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Strategy Note for Forest Sector Reform in Kenya

Executive summary

Background, methodology and structure of the report

This paper summarizes the main findings of the second phase of the “Governance Assessment of the Forestry Sector in Kenya”. The objective of the assessment was to *analyse the main challenges and strengths of Kenyan forest governance and the way how the Miti Mingi Maisha Bora (MMMB) programme can address the analysed governance issues and support them by operational activities.*

The assessment was carried out, by a team of three consultants of Indufor, Tapani Oksanen, Michael Gachanja and Anni Blåsten, against the five major building blocks of good forest governance and their principal components, as defined by the World Bank (World Bank 2009):

- (i) transparency, accountability and public participation;
- (ii) stability of forest institutions and conflict management;
- (iii) quality of forest administration;
- (iv) coherence of forest legislation and rule of law; and
- (v) economic efficiency, equity and incentives.

A desk study of existing Government of Kenya documents and reports and other available studies (e.g. by development partners, NGOs and international institutions) was combined with interviews of key informants in Kenya, including representatives of government institutions, civil society and the private sector. The initial findings of the team were presented in a background paper which was validated and enriched in a workshop held on 12-13 April 2011, in Naivasha, Kenya, where a broad *range of stakeholders from government and development partners, civil society and the private sector participated.*

Summary of key findings

Kenya, as a country, has suffered and still suffers from persistent governance problems. As an indication of these, Kenya ranks 146th out of 180 countries in Transparency International's Corruption Perceptions Index for 2009. The forest sector is no exception. It has experienced bad governance in the past, and still faces considerable challenges.

The Kenya Government is aware of these challenges, and the New Constitution provides national values and principles of governance as a basis for improving the situation. These include (i) sharing and devolution of power, (ii) the rule of law, (iii) democracy and participation of the people, (iv) equity, (v) integrity, transparency and accountability, (vi) defining, recognition, protection, and enforcement of human rights, (vii) access to information, (viii) objectivity and impartiality in decision making, and (ix) ensuring that decisions are not influenced by nepotism, favouritism, or other improper motives or corrupt practices. This provides a solid foundation – and an urgent imperative – to improve the governance situation also in the forest sector.

The Forests Act 2005 enacted in 2007 has brought a paradigm shift in forest management as it upholds the principles of public participation in natural resource management. The Act is currently in the process of revision to be consistent with the New Constitution. Together with the on-going forestry sector reforms, especially the creation of the Kenya Forest Service (KFS), the on-going revision of the Forest Policy and the planned National Forest Program process, and the REDD+ Strategy process, this provides a window of opportunity for effectively moving



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the sector towards better and more effective governance. It is also evident that there are growing numbers of actors in the Government of Kenya institutions, the academia, the civil society and the private sector, who are fully aware of the remaining issues and problems and committed to moving the reform agenda forward. But, equally, vested interests in the *status quo* remain and act as a factor to slow down the process.

This report recognises the considerable efforts and progress that has been made in the recent years by Ministry of Forestry and Wildlife (MFW), KFS and other stakeholders in promoting good forest governance. It also identifies a number of remaining challenges and actions needed.

Key challenges

Transparency, Accountability and Public Participation

The main challenges in this area relate to making information on forest resources, their use as well as related revenue streams available both internally within the KFS and externally to the wider public in a way that ensures transparency and accountability. This is especially crucial given the bad image of the former Forest Department and the continuing allegations of corruption and mismanagement of the forest resources. Availability of reliable information is a precondition of the functioning of the foreseen licensing/concession system of forest plantations in a way that creates the conditions for the markets to operate efficiently, and ensures that the Government of Kenya gets the best possible sustainable returns from the commercial use of the plantations. It is also a fundamental enabling factor for the Community Forest Associations (CFAs) and local governments to effectively participate in forest management and conservation, and to ensure equitable revenue/benefit sharing between KFS and other partners.

Considerable efforts have been made by KFS to move from the previous centralised, top-down, forest management model towards devolution of rights and responsibilities to the local-level, and to establish joint forest management systems. Capacity development of the local level actors is urgently needed to enable them to effectively tackle their responsibilities, and to benefit from these efforts. Given the disparities in the capacities of the CFAs and the KFS, it is important to ensure that the principle of Free Prior and Informed Consent (FPIC) is respected in the processes to establish the Forest Management Agreements, and that the processes themselves do not put an unreasonable burden on the local-level participants given their resource constraints. Equally, it is important to ensure that sufficient incentives are in place to benefit the communities in the short-term.

Stability of Forest Institutions and Conflict Management

A persistent factor influencing negatively the stability of the forest sector institutions in Kenya (and elsewhere) is the undervaluation of the contribution of the sector in the economic statistics, especially in terms of its contribution to the Gross Domestic Product (GDP). The contributions that are omitted relate to (i) the value addition of the sector through manufacturing, (ii) the provision of goods and services to subsistence economy, and (iii) the supply of critical cultural and environmental services. Due to this, currently the dependence of the Kenyan forest sector institutions on donor funding, especially regarding the development budget, presents a significant risk.

Revenue generation by the sector is negatively affected by the “logging ban”¹, combined with non-competitive allocation of logging rights, non-market based setting of timber (stumpage) prices in the plantations, and cases of illegal practices in timber disposals, as evidenced by in-

¹ The logging ban in government forest plantations is in fact a highly selective way of granting forest use rights as it is not universally applied. Hence the “logging ban”.



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ternal reports of KFS. In addition to improving the valuation and sales of timber from plantations, there is also an urgent need to develop a framework for charges (and revenue sharing mechanisms) for forest ecosystems services, such as environmental services and carbon.

The newly (in the Forests Act 2005) created local level forest management institutions are still weak, and the financial incentives which will enable them to develop their capacity are yet to be defined. As a consequence, KFS is using a significant share of its resources in monitoring and law enforcement activities. A critical issue is also to define how extension and training (e.g. towards the CFAs) will be organised without putting a high financial burden on KFS. In this regard collaboration with Civil Society Organisations (CSOs) and the agricultural extension services could provide a more sustainable institutional path.

The only major issue related to reliability of tenure rights concerns trustlands and un-alienated government land as no authority holds the title deed for these lands. It can also be foreseen that disputes and conflicts on forest management and use are likely to increase as the devolution process multiplies the number of stakeholders with a legitimate interest in forests. This will call for special attention to conflict resolution, especially taking into account the power imbalances between these actors.

Quality of Forest Administration

KFS is the key manager of the forest resources in Kenya, but also other institutions – especially at the local levels – will increasingly be involved as partners and co-managers. The creation of KFS was one of the major institutional innovations of the Forests Act 2005 to move the sector reform process forward. Despite of its importance, the establishment process of KFS is still incomplete, most staff is still employed by the MFW with inferior working conditions compared to those employed by KFS, and this is having a negative impact on staff morale. KFS has already lost some key managers. The move towards a more decentralised way of managing the forest resources in collaboration with CFAs and local governments is still in its initial stages, many critical elements of the process remain undefined, and the capacity of these newly established structures remains weak.

The role of KFS vs. other actors in the (co)management of the forest resources (including both plantations and natural forests) remains still somewhat ambiguous and some current and/or envisaged tasks (e.g. law enforcement and extension) may need rethinking given the financial burden they present to KFS. The composition of KFS Board has also raised concerns regarding potential conflicts of interest and unbalanced representation of the main groups of stakeholders. Concerns are also expressed regarding corruption control within KFS, especially related to the pre-harvest inventories in the forest plantations, and plantation licensing under the “logging ban”.

To improve the basis for sustainable forest management, Kenya needs to develop a commonly agreed definition for forests, as well as agree on the Criteria and Indicators for sustainable forest management. This is urgently needed especially as KFS, together with development partners, is now intensifying the work on natural forest assessments, and assessments of trees outside of forests. This is also indispensable for the development of standards for SFM, and to move towards independent forest certification based on a national standard. A more systematic way of monitoring forests and forest activities will also be a necessity, both to improve forest administration and governance, and to respond to the requirements of REDD+. This is closely related to how information management and dissemination is handled, both within KFS and to the Kenyan public.



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Coherence of Forest Legislation and Rule of Law

The Forests Act 2005 provides a solid foundation for the forest sector reform process. However, in light of the New Constitution, the on-going forest policy revision process, the National Forest Programme process, the REDD+ strategy development, and the experiences gained so far in its implementation, it is in need of revision. Some of the findings of this report are also best addressed in the context of the revision of the Forests Act. The (already planned) revision of the Forests Act 2005 should have high priority for the MFW and KFS, as the more detailed regulations can (and should) only be made after this process has been completed. The provisions of the New Constitution provide a good basis for ensuring the consistency and harmonisation of the (revised) Forests Act with other legislation relevant to the forest sector which are currently subject to similar revisions (e.g. the Wildlife Act and the Agriculture Act). Coordination within the MFW and between the MFW and other ministries in this respect is critical.

Effective enforcement of the Forests Act requires addressing both internal factors within the forest sector and external ones. In this regard notable progress has been made in the establishment of the Enforcement and Compliance (ENCOM) Division of KFS and the effective implementation of the organisational structures required. Challenges remain to maintain the cost of enforcement at acceptable levels, to ensure that the actions do not disproportionately target poverty-driven illegal activities and to implement effective institutional cooperation e.g. with the police and judiciary. Eventually, more of the enforcement activities will need to be taken care of by the local-level actors (e.g. the CFAs, and local authorities), which will require that sufficient incentives are in place (e.g. through revenue sharing). Resolving undefined property rights – where land adjudication processes are not complete, or where community rights are unclear - is also a prerequisite for effective law enforcement.

Economic Efficiency, Equity and Incentives

Achieving sustainable forest management will require economic efficiency, equity and sufficient incentives for all stakeholders who are expected to contribute. Currently the most pressing issue in this regard is the “logging ban”, which is promoting illegal timber extraction (in Kenya and in the neighbouring countries), or more specifically the ban on (i) logging in natural forests which due to its complexity requires more long-term action to establish the basis for SFM before it can be lifted, and (ii) the system of privileged timber licences in the forest plantations, which prevents a functional timber market, creates distortions, and needs to be lifted in the short-term. Parallel to the (re) establishment of a market-based timber economy, actions need also to be taken to include other forest products and services (e.g. conservation easements and ecotourism licences), similarly based on transparent information and processes, and open participation of interested stakeholders. To create a forest governance structure that truly allows the local stakeholders to assume an increasing role requires also the allocation of forests with considerable economic potential to be jointly managed, and the revenues (and other benefits) to be shared in a way that provides all participants sufficient incentive to maintain their interest and commitment. Clear and equitable detailed “rules of the game” need to be established in the (revised) Forests Act to provide the stability that is needed regarding both plantation forests and natural forests. On the other hand, sufficient penalties need to be established and enforced, to decrease the attractiveness of illegal operations.

These actions, together with full transparency of information, would also create the enabling environment required for fresh investment in the sector. In addition, specific support (regulations, credit, and training) will be needed to enable effective participation of the small-scale operators and communities.



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Priority actions

The most urgent actions to move the governance reform process forward in the short-term are:

1. Fast track revision of Forest Policy and/or Act to establish a clear direction and basis for the continued implementation of the sector reforms in line with the Constitution of Kenya, especially regarding the process of devolution of forest management and use rights and responsibilities. Key issues identified in this regard include:
 - Establishing the rules for the sharing of revenues between KFS, CFAs, local governments (and possibly other institutions).
 - Establishing the rules for access and use rights of local communities concerning the forest resources, and avoiding regulatory overreach in legislating on these.
 - Modifying and simplifying the rules for the establishment of the Forest Management Agreements signed between the KFS, the CFAs (and possibly the local governments and others) to ensure (i) the representative composition of the CFAs, (ii) a simple and transparent process tailored to the capacities of the agencies and communities involved, and (iii) adherence to the principle of Free Prior Informed Consent (FPIC) by the local community.
 - Guaranteeing public information disclosure on forest resources and their use, including related financial flows to ensure that the public (including all sectors of the society) has sufficient information to fully participate in the sector and to monitor the developments.
 - Clarifying the roles and mandates (policy-regulation-management) of the MFW and the KFS, ensuring that the nominations to the KFS board are based on self-regulation of the nominating bodies, and avoiding conflicts of interest.
 - Ensuring that the revision of the Forests Act is fully aligned with the relevant provisions of the constitution and on-going drafting of key bills in other sectors.
 - Ensuring that, through a participatory process, a definition for forests for Kenya is included in the revised Forests Act.

2. Establish and implement a policy and mechanisms for geo-referenced data and information sharing, including (but not limited to) inventory information on different types of forest resources (starting with plantations and expanding as the inventory data becomes available on other types of forests and trees on agricultural lands), forest licenses, concessions (as they become a reality), management agreements, annual operating plans, and revenues collected and shared:
 - within KFS at different levels
 - between KFS and other institutions relevant in the context of devolution (CFA's, local governments, KWS etc.)
 - with the Kenyan public

The policy and mechanism should provide information that allows overlaying of physical and financial information, is regularly updated, and allows easy access and provides information in usable format for the different stakeholders in the sector and outside.



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3. Initiate a systematic and planned process to abolish the “logging ban” and move toward a transparent and competitive system of allocating timber (and other types of) licenses and concessions.

- establish the (already initiated) “roadmap” for lifting the “ban”
- carry out a social impact assessment to ensure that the rights and benefits of the local communities are fully recognised and taken into account
- ensure that the process is transparent and allows the participation of all interested and capable companies without discriminating against new entrants. Transparent provision of information is critical in this regard.
- ensure that sufficient room is created also for small-scale operators to participate (e.g. through joint-ventures) to meet the social objectives.
- ensure that the process, including the setting of the reserve price, is based on up to date market information and allows KFS (and others who will share in the revenues) obtain the highest possible sustainable revenue streams.
- engage an independent third-party monitor, based on best international practice on Independent Forest Monitoring (IFM), to accompany the process of giving licenses and concessions until such time that the information systems are established and operational to a degree that confidence in the integrity of timber rights’ allocation is restored.
- Follow these same principles in the allocation of other rights and licenses based on ecosystems services of forests (e.g. lodges for ecotourism)

4. Establish through a participatory process, the Criteria and Indicators (C & I) for Sustainable Forest Management. The C & I will provide standards that will enable KFS to determine what constitutes a good forest management and to define a mismanaged forest.

Moving from a non-transparent, centralised and top-down forest management and governance model to a genuine model of transparency, equity and public participation, and devolution of rights and responsibilities to the local-level actors is a demanding process, both in terms of creating the right incentives and capacity for the local actors to take on the new roles and responsibilities, and in terms of the changes required in the central government structures and ways of working to become genuine and effective partners to the new actors. The direction in this regard is clear, as indicated by the KFS Strategic Plan 2009/10–2013/14 “Trees for Better Lives”, and the first steps have been taken. But, as indicated in this report, considerable challenges remain, and there are evident risks that if the work is not carried out effectively forward the result may be a governance structure that is neither empowering the local-level actors, private sector and civil society to become an effective partners, nor providing for an efficient and effective centralised way of managing Kenya’s forest resources.

