Conference of Parties 17 in Durban, South Africa, parties established an Ad Hoc Working Group on the Durban Platform for Enhanced Action to develop a protocol, another legal instrument, or an agreed outcome with legal force under the Convention, to be adopted at the twenty-first session of the Conference of the Parties and to come into effect and be implemented by 2020. *Report of the Conference of the Parties on Its Seventeenth Session*, at 2, U.N. Doc. FCCC/CP/2011/9/Add.1 (Mar. 15, 2012), available at <http://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf>.

<sup>4</sup> MOLLY PETERS-STANLEY, GLORIA GONZALEZ & DAPHNE YIN, FOREST TRENDS’ ECOSYSTEM MARKETPLACE, COVERING NEW GROUND: STATE OF THE FOREST CARBON MARKETS 2013 v (2013), available at <http://www.forest-trends.org/documents/files/FCM2013print.pdf>.

<sup>5</sup> ALLIE GOLDSTEIN & GLORIA GONZALEZ, FOREST TRENDS’ ECOSYSTEM MARKETPLACE, TURNING OVER A NEW LEAF: STATE OF THE FOREST CARBON MARKETS 2014 v (Molly Peters-Stanley ed., 2014), available at [http://www.forest-trends.org/documents/files/doc\\_4771.pdf](http://www.forest-trends.org/documents/files/doc_4771.pdf).

<sup>6</sup> United Nations Climate Summit, Sept. 23, 2014, *Forests: Action Statements and Action Plans* 3, available at <http://www.un.org/climatechange/summit/wp-content/uploads/sites/2/2014/07/New-York-Declaration-on-Forests2.pdf>. The non-binding New York Declaration on Forests and Action Agenda is a political declaration that grew out of dialogue among governments, companies, and civil society to spur action on forestry. See *id.*

negotiations are undertaken under the United Nations Framework Convention on Climate Change (FCCC)<sup>7</sup> whose ultimate objective is the stabilization of greenhouse gases in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.<sup>8</sup> All African countries are state parties to the Convention<sup>9</sup> and the Kyoto Protocol to the Convention.<sup>10</sup> Kenya signed the Convention in 1992 and ratified it in 1994. It ratified the Kyoto Protocol in February 2005.<sup>11</sup> Like all African countries, Kenya is a non-Annex I country, and, as such, it is not legally bound to reduce its greenhouse gas emissions under the Kyoto Protocol.<sup>12</sup>

Indigenous peoples in Africa are disproportionately impacted by climate change due to their vulnerability, which stems from their total dependence on the environments in which they live.<sup>13</sup> Indigenous peoples are among “the first to face the direct consequences of but the least able to respond to climate change.”<sup>14</sup> Numerous writers have highlighted the potential negative impacts of carbon credit schemes on indigenous peoples’ rights to their lands and resources.<sup>15</sup> These

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<sup>7</sup> *Status of Ratification of the Convention*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/essential\\_background/convention/status\\_of\\_ratification/items/2631.php](http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php) (last visited Mar. 16, 2015).

<sup>8</sup> United Nations Framework Convention on Climate Change, art. 2, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107, available at [http://unfccc.int/files/essential\\_background/background\\_publications\\_htmlpdf/application/pdf/conveng.pdf](http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf) [hereinafter UNFCCC].

<sup>9</sup> *Status of Ratification of the Convention*, *supra* note 7.

<sup>10</sup> *Status of Ratification of the Kyoto Protocol*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/kyoto\\_protocol/status\\_of\\_ratification/items/2613.php](http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php) (last visited Mar. 16, 2015). The Kyoto Protocol was adopted at the third session of the Conference of the Parties (COP 3) in Kyoto, Japan on December 11, 1997. *Id.* It entered into force on February 16, 2005. *Id.*

<sup>11</sup> See *Status of Ratification of the Convention*, *supra* note 7; see also *Status of Ratification of the Kyoto Protocol*, *supra* note 10.

<sup>12</sup> The UNFCCC advances the principles of State responsibility and polluter pays through the “common but differentiated responsibility principle” in which developed countries—the historical polluters—should take the lead in combating climate change and its adverse impacts. UNFCCC, *supra* note 8, art. 3(1). Article 4(2) of the UNFCCC singles out developed countries and other countries included in Annex 1 to undertake specific climate related actions. For a list of Annex 1 parties, see *List of Annex I Parties to the Convention*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/parties\\_and\\_observers/parties/annex\\_i/items/2774.php](http://unfccc.int/parties_and_observers/parties/annex_i/items/2774.php) (last visited Mar. 16, 2015). Non-Annex I Parties are mostly developing countries. See *Parties and Observers*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/parties\\_and\\_observers/items/2704.php](http://unfccc.int/parties_and_observers/items/2704.php) (last visited Mar. 16, 2015).

<sup>13</sup> UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, Background: CLIMATE CHANGE AND INDIGENOUS PEOPLES 1, available at [http://www.un.org/esa/socdev/unpfii/documents/backgrounder%20climate%20change\\_FINAL.pdf](http://www.un.org/esa/socdev/unpfii/documents/backgrounder%20climate%20change_FINAL.pdf) (last visited Mar. 16, 2015).

<sup>14</sup> *Id.*

<sup>15</sup> See TOM GRIFFITHS, FOREST PEOPLES PROGRAMME, SEEING “RED”? “AVOIDED DEFORESTATION” AND THE RIGHTS OF INDIGENOUS PEOPLES AND LOCAL COMMUNITIES

negative impacts are the consequence of designing climate change policy responses without incorporating a human rights dimension.<sup>16</sup>

This Article will therefore review the integration of indigenous peoples' rights in the design and implementation of carbon credit schemes in Kenya. The article is divided into four Parts. Part II will briefly introduce climate change and government responses in Kenya. Part III will look at the carbon credit schemes in Kenya, while Part IV will explore key issues of concern in the development of such schemes. The article will then end with a brief conclusion that emphasizes the importance of a rights-based approach in the development of carbon credit schemes in Kenya.

## II. CLIMATE CHANGE IN KENYA

The Republic of Kenya is a constitutional democracy located in East Africa. It measures 582,650 km<sup>2</sup> and has a population of over 38 million<sup>17</sup> in forty-seven counties.<sup>18</sup> Despite the fact that Kenya sits "astride the Equator, many of its climatic zones are typical of the tropics, with the country's geographical features exerting considerable influence on weather patterns."<sup>19</sup> Its geographical features range from coastal low lands to vast savannah plains to highlands that include the snowcapped Mount Kenya.<sup>20</sup> The climatic seasons range from warm-dry weather from January to March, long rains from April to June, cool-dry weather from July to October, and a short rain season in November and December.<sup>21</sup>

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(2007), available at [http://www.forestpeoples.org/sites/fpp/files/publication/2010/01/avoideddeforestationredjun07eng\\_0.pdf](http://www.forestpeoples.org/sites/fpp/files/publication/2010/01/avoideddeforestationredjun07eng_0.pdf).

<sup>16</sup> OVIEDO GONZALO, EUROPEAN PARLIAMENT DIRECTORATE-GEN. FOR EXTERNAL POLICIES, INDIGENOUS PEOPLES AND CLIMATE CHANGE (2009), available at [http://cmsdata.iucn.org/downloads/european\\_parliament\\_study\\_on\\_indigenous\\_peoples\\_and\\_climate\\_change.pdf](http://cmsdata.iucn.org/downloads/european_parliament_study_on_indigenous_peoples_and_climate_change.pdf).

<sup>17</sup> POPULATION REFERENCE BUREAU, KENYA POPULATION DATA SHEET 6 (2011), available at <http://www.prb.org/pdf11/kenya-population-data-sheet-2011.pdf>.

<sup>18</sup> Kenya's Constitution divided the territory of Kenya into 47 Counties. CONSTITUTION, art. 6(1), sched. 1 (2010). This is in the spirit of devolution. For a map of the Counties, see *County Data Sheets*, KENYA OPEN DATA, <https://opendata.go.ke/facet/counties> (last visited Mar. 16, 2015).

<sup>19</sup> U.N. Env't Programme, Information Note for Participants 3 (Mar. 15, 2007), available at [http://ozone.unep.org/Meeting\\_Documents/oweg/27oweg/OEWG-27-Information-Note.pdf](http://ozone.unep.org/Meeting_Documents/oweg/27oweg/OEWG-27-Information-Note.pdf).

<sup>20</sup> See *Physical Map of Kenya*, MAPS OF WORLD, <http://www.mapsofworld.com/physical-map/kenya-physical-map.html> (last updated June 28, 2014).

<sup>21</sup> *Id.*

However, climate change is disrupting Kenya's seasonal weather patterns at an alarming rate.<sup>22</sup> There are noticeable temperature and precipitation changes in all parts of the country, with the Northern Arid and Semi-Arid regions becoming warmer and the tropical coastal regions becoming cooler.<sup>23</sup> The impacts of these climatic-driven changes are experienced through the loss of biodiversity, changes in forest vegetation types and species composition, and droughts and reduced rangelands productivity. In addition, inundation and displacement of coastal wetlands, erosion of shorelines, increased salinity, and the intrusion of saline water into coastal aquifers due to rising sea levels are attributed to the impacts of climate change.<sup>24</sup> Kenya is rapidly becoming a water-stressed country<sup>25</sup> in part because of declining glaciers in Mount Kenya, which is the result of global warming<sup>26</sup> and the result of deforestation and forest degradation of Kenyan water sources.<sup>27</sup>

Kenya has operationalized legal and policy responses to climate change. In addition to being a party to both the FCCC and the Kyoto Protocol, Kenya has filed its report with the FCCC to demonstrate its commitment to fulfill its obligations under the Convention.<sup>28</sup> Kenya has a national environment policy, which establishes climate-resilience and low carbon development as a national priority.<sup>29</sup> The country also adopted the National Climate Change Response Strategy<sup>30</sup> and the National Climate Change Action Plan 2013-2017.<sup>31</sup> The Action

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<sup>22</sup> See GOV'T OF KENYA, NATIONAL CLIMATE CHANGE RESPONSE STRATEGY 5 (2010), available at [http://cdkn.org/wp-content/uploads/2012/04/National-Climate-Change-Response-Strategy\\_April-2010.pdf](http://cdkn.org/wp-content/uploads/2012/04/National-Climate-Change-Response-Strategy_April-2010.pdf).

<sup>23</sup> *Id.* at 29.

<sup>24</sup> *Id.* at 31-33.

<sup>25</sup> Shannyn Snyder, *Water in Crisis—Kenya*, WATER PROJECT, <http://thewaterproject.org/water-in-crisis-kenya> (last visited Mar. 16, 2015).

<sup>26</sup> *Africa Without Glaciers*, U.N. ENV'T PROGRAMME (Aug. 2012), [http://na.unep.net/geas/getUNEPPageWithArticleIDScript.php?article\\_id=90](http://na.unep.net/geas/getUNEPPageWithArticleIDScript.php?article_id=90).

<sup>27</sup> Kenya's five main forest areas are Mount Kenya, the Aberdare Range, the Mau Complex, Mount Elgon, and the Cherangani Hills. See *Forest Cover Changes in Kenya's Five*, U.N. ENV'T PROGRAMME, <http://www.unep.org/dewa/Assessments/Ecosystems/Land/ForestcoverchangesinKenyasfivewatertowers/tabid/6950/Default.aspx> (last visited Mar. 16, 2015).

<sup>28</sup> REP. OF KENYA MINISTRY OF ENV'T & NATURAL RES., FIRST NATIONAL COMMUNICATION OF KENYA TO THE CONFERENCE OF THE PARTIES TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (2002), available at <http://unfccc.int/resource/docs/natc/kenncl.pdf>.

<sup>29</sup> REP. OF KENYA MINISTRY OF ENV'T, WATER & NATURAL RES., NAT'L ENV'T POLICY, 2013 § 5.10.3 (2013), available at [http://www.cickenya.org/index.php/policies-regulations/item/download/342\\_81d665e5a93ed70383c6f383f77d19c1](http://www.cickenya.org/index.php/policies-regulations/item/download/342_81d665e5a93ed70383c6f383f77d19c1).

<sup>30</sup> GOV'T OF KENYA, *supra* note 22.

<sup>31</sup> Kenya's National Climate Change Action Plan was launched on March 27, 2013. *Kenya Launches a National Climate Change Action Plan (NCCAP)*, GOV'T OF KENYA MINISTRY OF ENV'T & MINERAL RESOURCES, <http://www.kccap.info/> (last visited Mar. 16, 2015). The plan addresses options for a "low-carbon climate resilient development pathway" and the "enabling aspects of finance, policy and legislation, knowledge

Plan recognizes carbon trading as instrumental in raising the \$2.5 billion required annually to get Kenya onto a low-carbon, climate-resilient growth path. The Action Plan also outlines possible design options for a Kenyan carbon-trading platform and presents a set of recommended actions that could be adopted as the design and implementation of Kenya's National Policy on Carbon Investments and Emissions Trading moves forward.<sup>32</sup> A climate change bill is also currently before Parliament.<sup>33</sup>

### III. CARBON CREDIT SCHEMES IN KENYA

Carbon credit schemes in Kenya fall under two categories: those under the compliance market—primarily the Clean Development Mechanism (CDM)—and those under the Voluntary carbon market.

#### A. Clean Development Mechanism Projects

Under Article 12 of the Kyoto Protocol, a Clean Development Mechanism (CDM) allows industrialized countries to meet part of their emission reduction targets by investing in emission reduction projects in developing countries.<sup>34</sup> Through CDM projects, the investing entity earns Certified Emission Reduction (CER) credits while stimulating sustainable development in the host country. CDM projects are registered with a CDM registry,<sup>35</sup> a standardized electronic database that ensures accurate accounting of the issuance, holding, and acquisition of CERs.<sup>36</sup>

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management, capacity development, technology requirements and monitoring and reporting." *Id.*

<sup>32</sup> For a downloadable list of the proposed options for a carbon trading platform, see *Climate Change Action Plan—Kenya*, GOV'T OF KENYA MINISTRY OF ENV'T & MINERAL RESOURCES, [http://www.kccap.info/index.php?option=com\\_phocadownload&view=category&id=38](http://www.kccap.info/index.php?option=com_phocadownload&view=category&id=38) (last visited Mar. 16, 2015).

<sup>33</sup> See *Climate Change Bill, 2014*, KENYA GAZETTE SUPPLEMENT No. 3, available at <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/ClimateChangeBill2014.pdf>.

<sup>34</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, Dec. 11, 1997, 37 I.L.M. 22, available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

<sup>35</sup> *CDM Registry*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, <https://cdm.unfccc.int/Registry> (last visited Mar. 16, 2015).

<sup>36</sup> *Issuance Certified Emission Reduction (CERs)*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, [https://cdm.unfccc.int/Issuance/cers\\_iss.html](https://cdm.unfccc.int/Issuance/cers_iss.html) (last visited Mar. 16, 2015).

There are currently nineteen registered CDM projects in Kenya.<sup>37</sup> These range from geothermal, wind, hydro and biogas power projects, bio residue briquettes, and small-scale afforestation and reforestation programs.<sup>38</sup> Kenya's first CDM project was registered in 2008. Mumias Sugar Company Limited, with the support of Japan Carbon Finance Limited, developed a 35 Megawatt (MW) sugarcane bagasse-based co-generation power plant as the country's first CDM project.<sup>39</sup> Over \$2.1 billion has been invested in these projects, which are estimated to produce cumulative emissions savings in excess of 135 million tCO<sub>2</sub>e.<sup>40</sup>

## **B. Voluntary Carbon Credit Schemes**

Under the voluntary carbon market, an entity can either be a company, an individual, or another "emitter." Motivated by a desire to reduce their emissions, these entities volunteer to purchase carbon credits generated through carbon projects.<sup>41</sup> The majority of the voluntary carbon projects in Kenya are in the forestry sector. Currently, there are nine forestry sector voluntary projects that include the Kasigau Corridor REDD Project Phases I (Rukinga Sanctuary) and II (the Community Ranches);<sup>42</sup> the International Small Group & Tree Planting Programme (TIST);<sup>43</sup> Aberdare Range/Mt. Kenya Small Scale Reforestation Initiative;<sup>44</sup> the Forest Again Kakamega Forest;<sup>45</sup> Mikoko Pamoja Mangrove

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<sup>37</sup> *Status of CDM projects in Kenya*, NAT'L ENV'T MGMT. AUTH., [http://www.nema.go.ke/index.php?option=com\\_content&view=article&id=241:status-of-cdm-projects-in-kenya&catid=100:dna&Itemid=598](http://www.nema.go.ke/index.php?option=com_content&view=article&id=241:status-of-cdm-projects-in-kenya&catid=100:dna&Itemid=598) (last visited Mar. 16, 2015).

<sup>38</sup> *Id.*; See also GOV'T OF KENYA MINISTRY OF ENV'T & MINERAL RESOURCES, ANALYSIS OF THE CARBON MARKET LANDSCAPE IN KENYA (2012), available at [http://www.kccap.info/index.php?option=com\\_phocadownload&view=category&id=38&amp;Itemid=45](http://www.kccap.info/index.php?option=com_phocadownload&view=category&id=38&amp;Itemid=45) (select the URL under "Annexe D – Carbon Markets in Kenya").

<sup>39</sup> *Project 1404: "35 MW Bagasse Based Cogeneration Project" by Mumias Sugar Company Limited (MSCL)*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, <http://cdm.unfccc.int/Projects/DB/TUEV-SUED1193228673.11/view> (last visited Mar. 16, 2015).

<sup>40</sup> *Id.*

<sup>41</sup> *Carbon Market FAQs*, GOLD STANDARD, <http://www.goldstandard.org/frequently-asked-questions/carbon-market> (last visited Mar. 16, 2015).

<sup>42</sup> By a U.S.-based corporation Wildlife Works. See *Forests*, WILDLIFE WORKS, [http://www.wildlifeworks.com/saveforests/forests\\_kasigau.php](http://www.wildlifeworks.com/saveforests/forests_kasigau.php) (last visited Mar. 16, 2015).

<sup>43</sup> By Clean Air Action Corporation (CAAC), a U.S. Corporation incorporated in Delaware but based in Tulsa Oklahoma. *Clean Air Action Corporation Office Locations*, CLEAN AIR ACTION CORP., <http://www.cleanairaction.com/offices.htm> (last visited Mar. 16, 2015). For more on The International Small Group & Tree Planting Programme (TIST), see *TIST—Planting Trees and Improving Agriculture for Better Lives*, TIST, <https://www.tist.org/i2/index.php> (last updated May 3, 2012).

<sup>44</sup> By the GreenBelt Movement, an NGO registered in Kenya. THE GREEN BELT MOVEMENT, <http://www.greenbeltmovement.org> (last visited Mar. 16, 2015).

Restoration;<sup>46</sup> the Enoosupukia Forest Trust Project;<sup>47</sup> Treeflights Kenya Planting Project;<sup>48</sup> the Chyulu Hills REDD+ Carbon Credit Program;<sup>49</sup> and the Mbirikani Carbon, Community and Biodiversity Project.<sup>50</sup> These projects are at various stages of development. The Kasigau Corridor REDD+ project “protects about 500,000 acres of dryland forest and is the first REDD+ project in the world to achieve Verified Carbon Standard (VCS) validation and verification with issued credits in February 2011 and was awarded Gold Level status by the Climate, Community, and Biodiversity Standard (CCB) for exceptional regional benefits.”<sup>51</sup> The Rukinga, Chyulu Hills, and Mbirikani REDD+ projects are currently merging to form the largest forest carbon project in the world.<sup>52</sup>

To safeguard community rights and interests, the projects utilize certification standards, primarily the CCB<sup>53</sup> and the VCS.<sup>54</sup> These certification schemes ensure that projects “simultaneously address climate change, support local communities and smallholders, and conserve biodiversity.”<sup>55</sup> The Kasigau

<sup>45</sup> By Eco2librium, a U.S. Corporation based in Idaho. *See Forest Again Kenya*, ECO2LIBRIUM, <http://www.eco2librium.net/forestagain.html> (last visited Mar. 16, 2015).

<sup>46</sup> By EarthWatch Institute, an International Environmental Charity based in Boston, Massachusetts. *Earthwatch Outcomes*, EARTHWATCH INST., <http://earthwatch.org/about/earthwatch-outcomes> (last visited Mar. 16, 2015). For the Mikoko Pamoja Mangrove Restoration project design document, see MIKOKO PAMOJA MANGROVE RESTORATION IN GAZI BAY, KENYA, PLAN VIVO (2010), *available at* [http://www.planvivo.org/wp-content/uploads/gazi\\_pin\\_PlanVivo\\_Kenya.pdf](http://www.planvivo.org/wp-content/uploads/gazi_pin_PlanVivo_Kenya.pdf).

<sup>47</sup> Clinton Climate Initiative, Carbon and Poverty Initiative, Rockefeller Foundation At <http://cenafrica.net/wp-content/uploads/2011/05/Clinton-Climate-Initiative-CCL.pdf>.

<sup>48</sup> By Tree Flights, a U.K.-based non-profit company. *See TREEFLIGHTSKENYA*, <https://sites.google.com/site/treeflightskenya/home> (last visited Mar. 16, 2015); *Tree Flights—Kenya*, FOREST CARBON PORTAL, <http://www.forestcarbonportal.com/project/treeflights-kenya> (last visited Mar. 16, 2015).

<sup>49</sup> By California-based Maasai Wilderness Conservation Trust. *See Chyulu Hills Redd+ Carbon Credit Program*, MAASAI WILDERNESS CONSERVATION TRUST, <http://www.maasaiwilderness.org/our-programs/conservation/forest-carbon-credits/> (last visited Mar. 16, 2015).

<sup>50</sup> By African Wildlife Foundation (AWF), an international conservation organization based in Kenya. *See MBIRIKANI CARBON, COMMUNITY AND BIODIVERSITY PROJECT*, AFRICAN WILDLIFE FOUND (2011), *available at* [http://www.awf.org/old\\_files/documents/climatechange/Mbirikani\\_Brochure\\_web\\_version.pdf](http://www.awf.org/old_files/documents/climatechange/Mbirikani_Brochure_web_version.pdf).

<sup>51</sup> *Kasigau Corridor Redd Project*, FOREST CARBON PORTAL, <http://www.forestcarbonportal.com/project/kasigau-corridor-redd-project> (last visited Apr. 2, 2015).

<sup>52</sup> Interview with Tim Christophersen, Senior Programme Officer, Forests and Climate Change, United Nations Environment Programme (UNEP) in Nairobi, Kenya (Feb. 17, 2015).

<sup>53</sup> *CCB Standards*, CLIMATE, CMTY. & BIODIVERSITY ALLIANCE, <http://www.climate-standards.org/cbb-standards/> (last visited Mar. 16, 2015).

<sup>54</sup> *See VERIFIED CARBON STANDARD*, <http://www.v-c-s.org> (last visited Apr. 2, 2015).

<sup>55</sup> *CCB Standards*, *supra* note 53.



Corridor REDD Project was the first to be issued Voluntary Emission Reductions (VERs) under both the VCS and the CCB standards.<sup>56</sup>

Kenya is also in the process of developing its national policy to reduce emissions from deforestation and forest degradation and to foster the conservation and sustainable management of forests, as well as enhancing its forest carbon stocks program (REDD+).<sup>57</sup> In this effort, Kenya is participating in the Forest Carbon Partnership Facility<sup>58</sup> (which is hosted by the World Bank) and is also an observer, receiving targeted support from the UNREDD program.<sup>59</sup> REDD+ is aimed at reducing emissions from deforestation activities and conserving the environment while also empowering the lives of community members living in the forest.<sup>60</sup> For example, Kenya's Readiness Preparation Proposal for REDD+ envisions strong community participation in national efforts to reduce deforestation that includes monitoring, reporting, and verification activities.<sup>61</sup>

#### IV. CARBON CREDIT SCHEMES AND INDIGENOUS PEOPLES IN KENYA

On January 13, 2014, Professor S. James Anaya, then U.N. Special Rapporteur on the Rights of Indigenous Peoples, called for the Government of Kenya "to ensure that the human rights of the Sengwer indigenous peoples are fully respected, in strict compliance with international standards protecting the

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<sup>56</sup> *Wildlife Works Carbon / Kasigau Corridor, Kenya*, CODE REDD, <http://www.coderedd.org/redd-project-devs/wildlife-works-carbon-kasigau-corridor/> (last visited Mar. 16, 2015).

<sup>57</sup> *What is Kenya Currently Doing to Support REDD+ Implementation in the Country?*, KENYA FORESTRY SERV., [http://www.kenyaforestservice.org/index.php?option=com\\_content&view=article&id=402:what-is-kenya-currently-doing-to-support-redd-implementation-in-the-country&catid=84:red-information&Itemid=553](http://www.kenyaforestservice.org/index.php?option=com_content&view=article&id=402:what-is-kenya-currently-doing-to-support-redd-implementation-in-the-country&catid=84:red-information&Itemid=553) (last visited Apr. 9, 2015).

<sup>58</sup> *See Kenya*, FOREST CARBON P'SHIP FACILITY, <https://www.forestcarbonpartnership.org/kenya-0> (last visited Mar. 16, 2015).

<sup>59</sup> *See Other Partner Countries*, U.N. PROGRAMME ON REDUCING EMISSIONS FROM DEFORESTATION AND FOREST DEGRADATION, [http://www.un-redd.org/AboutUNREDDProgramme/NationalProgrammes/Partner\\_Countries/tabid/4648/language/en-US/Default.aspx](http://www.un-redd.org/AboutUNREDDProgramme/NationalProgrammes/Partner_Countries/tabid/4648/language/en-US/Default.aspx) (last visited Mar. 16, 2015).

<sup>60</sup> Mercy Chebon, *Forests Carbon Credits*, KENYA FORESTRY SERV., [http://www.kenyaforestservice.org/index.php?option=com\\_content&view=article&id=302:forest-carbon-credits&catid=81:news&Itemid=538](http://www.kenyaforestservice.org/index.php?option=com_content&view=article&id=302:forest-carbon-credits&catid=81:news&Itemid=538) (last visited Apr. 8, 2015).

<sup>61</sup> *See REDD READINESS PREPARATION PROPOSAL: KENYA 62 (2010)*, available at [http://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/PDF/Jun2010/KENYA\\_REDD-RPP-JUNE\\_12th\\_2010.pdf](http://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/PDF/Jun2010/KENYA_REDD-RPP-JUNE_12th_2010.pdf). Indigenous peoples are being directly targeted for consultations and inclusion in National REDD+ Management arrangements. *See id.* at 15.

rights of indigenous peoples.”<sup>62</sup> The Sengwer community<sup>63</sup> was evicted ostensibly to conserve the Cherangany Forest, an upper catchment for the Nzoia, Kerio, and Turkwell Rivers that provides water to downstream communities.<sup>64</sup> Indigenous peoples organizations from around the world joined indigenous peoples in Kenya to condemn the eviction of the Sengwer.

But who are the indigenous peoples in Kenya? Many have rightly wondered which communities are classified as indigenous peoples in Kenya. Like the U.N., the Kenyan Constitution does not define “indigenous peoples” but recognizes them within the context of marginalization.

Article 260 of Kenya’s Constitution states:

“Marginalized community” means—

- (b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;
- (c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or
- (d) pastoral persons and communities, whether they are—
  - (i) nomadic; or

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<sup>62</sup> *UN Expert Urges Kenya to Protect Rights of Indigenous People Facing Eviction*, UN NEWS CENTRE (Jan. 13, 2014), <http://www.un.org/apps/news/story.asp?NewsID=46914#.VIYhYIuplI>.

<sup>63</sup> The Sengwer Community, originally known as the “Cherangany,” is a forest based hunter-gatherer community that has lived in the Cherangany forest for centuries. In March 2007, the World Bank approved a \$78 million Natural Resource Management Project to “assist the government better to manage water resources and forests, through strengthening of the information base, enhancing the legal and regulatory framework, financing investments in capital works, and engaging communities who must be partners in co-management.” WORLD BANK, KENYA—NATURAL RESOURCE MANAGEMENT PROJECT (2005), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/01/27/000104615\\_20060202095956/Rendered/PDF/NRM0PID010conceptOstage.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/01/27/000104615_20060202095956/Rendered/PDF/NRM0PID010conceptOstage.pdf). Unfortunately, the community component was not implemented as planned, with the Government resorting to evict the community. See *Stop the Illegal Eviction of the Sengwer Community, MRG Urges Kenyan Government*, MINORITY RIGHTS GRP. (Mar. 4, 2015), <http://www.minorityrights.org/13033/press-releases/stop-the-illegal-eviction-of-the-sengwer-community.html>. The community lodged a complaint with the World Bank Inspection Panel (the Bank’s accountability mechanism), which found violations had taken place and recommended follow up action. WORLD BANK, KENYA—NATURAL RESOURCES MANAGEMENT PROJECT: REQUEST FOR INSPECTION (2014), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/01/21/000470435\\_20150121090529/Rendered/PDF/880650REVISED0001400INSPOR201400001.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/01/21/000470435_20150121090529/Rendered/PDF/880650REVISED0001400INSPOR201400001.pdf).

<sup>64</sup> John Vidal, *Kenyan Families Flee Embobut Forest to Avoid Forced Evictions by Police*, GUARDIAN (Jan. 7, 2014 7:03 AM), <http://www.theguardian.com/global-development/2014/jan/07/kenya-embobut-forest-forced-evictions-police>.

- (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.<sup>65</sup>

This definition aligns with the basic criteria set by the United Nations<sup>66</sup> and the African Commission on Human and Peoples Rights<sup>67</sup> for identifying indigenous peoples. In addition, numerous court decisions, such as *Joseph Letuya v. Attorney General*,<sup>68</sup> have recognized pastoralist and hunter-gatherer communities as indigenous communities in Kenya. Indigenous peoples' rights<sup>69</sup> are recognized under both international and national law. It is important therefore to review these rights in the context of carbon credit schemes in the country.

Carbon credit schemes found in indigenous peoples' territories include geothermal power development projects in the Olkaria geothermal area, wind power projects in northern Kenya, and forest carbon projects in Chyulu and Mbirikani areas. Kenya's national REDD+ program will also have implications on the rights of all indigenous communities throughout the country.

### **A. Rights to Land and Territories**

Indigenous peoples "have strong spiritual, cultural, social, and economic relationships with their traditional lands."<sup>70</sup> However, carbon credit schemes are, and might continue, negatively impacting indigenous peoples' land rights. In the Olkaria geothermal area, for example, the Maasai have faced constant evictions from their traditional lands and territories in order to make room for geothermal

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<sup>65</sup> CONSTITUTION, art. 260 (2010). Article 260 is the interpretation clause of the Constitution.

<sup>66</sup> See UNITED NATION PERMANENT FORUM ON INDIGENOUS ISSUES, FACTSHEET: WHO ARE INDIGENOUS PEOPLES?, available at [http://www.un.org/esa/socdev/unpfii/documents/5session\\_factsheet1.pdf](http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf).

<sup>67</sup> AFRICAN COMM'N ON HUMAN AND PEOPLES RIGHTS, REPORT OF THE AFRICAN COMMISSION'S WORKING GROUP OF EXPERTS ON INDIGENOUS POPULATIONS/COMMUNITIES 89 (2005), available at [http://www.iwgia.org/iwgia\\_files\\_publications\\_files/African\\_Commission\\_book.pdf](http://www.iwgia.org/iwgia_files_publications_files/African_Commission_book.pdf).

<sup>68</sup> (2014) e.K.L.R. (C.C.K.), <http://kenyalaw.org/caselaw/cases/view/95729/>.

<sup>69</sup> Indigenous peoples' rights are enshrined in the U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, at 4 (Sept. 13, 2007); and the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (I.L.O. No. 169), June 27, 1989, 28 I.L.M. 1382.

<sup>70</sup> INT'L LAND COAL., SYNTHESIS PAPER: INDIGENOUS PEOPLES' RIGHTS TO LANDS, TERRITORIES AND RESOURCES 2 (2013), available at [http://www.landcoalition.org/sites/default/files/publication/1517/IndigenousPeoplesSynthesis\\_0.pdf](http://www.landcoalition.org/sites/default/files/publication/1517/IndigenousPeoplesSynthesis_0.pdf).

energy generation.<sup>71</sup> Indigenous peoples' territories are particularly vulnerable to encroachment and dispossession, as the lands appear as if they are available for other intensive use as a result of the low-impact subsistence strategies of indigenous pastoralists and hunter-gatherer communities.<sup>72</sup>

National laws and policies facilitate the dispossession of indigenous communities' land and resources. For example, community land had not been legally recognized until a new constitution was enacted in August 2010. But, despite constitutional recognition of community land, an enabling community land law is still under discussion in parliament.<sup>73</sup> Courts also interpret laws in a manner that dispossess indigenous communities of their lands. In *Joseph Letuya v. Attorney General*, for example, Kenya's Environment and Land court acknowledged that the Ogiek are an indigenous community. However, the Court failed to recognize Ogiek land rights on the basis of ancestral title, holding that land rights in Kenya accrue only when formally allocated by the government.<sup>74</sup> But, as a result of continued historical marginalization, the government rarely formalizes indigenous peoples' land rights. In *James Kaptipin v. The Director Forest*, the High Court acknowledged the precarious situation of the Sengwer community. It also acknowledged the existence of a legislative framework for the recognition and protection of Sengwer community rights. However, the Court held that "for the sake of protection of the Environment for present and the future generations, Kapolet forest should not be carved out for settlement of the Sengwer community."<sup>75</sup> This effectively denied the Sengwer their right to land.

The Constitution of Kenya has also classified all sub-surface resources, water bodies, and government forests as public lands that vest in county governments and/or a national land government.<sup>76</sup> This framework allows indigenous peoples to be dispossessed of their lands in cases where geothermal resources are found within their territories. Most government forests targeted for carbon credits are also the ancestral homes of indigenous hunter-gatherer communities like the Ogiek<sup>77</sup> and Sengwer.<sup>78</sup> The colonial government

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<sup>71</sup> Kanyinke Sena, *Up in Smoke? Maasai Rights in the Olkaria Geothermal Area, Kenya*, INT'L WORKING GRP. ON INDIGENOUS AFFAIRS (Nov. 2013), [http://www.iwgia.org/publications/search-pubs?publication\\_id=623](http://www.iwgia.org/publications/search-pubs?publication_id=623).

<sup>72</sup> INDIGENOUS PEOPLES AND CLIMATE CHANGE IN AFRICA: TRADITIONAL KNOWLEDGE AND ADAPTATION STRATEGIES 26 (Birgitte Feiring & Sille Stidsen eds., 2013), available at <http://www.charapa.dk/wp-content/uploads/Africa-IPs-CC-adaption.pdf>.

<sup>73</sup> See Community Land Bill, 2014, KENYA GAZETTE SUPPLEMENT No. 152, available at <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2013/THECOMMUNITYLANDBILL,2013.pdf>.

<sup>74</sup> *Letuya*, (2014) e.K.L.R., 11-12.

<sup>75</sup> *Kaptipin*, (2014) e.K.L.R., 8.

<sup>76</sup> CONSTITUTION, art. 62 (2010).

<sup>77</sup> The Ogiek, for example, have filed a case before the Africa Court on Human and Peoples Rights against the Kenyan government for consistent violations and denial of their land rights. See *African Court to Hear Ogiek Community Land Rights Case Against the Kenyan Government*, MINORITY RIGHTS GRP. INT'L (Nov. 26, 2014),

consistently evicted these communities from their forestlands, which they are now trying to reclaim. However, carbon projects in these forests might introduce an overriding public interest that may hamper the communities' efforts to reclaim these lands. The Kenyan Constitution guarantees the right to property to every person either individually or in association with others.<sup>79</sup> Even so, the right to property is not absolute and can be limited for a public purpose or in the public interest.<sup>80</sup> The question now is whether mitigating or adapting to climate change is a "public purpose or interest."

## **B. Consultation and "Free, Prior and Informed Consent"**

In his press release on the Sengwer community, Professor Anaya insisted that "no relocation shall take place without the free, prior and informed consent (FPIC) of the indigenous peoples concerned and after agreement of fair and just compensation and, where possible, the option of return."<sup>81</sup> The U.N. Declaration on the Rights of Indigenous Peoples enshrines the right to FPIC.<sup>82</sup> However, Kenya's Constitution only recognizes the right to participation and therefore community FPIC is never sought in the design of carbon credit projects like those for geothermal power generation.<sup>83</sup>

Indigenous peoples' rights to FPIC are also not granted even where lender organization policies demand that such rights be granted. In the design of the Lake Turkana Wind Power project,<sup>84</sup> for example, indigenous communities' FPIC was not sought despite the fact that International Finance Corporation (IFC)

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<http://www.minorityrights.org/12799/press-releases/african-court-to-hear-ogiek-community-land-rights-case-against-the-kenyan-government.html>.

<sup>78</sup> *Kenya Defies Its Own Courts: Torching Homes and Forcefully Evicting the Sengwer from Their Ancestral Lands, Threatening Their Cultural Survival*, FOREST PEOPLES PROGRAMME (Jan. 22, 2014), <http://www.forestpeoples.org/topics/legal-human-rights/news/2014/01/kenya-defies-its-own-courts-torching-homes-and-forcefully-evi>.

<sup>79</sup> CONSTITUTION, art. 40 (2010) (Kenya).

<sup>80</sup> *Id.* art. 40(3)(b).

<sup>81</sup> *Kenya / Embobut Forest: UN Rights Expert Calls for the Protection of Indigenous People Facing Eviction*, U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS (Jan. 13, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14163&LangID=E#sthash.y0O9229c.dpuf>.

<sup>82</sup> U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 69, arts. 1, 10, 19, 29, 30, 32.

<sup>83</sup> The Constitution of Kenya, 2010 mentions "participation" twelve times. See CONSTITUTION, arts. 10(2)(a), 69(1)(d), 118(1)(b), 124(3)(b), 174(c), 184(1)(c), 196(1)(b), 201(a), 260, scheds. 4-5.

<sup>84</sup> The Lake Turkana Wind Power project (LTWP) will provide 300 MW of Wind power to Kenya's national electricity grid. LAKE TURKANA WIND POWER, <http://ltwp.co.ke/home> (last visited Mar. 16, 2015). It is located in Northwest Kenya near Lake Turkana and is the largest wind power project in Sub-Saharan Africa. *Id.*

Performance Standard 7 requires FPIC.<sup>85</sup> Even so, the project claims that it has gotten all the environmental and social approvals required by the IFC Performance Standards.<sup>86</sup>

Lack of recognition of communities as indigenous peoples is a major obstacle to realization of indigenous peoples' FPIC. In most of the Environmental Impact Assessments (EIA) completed for the development of carbon projects, references are made to international instruments that safeguard indigenous peoples' rights.<sup>87</sup> But the EIAs do not mention or recommend consultation processes that ensure indigenous peoples' FPIC. This is often the case because of lack of awareness about FPIC processes. EIA consultants have argued that FPIC is inconsistent with national laws or that, because communities do not identify themselves as indigenous peoples, instruments that secure indigenous peoples' rights are inapplicable. However, regional institutions and civil society organizations have recently begun to call for FPIC processes when natural resource projects have "the potential to impact local communities regardless of whether affected communities identify themselves as indigenous peoples."<sup>88</sup>

Despite law and policy directives requiring it,<sup>89</sup> public participation remains relatively low, even in EIA, "with the highest score of 1.65 in 2010, out of a possible score of 5."<sup>90</sup> Lack of public participation is attributed to low levels of awareness, institutional and human capacity issues, and resource constraints.<sup>91</sup>

Corruption is also a key challenge to ensuring public participation and consultation. The report, *A Corruption Risk Assessment for REDD+ in Kenya*, identified corruption as a major driver of deforestation and forest degradation, and it also found that corruption inhibits transparency and access to information.<sup>92</sup> The report recommends a raft of measures that include accountability,

<sup>85</sup> INT'L FIN. CORP., PERFORMANCE STANDARD 7: INDIGENOUS PEOPLES 7 (2012), available at [http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7\\_English\\_2012.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES).

<sup>86</sup> *The Community*, LAKE TURKANA WIND POWER, <http://ltwp.co.ke/the-project/the-community> (last visited Mar. 16, 2015).

<sup>87</sup> For example, all the Environmental Impact Assessments regarding the various geothermal power generation sites mention the U.N. Declaration on the Rights of Indigenous Peoples and World Bank's Operational Policy 4.10 on Indigenous Peoples.

<sup>88</sup> EMILY GREENSPAN, OXFAM AM., FREE, PRIOR, AND INFORMED CONSENT IN AFRICA: AN EMERGING STANDARD FOR EXTRACTIVE INDUSTRY PROJECTS 42 (2014), available at <http://www.oxfamamerica.org/static/media/files/community-consent-in-africa-jan-2014-oxfam-americaAA.PDF>.

<sup>89</sup> *Id.* at 36.

<sup>90</sup> Angela N. Mwenda et al., *Trends in Consultation and Public Participation Within Environmental Impact Assessments in Kenya*, 30 IMPACT ASSESSMENT & PROJECT APPRAISAL 130, 132 (2012), available at <http://www.tandfonline.com/doi/pdf/10.1080/14615517.2012.668075>.

<sup>91</sup> GOV'T OF KENYA, NATIONAL CLIMATE CHANGE RESPONSE STRATEGY, *supra* note 22, at 58.

<sup>92</sup> UN-REDD PROGRAMME, A CORRUPTION RISK ASSESSMENT FOR REDD+ IN KENYA (2013).

transparency, and public access to information.<sup>93</sup> Article 35 of the 2010 Constitution guarantees access to information held by the state or by another person and requires access to information for the exercise or protection of any right or fundamental freedom.

### **C. Benefit sharing in Carbon Credit Schemes**

Benefit sharing refers to the fair and equitable distribution of the benefits arising out of the utilization of a resource.<sup>94</sup> Because indigenous cultures and livelihood systems are totally dependent on the environments in which they are found, carbon credit schemes should strive not to negatively impact the rights of indigenous communities.<sup>95</sup> Unfortunately, not only have communities been evicted to pave the way for renewable energy carbon credit schemes like geothermal power generation,<sup>96</sup> but they also rarely benefit beyond mere compensation, at government determined rates, for the land compulsorily acquired for such projects. For those who are given alternative land for settlement, Resettlement Action Plans rarely consider the sustainability of the community's cultures and livelihood system. Carbon project developers consider benefit sharing only within the context of corporate social responsibility and not as a community entitlement.

The above negative experiences motivate forest communities to fear that forest carbon projects will also lead to their evictions and dispossessions of their lands.<sup>97</sup> The fear is premised on the understanding that investors in forest carbon projects will want to secure their investments. Investors may therefore evict them or restrict use of their forestlands. Furthermore, there are fears that, if indigenous peoples exercise their rights to FPIC and reject proposed projects,<sup>98</sup> governments

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<sup>93</sup> REP. OF KENYA MINISTRY OF ENV'T, WATER & NATURAL RES., A CORRUPTION RISK ASSESSMENT FOR REDD+ IN KENYA 3 (2013), available at [http://www.unredd.net/index.php?option=com\\_docman&task=doc\\_details&Itemid=&gid=11809](http://www.unredd.net/index.php?option=com_docman&task=doc_details&Itemid=&gid=11809). The report was supported by the UN-REDD program as part of its targeted support to the REDD+ strategy development.

<sup>94</sup> NATURAL JUSTICE, ACCESS AND BENEFIT SHARING 3 (2012), available at <http://naturaljustice.org/wp-content/uploads/pdf/Access-and-Benefit-Sharing.pdf>.

<sup>95</sup> Special Rapporteur on the Rights of Indigenous Peoples, *Extractive Industries and Indigenous Peoples* 18, U.N. Doc. A/HRC/24/14 (July 1, 2013) (by S. James Anaya), available at [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41\\_en.pdf](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41_en.pdf).

<sup>96</sup> Sena, *supra* note 71.

<sup>97</sup> See, e.g., *Indigenous Peoples Say No to REDD+ and Durban Climate Agreement*, CULTURAL SURVIVAL, <http://www.culturalsurvival.org/news/none/indigenous-peoples-say-no-redd-and-durban-climate-agreement> (last visited Mar. 16, 2015).

<sup>98</sup> For example, Ameridian communities in Guyana can opt in or out of the national REDD+ program, raising issues how national carbon stocks will be calculated as under REDD+, countries account for carbon in the country as a whole. See FOREST CARBON PARTNERSHIP FACILITY, GUYANA'S READINESS PREPARATION PROPOSAL 13 (2012),

may restrict communities' use of forest resources in order to control leakage in national REDD+ processes.<sup>99</sup> However, forest carbon projects in Kenya have yet to raise serious concerns, as they approach benefit sharing differently. In the national REDD+ context, benefit sharing has been brought to the forefront, focusing on both carbon and non-carbon benefits.<sup>100</sup> The design of the REDD+ strategies has so far included strong community participation in REDD+ benefit sharing discussion.<sup>101</sup> Benefit sharing accruing from forest carbon projects will be both financial and environmental. According to the UNREDD program, financial benefits from forest carbon projects will be based on project performance with projects that secure more carbon while respecting rights that are more attractive to buyers.

Unfortunately, Kenya has no benefit-sharing regime that will guide carbon benefits distribution. UNREDD advises that property rights may likely influence the nature and extent of benefits that accrue to different stakeholders. The stakeholders are those who have control, user, or authoritative rights. Those with control rights have ownership and rights to sell or lease land; those with user rights enjoy the benefits of the land while those with authoritative rights assign control rights.<sup>102</sup> A proposed Natural Resources Benefit Sharing law<sup>103</sup> currently before the Senate may eventually determine carbon benefits distribution. Though the proposed law does not define "natural resources," it would apply to forest resources.<sup>104</sup> The bill proposes the establishment of a Benefit Sharing Authority,<sup>105</sup> whose functions will include "coordinating the preparation of benefit

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available at <http://www.forestcarbonpartnership.org/sites/fcp/files/2013/FCPF%20-%20Readiness%20Preparation%20Proposal%20-%20Guyana%20December%202012.pdf>.

<sup>99</sup> "Carbon leakage" is "the displacement of greenhouse gas emissions from one place to another due to emission reduction activities" either through "a direct or indirect shift of emission-intense activities from within to outside an emissions accounting system." *Accounting for Carbon Leakage from REDD+*, REDD DESK, <http://theredddesk.org/resources/accounting-carbon-leakage-redd-are-current-quantification-methods-suitable> (last visited Mar. 16, 2015).

<sup>100</sup> Non-Carbon benefits are "the social, environmental, and governance benefits that REDD+ provides." See Allison Silverman & Niranjali Amerasingh, *UNFCCC REDD+ Negotiations: Non-Carbon Benefits Are Still on the Table*, FORESTS CLIMATE CHANGE (July 11, 2014), <http://www.forestclimatechange.org/forests-climate-change-mitigation/unfccc-redd-negotiations-non-carbon-benefits-still-table/>.

<sup>101</sup> The author led the multi-stakeholder consultation process towards the development of Kenya REDD+ Readiness Proposal in 2009-2010.

<sup>102</sup> UN-REDD PROGRAMME, CARBON RIGHTS AND BENEFIT-SHARING FOR REDD+ IN KENYA 8 (2013) [hereinafter BENEFIT-SHARING FOR REDD+ IN KENYA], available at <http://www.kenyaforestservice.org/documents/Carbon%20Rights%20and%20Benefit%20Sharing%20For%20REDD%20in%20Kenya.pdf>.

<sup>103</sup> See Natural Resources (Benefit Sharing) Bill, 2014, KENYA GAZETTE SUPPLEMENT No. 137, available at [http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/NaturalResources\\_Benefit\\_Sharing\\_Bill\\_\\_2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/NaturalResources_Benefit_Sharing_Bill__2014.pdf).

<sup>104</sup> *Id.* § 3(1)(d).

<sup>105</sup> *Id.* § 5(1).



sharing agreements between local communities and affected organizations.”<sup>106</sup> The Authority shall also “review, and where appropriate, determine the royalties payable by an affected organization engaged in natural resource exploitation.”<sup>107</sup> For benefit sharing, Section 26 of the Natural Resource (Benefit Sharing) Bill, 2014 states that:

- (1) The revenue collected shall be shared as follows—
  - (a) twenty per cent of the revenue collected shall be set aside and shall, subject to subsection (2), be paid into a sovereign wealth fund established by the national government; and
  - (b) eighty per cent of the revenue collected shall, subject to subsection (3), be shared between the national government and the county governments in the ratio of sixty per cent to the national government and forty per cent to the county governments.
- (2) The monies paid into the sovereign wealth fund under subsection (1)(c) shall be paid into the following funds constituting the sovereign wealth fund as follows -
  - (a) sixty per cent of the monies shall be paid futures fund; and
  - (b) forty per cent of the monies shall be paid natural resources fund.
- (3) At least forty per cent revenue assigned to the county governments under subsection (1)(b) shall be assigned to local community projects and sixty per cent of that revenue shall be utilized in the entire county.
- (4) Where natural resources bestride two or more counties, the Authority shall determine the ratio of sharing the retained revenue amongst the affected counties.
- (5) In determining the revenue sharing ratio of retained revenue amongst counties sharing a resource as prescribed under subsection (4), the Authority shall take into account -
  - (a) the contribution of each affected county in relation to the resource,
  - (b) the inconvenience caused to the county in the exploitation of the natural resource; and
  - (c) any existing benefit sharing agreement with an affected organization.

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<sup>106</sup> *Id.* § 6(1)(a). Under Section 2 (the interpretation clause), an “‘affected organization’ means an organization involved in the exploitation of a natural resource to which this Act applies.”

<sup>107</sup> *Id.* § 6(1)(b).

It is unclear whether communities will support this formula proposed in the bill. However, the process should involve the mapping of existing systems of rights; assessing the system of rights and sharing benefits according to internationally accepted criteria of effectiveness, efficiency, and equity; and developing options to guide the way forward.<sup>108</sup> Benefit-sharing arrangements under forest carbon projects like the Kasigau REDD+ project will inform the process.<sup>109</sup>

## V. CONCLUSION

It is important to note that carbon credit schemes will play an important role in both climate change adaptation and mitigation not only in Kenya but also in other parts of the world. These projects, however, should not result in the abuse of indigenous peoples' rights. On the contrary, they could be a critical bridge to the recognition and respect for indigenous peoples' rights to their lands. Realizing this would require new rights-based approaches to the design and implementation of carbon credit schemes. The approaches should not only entrench respect for rights, but also strengthen community participation and ownership of not only lands but also ownership of part of the projects. Encouragingly, efforts toward this result are being undertaken. The UNREDD program, for example, has launched a community-based REDD+ program to establish community-level programs that will complement the national REDD+ program.<sup>110</sup> Moreover, the Surui people of Brazil have established the first indigenous peoples' carbon fund to protect their "240,000 hectares of Amazon rainforest in hopes of earning eight million carbon credits."<sup>111</sup> The Surui community efforts should be emulated in Kenya.

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<sup>108</sup> BENEFIT-SHARING FOR REDD+ IN KENYA, *supra* note 102, at 9-10.

<sup>109</sup> *The Kasigau Corridor REDD Project Phase II—The Community Ranches*, CLIMATE, CMTY. & BIODIVERSITY ALLIANCE (Mar. 17, 2011), <http://www.climate-standards.org/2011/03/17/the-kasigau-corridor-redd-project-phase-ii-the-community-ranches/>.

<sup>110</sup> *Celebrating the Launch of Community Based REDD+*, U.N. PROGRAMME ON REDUCING EMISSIONS FROM DEFORESTATION AND FOREST DEGRADATION (May 15, 2014), <http://www.un-redd.org/CommunityBasedREDDLaunch/tabid/133356/Default.aspx>.

<sup>111</sup> Steve Zwick, *Brazil's Suruí Establish First Indigenous Carbon Fund*, ECOSYSTEM MARKETPLACE (Dec. 3, 2010), [http://www.ecosystemmarketplace.com/pages/dynamic/article.page.php?page\\_id=7871&](http://www.ecosystemmarketplace.com/pages/dynamic/article.page.php?page_id=7871&).



