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A large, dark silhouette of an acacia tree dominates the foreground, its branches spreading across the frame. In the background, a bright sun is partially obscured by the tree's trunk, creating a lens flare effect. The sky is a mix of dark and light tones, suggesting a sunset or sunrise. Other smaller acacia trees are visible in the distance.

**Forest carbon rights in REDD+ countries:
a snapshot of Africa**

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Preface

The world's forests are disappearing at an alarming rate. Not only does this endanger biodiversity and the livelihoods of forest-dependent communities, it is a major contributing factor to global climate change. It is a challenge that needs to be addressed – urgently.

The international community has responded by developing a policy initiative to *Reduce Emissions from Deforestation and Degradation*, otherwise known as REDD+. The ongoing negotiations under the UNFCCC have seen substantial progress in the development of a potential REDD+ mechanism. In the interim, numerous countries have begun their preparations to become “ready for REDD+”, with the assistance of both donor nations and the multilateral development banks. Ultimately, though, for a REDD+ mechanism to be successful, it will need to accommodate the interests of key stakeholders, including not only developed and developing country governments but also local communities and the private sector.

As legal advisors acting across the range of initiatives and projects seeking to mitigate dangerous climate change – from renewable energy funds to innovative forest conservation projects – it is incumbent on us to participate in that dialogue. This report therefore applies a perspective developed from acting for a range of government and private participants in the area of REDD+ to the emerging discussion of forest carbon rights. In light of our experience and the excitement about the potential contribution of REDD+ in Africa, we have focused our attention on key African nations. We hope that it is informative.

Although this report is a collaborative effort of a number of members of the Norton Rose climate change practice, special thanks are owed to Sophie Chapman for coordinating the research and co-authoring the report.

Andrew Hedges

Partner, European Head of Climate Change, London
Norton Rose LLP

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Introduction

What is REDD+?

REDD+ at the national level

The contribution of this report

What is REDD+?

The Intergovernmental Panel on Climate Change (IPCC) estimates that forest loss contributes to almost 20 per cent of greenhouse gas emissions worldwide,¹ creating an immediate need to address issues surrounding deforestation. Influential reports on the long-term costs of addressing climate change, such as the Stern Report, have shown that ambitious action to tackle forest loss in the near term is significantly more cost-effective than a range of other mitigation actions.²

After a long period of development, a consensus emerged at the 2007 UNFCCC negotiations in Bali that a new regulated international mechanism was needed to support *Reducing Emissions from Deforestation and Forest Degradation in Developing Countries*, otherwise known as “REDD”. REDD has subsequently emerged as one of the most active areas of international climate change policy.³ Those policy discussions have led to an expansion of the concept with a view to capturing a more comprehensive range of activities regarding forests and natural ecosystems. The conceptual framework that has emerged from international policy discussions is REDD-plus (hereafter, “REDD+”). In addition to reducing rates of deforestation and forest degradation, REDD+ includes enhancement of forest carbon stocks, conservation and sustainable management of forests.⁴

Although the negotiations at Copenhagen failed to approve a new regulated international mechanism under the UNFCCC to support REDD+, clear progress was made on the elements constituting such a mechanism.⁵ These include:

- overarching principles such as that participation under the mechanism should be voluntary and be in accordance with a country’s capabilities and national circumstances
- a definition of the scope of the activities that fall under the mechanism (at present, this is likely to cover the full scope of REDD+ outlined above)

- the safeguards relevant to REDD+ activities, including the prevention of leakage, ensuring participation of stakeholders such as indigenous peoples and ensuring existing forests are not converted to plantations
- the elements to be developed by developing countries wishing to participate, such as a national action plan, forest reference levels and monitoring and reporting systems
- recognition that a country’s ability to participate under the mechanism should proceed in phases which move from capacity building to implementation and finally to results-based actions
- a work programme for UNFCCC technical bodies to assist the mechanism to become operational.

REDD+ at the national level

With the emergence of a broadly accepted framework that could underpin REDD+, multilateral institutions, development banks and donor nations are accelerating their work with developing countries regarding the design and implementation of national REDD+ strategies, policies and programmes.⁶ As this work progresses, it is becoming clear that there is a need to develop a consistent approach to the concept of “carbon rights” in national REDD+ regimes. In relation to the commercialisation of REDD+ at scale, a consistent approach to carbon rights reduces both uncertainty and complexity; thus, it also reduces the costs and risks of participation. In light of this, beginning to address the complex issues that fall under the rubric of carbon rights will benefit key stakeholders, including:

- donors and multilateral institutions that wish to move quickly from capacity building to funding demonstration activities at scale (such as payments for emissions reductions achieved by national or significant subnational programmes)⁷
- indigenous and community stakeholders engaged in ensuring that the design and implementation of REDD+ in their country properly accounts for their role
- private sector investors considering deploying capital to support early-stage demonstration activities

- proactive host countries seeking to develop REDD+ regimes that address the interests of each of the above in order to facilitate fast-start funding streams⁸ and the long-term success of their REDD+ strategy.

Including the perspective of private sector investors in the analysis of the components of a carbon rights regime is a legitimate and necessary task. The estimated costs for funding a workable REDD+ regime designed to make significant inroads into deforestation and forest degradation rates globally are far beyond what has ever been previously delivered solely from public sources.⁹ There is therefore a strong imperative to ensure that both international and domestic regimes implementing REDD+ move toward an effective mechanism to attract appropriate and sustained private finance. For this reason, this report is informed by the on-the-ground issues that our experience has shown are relevant to private sector investors contemplating involvement in early-stage REDD+ demonstration activities.

The contribution of this report

The objective of this report is to add to the emerging body of analysis necessary to underpin forest carbon regimes¹⁰ that work for each body of stakeholders – government, local and private. In that regard, this report is informed by some core assumptions:

- that more work needs to be done to characterise what forest carbon rights should encompass under a workable forest carbon regime
- that in light of the unique national circumstances of each developing country implementing REDD+, a forest carbon regime will need to be built upon the existing legal regimes in relevant areas such as forestry and environmental management
- that it is critical to consider the practical on-the-ground realities of forest governance in order to inform a workable conceptual framework for carbon rights regimes
- that in light of the above there is a real utility in mapping a broad conceptual framework for certain aspects of a forest carbon regime against the existing legal regime in selected countries.

The report therefore approaches three key questions about REDD+ and forest carbon – one conceptual, one practical and one speculative:

- What are some of the elements of a workable forest carbon regime that are emerging from policy discussions?
- What aspects of existing tenure, forest and environment regimes are relevant to these elements, particularly as the basis for establishing beneficial proxy models to govern early-stage demonstration activities?
- What do the above questions tell us about how forest carbon regimes should develop further in order to move forward?

In asking those questions we have looked at a snapshot of African countries representative of a range of national circumstances.

Multilateral initiatives including UN-REDD,¹¹ the Forest Investment Program (FIP)¹² and the Forest Carbon Partnership Facility (FCPF) all have a substantive focus on Africa as a key location to achieve the anticipated benefits of both climate change mitigation and socio-economic development through REDD+. Due to their representation of a broad set of national circumstances, their involvement with the FCPF and the consequent availability of information, we use five key African nations to explore the questions of forest carbon ownership and governance: Kenya, Ghana, Tanzania, the Democratic Republic of Congo and Ethiopia.¹³ The FCPF seeks to build the capacity of developing countries in subtropical and tropical regions to reduce emissions from deforestation and forest degradation and to prepare them to take advantage of the incentive mechanisms that are currently under development.¹⁴ As part of their *Readiness Preparation Proposals* (“R-PPs”),¹⁵ each of these countries has acknowledged the importance of clarifying issues arising from forest carbon ownership and governance.

This report is legalistic in the sense that, to the extent possible, we have looked at the available primary legislation to provide context to the analysis conducted by countries themselves in their R-PPs. In doing so, we recognise the role of governance issues in Africa, particularly in the context of the gap between legislative intent and compliance (due to issues surrounding implementation and enforcement,

among others). However, it is beyond the scope of this report to identify all of the issues associated with the current implementation of the laws discussed in this report. In essence, we aim to contribute to one key aspect of the policy discussion about REDD+ in Africa, that is, the legal issues surrounding carbon rights in Africa, rather than the broad spectrum of issues that we recognise also need to be addressed. Despite such capacity issues, it remains an important task to look to the potential of existing local legal regimes rather than assume such capacity issues nullify their utility.

The report proceeds in two parts. Part I explores the conceptual basis of forest carbon ownership and governance. Part II presents an exposition of the five selected countries in Africa. We then conclude by commenting on how this analysis informs the development of both the international regime and the ongoing REDD-readiness efforts within African countries.



Part I – A conceptual basis for forest carbon regimes

Key themes

Rights to forest carbon
Rights of local peoples
Forest carbon rights and “carbon credits”

Summary

The REDD+ debate is presently characterised by numerous different interests and perspectives. Host countries are interested in attracting investment to co-benefit their economies; indigenous communities and their advocates worry about the expropriation of traditional rights under new regimes; multilateral agencies such as the World Bank are concerned with the appropriate use of donor funds intended for capacity building; and the private sector is concerned with the pragmatic questions surrounding the rights and risks associated with REDD+ implementation. If REDD+ is going to work, it is important to accommodate all viewpoints in a manner that does not paralyse the policy-development process.

Key themes

Key themes of a workable forest carbon regime as it relates to REDD+ are emerging from a variety of sources, including both international policy discussions and the experience of pilot projects. Some of those include that any such regime should be:

- clear in terms of the differing roles and responsibilities of various State, regional and local actors
- supported by the capacity to properly regulate and enforce such rules
- capable of recognising and including a role for informal customary law and the rights of indigenous peoples¹⁶
- equitable in terms of the sharing of benefits generated by REDD+.

The implementation of such elements will, however, be unique to the national circumstances of the participating nation. As such, by analysing the existing laws pertaining to forests and other related areas, we can determine the

extent to which a forest carbon regime consistent with the above themes is best implemented via further development of existing regimes or through an entirely bespoke regime. To take a simple example, even where existing arrangements for forest ownership could form the basis of ownership of the carbon sequestered in such forests,¹⁷ the structure of a legal regime designed to exploit rather than conserve forests may mean its use as an implementation vehicle for REDD+ is problematic.

Substantive elements of any consideration of local legal regimes for the above purpose therefore include understanding:

- the existing approach to ownership rights or substantive use rights in respect of forests, including the likely scope of such rights extending to carbon sequestered by such forests
- the means by which existing communal or informal rights are or could be recognised
- what other elements of any applicable legal regime could be utilised to enable the implementation of REDD+ activities under a national strategy that is effective and sustainable.

Below we consider those elements further in order to refine our analysis of forest carbon rights in the selected African countries, both in terms of the existing relevant legal regimes but also their capacity to evolve as vehicles for REDD+ activities.

Rights to forest carbon

In the absence of specific REDD+ laws, forest carbon rights frameworks are nationally specific, finding a basis in existing “proxies”. They can be conferred by statute or contract, and can find a basis in either civil or common law; they can also attach to concepts common to both the civil and common law worlds such as usufruct rights¹⁸ as opposed to the full ownership of forested land. Provisions relating to land tenure, tree tenure, forest governance, environmental protection and indigenous rights can all affect how carbon rights are conferred and governed.¹⁹

We start from the premise that ownership, or substantive use rights in respect of forests, should be the starting

point for determining the entity most likely to have rights in respect of the carbon sequestered in that forest. Whilst recognising that alternative approaches can be taken (for instance, approaches that look to carbon sequestration under a REDD+ regime as an entirely new resource to be regulated),²⁰ our view is that a pragmatic analysis of which entities can control or substantively affect forests is more likely to lead to the production of knowledge that is aligned with stakeholder expectations. By this we mean that the ecosystem service provided by a forest in sequestering carbon is inextricably linked with the sustainable management of that forest, and therefore the principal focus should be placed upon those with rights to manage or control the forests.

We have some reservations with approaches developed for western legal systems such as Australia being exported to developing countries. Such approaches, which create “a new and unique form of land interest that confers upon the holder a right to the incorporeal benefit of carbon sequestration on a piece of forested land”,²¹ rely on a sophisticated land tenure system supported by strong legal enforcement. Whilst this might be the appropriate approach in particular countries, we consider that an approach that links carbon sequestration rights with forest ownership or control is more appropriate so long as requisite reforms or additional measures are included to address any inequalities in existing forest ownership or control regimes *vis-à-vis* local communities and indigenous peoples.²²

Such analysis begins with determining the interplay between public and private rights in respect of forests in a given nation, particularly the manner in which government claims to the national forest resource are delegated to public and private entities. For each of the countries analysed, we utilise their FCPF-related analysis as well as a review of relevant primary and secondary information²³ on land, forest and environmental management laws to broadly identify the mechanisms by which forests are owned or substantively controlled, focusing on the different types of tenure available and the possible scope of such existing rights.

Rights of local peoples

An approach solely based upon existing ownership or substantive use rights in respect of forests risks embedding known issues that may also be drivers of deforestation. For example, some may argue that national forest regimes operating by means of granting concessions to private entities may fail to recognise pre-existing use rights of forest-dwelling communities.²⁴ Disputes driven by the

imbalance between formal and informal right holders are a recognised driver of deforestation in forest countries. As such, any analysis of the utility of existing mechanisms that grant ownership or use rights in respect of forests needs to be accompanied by an assessment of how those mechanisms address such community rights.

The issue of benefit sharing is also relevant here as the manner in which financial incentives associated with certain REDD+ activities are distributed may well be determined by either ownership of the forest carbon or an acknowledgment of an entitlement to benefit based on equity considerations. The capacity of existing law to provide appropriate benefit-sharing arrangements is therefore an important element of the broader consideration of mechanisms to safeguard the interests of local stakeholders. In this regard, existing regimes to provide for payments for ecosystem services (often termed “PES”) are also relevant as they are able to form the basis of an effective benefit-sharing model. Provisions relevant to ensuring the rights of forest-dependent communities can also include requirements to consult with or obtain the informed consent of community representatives, a role for public inquiries before the grant of concessions, the documentation of specific elements of any development plans relating to communities and specific revenue-sharing regulations.

In our analysis of existing laws relating to forest ownership and use, we therefore also look to identify how the rights of local peoples are treated and whether existing regimes encompass the potential to address issues such as consultation and benefit sharing. We also note where innovative mechanisms, such as payments for environmental services, can form the basis of benefit-sharing arrangements, given that PES schemes have the potential to support a mix of community, commercial and State interests. Given that we cannot cover all aspects of community rights and participation within each country,²⁵ we generally limit our discussion to issues specifically relating to benefit sharing.

Forest carbon rights and “carbon credits”

Useful analysis can arise from considering some of the key basic issues discussed above, such as the likely treatment of rights to carbon sequestered in forests under existing legal regimes. This can occur without necessarily considering the additional issues that come with the possible commodification of forest carbon rights for the purposes of national or international climate change mitigation regimes. To put this another way, it is not correct

to say that the only purpose of clarifying forest carbon rights is to underpin the creation of carbon credits.²⁶ Well-designed and well-regulated climate change mitigation regimes could, however, utilise such carbon credits and associated carbon markets to achieve strong environmental goals. Of particular relevance is the ability of such markets to channel private finance to REDD+ projects and programmes under host country national strategies, thus reducing the pressure on finite public finance sources.

Whilst consideration of the full scope of the issues associated with the creation and transfer of carbon credits in respect of rights to forest carbon²⁷ is beyond the scope of this report, we do consider some of these briefly. In particular, such consideration can be explored through the experience of existing private sector demonstration activities that intend to generate carbon credits in respect of such activities and thus help to finance them. To date, these investments have focused on the voluntary market, although many are structured as early-stage preparation activities for a future international compliance regime.

Based on our direct experience with REDD+ demonstration and pilot projects in Asia, Latin America and Africa, and supported by various synthesis studies, the potential role of the private sector in providing finance for REDD+ activities brings with it consideration of:

- the way that some of the issues raised earlier in this section can be informed by this experience, particularly testing how analogous or “proxy” laws (and their associated implementing rules and procedures) can be applied to establish forest carbon ownership
- the additional issues that investors will take into account (including how those can be mitigated by national strategies).

Regarding the first of these issues, our experience has been that reputable investors are interested in REDD+ demonstration projects²⁸ that are aligned with the elements of a workable forest carbon regime discussed earlier. Such projects are long-term investments with success tied to the ability of the project to create sustainable solutions to existing drivers of deforestation. This is reflected in the prevalent use of the CCBA standards for project design.²⁹ Such long-term focus is also reflected in a focus on identifying legal regimes that will enable the sustainable management of the target forest for the life of the project,³⁰ and has caused early-stage investors to grapple with some

of the issues discussed earlier regarding proxy regimes, including challenges arising from:

- the use of forest concessions originally designed for the logging of forests as a vehicle for long-term forest conservation, such as ensuring that requirements to ensure the continued validity of the concession do not run counter to that objective
- the risks of legal regimes in respect of other sectors (such as mining or infrastructure development) undercutting the long-term nature of the chosen legal vehicle for the project
- the use of legal regimes designed for forest conservation such as national parks or protected areas where such regimes do not adequately provide for the role of the private sector in managing such areas
- overcoming deficiencies in benefit-sharing arrangements by implementing contractual solutions with local communities for the channelling of revenue through trust funds and other community investment vehicles.

Additional issues relevant to potential private sector investors include:

- understanding the approach of a host country to demonstration projects in terms of their ability to assist the development and implementation of a national strategy
- the likely treatment of carbon credits under local laws – including tax, marketing and financial services laws
- wider issues common to any foreign investment in a host country,³¹ such as the rule of law, risk of civil strife or government expropriation, labour laws and the tax treatment of foreign investment vehicles.

For each country we therefore consider some of the governance and investment challenges related to it, particularly those recognised in the FCPF R-PPs as an area for further attention. Where relevant, we have also identified aspects in the R-PPs indicating whether countries are developing national REDD+ strategies that recognise the potential role for private finance in funding REDD+ projects or programmes. Examples we seek to highlight include: the role of existing well-designed REDD+ projects as demonstration activities for a national strategy; consistency

between proposals to develop the regulatory regime for REDD+ with existing approaches being used by various pilot projects in respect of forest carbon rights; and the status of the development of monitoring, reporting and verification regimes.

Summary

For each country we seek to analyse the general approach to land and forest ownership; this includes considering the proxy legal frameworks that could confer forest carbon ownership rights and the approach either under existing laws or emerging country REDD+ plans to issues such as benefit sharing (including innovative approaches such as payments for ecosystem services). We also consider some particular aspects relevant to the private sector. Emphasising our recognition of the issues associated with these countries regarding the actual implementation of existing laws, it is not our aim to provide a comprehensive review of all relevant details of the existing status of forest carbon frameworks in these countries, or to undertake a detailed analysis of how these frameworks could evolve. Rather, we identify a selection of pertinent issues and comment on the present situation as a starting point for moving forward with the country's REDD+ strategies.

Moving from the conceptual to the practical, in the next section we explore the situation within key prospective REDD+ hosts in Africa.



Part II – Forest carbon frameworks in Africa

Kenya

Ethiopia

Tanzania

Ghana

Democratic Republic of Congo

Kenya



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Kenya and REDD+

Kenya loses approximately 12,000 hectares of forest each year and has a history of widespread deforestation.³² Kenya's R-PP identifies numerous drivers of deforestation. These include a growing population, widespread poverty,³³ agricultural expansion³⁴ and the demand for forest-based fuels³⁵ which exert substantial pressure on the nation's forest resources. REDD+ has the potential to offer one tool within a strategy to address these challenges. As a UN-REDD partner country³⁶ and one of the African nations involved with the FCPF, Kenya exhibits a strong political will to engage multilateral mechanisms to deal with deforestation.

Issues around forest carbon ownership

Land tenure insecurity issues in Kenya pose a challenge to both the conferral and ongoing security of forest carbon

rights. With this in mind, a number of possibilities to secure the formal rights to forest carbon in Kenya may exist and a selection is explored here.

Kenya's 2010 Constitution provides a starting point for considering how to secure forest carbon tenure.³⁷ It establishes security over land rights as a key principle of land policy,³⁸ together with "sound conservation and protection of ecologically sensitive areas".³⁹ In principle, this clear articulation of the importance of tenure security and conservation by the supreme law of the country supports the development of REDD+ strategies, including the challenge posed by land tenure insecurity.⁴⁰ Chapter 5's *Land and Environment* provisions categorise land ownership as either public, community or private.⁴¹ The majority of Kenya's forests are either in public ownership and managed by the Kenyan Forestry Service (KFS)⁴² or owned by local communities and managed in trust arrangements by local authorities.⁴³ To a lesser extent, forests are also owned privately.⁴⁴

The *Forests Act 2007*⁴⁵ (*Forests Act*) vests the ownership of all forests in the State, except those granted to private owners or local authorities.⁴⁶ The existing presumption of State ownership in the absence of arrangements conferring community or private ownership could provide a centralised system for assessing forest carbon ownership,⁴⁷ which may be helpful in the context of designing a national REDD+ strategy. However, there is a debate regarding the efficacy of central approaches to forest governance: due to implementation challenges, centralised systems of

governance do not necessarily equate to centralised control, and may not give adequate emphasis to local participation in the decision-making process.⁴⁸ However, a positive example of centralised control would be the use of state ownership to facilitate the creation of a nature reserve under the *Forests Act*⁴⁹ in order to support the permanence of a REDD+ project. Similarly, the *Wildlife (Conservation and Management) Act 1976*⁵⁰ (*Wildlife Act*) gives the government the power to create⁵¹ and manage⁵² a national park.

In contrast to public lands, community lands (including those that are forested) are locally managed and not regulated by the government.⁵³ The Constitution defines community land as land that is lawfully registered, transferred or declared to be community land, in addition to that which is held, managed or used by specific communities – including forest peoples.⁵⁴ Also, unregistered community land is held in trust by county governments;⁵⁵ the provisions of the *Trust Land Act 1939*⁵⁶ (*Trust Land Act*) formally recognises customary land use rights.⁵⁷ The conversion of customary rights into statutory rights under a formal system of registration does not, however, necessarily translate into tenure security due to deficiencies in land administration.⁵⁸

Even where community land ownership is clear, the rights to the forest carbon may not be. For example, the *Forests Act* is not intended to prejudice customary rights which attach to the historical use of land by forest communities,⁵⁹ which leaves tenure in forest carbon uncertain on land subject to community ownership. This begs the question, can the conservation of a tree for the purpose of sequestering carbon in that tree under a REDD+ regime be considered a “customary” right of land use, given that REDD+ is a new concept? Given that forest carbon is a new form of “forest produce”⁶⁰ which does not have a monetary value outside of the intangible assets sold within a legally constructed marketplace, a customary right of land use may not confer ownership of the forest carbon. Such questions concerning both real and usufruct rights to community land need to be clarified as part of Kenya’s REDD+ strategy.

Private business interests⁶¹ own some of Kenya’s forested area,⁶² and private forest is not generally subject to State regulation.⁶³ In order to ensure the conservation of privately owned land, existing provisions in the *Environmental Management and Co-ordination Act 1999*⁶⁴ (*Environmental Management and Co-ordination Act*) could be used to

establish an environmental easement or conservation order. Granted by a court, these instruments impose “one or more obligations with respect to the use of land” on the covered area, which could prove to be a useful existing mechanism to implement long-term protection of forest assets on private land for REDD+ purposes. However, Section 112 has not yet been used for this objective.

Capacity for benefit sharing

Positively, Kenya’s REDD+ preparations show a willingness to test different approaches to benefit sharing in order to support community participation in forest management.⁶⁵ New schemes to enhance community participation in forest management and benefit sharing have recently been instituted,⁶⁶ without conclusive results as yet. Both weak community participation in forest management and inadequate benefit sharing from forest resources have been identified as drivers of deforestation, indicating the importance of communities and equity considerations in successful REDD+ governance. The KFS notes that forest-dependent communities need reassurance that REDD+ will not restrict their access to forests or forest produce.⁶⁷ In addition, stakeholders want to know what the anticipated benefits of REDD+ will be, including the details of revenue distribution.⁶⁸ Acknowledging these concerns, one part of Kenya’s proposed REDD+ readiness strategy is to test appropriate benefit-sharing arrangements, including those elaborated under the *Forests (Participation in Sustainable Forest Management) Rules*.⁶⁹ For example, Rule 26 provides for cost- and benefit-sharing arrangements between communities and the KFS.⁷⁰ The willingness to test appropriate benefit-sharing schemes as part of REDD+ readiness activities provides an example of the use of existing mechanisms as the basis for a more targeted regime designed for REDD+.

The commercial context of forest carbon

Kenya expressly acknowledges a role for the private sector in its REDD+ strategy.⁷¹ The R-PP identifies, and prioritises, the need for economic incentive schemes and financial management processes which are adequate for both the transition to and future implementation of REDD+ strategies.⁷² The extent to which Kenya has already adopted market-based approaches to natural resource management, in combination with its stated intention to develop incentive

mechanisms as part of its national REDD+ strategy, indicates a receptivity within the Kenyan political economy to the kind of structures that will attract private sector investment.

Providing support for recent reforms in forest policy and governance is considered by Kenya to be “the most promising strategy for REDD+”⁷³ and, in principle, key elements of the new policy and legislative framework will include appropriate incentives for sustainable management and use of forest resources – including payments for ecosystem services.⁷⁴ Another example is provided by the *Environmental Management and Co-ordination Act*, which permits taxes or fiscal incentives to be imposed “to induce or promote the proper management of the environment and natural resources or the prevention or abatement of environmental degradation”.⁷⁵ In addition, the owner of private forested land can apply under the *Forests Act* for technical and financial assistance from the KFS for the purposes of good forest management.⁷⁶ It is possible that existing provisions for market-related incentive structures linked to environmental conservation could be applied to activities deemed to be the “proper management” of forested areas being used for REDD+ projects, and greater clarity about these potential applications would help to encourage investors.

In terms of the potential role for carbon credits tied to forest assets being used as a vehicle for investment and deployment of Kenya’s REDD+ strategies, Kenya is notable in its approach. It is one of the few countries to recognise the need to chart a path by which subnational project activities focused on voluntary carbon markets are integrated into a consistent national approach. For instance, the R-PP expressly states the importance of clarifying the proper authority to transact international carbon credits as key components of Kenya’s arrangements for REDD+ implementation⁷⁷ and also the need to clearly define the future procedures and rules for forest carbon crediting (including the rules regarding participation in subnational activities and domestic approval requirements),⁷⁸ noting that such measures would reduce the risks for private sector investors.⁷⁹

Kenyan officials have continued to indicate that the government is committed to developing and implementing a REDD+ regime, with initiatives including a carbon credit investment framework (covering modalities of carbon credit registration, revenue sharing and accountability

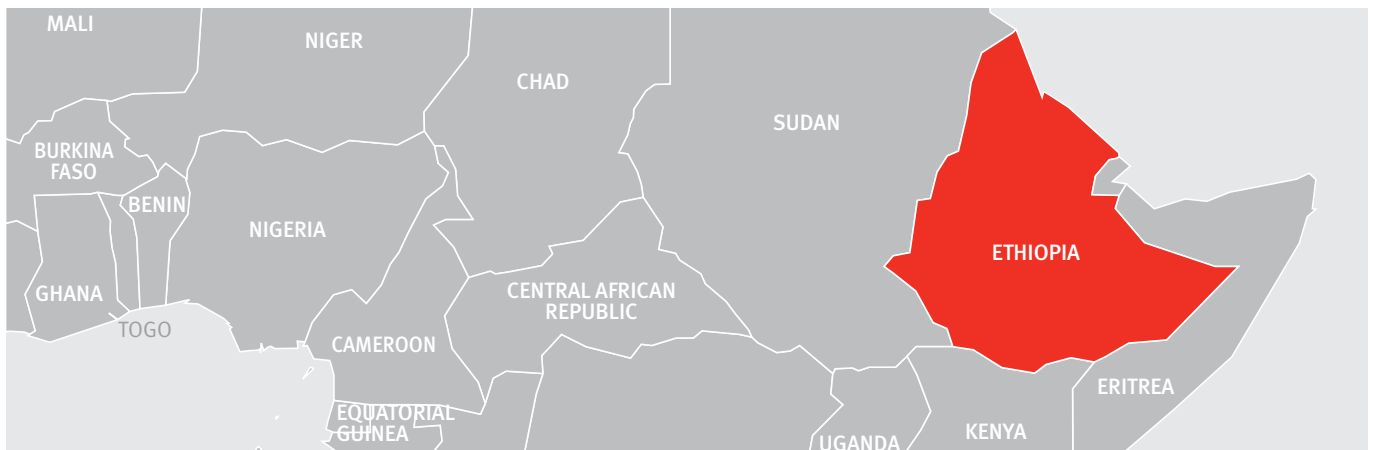
issues).⁸⁰ There is also discussion around developing an emissions trading scheme in Nairobi.⁸¹ Nonetheless, the R-PP concludes that current capacity within the country is insufficient to address all the steps needed to develop a robust MRV system. Some of the skills, expertise and infrastructure needed to design and implement a plan to establish historical emissions/removals and to make forward projections⁸² are already present, but the R-PP does note that gaps include expertise in carbon stock assessment, remote imagery interpretation and economic analysis.⁸³

Moving forward

Kenya’s R-PP reports that early action is feasible at either the national or subnational levels if those involved have confidence that the risks associated with REDD+ investments are shared and will be eligible for reward by an international REDD+ mechanism.⁸⁴ At present, there is an opportunity to start positive cycles of development in Kenya’s forest carbon space: for example, channelling finance into REDD+ projects will allow for methodology and modality development to clarify the definition of REDD+ credits⁸⁵ (in other words, the nature of forest carbon assets in Kenya). Private sector involvement in this process relies, in part, on confidence in reward for early action – highlighting the need for smart REDD+ strategies on the ground, now.

If successful, plans to test benefit-sharing arrangements during the pilot phase could prove helpful in garnering the support of local communities for REDD+ projects. Moreover, there is a possibility to apply Kenya’s existing laws relating to forest tenure, noting that certain clarifications can assist to make the current proxy regime more applicable for the purposes of REDD+. Although this will not solve all the issues posed by (forest) tenure insecurity in Kenya, it would begin the important process of defining transparent rules on the allocation of forest carbon rights within the country.

Ethiopia



Ethiopia and REDD+

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Moving forward

Ethiopia and REDD+

Over the past two decades, Ethiopia’s forest cover has declined substantially.⁸⁶ As one of the most recent countries to submit an R-PP to the FCPF, Ethiopia is focused on utilising the emerging international framework and financial support for REDD+ to assist in addressing this challenge. Population growth,⁸⁷ unsustainable forest management practices (including the use of fire to clear forest land)⁸⁸ and conversion to agricultural land⁸⁹ are all identified as causes of deforestation which Ethiopia seeks to manage better. With a devolved governance structure operating at both federal and regional levels,⁹⁰ REDD+ strategies aim to engage local communities and at the same time maintain links to the centralised political decision-making processes.⁹¹ Similar to many African nations, insecurity about land use rights, a lack of resources and administrative inefficiencies all pose challenges to REDD+ implementation, although the R-PP indicates that many positive steps are being taken to address such barriers. We use this information to consider the current status and future development of Ethiopia’s forest carbon framework.

Issues around forest carbon ownership

Uncertainty around forest use rights is a major cause of deforestation given that insecurity of land tenure provides little incentive for sustainable management and conservation of forested land.⁹² As a prerequisite for creating forest carbon, work to clarify the use rights attached to forests has been identified as an important part of Ethiopia’s REDD+ strategy.⁹³

As the supreme law of the land, the *Constitution of the Federal Democratic Republic of Ethiopia* 1994⁹⁴ (the *Constitution of Ethiopia*) provides a starting point for assessing the compatibility of REDD+ programmes with existing national law. It enshrines the right to a clean and healthy environment⁹⁵ and the right to sustainable development.⁹⁶ Although these principles imply environmental protection as a means to ensure the rights as stated, there is no express provision for protecting the natural environment.

The *Constitution of Ethiopia* vests the ownership of land and natural resources in the State.⁹⁷ This establishes a precondition for centralised forest management and tenure arrangements, similar to the examples of Kenya and Tanzania. If forest carbon is defined as a natural resource, it could be argued that forest carbon rights also vest in the State. However, the *Constitution of Ethiopia* also permits every Ethiopian to the right to own “private property”, where private property is either a tangible or intangible product flowing from the work of individuals, collectives or communities.⁹⁸ If an alternative view of forest carbon defines it as something “produced” by the communities

that manage⁹⁹ a REDD+ project and/or the private operators who invest¹⁰⁰ in projects, the forest carbon rights might be considered to be private property – even though there is a presumption of State ownership over natural resources. Also relevant here is the existing delegation of authority by the State to regional governments, discussed further below. It may be argued that such delegation extends to enabling the regional governments to take a lead role in defining an approach to forest carbon rights.¹⁰¹ Preliminary definitional questions such as these need to be addressed in order for carbon rights to be both established and appropriately shared.

Pursuant to Article 40 of the *Constitution of Ethiopia*, the *Federal Rural Land Proclamation 1997*¹⁰² (the *Rural Land Proclamation*) transfers the authority for land administration to the regional governments, and regional instruments must adhere to environmental law.¹⁰³ In practice, however, not all regions have enacted local land laws.¹⁰⁴ This means that Ethiopia's land tenure system is fragmented. Customary land tenure has been a diminishing feature of Ethiopian land law, with State authorities gradually superseding customary institutions¹⁰⁵ via constitutional authority.¹⁰⁶ The dominance of statutory tenure may form the basis of a consistent national approach to forest carbon rights that incorporates the role of customary tenure, although this will in practice be subject to any such approach adequately addressing local tensions around land ownership.

National environmental law is also relevant to REDD+ in Ethiopia. The Environmental Policy¹⁰⁷ deals with forest, woodland and tree resources with practical provisions aimed at the drivers of unsustainable forest use.¹⁰⁸ The *Forest Development, Conservation and Utilisation Proclamation 2007*¹⁰⁹ (the *Forest Development Proclamation*) outlines more specific forestry provisions, and establishes both private and State forest ownership.¹¹⁰ The *Forest Development Proclamation* allows for private development of rural forests in accordance with regional laws, and also allows concessions to be taken out in State forests.¹¹¹ If “development” catches conservation for the purposes of creating forest carbon assets, it might be possible to use existing concession arrangements to secure either private ownership or use rights over forested land. Presumably, this law would need to be reconciled with the interpretation of “forest carbon rights” in the constitutional context, that is, whether forest carbon is a natural resource owned by the State, or an intangible form of private property derived from use rights over the forested land. State forests can also be registered as protected, although the specific circumstances

under which this can be done may need to be expanded to suit the purposes of REDD+.¹¹²

Capacity for benefit sharing

In principle, the importance of community participation and consultation is enshrined in law. The *Constitution of Ethiopia* requires that citizens have the right to be consulted about projects and policies affecting their community.¹¹³ In addition, the Environmental Policy seeks to uphold customary rights over land and natural resources use¹¹⁴ and the *Forest Development Proclamation* makes numerous references to community consultation and participation in the context of forestry governance and management.¹¹⁵ However, the laws do not necessarily reflect the extent to which they are translated into practice, and the emphasis on participation/consultation rather than ownership and control may result in an unfavourable power differential between communities and the State.

If community rights are limited to procedural issues that rely on State authorities to realise them, then forest peoples need some assurance about the capacity and willingness of governments to respect their interests. In addition, the R-PP indicates that in order for REDD+ funds to be easily monitored, only legal entities that manage forested areas can receive financial support (for forest-dependent communities, such entities can take the form of a forest-user cooperative or a forest-user association).¹¹⁶ It will be important to ensure that communities are aware of these requirements, and are given support to meet them, in order to adopt an empowered role in the REDD+ process.

There does not appear to be any specific benefit-sharing mechanism in forestry law that could be used as the starting point for conferring clear entitlements to forest carbon revenues for forest-dependent peoples, although the R-PP reports that benefit-sharing mechanisms have been agreed between communities and governments (both national and regional) under the auspices of Participatory Forestry Management (PFM¹¹⁷) initiatives.¹¹⁸ The R-PP also reports that Ethiopia's PFM programme is being expanded,¹¹⁹ which has the potential to provide new and improved models for benefit sharing to use in REDD+ planning. The R-PP recognises the importance of addressing benefit-sharing issues¹²⁰ and it is expected that different mechanisms will be tested in the planned REDD+ pilots.¹²¹ Arguably, more explicit benefit-sharing provisions relating to the

revenues from REDD+ credits could be drafted into existing legal instruments; not only would this provide greater legal certainty for investors, it could promote community confidence and support for the REDD+ concept.

The commercial context of forest carbon

Ethiopia's developing REDD+ strategy recognises the role that existing or future demonstration projects capable of creating carbon credits may have in testing key mechanisms relevant to REDD+ implementation. In particular, Ethiopia sees such projects as a potential source of knowledge of carbon accounting and benefit sharing. This positive approach is similar to that of Kenya, in that recognition of the role such projects can play in the development of a national approach enhances the attractiveness of Ethiopia as a location for private co-investment in such projects. The R-PP also recognises that, to date, such pilots have been relatively dependent on public sector funds and that work needs to be done to attract private sector engagement (whether domestic or international).¹²² In this respect, the current detail of the Ethiopian approach to integrating demonstration projects into a wider national approach is less clear than Kenya – which sets out many of the key regulatory developments required to properly do so.

More broadly, there are elements of the existing Ethiopian legal regime that may assist in developing appropriate incentives for private sector investment in REDD+ projects and programmes. For example, Ethiopia's Environmental Policy recognises the “complementary roles” of the State, communities and private entrepreneurs in forestry development.¹²³ Furthermore, the *Forest Development Proclamation* requires investment opportunities and incentives to be provided to investors in the forestry industry,¹²⁴ although the exact nature of such incentives and the activities they are designed to promote is not specified. This provision might be broad enough to authorise the development of incentive schemes for investors as part of Ethiopia's REDD+ framework. This is in line with the *Constitution of Ethiopia*, requiring the government to “ensure the right of private investors to the use of land on the basis of payment arrangements established by law”.¹²⁵

Another positive point is the reported success of business-oriented forestry enterprises being used to manage forest resources at a regional level and thus also take the lead in implementing REDD+ activities.¹²⁶ The lessons from such

enterprises might assist in creating strategies to address the reported under-engagement of the private sector in REDD+ pilots, with a view to considering a possible role for public–private cooperation in REDD+ projects.¹²⁷ In addition, the value of ecosystem services has been acknowledged in the R-PP in reference to pilot selection.¹²⁸ It appears that the conceptual understanding for private sector involvement in REDD+ and the willingness to involve investors in projects is present in Ethiopia, but is not yet supported by technical and institutional capacity.

The institutional capacity limitations referred to above are currently reflected in the “institutional vacuum” regarding forestry in Ethiopia,¹²⁹ with no dedicated forestry institution and a lack of resources to deal with forestry issues.¹³⁰ As a consequence, efforts to address forestry issues are perceived as fragmented across different governments,¹³¹ non-governmental organisations¹³² and private sector organisations. This ad hoc and decentralised system of governance can increase regulatory risk and thus poses a challenge to creating a consistent strategy capable of attracting early-stage co-investment to demonstration activities in Ethiopia.

Similarly, the technical capacity to develop an MRV system is in its early stages. At the federal level, the Environmental Protection Agency (EPA) chairs a REDD+ steering committee that will be responsible for developing a national coordination and cooperation mechanism to link forest carbon MRV to national REDD+ policy.¹³³ Representatives from both the federal and regional levels will “play key roles” in overseeing the MRV system.¹³⁴ At present, it is unclear how this work will interface with regional initiatives, such as the reported appointment of an entity to administer and sell carbon credits.¹³⁵ Although consistent with the devolved system of Ethiopian governance, it could be asked whether this creates the potential for a fragmented system that could have a negative impact on the implementation of a consistent national approach. Against this can be noted the stated intention of Ethiopia to test national approaches to MRV through various pilot activities – many of which may be located in different regions or at least draw from existing pilots in such regions.¹³⁶

Moving forward

There are many positive signs for the development of REDD+ in Ethiopia. Notwithstanding the challenges posed

by fragmented governance between the federal and regional levels, existing regulatory structures (in the form of constitutional mandate, policy and proclamations) could potentially support REDD+. Important questions to be resolved include the treatment of forest carbon as a form of property (is it public or private?) and the applicability of existing provisions for granting concessions and declaring protected areas could be clarified for the specific purposes of REDD+. The law could also be altered to add greater clarity and security to benefit-sharing arrangements, which will be tested during the pilot phase. Frequent regulatory references to the importance of community participation and consultation could be anchored more firmly in provisions securing actual entitlements to the carbon revenue.

The status of the law cannot be considered in isolation from institutional constraints. This is indeed highlighted in Ethiopia's R-PP, which notes the need for capacity building in many areas around forest governance and the development of an appropriate MRV system. If these challenges can be met, then REDD+ could be used as a vehicle to promote the involvement of the private sector in forestry management to an extent that it is consistent with national development priorities. It can be hoped that with the support of the FCPF and other bilateral donors, Ethiopia will work towards developing a REDD+ framework that can support both early demonstration activities and future investment flows.

Tanzania



Tanzania and REDD+

Issues around forest carbon ownership

Capacity for benefit sharing

The commercial context of forest carbon

Moving forward

Tanzania and REDD+

Tanzania’s high rates of deforestation and degradation are consistent with trends throughout sub-Saharan Africa. Anthropogenic (that is, human-induced) drivers of deforestation include logging, mining, subsistence fuel use and land use change due to agricultural expansion.¹³⁷ At present, Tanzania has a bilateral partnership with Norway (the Norway–Tanzania Forest Climate Change Partnership Agreement) in addition to multilateral involvement with capacity-building initiatives under UN-REDD.¹³⁸ Demonstration projects have already been initiated to assist with the process of designing a nationally appropriate REDD framework.¹³⁹

Many drivers of deforestation are related to Tanzania’s low economic development, including population growth and rural poverty.¹⁴⁰ Subsistence use of the forest for fuel and unsustainable agricultural practices (for example, overgrazing, use of fires in land management)¹⁴¹ threaten

forests. Some drivers are political: Tanzania has been host to large numbers of refugees from conflicts in the region, where the construction and maintenance of camps cause rapid deforestation. Insecure land tenure flowing from an absence of land use planning is also a major driver of deforestation in Tanzania, with approximately half of the forested area having no properly defined management regime.¹⁴² On a more positive note, there is a history of Participatory Forest Management (PFM), which currently applies to 4 million hectares of forested land.¹⁴³ In addition, existing land, forest and environmental management regimes have the potential to support REDD+ strategies for the purpose of reversing the trend towards deforestation. We discuss some of the issues around forest carbon ownership, commercialisation and governance below.

Issues around forest carbon ownership

Tanzania’s land is under a system of State ownership that grants use rights for different categories of land use. The *Land Act* 1999¹⁴⁴ (the *Land Act*) and the *Village Land Act* 1999¹⁴⁵ (the *Village Land Act*) create three different land categories: reserved land, which includes all lands set aside for special purposes (including forest reserves), village land,¹⁴⁶ and general land (as a residual category that catches unoccupied land which can be used for other purposes).¹⁴⁷ The *Land Act* preserves colonial tenure systems by recognising a granted right of occupancy, leasehold estates and customary tenure.¹⁴⁸ It must be noted, however, that despite the relatively straightforward statutory regime,

Forest carbon rights in REDD+ countries: a snapshot of Africa

issues around land registration mean that customary rights are not secure¹⁴⁹ and only careful due diligence can reveal any unregistered and/or overlapping claims to land on the basis of customary use.

Nonetheless, the centralised system of land ownership provides a clear starting point for determining who has rights attaching to a piece of forested land, which is also governed by forestry law. The National Forest Policy 1998¹⁵⁰ encourages community and private sector involvement in forest management¹⁵¹ and is implemented through the *Forest Act* 2002¹⁵² (the *Forest Act*). The *Forest Act* is used to establish forest reserves that are managed at either the national, local, village or community levels, attaching rights and management responsibilities to the reserved area.¹⁵³ It also governs applications for restrictive covenants¹⁵⁴ and forestry concessions¹⁵⁵ in forested land, whether reserved or unreserved.¹⁵⁶ For the purposes of controlling how a forest (and its “produce”) is used, this system provides an appropriate starting point for a REDD+ regime.

Once the holder of the use rights has been established under the land tenure system, the nature of those rights needs to be examined to determine the extent to which they can be applied to confer rights to forest carbon, for the purposes of creating and protecting a forest carbon asset from a REDD+ project. The *Forest Act* aims to conserve and manage natural resources and promote sustainable development.¹⁵⁷ In principle, this objective is compatible with the goals of REDD+ and may support the application of the *Forest Act* for both establishing use rights and protecting the permanence of REDD+ projects. For example, the holder of use rights over “private” forests (created either by a customary right of occupancy of village land¹⁵⁸ or via a leasehold arrangement with a third party¹⁵⁹) can apply for a restrictive covenant which permits only “good forestry” for the “commercial production of forest produce” and other types of conservation.¹⁶⁰ If projects under REDD+ transform a standing forest into a “product” (that product being a forest carbon asset), then it may be possible to protect a REDD+ area with such a covenant. Given that the definition of “forest produce” catches anything that is produced by or from trees and can be expanded by official notice,¹⁶¹ there may indeed be scope to use this existing rule for the specific purposes of REDD+.

Capacity for benefit sharing

Although the tenure system is centralised, local management through participatory forest management is a feature of

Tanzanian forest governance. In fact, the *Forest Act* was partly designed in response to a recognised need to include local communities in forest management.¹⁶² It seeks to implement Participatory Forest Management (PFM) in the form of Community Based Forest Management (CBFM) and Joint Forest Management (JFM).¹⁶³ It therefore contains several features relevant to forest communities, including: the requirement to consider the rights¹⁶⁴ and existing resource use¹⁶⁵ of local communities when designing forest management plans;¹⁶⁶ the requirement for consultation with local authorities, local communities *and* private sector stakeholders;¹⁶⁷ and publication, consultation and review with respect to a detailed forest management plan.¹⁶⁸ However, this model has not automatically led to equitable benefit sharing and greater success in achieving sustainable forest management. Unfair benefit sharing within communities¹⁶⁹ and the state of governance at each level of government¹⁷⁰ reportedly compromise the objectives of the *Forest Act*. In fact, the R-PP concludes that due to these and other issues, the implementation of PFM has not yet led to “benefit-sharing mechanisms that may inform REDD”.¹⁷¹ Although several challenges to the implementation of successful participatory forest management have been identified, the issue is to be addressed as part of REDD+ preparations.¹⁷²

In addition, it may be possible to address benefit-sharing mechanisms under other legal regimes. For example, the *Environmental Management Act* allows a role for benefit sharing in the design of Environmental Management Plans for Nationally Protected Areas,¹⁷³ which would be relevant if a REDD+ project was protected under this provision.

The commercial context of forest carbon

Although there are institutional weaknesses to overcome, the Tanzanian R-PP highlights a number of areas where its REDD+ strategy can, in time, align with the potential investment of private finance to REDD+ demonstration projects and programmes.

Tanzania’s R-PP describes the institutional framework for the forestry sector as weak.¹⁷⁴ The Forestry and Beekeeping Division (under the auspices of the Ministry of Natural Resources and Tourism), in addition to the Prime Minister’s Office, Regional Administration and Local Governments are all involved in forestry administration.¹⁷⁵ A lack of coordination between these different areas of governance is a noted problem.¹⁷⁶ However, given that Tanzania’s forest policy has recently been revised to account for the impact of

climate change within the country,¹⁷⁷ there is an identifiable level of political will around forestry-related climate change action.

Particularly noteworthy aspects of Tanzania's REDD+ strategy development include the investigation of the modalities for establishing a national REDD Trust Fund designed to ensure international financial flows regarding REDD are appropriately channelled to conservation and community needs.¹⁷⁸ Whilst this is not directly relevant to attracting long-term investment into targeted activities, a well-developed fund structure can provide an important investment environment through attracting accelerated multilateral support. In the early stages of REDD+ implementation, the majority of private finance will be likely to focus on countries capable of accessing and successfully deploying such support. Tanzania also plans to further investigate the potential positive role for projects designed to generate carbon credits.¹⁷⁹ This will encompass analysis of existing projects (both under the CDM and in voluntary markets) with a view to identifying positive examples of local governance arrangements, incentive schemes involving equitable benefit sharing and participatory approaches to monitoring and verification.¹⁸⁰

Developing the tools to integrate such pilot initiatives within a national approach to monitoring, reporting and verifying carbon emissions in respect of Tanzania's forests stocks is, however, in its infancy. At present, there is no comprehensive and updated information on the exact nature of Tanzania's forest resources. The National Forest Programme (NFP) identified the National Forestry Resources Monitoring and Assessment (NAFORMA) as a priority for the Forestry and Beekeeping Division (FBD).¹⁸¹ Although this programme was developed under the auspices of the Food and Agriculture Organisation of the United Nations (FAO), it has become part of Tanzania's REDD+ strategy¹⁸² and will be used in the creation of a National Carbon Accounting System.¹⁸³ Tanzania is a pilot country under UN-REDD¹⁸⁴ which is providing assistance with the technical challenges associated with MRV.¹⁸⁵ The Group on Earth Observations' Forest Carbon Tracking Initiative¹⁸⁶ uses Tanzania as a demonstration country.¹⁸⁷ In addition, community monitoring of forest carbon is being tested in Tanzania with some evidence of success,¹⁸⁸ and a National Carbon Monitoring Centre has been proposed in order to oversee the MRV system when operational.¹⁸⁹

There are also some noteworthy existing legal mechanisms that could provide opportunities to create the right investment context for sustainable activities. For instance,

the *Environmental Management Act* provides for the use of economic instruments and financial incentives for the purposes of minimising environmental damage,¹⁹⁰ including tax deductions and rebates,¹⁹¹ special grants for specific projects¹⁹² and other discretionary measures.¹⁹³ Given that economic instruments that can be used include creating a market and property rights,¹⁹⁴ the authority to create legal security around forest carbon rights in addition to the regulatory and commercial structures that support their commercialisation may already exist. As such, the existing legal capacity for innovation and pre-existing receptivity to market-based tools for forest management could prove helpful during the process of creating REDD+ strategies. In addition, Tanzania's R-PP acknowledges the importance of ecosystem services connected with forests, framing forest conservation in the language of the market.¹⁹⁵

Moving forward

Tanzania's history of deforestation and efforts to deal with the problem provide both the will and the institutional foundation for a REDD+ regime, although substantial work is needed in order to ensure that public funding is used appropriately and private investments are secure. In practice, insecurity of tenure and an absence of formal use rights in the general land means that forest resources are often vulnerable to exploitation¹⁹⁶ and work as a driver to deforestation. Existing land, forestry and environmental law provide a starting point for establishing forest carbon ownership, although the challenge posed by overlapping and/or unregistered claims to land needs to be addressed as part of tenure reform. Also, whether existing use rights include the right to create and benefit from a forest carbon asset is a matter that would benefit from clarification.

It appears more straightforward that existing legal instruments could be used to protect and manage forested areas, including those provisions aimed at promoting the rights (and responsibilities) of communities. However, the R-PP cautions that existing benefit-sharing mechanisms do not provide a model for REDD+,¹⁹⁷ indicating an important gap to be addressed under the auspices of REDD+ capacity-building efforts. The presence of both multilateral and bilateral support alongside some evidence of local political will to develop REDD+ strategies means that Tanzania is a promising candidate for REDD+ investments.

Ghana



Ghana and REDD+

Issues around forest carbon ownership

Capacity for benefit sharing

The commercial context of forest carbon

Moving forward

Ghana and REDD+

In February 2010, the Forest Investment Program (FIP) administered by the World Bank selected Ghana to host pilot REDD+ projects. A tropical West African nation, Ghana faces an ongoing challenge with both forest degradation and deforestation. At present, it is losing approximately 65,000 hectares¹⁹⁸ of forest every year and is struggling to prevent widespread degradation of forests in both protected and unprotected areas of the country. Demographic, policy and economic drivers of the problem operate simultaneously: local and international demand for forest products, a growing population, unsustainable farming practices, fuel derived from forest products, and illegal logging all drive forest degradation and deforestation in Ghana.¹⁹⁹ Ghana has been described as the most complex of all the prospective host countries for REDD+, but also among the most promising. It clearly illustrates the difficulties in defining forest carbon ownership.

Ghana's land tenure system is characterised by customary ownership – indeed, the majority of Ghanaian land is under

customary ownership. Overlapping claims to land in addition to attempts at statutory intervention create an uncertainty within existing tenure arrangements posing a clear barrier to securing forest carbon rights. Possibilities for securing forest carbon ownership through existing proxy provisions adapted for this purpose must navigate the complex land tenure arrangements to secure land ownership, obtaining the economic right to trees on the land, or the adaptation of existing timber concession arrangements for the specific purposes of REDD+. As stated in its R-PP, Ghana intends to review these options as part of its REDD+ strategy.

Issues around forest carbon ownership

Customary lands form approximately 78 per cent²⁰⁰ of the total land area in Ghana²⁰¹ and consist of both stool²⁰² and family lands; family lands together with individual lands form about 35 per cent of the total lands in customary ownership.²⁰³ Customary land tenure claims more than 65 per cent of the undeveloped land in Ghana.²⁰⁴ Despite efforts of past governments to statutorily regulate and control the customary land tenure system in Ghana, indigenous tenure systems still govern land transactions.²⁰⁵ Resulting from increased privatisation and commoditisation of land under customary tenure, a maze of multiple tenure relations has evolved, creating many management challenges for customary land users.²⁰⁶ There has been a trend towards the privatisation of customary land under individual or family ownership in Ghana. However, consistent with trends elsewhere in Africa, there has been some tension between State ownership over land and customary ownership.²⁰⁷ Efforts to regain customary control over land have increased

across Ghana.²⁰⁸ In addition, some informal arrangements operate outside the control of the State; for example, a migrant farmer may rent a piece of land temporarily, but this does not include the rights to use this land.²⁰⁹ Tenant farmers do not own the trees found or even planted on their land except for planted economic trees in the Upper West Region of Ghana.²¹⁰ Also, in traditional land agreements, when the tenant changes the land use that was agreed during the land acquisition, the landowner's consent is required.²¹¹

Early in 2010, the Forestry Commission of Ghana acknowledged the need to review the status of existing tree tenure provisions and forest management practices in order to assess the extent of reform needed to become REDD-ready.²¹² Six months later, an independent research collaboration by Ghanaian experts found that “questions of ownership and use rights to land and trees are complex and widely contested” where tree and land tenure is neither straightforward nor congruent.²¹³ Multiple stakeholders can claim ownership under a legally pluralistic system in which it is unclear whether carbon credits are derived from the land, economic rights to trees or a new entity specific to the requirements of REDD+.²¹⁴ It was argued that the existing legal and institutional framework poses “significant problems and challenges” for REDD+ implementation in Ghana²¹⁵ due to the regulatory risks created by convoluted legal provisions around rights and tenure: naturally grown trees are nominally owned by traditional authorities, although the rights to economically exploit such trees belongs to the State in protected (“reserve”) and unprotected (“off-reserve”) land. This situation is further complicated by the fact that even though individual landowners/land users cannot claim an economic interest to naturally grown trees, they can nonetheless fell trees in unprotected areas.²¹⁶ Given that REDD+ strategies need to work with existing forest management schemes,²¹⁷ any specific REDD+ policy must begin by clarifying the legal status of tree tenure.

Environmental law overlaps with forestry and land management law in Ghana. For example, the *Forest and Wildlife Policy* (1994) provides a basis for the development of a national forest estate and timber industry.²¹⁸ The Environmental Protection Agency (EPA) was formed by the *Environmental Protection Agency Act* (1994) to play a role in numerous areas of environmental governance, including natural resource management.²¹⁹ Existing controls over logging could have an important role to play in preventing illegal logging and may also be helpful in controlling limited logging practices if conservation areas permit limited logging by reason of either customary use or as an additional

revenue stream to the landowners. The latter point indicates how REDD+ can help to reduce the opportunity cost of logging for communities, that is, by generating a higher value from the emissions reductions credits obtained through conservation than the payments for felled timber.

Capacity for benefit sharing

Aside from the questions surrounding tenure, existing constitutional benefit-sharing arrangements are controversial and, if applied to REDD+, may not create adequate incentives for land users to support projects. Article 267 of the *Constitution of the Republic of Ghana* 1992²²⁰ articulates a formula for sharing forest revenue. The Administrator of Stool Lands is entitled to 10 per cent of the total revenue received, with the rest to be shared thus: 25 per cent to the stool in keeping with its status; 20 per cent to the traditional authority; and 55 per cent to the District Assembly.²²¹ In practice, the Forestry Commission takes about 50 per cent to cover its management costs and gives the remaining 50 per cent to the Administrator of Stool Lands to share in accordance with the formula.²²² Financial benefits from timber revenue accrue exclusively to District Assemblies and traditional authorities (chiefs), rather than farmers.²²³ This has created a driver for (illegal) chainsaw milling, which is widespread despite an official prohibition since 1998.²²⁴

Without adequate compensation for the opportunity cost of conserving the forest (for example, the revenue foregone by not exploiting the forest for agriculture or timber exploitation), there is little benefit for the rural poor who rely on forests for their livelihoods.²²⁵ With respect to stakeholder participation, the Ghanaian experience highlights another important policy issue: although benefit-sharing arrangements do exist in the constitutional law of the country (however controversial they may be), these alone do not ensure that adequate stakeholder consultation is achieved. Comparative power disparities between the government, commercial interests and rural land users derive from both economic vulnerabilities and knowledge gaps, with the potential to limit community choices and affect the extent to which they can constructively engage in REDD+ debates. Nonetheless, a recent study by the Katoomba Group²²⁶ provides historical examples of benefit-sharing structures in Ghana, including but not limited to the constitutional revenue-sharing formula. For example, the experiences of Commercial Plantation Agreements, Community Forest Management Projects and Community Resource Management Areas (CREMAs)²²⁷ can be used to inform the development of appropriate benefit-sharing

arrangements under REDD+.

The commercial context of forest carbon

Ghana's R-PP indirectly makes several suggestions with respect to creating an enabling investment environment for REDD+, although it does note the challenges of enacting broad policy reforms without the assurance of eventual rewards from emission reductions or other environmental benefits.²²⁸ For example, a centralised carbon accounting registry for tracking carbon emissions and credit monitoring²²⁹ is identified as a “necessary institutional innovation”. In addition the R-PP notes the potential for a national credit buffer system where the government assists in insuring forest credits from risks and losses.²³⁰ The latter is notable in that it recognises one of the critical elements in the integration of subnational activities into a national strategy – namely, the potential necessity for providing comfort to investors in critical regional projects that reversals occurring outside of their control can be dealt with under a national buffer system.²³¹ Ghana also acknowledges the role of demonstration activities that cover a range of projects and programmes, including those that involve site-level crediting and participation in voluntary carbon markets.²³²

It is worth noting, however, that Ghana's capacity to implement some of the above measures is in its infancy. Indeed, the design and implementation of an MRV system is in its early stages. Ghana's R-PP reports that a comprehensive MRV system is being planned that will include factors such as GDP, population growth, agricultural expansion, forest industry growth and specific investment programmes (among others) in assessing the expected rates of deforestation in the absence of REDD+ initiatives. In order to estimate historic emissions/removals and project this forward, domestic capacity has been assessed as insufficient to perform all the necessary steps, indicating an important area for action.

The need to create institutional structures and financial arrangements to manage REDD+ financing (public and private) is reiterated throughout Ghana's description of its “arrangements for REDD implementation”.²³³ The R-PP includes a National Expert Consultation on Allocation of Terrestrial Carbon Rights as part of its R-PP process,²³⁴ anticipating that one outcome of this review will be to clearly define procedures for ensuring that REDD+ payments – in addition to other payments for ecosystem services – reach resource managers.²³⁵ Given that Ghana contemplates the use of PES schemes in the context of REDD+ and identifies

their relationship to broader PES policy, there appears to be a willingness (at least at the policy level) to utilise market-based incentives for forest conservation. These approaches could utilise existing legislation. For instance, the *Timber Resources Management (Amendment) Act* (2002)²³⁶ provides for benefits and incentives applicable to investors in forestry and wildlife in referring to those available under the taxation and customs regimes of Ghana and other financial incentives.²³⁷

Moving forward

Ghana's R-PP notes the challenges of enacting broad policy reforms without the assurance of eventual rewards from emission reductions or other environmental benefits.²³⁸ This indicates the important role of policy at both the national and international levels in providing (future) crediting mechanisms which are able to reward early action and stimulate REDD+ activity. In contemplating how REDD+ will work in Ghana, the domestic capacity of the country to address the many challenges posed by both tenure and governance needs to become a key target for international support and it is expected that public finance will first be needed to build the requisite elements of a forest carbon framework. Significant challenges will be posed by the question of benefit sharing for pilot projects due to existing constitutional benefit-sharing provisions that exclude individuals from the process. In the absence of a sound benefit-sharing scheme for REDD+ proposed to be developed through the national Expert Consultation on Allocation of Terrestrial Carbon Rights, the design of benefit-sharing arrangements must be informed by existing examples from within the country.

Both the R-PP and studies around the Ghanaian forestry space emphasise the complexity of land tenure arrangements as a potential issue for investors. Ghana displays a multi-layered system of land tenure covering statutory, customary and informal arrangements. The insecurity of land tenure created by this complex system creates a regulatory risk for REDD+ projects, which is why current efforts to prepare for REDD+ emphasise the importance of reviewing Ghanaian land ownership. However, this is not to say that the task of defining forest carbon ownership in Ghana and ensuring adequate REDD+ governance is insurmountable. Key precursors to finding a way forward already exist; the issues to be addressed have been identified, and both political will (within Ghana) and multilateral support for the review process is apparent.

Democratic Republic of Congo



Democratic Republic of Congo and REDD+

Issues around forest carbon ownership

Capacity for benefit sharing

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Democratic Republic of Congo and REDD+

The Democratic Republic of Congo (DRC) has a politically turbulent history, with ongoing civil strife still present in the eastern region of the country. Although warfare has resulted in the mismanagement of many national resources, rates of deforestation have remained low. As such, the main focus of REDD+ strategies need not be on the drivers of deforestation but on avoiding the *potential* drivers. REDD+ programmes are already active in the DRC: it has been selected as a pilot under both the FIP and UN-REDD. It also participates in the dialogue about conservation of the Congo Basin held under the auspices of the Central African Forests Commission (COMIFAC²³⁹). A key issue will be whether the public funding flowing into the country can build sufficient capacity to encourage private investment.

Issues around forest carbon ownership

It is widely acknowledged that implementing the rule of law in the DRC is problematic, and we emphasise our recognition of this point. Nonetheless, our focus is to identify the existing legal framework which has the potential to support REDD+. In our view, the institutional limitations of a legal framework do not diminish the importance of considering its role in supporting REDD+ policy. First, governance failures in the law do not necessarily speak to the quality of the legal provisions contained in that law. Second, to have a good chance of success, REDD+ policy must contend with the same governance issues that affect existing regimes. Therefore, if existing legal provisions have merit, there is scope for REDD+ to both utilise *and* support the existing legal framework. For example, an analysis of the country's *Code Forestier – or Forestry Code 2002*²⁴⁰ (*Forestry Code*) – indicates several positive features that have the potential to support early-stage demonstration activities. In light of this, in our view, policies aimed at implementing REDD+ should be considered with the reality of governance inadequacies in mind and also the understanding that REDD+ investment may offer an opportunity to address the institutional challenges affecting implementation.

The *Forestry Code* provides the opportunity for a nationally consistent approach to REDD+ as it clearly establishes that forests are the property of the State.²⁴¹ The use of forests by public or private entities, even where land is divided

and allocated for use, must occur in accordance with the provisions of the *Forestry Code*.²⁴² Arguably, this enables a consistent approach to be developed across both public and private land. However, the DRC R-PP recognises the long delay between the enactment of the *Forestry Code* in 2002 and the progress of a number of implementing measures. Many of the elements discussed below are therefore not yet operational.²⁴³ It is also often argued that a harmonised approach to law-making also needs to accommodate different subnational circumstances: given that both the participation and support of local communities will be integral to REDD+ success, the centralised approach to forest governance needs to incorporate an adequate level of flexibility. The DRC R-PP recognises this in its discussion of the challenges of implementing decentralisation under a new constitutional framework, particularly regarding balancing the national leadership against the devolution of powers to provincial authorities in respect of forests and the environment.²⁴⁴

An important question in the context of REDD+ is whether the scope of the *Forestry Code* is sufficiently wide to capture the concept of carbon sequestered in forests and ecosystems. In advance of more detailed legislative regimes relating to REDD+, the *Forestry Code* applies to the conservation, exploitation and development of forest resources over the whole of the national territory. Key concepts used in that scope such as “forest development”²⁴⁵ and “conservation”²⁴⁶ support the view that it is intended to encompass the full range of activities that could relate to “forests”,²⁴⁷ including purposes intended to protect carbon sequestered in forests. A more critical view of the *Forestry Code* may note that it was not intended to cover the technical complexities of REDD+, and in order to offer sufficient clarity it needs to be supplemented with more specific REDD+ rules. Currently, the DRC is determining its approach to the legal characterisation of forest carbon. It recognises that forest carbon may already be dealt with under existing laws but notes that there may be valid reasons for a “more centralised management or implementation means by the State” such that carbon assets should be held by the State but “subject to redistribution rules”.²⁴⁸

Where a demonstration activity is focused on forest conservation across a range of forest tenures, it will be likely to raise issues which are distinct to each type of tenure and also to the entity implementing the activity. For instance, the *Forestry Code* allows forests to be classified for environmental purposes – including areas such as reserves

and national parks. This provision would prove useful for a demonstration activity where the entity managing that project sought to protect forests that would otherwise be used for logging by conversion of such areas to a reserve or national park. However, the structure of the *Forestry Code* is unclear in terms of how this could occur in a manner that recognises the continued role of that entity in managing the forests conferred with a protected status.²⁴⁹ Again, supplementary provisions may be necessary to clarify the law for specific REDD+ application.

An alternative approach would be to utilise the provisions of the *Forestry Code* relating to the grant of concessions for forest exploitation, with the intention to establish a conservation area rather than a logging operation. This appears possible under the *Forestry Code*, although there are inherent gaps due to the different objectives being pursued. Nonetheless, existing mechanisms under the *Forestry Code* have the potential to support this approach – for example: the ability to grant State forest to an entity for a period of up to 25 years under a forest concession (providing comfort as to the long-term nature of the rights covered);²⁵⁰ the use of the required forest inventory as a means to estimate forest carbon stocks; the use of the forest development plan to document the REDD+ activities to occur on the concession;²⁵¹ and the existing consultation and community engagement mechanisms to address stakeholder concerns and address disputes (discussed further below). However, issues likely to arise from this approach include: whether the existing financial structures associated with the grant and implementation of a forest concession are applicable for a conservation concession (considering the former are designed around logging assumptions);²⁵² and ensuring that the provisions which provide for the forfeiture of unexploited logging concessions are not triggered where a forest concession is not logged but, in fact, conserved for environmental purposes.

It must be noted that the operation of this *Forestry Code* is challenged by the potential for overlapping mining concessions and land claims,²⁵³ created in part by a lack of coordination between the administrative bodies that are responsible for issuing the different titles.²⁵⁴ A lack of clarity in land law provisions is exemplified by the fact that the conceptual status of rights in areas of land deemed to be local community property is unclear in that they can not necessarily be defined as individual property rights.²⁵⁵ In addition, conflict between customary rights and State policy affects forest governance.²⁵⁶ Nonetheless, both the government and the donors currently active in the country

acknowledge that these issues need to be addressed as part of its REDD+ strategy – a recognition that will hopefully translate into constructive action.

Capacity for benefit sharing

The *Forestry Code* includes a variety of elements relevant to ensuring that the rights of local communities are recognised. These include: the protection of customary usage of forests by local communities; consultation with community representatives and regional governance institutions; the role of public inquiries before the grant of concessions; the documentation of specific elements of any development plans relating to local communities; and, the right of communities to bring legal actions for breach of the *Forestry Code*.²⁵⁷ As already mentioned, these would need to be aligned with the specific requirements of REDD+ in order to ensure that appropriate consultation and benefit-sharing arrangements were established to underpin the long-term success of the demonstration activity. Issues relating to the implementation of these provisions also need to be addressed, given that many revenue-sharing provisions have yet to be enacted or realised.²⁵⁸ However, it is encouraging to note that the basic elements are in place for further development. The DRC explicitly acknowledges the importance of clarifying forest carbon rights within the context of benefit-sharing mechanisms.²⁵⁹ Of particular relevance is the stated workplan to review lessons learned from existing DRC revenue-sharing mechanisms, as well as those from other countries.²⁶⁰

The commercial context of forest carbon

The R-PP frames REDD+ as an economic incentive for improving the institutional capacity of the forest sector.²⁶¹ It contemplates the use of PES mechanisms,²⁶² taxation relief²⁶³ and public-private partnerships²⁶⁴ within the REDD+ framework and notes the importance of creating an enabling environment for business involvement.²⁶⁵ This is evidence that the DRC acknowledges a role for the private sector in REDD+, without providing specific details of how such initiatives will work in its unique national context. Part of publicly funded capacity-building programmes could include the technical assistance necessary to build structures which can manage both public and private financial flows.

Particular aspects of DRC's developing implementation strategy are relevant here. The first is the proposal to

develop a centralised national fund for REDD+ funding. The fund would be independently managed and audited and include 11 provincial sub-funds.²⁶⁶ As discussed in respect of Tanzania's similar proposal, this type of model could be an important indirect comfort in attracting private sector co-investment into REDD+ projects and programmes in the DRC. Another aspect is the recognition of the need to enable "greater freedom of private or community economic authorities" to lead projects whilst ensuring that such projects form part of a consistent national strategy. Thus, DRC proposes to utilise regional pilot projects meeting defined criteria to build its REDD+ capacity,²⁶⁷ as well as establish a national register of forest carbon initiatives in the country.²⁶⁸

In terms of PES schemes, like some other countries involved with the FCPF, the *Forestry Code* does not at present provide existing mechanisms recognising the role of payments for environmental services. However, the *Forestry Code* recognises conceptually that forest development occurring in respect of a forest development unit may encompass more than logging but extends to environmental services and other objectives compatible with maintaining forest cover. The scope of the *Forestry Code* in conjunction with the elements described above do therefore enable it to act as a vehicle for further development and implementation of early-stage demonstration activities.

In terms of attracting private co-investment to demonstration activities in DRC, the critical issues remain the governance challenges faced in the DRC with respect to implementing REDD+. The lack of institutional capacity and coordination that affects governance in the country generally will affect the extent to which a REDD+ strategy can be devised and implemented, although external assistance may help to mitigate this risk. The R-PP acknowledges the issues around implementing and enforcing the law in the DRC.²⁶⁹ The recent history of political instability also may make investors cautious given that new outbreaks of civil strife threaten the rule of law around tenure security (affecting forest carbon rights) and forest conservation (to ensure the permanence of projects). Political instability may not act as a complete barrier to REDD+ projects, however, given that the site for one planned REDD+ project lies in a conflict-prone area in the east of the country. The risks posed and options to mitigate those risks need to be assessed on a project-by-project basis as REDD+ moves forward in the DRC.

An interesting aspect of the DRC's strategy to overcome some of its institutional weaknesses lies in its approach to

the development of an MRV system. Although recognising that capacity building will be necessary within the Directorate of Sustainable Development, the Directorate of Forest Inventory and Management and local universities,²⁷⁰ it also is looking to develop a cost-effective regional approach to MRV (as one country of several within the Congo Basin) which can also be used to ensure reliable information at the national level.²⁷¹

Moving forward

The enthusiasm of the DRC to participate in REDD+ appears to be supported by multilateral involvement in the country. However, it is difficult to predict how much of this activity will translate into the legal and institutional structures that are necessary to support REDD+ in the long term, and to what extent wider development issues such as the implementation of the rule of law will affect the successful development of projects. On a positive note, the DRC could provide an example of how regional initiatives for forest conservation can be integrated within a country's national framework, if efforts to develop a collaborative MRV system in the Congo Basin prove successful.

Acknowledging the utility of working with existing laws as a basis for a REDD+ framework and notwithstanding the challenges to their implementation, the *Forestry Code* could be developed further to support REDD+ activities occurring under and in accordance with the DRC's national strategy. The design of a more specific regime for the grant of forest concessions which utilises the existing elements of the *Forestry Code* but is more appropriately designed for REDD+ activities would help to define the rights (and obligations) of investors. Clarifying the circumstances where a privately managed forest concession could move to protected status, to serve the purposes of REDD+, but still recognise the private entity's role in implementing the conservation project would also achieve this. However, indications that the DRC is interested in developing a bespoke legal regime should be noted. Even if this approach to a new regime is adopted, there would be important interface issues to be dealt with regarding the current *Forestry Code*.



Concluding observations

Some provisional conclusions

Comments on the path to REDD+

Cause for optimism

This report is a snapshot. As such, we are reticent to draw firm conclusions. Many of our observations of the laws of the selected African countries can be considered further in light of the reality of legal implementation “on the ground”. However, the report has identified some themes and issues for further consideration. These can be considered in light of the broad analytical questions we posed in the introduction. Finally, from our perspective as specialist legal advisers, we make some comments about the development of a REDD+ mechanism in the near future.

Some provisional conclusions

In the transition to more specific REDD+ legislation, existing analogous laws can be used to secure forest carbon rights and develop appropriate frameworks for REDD+

Although they will not form the ideal foundation for the purposes of REDD+ in all cases, existing provisions contained in land, forestry and environmental law can provide a starting point for a nationally appropriate and workable legal and institutional design for REDD+. Systems of land tenure and management are a product of decades (if not centuries) of legal and institutional evolution; it will be necessary to work within these established systems and realities, rather than impose an entirely new model. Existing “proxy” REDD+ regimes thereby provide the starting point for either adapting existing provisions or designing new ones.

Most countries have useful laws relating to forest and environmental management that could be developed further to address REDD+, although this will be a question of implementation capacity

This observation follows on from the above and our position in Part I of this report that forest carbon regimes are more likely to be consistent with local expectations where forest carbon ownership is tied to ownership or management responsibility in respect of the forested area. In light of this, we were interested in the structure of existing forest regimes and how they could be used as a base for

developing a consistent approach to forest carbon. Each of the selected countries (with perhaps the exception of Ethiopia and its limited institutional history with respect to forest management) had forest regimes that contained elements potentially relevant to managing forest carbon, including: long-term concessions to delegate management authority of a forest to a public or private entity; tools such as management plans to document and supervise REDD+ activities; and consultation and community engagement mechanisms to manage concerns and address disputes. Other elements often derive from environmental legislation. Of particular note were the existing legal capacity to implement long-term conservation easements in Kenya and Tanzania. However, we emphasise again that this is dependent on actual implementation. For example, although the Kenyan regime has enabled conservation easements for some time, there is limited evidence of these being actually registered by the Kenyan courts. Another significant example is the long delay in the DRC between the passage of the Forestry Code and the implementation of its provisions.

Existing issues with complex or insecure tenure arrangements will also potentially delay or frustrate the development of a consistent approach to forest carbon in a country

Tenure insecurity is a well-recognised driver of deforestation and forest degradation. However, it also became clear from our review of the selected countries that these issues would also impact on the development of a consistent forest carbon regime. Ghana is unfortunately a good example of this, where complex and often contested tenure arrangements pose a significant challenge to establishing a consistent approach to forest carbon. Other countries demonstrate a better starting position for building up a forest carbon regime. Tanzania, Kenya and Ethiopia can be highlighted in this regard, although each has its own unique circumstances and challenges.

Centralised approaches that are consistent with existing laws may offer a good starting point, particularly when structured as central guidance that allows for regional implementation

In common with a common approach worldwide, most of the selected countries’ forest regimes provide that forest resources are the property of the State until delegated (for instance, refer to our analysis of the forest regimes in Kenya and the DRC). When considered in light of the potential to create an equitable forest carbon regime, challenging questions arise. For example, models based on centralised control, when combined with weak enforcement and limited local rights, are often a driver of deforestation. The question

therefore arises as to whether this should continue to be the model for a forest carbon regime designed to tackle such issues – or whether a more pluralistic model is appropriate. In light of the approaches in the selected countries (both in terms of their existing forest regimes and developing REDD+ strategies) we consider an approach that involves central guidance with regional and appropriately targeted implementation is worth additional consideration. Although driven by the circumstances of the country, the approach of Ethiopia is interesting in this regard in that it has a devolved governance structure at both federal and regional levels which it intends to follow in the implementation of its REDD+ strategy. The approach outlined by the DRC in its REDD+ strategy is also of interest – although there remains a tension between the stated objective to devolve authority to regions and the interest of the national government to hold control over “carbon assets” for redistribution.

A number of existing and pilot benefit-sharing schemes have been identified but there appear to be limited examples of successful schemes that could be adjusted and extended to REDD+ at scale

Of the countries reviewed, Ghana was of interest in that it already had a constitutionally specified benefit-sharing mechanism in respect of forest revenues. However, it appears to be a mixed example. It demonstrates a positive centrally driven approach to implement consistent rules. Yet, our review also highlighted how the actual implementation of such mechanisms can fail to ensure revenues reach the appropriate stakeholders. These conclusions are, however, the essence of learning from existing models.

In terms of pilot-level benefit-sharing models, the implementation of Participatory Forest Management in Tanzania and Ethiopia is noteworthy. Of particular interest was the conclusion of both of these countries that the time, cost and complexity of these models mean that they do not yet represent a workable model for REDD+ benefit sharing. It is clear, however, that more information will become available as more countries, such as Kenya, look to also test different variants of the PFM model.

Comments on the path to REDD+

For each of the selected countries we also considered the approaches being adopted that may enhance the role of the private sector in supporting REDD+ activities. Before considering some of our findings in this regard it is worthwhile outlining our views on how developed and

developing countries could do more to test how private sector investment could be utilised to achieve their REDD+ objectives.

From the perspective of an advisor to international investors with capital to deploy, REDD+ remains a challenging space. There are a significant number of investors focused on the opportunities arising from an accelerating global shift to low-carbon technologies and the better management of natural resources such as forests. However, there is also increasing competition between various countries to create the right incentives to draw investment to the low-carbon path being mapped out for their country or region. The European Union, with its mix of market drivers and renewable energy incentives, is a good example of this. This needs to be taken into account when we turn to REDD+ and ask from where the significant expected financial flows will be sourced.

Public finance is insufficient. The expectation is that significant private finance will therefore have to be channelled into funding the implementation of REDD+ strategies across the globe. However, even for forward-thinking investors looking to support the development of a REDD+ mechanism, it is currently extremely difficult to make such investments at the scale required. Indeed, the risk/reward profile of such investments often just does not add up in terms of the deployment of capital. From our experience to date, designing and implementing effective REDD+ activities that are financially sustainable involves high upfront costs and a range of complex challenges. A dichotomy exists between the need for patient capital to support such initiatives through their long development phase and the inherent risks that disincentivise such support. This dichotomy is even more pronounced due to the fact that patient capital is generally more risk-averse.

Despite the issues outlined above, there is a way forward. In order to be successful, REDD+ frameworks will need ambitious action over the next three to five years. By successful, we mean not only success in terms of reduced emissions but also in terms of whether such success is financially sustainable over time. The latter requires consideration of how REDD+ programmes at scale can harness the strengths and ongoing involvement of both the public and private sector. Whilst obviously a complex challenge, we would suggest three themes are critical:

Global architecture – immediate progress is needed in the UNFCCC negotiations in order to enable the principles of a REDD+ mechanism to be agreed. Without this, the difficult

work on developing the detail behind those principles will be delayed. In turn, host countries will simply not be able to maintain the political momentum to continue readiness activities that assume an international mechanism is being developed that can channel expertise and funds to assist implementation. Similarly, lack of development in the global architecture presents a significant risk to private sector involvement in REDD+ in the long term. In that regard, the patient capital needed to be invested to support these programmes will not be deployed at scale unless there is a real sense of progress internationally.

Programme design – whilst extensive capacity-building and readiness activities are afoot, these need to consider also how to harness private sector involvement. Without testing of different models, the lessons necessary to move to scale will be absent. Key areas requiring further investigation here are twofold. First, more detailed consideration is needed of how to transform existing private sector investment patterns within a country. This is not limited to the forestry sector but needs to consider cross-sectoral issues such as agriculture, energy and infrastructure. Second, greater analysis is needed on how incentives that draw in specialist private sector investment can be used to successfully implement REDD+ programmes, particularly those that require the ability to access and transform existing private sector investment patterns in the country.

Financial mechanisms – even if the use of a carbon market is considered by some governments and commentators as an inappropriate mechanism to underpin REDD+ at scale, there remains a fundamental issue that needs to be addressed. This is the question of how significant finance can be deployed quickly and effectively in order to mitigate dangerous climate change. A model that is based on public funds being deployed by public agencies such as the multilateral banks will, in our view, both struggle to achieve success (due to the resource constraints on such agencies) and fail to create replicable lessons outside of that model. Therefore, even if a carbon market is not employed immediately, there needs to be the development and testing of financial mechanisms that draw in a wider pool of deployment entities, whether public or private. There are a variety of examples in other sectors for achieving this (for instance, consider the success of a number of renewable energy strategies that have utilised feed-in tariffs to significantly accelerate investment). The challenge is to develop well-designed demonstration programmes to test if they can be used for REDD+.

This is not to say that nothing is happening. Innovative mechanisms such as the FIP have investment criteria that encompass a range of interesting financial tools that could underpin such demonstration programmes. For instance, the criteria recognise the use of multilateral guarantees to reduce the risk for early-stage equity investors. The FCPF Carbon Fund will also create incentives by entering into agreements to purchase emission reductions on an ex-post basis from selected country programmes. Other models being tested in other areas such as renewable energy are also relevant. For example, the Global Energy Efficiency and Renewable Energy Fund launched by the European Union is an interesting example of public funds being used to seed equity into private sector low-carbon investments. Regardless, as always, more could be done. One example is that the deployment by developed countries of the significant fast-start finance pledged by them to support REDD+ could be used to test different deployment models; a possible example of this is discussed next.

A bilateral arrangement between a developed and a developing country can be envisaged which could deliver near-term transformational demonstration REDD+ projects or programmes where upfront costs and delivery risks are appropriately shared between the private and public sectors. This could be innovatively designed such that REDD+ activities would be: embedded in the host country's REDD+ strategy; aligned with developing international norms on safeguards; and capable of generating lessons to feed into other initiatives. Key elements to deliver this would encompass:

- the establishment of a bilateral partnership between a developed and developing country covering all of the components of the programme, such as: the identification of REDD+ demonstration projects or programmes in line with the national REDD+ implementation strategy; the criteria to identify and agree on a private or public/private delivery partner for the project; and appropriate governance arrangements (including legal authorisation of the project, approach to project design, benefit-sharing rules and other safeguards)
- the establishment of a procurement mechanism to identify demonstration activities in the host country that meet the above criteria and have pre-committed private sector co-investment ready to meet all or part of upfront costs if the financial commitment described below was made available in conjunction with other multilateral risk mitigation tools such as political risk insurance

- the developed country partner makes a financial commitment (whether through an offtake agreement, guarantee or other financial incentive) to the selected entity that if the demonstration activity is successfully implemented in line with all the above criteria, it will achieve a minimum return.

In essence, this model looks to take the approach of existing initiatives such as the FCPF but include a distinct element to test whether significant private sector finance can be leveraged through public funds.

How, then, does the analysis in this report inform the above suggestions? There are a significant number of positive elements in the laws and proposed strategies of the selected countries which could be used to support innovative programmes. Some positive themes to emerge from the report are mentioned below.

Many countries are utilising pilot projects that could involve testing the role of the private sector in REDD+ activities

Tanzania, Ethiopia and Kenya each have clear strategies to use existing, both public and private, pilot activities in testing what strategies may work for larger-scale implementation. Of these, Kenya is perhaps the most noteworthy in the clarity with which it outlines both the importance of this to its strategy and the work required to implement it successfully. Also noteworthy in this context is Ghana's proposal to investigate the design of a national buffer mechanism (a kind of forest carbon insurance) to manage risk and enhance confidence that reversals of achieved emission reductions could be appropriately managed. This type of mechanism could offer real value in underpinning the permanence of subnational pilot projects.

A number of countries have existing laws that could enable the creation of incentives for the private sector (whether domestic or international) to adjust unsustainable land use practices

As flagged in Part I of this report, analysing the function of the private sector involves understanding the different roles that it plays. Whilst it can represent a new source of investment that could underpin REDD+, it can also be the vehicle for investment in unsustainable land use patterns. Successful REDD+ strategies will therefore need to use a mix of regulation and incentives to transform the latter. In our review, Kenya and Tanzania were both identified as having the existing legal capacity to develop a range of incentive mechanisms to implement such strategies.

Some countries are looking at interesting ideas that could enhance their ability to attract REDD+ finance, both public and private

Of particular interest here was the investigation by Tanzania and the DRC of the use of national trust funds to ensure that international financial flows regarding REDD+ are appropriately channelled to conservation and community needs. These could provide an important element of a positive investment environment, thus enhancing both private and public international financial flows.

Cause for optimism

Recent developments at the international and bilateral levels provide cause for optimism about the possibility of creating enabling investment environments within Africa, without underestimating the extent of intelligent and sustained work that needs to be done in order to achieve this. Multilateral funding, bilateral development partners and regional initiatives offer both the will and material resources to take action within host country jurisdictions. If efforts are targeted appropriately, now is the time for real progress to be made.

Endnotes

- 1 UN-REDD, available at: <http://www.un-redd.org/AboutREDD/tabid/582/Default.aspx>, last accessed 11 October 2010. See also Solomon, S et al (eds), "Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change" (2007), Cambridge University Press.
- 2 See further Nicholas Stern, "The Economics of Climate Change" (2006) [the "Stern Report"]; Johan Eliasch (ed), "Climate Change: Financing Global Forests" (2008) [the "Eliasch Review"].
- 3 It is widely anticipated that REDD+ has the potential to make a substantial contribution not only to climate change mitigation, but also to improving living standards in the countries that host them.
- 4 Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007; Decision 2/CP.13 Reducing emissions from deforestation in developing countries: approaches to stimulate action Part 3. It is worth noting that there is some debate about the term "sustainable management of forests" in the context of REDD+. As used in the Bali Action Plan, the term refers to forest management for the purpose of sustaining constant levels of carbon stocks; beyond REDD+, it may be used to refer to management activities designed to serve other goals. Source/see further: FOA Information Note, "Sustainable management of forests and REDD+: Negotiations need clear terminology" (2009). Available at <http://www.fao.org/forestry/18938-1-0.pdf>, last accessed 18 October 2010.
- 5 Although the draft text has continued to be discussed during 2010, we refer to the draft text on a REDD+ mechanism in the state it reached at the conclusion of Copenhagen in December 2009. See Report of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention on its eighth session, held in Copenhagen from 7 to 15 December 2009, FCCC/AWGLCA/2009/17 at page 34.
- 6 Multilateral activity includes the involvement of the UN-REDD Programme, the World Bank Forest Carbon Partnership Facility (FCPF), the Forest Investment Program (FIP) and the Global Environmental Facility (GEF). Bilateral initiatives include the involvement of Norway, the USA, Australia, France and Japan. A good summary of the various initiatives can be found in Antonia GM La Vina, "The Future of REDD-Plus: Pathways of Convergence for the UNFCCC Negotiations and the Partnership" (2010), FIELD Working Paper.
- 7 In the vernacular of REDD+ policy discussions, these type of demonstration activities fall under Phase 2 and are considered key to determining the final scope of Phase 3 where a fully functioning mechanism that enables rewards to flow for results-based actions.
- 8 The fast-start funding pledges made by various donor countries in respect of a variety of mitigation measures also include significant pledges for near-term REDD+ capacity building, particularly for the period through to 2012. Available at: <http://www.faststartfinance.org/content/recipient-countries>, last accessed 11 October 2010.
- 9 The Eliasch Report commissioned research which showed that to halve deforestation by 2020 additional finance of \$11–19bn a year will be needed by 2020. The Report of the Informal Working Group on Interim Finance for REDD+ (2009) [the "IWG-IFR"] p 2, para 5 demonstrated that €15–25bn was needed for the period 2010–2015 for capacity-building and performance-based results in order to achieve a 25 per cent reduction by 2015.
- 10 The approach applied by this report is drawn from: the objectives of the FCPF R-PPs themselves (that is, the analysis by participating countries of a range of elements relevant to REDD+, including legal issues); leading examples of similar analysis undertaken in respect of different countries in Asia and Latin America – see, for example, the reviews of Brazil, Guyana and Papua New Guinea in John Costenbader (ed), "Legal Frameworks for REDD: Design and Implementation at the National Level" (2009) IUCN Environmental Policy and Law 77; and the approach we have taken in conducting due diligence for investors actively engaging in early stage demonstration activities in Latin American, Asian and African countries.
- 11 The UN-REDD Programme is the United Nations Collaborative initiative on REDD. Launched in September 2008 to assist developing countries prepare and implement national REDD+ strategies, the UN-REDD Programme builds on the convening expertise and power of the Food and Agriculture Organisation of the United Nations (FAO), the United Nations Development Programme (UNDP) and the United Nations Environment Programme (UNEP). The Programme currently supports REDD+ readiness activities in nine pilot countries in Africa, Asia and the Pacific and Latin America. Source: UN-REDD, available at <http://www.un-redd.org/AboutUNREDDProgramme/tabid/583/Default.aspx>, last accessed 11 October 2010.
- 12 The Forest Investment Program (FIP) is a specialised programme of the Strategic Climate Fund (SCF), operating under the auspices of the Climate Investment Funds (CIF). The CIF are administered through multilateral development banks (African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, and World Bank Group) to support the implementation of country-led programmes and investments. Source: Climate Investment Funds, available at: <http://www.climateinvestmentfunds.org/cif/MDB-Role>, last accessed 11 October 2010. The FIP supports developing countries' efforts to combat deforestation and promotes sustainable forest management to reduce emissions and protect carbon reservoirs. Source: Climate Investment Funds, available at: <http://www.climateinvestmentfunds.org/cif/node/5>, last accessed 11 October 2010.
- 13 The African nations currently involved with the FCPF can be distinguished by their current level of involvement with the FCPF: first, those which have submitted a Readiness Preparation Proposal ("R-PP") for review by the FCPF; and second, at an earlier stage in the process, those which have submitted a Readiness Plan Idea Note ("R-PIN"). Our five case study countries have all submitted their R-PPs to the FCPF.
- 14 World Bank (Carbon Finance Unit), Forest Carbon Partnership Facility, available at: http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/English_54462_WorldBank_FCPF_Brochure.pdf, p 6, para 2, last accessed 11 October 2010.
- 15 See supra note 13.
- 16 The importance of elements such as safeguards to protect the rights of indigenous peoples are included in the current negotiating text. Other sources at the international level include the evolving development of standards employed by key multilateral agencies such as the World Bank – see the World Bank Safeguards (World Bank, Safeguard policies, numerous. Available at: <http://go.worldbank.org/WTA1ODEZTO>, last accessed 11 October 2010. The decision on REDD+ design guidance also included elements regarding the need to ensure full and effective engagement with indigenous peoples and local communities, and protections for indigenous peoples (see Methodological Guidance for Activities Relating to Reducing Emissions from Deforestation and Forest Degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries, in: Report of the Conference of the Parties on its Fifteenth session, held in Copenhagen from 7 to 19 December 2009, Addendum, Part Two: Action taken by the Conference. FCCC/CP/2009/11/Add.1, Decision 4/CP.15, at page 11). There is also a significant body of relevant analysis discussing the long-term benefits of structured engagement with local stakeholders through consent processes and equitable sharing of benefits (see further, David Takacs (for Conservation International) "Forest Carbon: Law + Property Rights" (November 2009); "Legal Frameworks for REDD: Design and Implementation at the National Level" (2009) IUCN Environmental Policy and Law 77, Chapters 2–3). This is also reflected in key emerging standards used to guide the design of demonstration projects, such as the Project Design Standards developed by the Climate, Community and Biodiversity Alliance (CCBA) or overall national strategies (such as the REDD+ Social and Environmental Standards, also prepared by the CCBA). The CCBA represents a partnership amongst research institutions, non-governmental organisations (NGOs) and corporations – available at: <http://climate-standards.org/index.html>, last accessed 11 October 2010.
- 17 A forest and associated ecosystems can act as a "carbon sink", being the biological mechanism by which carbon dioxide is absorbed from the atmosphere and "sequestered" in the relevant forest. Broadly speaking, the "carbon stock" of a carbon sink refers to the amount of carbon likely to be sequestered or stored within that sink. See further, UNFCCC Glossary of Climate Change Acronyms, available at http://unfccc.int/essential_background/glossary/items/3666.php, last accessed 19 October 2010. In this report we have limited our consideration to rights in respect of forests and therefore have not considered potential legislative regimes in the selected countries that could relate to soil carbon (meaning the manner in which underground soil can also act as a carbon sink).
- 18 A right to the use and enjoyment of the fruits or profits of another's property, without fundamentally changing its substance. Source: Damien Abbott, *Encyclopedia of Real Estate Terms*, Third Edition. (London, Delta Alpha Publishing, 2008).
- 19 For a good discussion of how these issues can interplay in determining an approach to forest carbon, see Rosenbaum, KL et al, *Climate Change and the forest sector*. Possible national and subnational legislation. FAO forestry Paper 144, Rome, Italy: FAO (2004); pp 31–33.
- 20 For instance, in 2008 Ecuador altered its constitution to clarify that carbon rights could not be private property and thus were to be regulated by the state. For a summary of possible negative reactions such a reaction can cause, see John Costenbader (ed), "Legal Frameworks for REDD: Design and Implementation at the National Level" (2009) IUCN Environmental Policy and Law 77, p 26, regarding the New Zealand experience where attempts to "nationalise" carbon rights in respect of forests resulted in a backlash from private owners.
- 21 Samantha Hepburn, "Carbon Rights as New Property: The benefits of statutory verification" (2009) *Sydney Law Review* 31(20) p 239, para 1.

- 22 Argentina provides a positive example of a workable approach based upon existing laws and tied to a recognition of the link between sequestration and forest ownership or management. Argentina's carbon rights regime recognises the right to receive compensation for forest protection, including that the entitlement to carbon benefits rests with the owners of the land or rights holders to the forest resources [Readiness Preparation Proposal – Argentina (submitted June 2010) p 48, para 2]. The Forest Law includes relevant elements, such as: establishing a standard for protection of native forests and the environmental services they provide, and a system for distributing any funds they generate (Article 1) [Readiness Preparation Proposal – Argentina (submitted June 2010) p 48, para 4]; and, the establishment of a fund to compensate the opportunity cost of forest protection for the purposes of conserving the ecosystem services (Article 30) [Readiness Preparation Proposal – Argentina (submitted June 2010) p 48, para 5].
- 23 These debates are broad, with plentiful literature available for review. It is beyond the scope of this paper to attempt a full literature review, therefore we refer only to a selection of relevant texts.
- 24 For relevant literature, see discussion supra note 16.
- 25 An exposition of the international law regarding this topic can be found in Rosemary Lyster, "The New Frontier of Climate Law: Reducing Emissions from Deforestation and Degradation" (January 2010) Legal Studies Research Paper 10/08, p 16.
- 26 By "carbon credit", we mean the translation of the offset potential of the carbon sequestered in a sink such as a forest into an intangible asset that can be transferred to a third party and thus enable an acquirer to exclusively use such offset potential on a voluntary basis or under a national, regional or international climate change mitigation regime.
- 27 Briefly, the physical nature of forest carbon (being the carbon sequestered in a carbon sink such as a tree) can be distinguished from the forest carbon asset, which represents the commodity derived from forest carbon. Consideration of the creation and transfer of carbon credits in respect of forest carbon therefore encompasses the chain of procedural rules that enables appropriately sequestered and protected carbon stocks to be translated into a tradable certification of that asset.
- 28 Early-stage "demonstration" activities could include: improving the capacity to enforce laws that target illegal activities leading to deforestation or degradation; converting existing illegal concessions or unsustainably managed production concessions to conservation purposes; integrating some or all of the above with new or more stringently managed protected areas; and enhancing the long-term implementation of the activity through the targeted use of payments for environmental services.
- 29 See discussion of the CCBA supra note 16.
- 30 Generally focused on a minimum 30-year period but with design elements intended to be sustainable over significantly longer periods.
- 31 These can be considered in terms of country-specific investment risks (for example, regulatory and political risks such as administrative efficiency, regime stability and tenure security) and project-specific risks (for example, mining and/or agricultural interests that compete with conservation, the occurrence of fires and the failure to alter unsustainable use of the forests for fuel).
- 32 Readiness Preparation Proposal – Kenya (submitted June 2010) p 1, para 3.
- 33 *Ibid.*, Annex 2a-1 p 9, para 4.
- 34 *Ibid.*, Annex 2a-1 p 19, para 1.
- 35 *Ibid.*, Annex 2a-1 p 19, para 5: "Charcoal is the most important form of cooking fuel for the majority of the population of Kenya."
- 36 In addition to the sponsored pilot countries, the UN-REDD Programme supports numerous "partner" countries in Africa, Asia-Pacific and Latin America. Partner countries have access to benefits such as networking, participation in regional workshops and observer status to the UN-REDD Programme Policy Board. Source: UN-REDD, available at: http://www.un-redd.org/AboutUNREDDProgramme/NationalProgrammes/Partner_Countries/tabid/4648/language/en-US/Default.aspx, last accessed 11 October 2010.
- 37 The Constitution of Kenya, signed into law on 27 August 2010.
- 38 Article 60(1)(b), The Constitution of Kenya (2010).
- 39 As articulated in Article 60(1)(e), The Constitution of Kenya (2010).
- 40 See supra note 32, Annex 2a-1 p 14, Table 2a-1-3.
- 41 Article 61(2), The Constitution of Kenya (2010).
- 42 Section 5, Forests Act, Commencement date: 1 February 2007, Cap 385.
- 43 See supra note 32, p 12, para 2.
- 44 See supra note 32, Annex 2a-1, p 12, Table 2a-1-2 – Categories of Forest Ownership in Kenya.
- 45 Section 21, Forests Act, Commencement date: 1 February 2007, Cap 385.
- 46 Section 21, Forests Act: "All forests in Kenya other than private and local authority forests, are vested in the State, subject to any rights of user in respect thereof, that by or under this Act or other written law, have been or are granted to any other person."
- 47 Article 61, The Constitution of Kenya (2010).
- 48 See further: Lorenzo Cotula and James Mayers, *Tenure in REDD: Start-point or afterthought?* Natural Resource Issues no. 15, International Institute for Environment and Development, London (2009) p 11; and Arild Angelsen (ed), *Realising REDD+: National strategy and policy options* (2009; Center for International Policy Research) Chapter 14.
- 49 Section 32, Forests Act.
- 50 Wildlife (Conservation and Management) Act, Commencement date: 13 February 1976, Cap 376.
- 51 Section 6, Wildlife (Conservation and Management) Act.
- 52 Section 9, Wildlife (Conservation and Management) Act granting the power to manage a national park to the Kenya Wildlife Service (established under Section 3).
- 53 Unless their involvement is requested. Readiness Preparation Proposal – Kenya p 12, para 3.
- 54 Including ancestral lands and lands traditionally held by hunter-gatherer communities. Article 63(2), The Constitution of Kenya (2010).
- 55 Article 63(3) The Constitution of Kenya (2010): "Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held."
- 56 Trust Land Act, Commencement date: 1 March 1939, Cap 288.
- 57 Section 69, Trust Land Act: "In respect of the occupation, use, control, inheritance, succession and disposal of any Trust land, every tribe, group, family and individual shall have all the rights that they enjoy or may enjoy by virtue of existing African customary law or any subsequent modifications thereof, in so far as such rights are not repugnant to any of the provisions of this Act, or to any rules made there under, or to the provisions of any other law for the time being in force."
- 58 Lorenzo Cotula, Camilla Toulmin and Ced Hesse, *Land Tenure and Administration in Africa: Lessons of Experience and Emerging Issues* p 3, para 4 (IIED, 2004), available at: <http://www.iied.org/pubs/pdfs/9305IIED.pdf>, last accessed 10 October 2010.
- 59 Section 22, Forests Act.
- 60 Section 22, Forests Act: "Nothing in this Act shall be deemed to prevent any member of a forest community from using, subject to such conditions as may be prescribed, such forest produce as it has been the custom of that community to take from such forest otherwise than for the purpose of sale."
- 61 Registered Land Act, Commencement date: 16 September 1963, Cap 300.
- 62 See supra note 32, Annex 2a-1, p 12, Table 2a-1-2 sourced from the FAO Forest Resource Assessment 2010 – Country Report for Kenya.
- 63 See supra note 32, p 12, para 3.
- 64 Environmental Management and Co-ordination Act 1999; Commencement date: 14 January 2000, no. 8, Section 112.
- 65 See supra note 32, Annex 2a-1, p 13, para 2 and p 36, para 5, part 5.
- 66 See supra note 32, p 13, para 3.
- 67 See supra note 32, p 18, para 5, part 3.
- 68 See supra note 32, p 18, para 5, part 4.
- 69 Part III – Community Participation; and IV – Community Forest Management Agreements.
- 70 See Clause 13 of Form 4, "Kenya Forest Service Joint Forest Management Agreement," pursuant to Rule 26 of the Forests (Participation in Sustainable Forest Management) Rules.
- 71 See supra note 32, Annex 2a-1, p 24, para 3.
- 72 See supra note 32, p 44, part 3.
- 73 See supra note 32, p 30, para 1.
- 74 See supra note 32, p 30, para 2.
- 75 Section 57(1), Environmental Management and Co-ordination Act.

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- 76 Section 25(3), Forests Act. Application for registration made pursuant to Section 25(1) of the Forests Act.
- 77 See supra note 32, p 47, para 2, 1-a and 3.
- 78 See supra note 32, p 44, para 1, part 6.
- 79 See supra note 32, p 44, parts 3, 4 and 5.
- 80 Republic of Kenya, Budget Speech for the Fiscal Year 2010/2011 (1 July–30 June) given by Hon. Uhuru Muigai Kenyatta, E.G.H., M.P., Deputy Prime Minister and Minister for Finance, 10 June 2010. Kenyan budget documents publicly available at: www.treasury.go.ke, last accessed 11 October 2010, p 21, part 100.
- 81 Ibid.
- 82 See supra note 32, p 57, para 2.
- 83 See supra note 32, p 57, para 2.
- 84 See supra note 32, p 43, para 2.
- 85 See supra note 32, p 43, para 2.
- 86 Readiness Preparation Proposal – Ethiopia (Draft, August 2010) p 40, para 3: 15.11 million hectares in 1990 to 12.2 million hectares in 2010.
- 87 See supra note 86, p 43, para 2, part 1.
- 88 See supra note 86, p 43, para 2, part 4.
- 89 See supra note 86, p 43, para 2, part 2.
- 90 See supra note 86, p 9, para 3.
- 91 See supra note 86, p 6, para 3.
- 92 See supra note 86, p 6, para 6.
- 93 See supra note 86, p 7, para 5.
- 94 Constitution of The Federal Democratic Republic of Ethiopia, adopted 8 December 1994.
- 95 Article 44, *ibid.*
- 96 Article 43(1), *ibid.*
- 97 Article 40(3), *ibid.*
- 98 Article 40(2), *ibid.*
- 99 Management is a form of labour, captured in the constitutional definition of private property. Article 40(2) defines “Private property” as any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common.
- 100 Connoting an enterprise or investment of capital.
- 101 See supra note 86: p 40, para 4 indicates that the regional States’ authority to administer forest resources may extend to the authority to manage sales of “carbon credits”.
- 102 The Federal Rural Land Proclamation 89/1997.
- 103 Article 5(3), The Federal Rural Land Proclamation 89/1997; Readiness Preparation Proposal – Ethiopia (Draft, August 2010) p 40, para 4, confirms that regional States have the authority to administer forest resources.
- 104 Wibke Crewett, Ayalneh Bogale, Benedikt Korf, “Land tenure in Ethiopia: Continuity and Change, Shifting Rulers, and the Quest for State Control” (2008) Collective Action and Property Rights Working Paper 91, p 16, para 3, available at: <http://www.capri.cgiar.org/pdf/capriwp91.pdf>, last accessed 11 October 2010.
- 105 *Ibid.*, p 6, para 2.
- 106 Article 9(1), see supra note 99.
- 107 Federal Democratic Republic of Ethiopia, “Environmental Policy: Environmental Protection Authority in collaboration with the Ministry of Economic Development and Cooperation”, Addis Ababa, 1997.
- 108 *Ibid.*, Section 3.2.
- 109 Forest Development, Conservation and Utilisation Proclamation No. 542-2007.
- 110 Article 3, *ibid.*
- 111 Article 4, *ibid.*
- 112 Article 11(2), *ibid.*
- 113 Article 43(2), see supra note 99.
- 114 Section 4.3, see supra note 112.
- 115 Articles 4(3); 8(2), (4); 10(3); 11(3), (5), (6); 12(2), (3), (4), see supra note 114.
- 116 See supra note 86, p 114, para 6.
- 117 “Participatory Forest Management (PFM) is used as an umbrella term to include shared forest management, joint forest management, collaborative forest management and community forestry.” Source: Anna Lawrence and Kate Green, “Research and Participatory Forest Management: Comparing the priorities of resource users and development professionals”, Chapter 4 in Anna Lawrence (ed), *Forestry, forest users and research: new ways of learning* (European Tropical Forest Research Network [ETFRN] Series No. 1, 2000).
- 118 See supra note 86, p 41, para 4.
- 119 See supra note 86, p 41, para 4.
- 120 See supra note 86, p 114, para 6.
- 121 See supra note 86, p 53, para 5.
- 122 See supra note 86, p 57, row 2.
- 123 See supra note 112, Section 3.2(a).
- 124 Article 6(7), see supra note 114.
- 125 Article 40(6), see supra note 99.
- 126 Readiness Preparation Proposal – Ethiopia (Draft, August 2010) p 41, para 3. A particular example is the Oromia Region’s Forest and Wildlife Enterprise, which is also involved in the implementation of the Bale Eco-Region Sustainable Management Project, which covers some 500,000 hectares and involves forest rehabilitation, sustainable forest management and the testing of different forest management models. See summary in Readiness Preparation Proposal – Ethiopia (Draft, August 2010) p 99, para 2.
- 127 See supra note 86, p 57, row 2, column 2.
- 128 See supra note 86, p 55, para 3.
- 129 See supra note 86, p 55, para 2.
- 130 See supra note 86, p 66, para 2.
- 131 See supra note 86, p 41, para 2. Governments include the Ministry of Agriculture and Rural Development, the Ministry of Culture and Tourism and the Ethiopian Wildlife Conservation Authority.
- 132 See supra note 86, p 66, para 2.
- 133 See supra note 86, p 117, para 2.
- 134 See supra note 86, p 117, para 3.
- 135 See supra note 86, p 41, para 3. This notes that Oromia Region’s Forest and Wildlife Enterprise has been tasked with this role and that similar initiatives are occurring in Amhara, SNNP and Tigray.
- 136 See supra note 86, p 125.
- 137 Readiness Preparation Proposal – Tanzania (Final draft, August 2010) p 4, para 3.
- 138 *Ibid.*, p 4, para 4.
- 139 *Ibid.*, p 4, para 6.
- 140 *Ibid.*, p 24, para 2.
- 141 *Ibid.*, p 23, para 2.
- 142 17 million hectares of forested land classified as “general land” (see “Issues around forest carbon ownership” for an explanation).
- 143 Established under the Forest Act 2002, see Readiness Preparation Proposal – Tanzania (Final draft, August 2010) p 4, para 2 and p 24, para 3.
- 144 The United Republic of Tanzania, the Land Act 1999.
- 145 The United Republic of Tanzania, the Village Land Act 1999.

- 146 Covering all land in villages.
- 147 See supra note 137, p 20, para 3.
- 148 Siri Lange, *Land Tenure and Mining in Tanzania* (2008) p 5, para 2.
- 149 *Ibid.*, p 5, para 6.
- 150 The United Republic of Tanzania, *National Forest Policy*, 1998.
- 151 See supra note 137, p 21, para 2.
- 152 The United Republic of Tanzania, *Forest Act* 2002.
- 153 Part V, *ibid.*
- 154 Section 19, *ibid.*
- 155 Section 20, *ibid.*
- 156 Sections 20(2)(a+b) and (3)(a+b), *ibid.*
- 157 Section 3, *ibid.*
- 158 Section 4(d)(i), *ibid.*
- 159 Section 4(d)(ii), *ibid.*
- 160 Section 19(1), *ibid.*
- 161 Section 2, *ibid.*
- 162 Jon C. Lovett, "The Forest Act, 2002 (Tanzania)" (2003) *Journal of African Law* 47(1) pp 133–35; p 133, para 1.
- 163 See supra note 137, p 21, para 5.
- 164 Section 11(f) *Forest Act*.
- 165 Section 11(d) *ibid.*
- 166 See generally, Part III, *ibid.*
- 167 Section 13(1), *ibid.*
- 168 Section 13(5), *ibid.*
- 169 See supra note 137, p 25, para 3.
- 170 See supra note 137, p 22, para 2.
- 171 See supra note 137, p 25, para 3.
- 172 See supra note 137, p 25, para 4.
- 173 Section 49(3)(e), *Environmental Management Act* 2004.
- 174 See supra note 137, p 22, para 3.
- 175 See supra note 137, p 22, para 3.
- 176 See supra note 137, p 22, para 3.
- 177 See supra note 137, p 21, para 4.
- 178 See supra note 137, p 33, para 6.
- 179 See supra note 137, p 34, para 3.
- 180 See supra note 137, p 34, para 5. Regarding the latter, the community-level carbon monitoring initiative (Think Global Act Local) is noted as a success – see p 53, para 2.
- 181 Food and Agriculture Organisation of the United Nations (FAO), *National Forestry Resources Monitoring and Assessment*, available at: <http://www.fao.org/forestry/15469-1-19.pdf>, last accessed 13 October 2010, p 2, para 1.
- 182 See supra note 137, p 58, para 3.
- 183 See supra note 137, p 51, para 4.
- 184 Available at: <http://www.un-redd.org/AboutUNREDDProgramme/NationalProgrammes/tabid/584/Default.aspx>, last accessed 13 October 2010.
- 185 UN-REDD Programme Newsletter, "MRV Training for REDD+ Remote Sensing Tool in Tanzania" Issue No. 12, September 2010.
- 186 Available at: <http://www.geo-fct.org/home/fct-initiative-brochure>, last accessed 13 October 2010. Details on the initiative, designed to support the establishment of national forest monitoring and carbon reporting.
- 187 See supra note 137, p 53, para 1.
- 188 See supra note 137, p 64, para 4.
- 189 See supra note 137, p 3, para 4.
- 190 Section 80(1), *Environmental Management Act* 2004.
- 191 Section 80(2)(d), *ibid.*
- 192 Section 80 (2)(e), *ibid.*
- 193 Section 80(2)(g), *ibid.*
- 194 Section 80(4), *ibid.*
- 195 See supra note 137, p 18 para 2.
- 196 See supra note 137, p 18, para 1.
- 197 See supra note 137, p 25, para 4.
- 198 Theodora Mantebea Mends and Johan De Meijere, "A study of the Institution of the Customary Land Tenure System in the Supply of Property Rights for Urban Development – An Example of Accra, Ghana" (2006). Paper given at the "Promoting Land Administration and Good Governance" – 5th FIG Regional Conference, Accra, Ghana, 8–11 March 2006; p 6, para 2.
- 199 Comments made during interviews at the Commonwealth Forestry Conference, 1 July 2010 (Edinburgh).
- 200 See supra note 198.
- 201 Changes to customary land tenure differ between northern and southern Ghana. For a more detailed discussion of regional differences, see Ellen Bortei-Doku et al, "Legal and Institutional Issues in Land Policy Reform in Ghana" (Technical Publication no. 74) Institute of Statistical, Social and Economic Research, University of Ghana, Legon.
- 202 "Stool" refers to the seat or chair that a chief or king sits upon; the term symbolically represents the traditional authority or a chieftaincy for a particular ethnic group or clan. Source: The Katoomba Group, "Implications of the Legal and Policy Framework for Tree and Forest Carbon in Ghana: REDD Opportunities scoping exercise" (2010) p 3, footnote 6.
- 203 See supra note 198.
- 204 Ellen Bortei-Doku et al, *Legal and Institutional Issues in Land Policy Reform in Ghana* (Technical Publication no. 74), Institute of Statistical, Social and Economic Research, University of Ghana, Legon, p 39, para 3.
- 205 See supra note 198, p 5, paras 2 and 5.
- 206 See supra note 204, p 44, para 2.
- 207 See supra note 204, p 40, para 1.
- 208 See supra note 204, p 12, para 3.
- 209 Paul Osei-Tutu et al, "Hidden forestry revealed: characteristics, constraints and opportunities for small and medium forest enterprises in Ghana" (2010), p 21, para 2.
- 210 Tabi Agyarko, *Forestry Outlook Study for Africa (FOSA): Ghana* (2001) FOSA Working Paper FOSA/WP/12; p 3, para 3.
- 211 *Ibid.*
- 212 Readiness Preparation Proposal – Ghana (Final Version, January 2010) p 45, para 4.
- 213 The Katoomba Group, "Implications of the Legal and Policy Framework for Tree and Forest Carbon in Ghana: REDD Opportunities scoping exercise" (2010) p 13, para 3.
- 214 *Ibid.*
- 215 *Ibid.*, p 13, para 4.
- 216 *Ibid.*, p 13, para 4.
- 217 This view is found repeatedly throughout the reviews of country submissions conducted by the FCPF.
- 218 Emmanuel Marfo, "Chainsaw milling in Ghana: An overview of the issues" (2009), p 19, para 4.

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- 219 Environmental Protection Agency Act (1994) Act 490; Emmanuel Marfo, "Chainsaw milling in Ghana: An overview of the issues" (2009) p 22, para 1.
- 220 The Constitution of the Republic of Ghana 1992.
- 221 Article 267(6), *ibid.*
- 222 Emmanuel Marfo, "Chainsaw milling in Ghana: context, drivers and impacts" (2010), p 34, box 3.
- 223 See *supra* note 210, p 3, para 3.
- 224 Emmanuel Marfo, "Chainsaw milling in Ghana: An overview of the issues" (2009), p 3, para 1.
- 225 See *supra* note 213, p 18, para 1.
- 226 "The Katoomba Group is an international network of individuals working to promote, and improve capacity related to, markets and payments for ecosystem services (PES). The Group serves as a forum for the exchange of ideas and strategic information about ecosystem service transactions and markets, as well as site for collaboration between practitioners on PES projects and programs." Source: The Katoomba Group website, available at <http://www.katoombagroup.org/>, last accessed 20 October 2010.
- 227 See *supra* note 213, pp 17–20.
- 228 See *supra* note 212, p 22, para 3.
- 229 See *supra* note 212, p 63, para 2, part 1. Related to this technical capacity, Ghana's R-PP reports that a comprehensive MRV system is being planned, to include factors such as GDP, population growth, agricultural expansion, forest industry growth and specific investment programmes (among others) in assessing the expected rates of deforestation in the absence of REDD initiatives.
- 230 See *supra* note 212, p 63, para 2, part 2.
- 231 For a recent summary and discussion of the issues associated with "nesting" subnational projects within a national approach, including buffer accounts, see Chapter 4 of DFID/Climate Focus, *Engaging the Private Sector in the Potential Generation of REDD+ Carbon Credits: An analysis of the issues* (June 2010), available at http://www.dfid.gov.uk/Documents/REDD-engaging_the_private_sector-Aug2010.pdf, last accessed 10 October 2010.
- 232 See *supra* note 212, p 61, para 4.
- 233 See *supra* note 212, p 58, section 2c – "Arrangements for REDD Implementation".
- 234 See *supra* note 212, p 46, para 2.
- 235 See *supra* note 212, p 54, column 3, No. 2, "National Expert Consultation for Carbon Rights".
- 236 Section 14, Timber Resources Management (Amendment) Act (2002) Act No. 617.
- 237 Sections 14A–14D, *ibid.*
- 238 See *supra* note 212, p 22, para 3.
- 239 Available at <http://www.comifac.org/>, last accessed 13 October 2010.
- 240 Forestry Code 2002.
- 241 Article 7, *ibid.*
- 242 Article 8, *ibid.*
- 243 Readiness Preparation Proposal – Democratic Republic of Congo (Final Version, July 2010), p 44, para 2.
- 244 *ibid.*, pp 44–45.
- 245 Article 1(4) Forestry Code: "All operations aimed at defining the technical, economic, legal and administrative measures for forests in order to make them more sustainable and gain the maximum profit from them."
- 246 Article 5 Forestry Code: "Management measures enabling a sustainable use of forest resources and ecosystems, including protection, maintenance, restoration and improvement thereof."
- 247 Importantly for consistency of approach, this is defined to encompass both existing forests under Article 1(a) Forestry Code: "land covered with plant formation based on trees or bushes suitable for providing forest products, sheltering wild fauna and exercising a direct or indirect effect on the soil, climate or water system" and land that could benefit from reforestation under Article 1(b) Forestry Code: "land which, having previously contained a tree or shrub plant covering, has been cut bare or burnt and for which natural regeneration or reforestation actions are implemented."
- 248 See *supra* note 243, p 124, para 2.
- 249 Article 25, Forestry Code recognises that the management of classified forests may be delegated to "legal entities governed by public law or to associations recognised as being of public utility".
- 250 Article 90 Forestry Code, re rights of the holder of a forest concession.
- 251 Noting that the Forestry Code provides the capacity for the Minister.
- 252 Articles 85 and 86 Forestry Code, regarding the pricing for the acquisition of a forest concession (likely tied to assumed logging revenues than REDD+ activities); taxes specified at Articles 93, 102 and 121 regarding taxes (tied to land area and rates linked to harvesting activities).
- 253 See *supra* note 243, p 56, para 5.
- 254 See *supra* note 243, p 57, para 3.
- 255 See *supra* note 243, p 43, para 3.
- 256 See *supra* note 243, p 57, para 3.
- 257 Articles 29–32 Forestry Code (national and provincial forest consultation committees, including representation for environmental associations); Articles 36, 38 and 41 (rights of local communities); Article 74 (consultation re development plans); Article 84 (public inquiry prior to grant of forest concession agreement); Article 134 (grant of rights to local communities and national non-government organisations to exercise rights regarding breaches of provisions).
- 258 See *supra* note 243, p 131, para 1.
- 259 See *supra* note 243, p 68, part 2(a).
- 260 See *supra* note 243, p 125.
- 261 See *supra* note 243, p 125, para 4.
- 262 See *supra* note 243, p 125, para 4.
- 263 See *supra* note 243, p 59, para 1.
- 264 See *supra* note 243, p 59, para 1.
- 265 See *supra* note 243, p 31, para 2.
- 266 See *supra* note 243, p 67, part h.
- 267 See *supra* note 243, p 61, potential criteria for selection as sectoral projects include technical ability (such as prior experience with CDM or the voluntary market); the existence of co-financing to launch the project; and the project's contribution to the training of government actors and sharing of data.
- 268 See *supra* note 243, p 67, part g.
- 269 See *supra* note 243, p 42, part 6.
- 270 See *supra* note 243, p 84, para 3 to p 85, para 1.
- 271 See *supra* note 243, p 84, para 1.

Contacts

Andrew Hedges

Partner, European head of climate change
Norton Rose LLP
Tel +44 (0)20 7444 3074
andrew.hedges@nortonrose.com

Anthony Hobley

Consultant
Head of global climate change
Norton Rose Australia
Tel +61 (0)2 9330 8709
anthony.hobley@nortonrose.com

Elisa de Wit

Partner
Norton Rose Australia
Tel +61 (0)3 8686 6266
elisa.dewit@nortonrose.com

Hannah Logan

Senior associate
Norton Rose (Asia) LLP
Tel +65 6309 5331
hannah.logan@nortonrose.com

Rebecca Mohr

Partner
Brigitta I. Rahayoe & Partners
Tel +62 21 5793 6699
rebecca.mohr@brigitta.co.id

Tim de Wet

Director
Deney's Reitz
Tel +27 11 685 8664
tjdw@deney'sreitz.co.za

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Forest carbon rights in REDD+ countries: a snapshot of Africa

We are one of the few Tier 1 global climate change practices. We are committed to contributing to the successful development of REDD+ as an important part of global efforts to tackle climate change. We will continue to investigate the question of carbon ownership and governance through our advisory role to clients, which include early-stage financial investors, service providers in areas such as remote sensing, and national governments.