

Report No. 88065-KE

KENYA

NATURAL RESOURCE MANAGEMENT PROJECT



INVESTIGATION REPORT

MAY, 22 2014

In Memoriam
Alf Morten Jerve (1953 – 2014)

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Abbreviations and Acronyms

ADC	Agricultural Development Corporation
ACHPR	African Commission on Human and Peoples Rights
CBO	Community-Based Organization
CDD	Community Driven Development
CFA	Community Forest Associations
GoK	Government of Kenya
ESMF	Environmental and Social Framework
FAC	Forest-Adjacent Communities
IA	Implementing Agency
IDP	Internally Displaced Persons
IMTF	Inter-Ministerial Task Force
IP	Indigenous Peoples
IPGCC	Indigenous People's Group Coordinating Committee
IPO	Indigenous Peoples Organization
IPP	Indigenous Peoples Plan
IPPF	Indigenous Peoples Planning Framework
KAP-SLM	Kenya Agricultural Productivity-Sustainable Land Management Project
KFS	Kenya Forest Service
MENR	Ministry of Environment and Natural Resources
MOF	Ministry of Finance
MOWI	Ministry of Water and Irrigation
NGO	Non-Governmental Organization
NLC	National Land Commission
NLP	National Land Policy
NRM	Natural Resources Management
NRMP	Natural Resources Management Project
OP	Operational Policy
PAD	Project Appraisal Document
PDO	Project Development Objective
PFM	Participatory Forest Management
PF	Process Framework
RAP	Resettlement Action Plan
RPF	Resettlement Policy Framework
SA	Social Assessment
SIL	Specific Investment Loan
UN	United Nations
VMG	Vulnerable and Marginalized Groups
VMGCC	Vulnerable and Marginalized Groups Coordinating Committee
VMGP	Vulnerable and Marginalized Groups Plans

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Executive Summary

Background

1. This report was prepared by the Inspection Panel in response to two Requests for Inspection of the “Kenya: Natural Resources Management Project” (NRMP). The First Request, submitted on January 2, 2013, was sent by members of the Sengwer Indigenous community from four areas of the Cherangany Hills in the Western Highlands of Kenya; the Second one, submitted on June 28, 2013, was sent by four representatives of the Cherangany Indigenous Peoples Community on behalf of people living in the Cherangany Hills. The two requests address overlapping issues. Throughout the report, the Panel refers to these communities as Cherangany-Sengwer.

Project Context

2. Kenya’s rich endowment of natural resources is vulnerable and widely considered one of the most degraded in Africa. In recognition of acute problems in its forests sector, the Government of Kenya (GoK) prepared a new Forest Policy and in 2005 enacted a Forests Act. This 2005 Forests Act led to the establishment of the Kenya Forest Service (KFS) to replace the former Forestry Department, and provided for the co-management of gazetted forests by KFS and adjacent communities through the setting up of Community Forest Associations (CFAs). The Act does not allow for people to reside inside gazetted forests.

3. The NRMP’s design and implementation occurred during a period of significant institutional and legislative uncertainty and political change following Kenya’s December 2002 and 2007 elections. After the general elections of 2007, there was political and ethnic unrest leading to violence and mass displacement of people across the country, including incursions into forests such as the Cherangany Hills. This led to increased Government attention to the management and conservation of forests, and new concerns about forest encroachers. Between 2005 and 2009, there were repeated occurrences of evictions of forest dwellers (among them the Cherangany-Sengwer), who would later return to the forests to farm and re-build their houses.

4. The World Bank Board of Executive Directors approved the NRMP in 2007. The Project was designed to support the management of Kenya’s threatened natural resource base by strengthening policies and practices that would ensure, among other things, sustainable provision of water, improved irrigation, and enhanced forest management. Component 2 of the NRMP (the focus of the requests), sought to operationalize the newly enacted Forests Act by facilitating the creation of a transparent and accountable regulatory and institutional framework for forest resources management. Activities under Component 2 initially included realigning and demarcating boundaries in selected gazetted forests, identifying partnership models for community participation and benefit sharing, supporting the implementation of a resettlement policy framework, and developing and implementing resettlement action plans.

5. The Project was restructured in 2011 to fit a more realistically achievable set of objectives within the time span of the Project. During restructuring, Management stated that the Project “would not be able to implement the land related commitments, i.e., (i) hasten the provision of titles for land presently occupied and used by the communities in the Project areas including support for necessary steps, such as land survey, demarcation and registration of titles, (ii) establish a comprehensive strategy to rehabilitate livelihoods of evicted people to

the level of December 2002, and (iii) offer assistance within the land restitution process to indigenous peoples to claim all lands over which they have lost control between 1895 and 2002.” The restructuring also developed a livelihood and rural development program for indigenous peoples and forest communities, and introduced new terminology: “Indigenous Peoples” would be referred as to “Vulnerable and Marginalized Groups” (VMG). The Project closed in June 2013.

6. The Cherangany Hills, the geographical focus of the requests, were not originally intended to be one of the NRMP’s intervention areas but were introduced through the Project’s Indigenous Peoples Planning Framework (IPPF), which also bound the Project to a number of commitments aimed at resolving long-standing land rights issues of indigenous peoples residing there. During restructuring, realignment and demarcation of forest boundaries remained as Project activities, and the Cherangany Hills were formally recognized as a Project area, but the proposed land and resettlement activities were taken out of the Project, with support for the more comprehensive resolution of land issues being limited to technical assistance and logistic support for national processes.

Key Claims Presented to the Panel and Management Response

7. The Requesters identify harms that, according to them, are caused by the Bank’s lack of compliance with its operational policies and procedures during the design, appraisal and implementation of the NRMP. These claims allege forceful evictions from ancestral lands; lack of provisions for resettlement and inadequate consultations; inadequate consideration of the customary rights to forests of the indigenous people; and harm derived from changing their designation from “Indigenous Peoples” to “VMGs” without proper consultations.

8. Management in its response acknowledges the challenging environment in which the NRMP was designed and implemented, and notes that the original Project design was overly ambitious with respect to solving land rights issues. It states that the Bank took an active approach in responding to the concerns raised in the Requests. It also states that “although the evictions were not the result of the Project, Management acted swiftly upon learning about such incidents by securing a moratorium on evictions from the Government.” Other actions taken during the restructuring aimed at addressing indigenous peoples’ concerns related to restriction of access to forests and loss of customary rights.

Analysis of Eviction Risks and Resettlement in the NRMP

9. The Panel acknowledges that evictions have been occurring in the Cherangany Hills before, during, and after the NRMP. The Panel finds that no evictions were supported as part of the NRMP. At the same time, the Panel finds that the risks of evictions were not properly understood in Project design and that a correct application of the Bank’s safeguard policies may have prevented or mitigated some of the harms caused by these evictions. The inclusion in the Project of an area ridden with long-standing land conflict issues and where indigenous peoples are present (the Cherangany Hills) warranted an adequate analysis of Project impacts and risks, and planning of mitigation measures.

10. The original Project design included frameworks to address the risk of evictions through the IPPF and the Resettlement Policy Framework (RPF), but no planning for their implementation occurred, and no resettlement plan was prepared for any forested area under the Project. While commending Management for securing a moratorium on evictions in 2011,

and acknowledging the challenges posed by the political and ethnic complexities as background, the Panel notes that the moratorium could instead have been a critical risk mitigation measure during project preparation.

11. The Panel finds that more attention should have been given from the outset to identify risks for affected people and adequately mitigate for such risks as required by Bank Policies on Environmental Assessment, Project Appraisal, Indigenous Peoples, and Involuntary Resettlement. The Panel also finds that the lack of follow-up actions to the RPF through a RAP represents non-compliance with OP/BP 4.12 on Involuntary Resettlement and IP 13.05 on Project Supervision.

12. The Panel acknowledges that the Cherangany Hills were not originally intended to be one of the Project intervention areas. The Panel also notes that the IPPF was peer reviewed by Bank staff during preparation, and extensively reviewed and commented on by all stakeholders, including KFS, which pointed out that the Cherangany Hills were not to be included in the Project. Yet the IPPF as drafted remained unchanged and therefore became an obligation of the borrower under the legal agreements of the Project.

Institutional Analysis at Appraisal

13. The Panel finds that given the historical mission of KFS and its predecessor (the Forestry Department), which primarily used a compliance and enforcement approach, the risks associated with the lack of past experience of this institution in implementing the Project through a collaborative and community based approach were not properly understood.

14. The Panel finds non-compliance with the key provisions of OMS 2.20 (Project Appraisal), during initial project design as they relate to the proper institutional analysis of the capacities of KFS. In this context, the Panel particularly highlights the challenges resulting from the implementation of activities that would have required multi-agency interventions, such as resettlement operations, given that Component 2 of the NRMP did not target any agencies beyond the KFS.

Project Supervision

15. The Panel notes that the World Bank was aware and concerned about evictions during project implementation, and made serious and repeated steps in response, including: (i) advising the GoK to establish a moratorium on evictions from Embobut forest until a permanent solution for resettlement of people could be found; (ii) obtaining an assurance that some communities, including Cherangany-Sengwer, could remain with access privileges to the forest; (iii) strengthening of the Project's sensitization and training of forest rangers following an incident in which a house and property were burned in the area in November 2011; and (iv) supporting the Inter-Ministerial Task Force on Land and Legacy issues to provide a basis for further conflict resolution.

16. The Panel finds that Management responded repeatedly and firmly and brought to the attention of the Borrower instances of non-compliance with social safeguards obligations, as required by OP/BP 13.05.

Indigenous Peoples and Vulnerable and Marginalized Groups (VMGs)

17. The Panel finds that the use of the term VMGs instead of Indigenous Peoples does not in itself amount to non-compliance with OP/BP 4.10 because the policy does not require its use to ensure protection of the rights included therein.

18. At the same time, the Panel notes that for the Cherangany-Sengwer the term Indigenous Peoples is central to their self-identity and therefore for the protection of their customary rights. The Panel fully recognizes the complexity of applying the term Indigenous People to many communities, particularly when, according to Management, the GoK has already expressed its position about these designations. Nonetheless, it is the Panel's view that meaningful compliance with the Indigenous Peoples policy calls for more consideration to be given to a community's attachment to a particular designation through greater consultation, and in ensuring that the use of any other designation does not dilute the full customary rights of IPs as enshrined in OP 4.10.

Customary Rights, Participatory Forest Management, and Livelihood Issues

19. While acknowledging the difficult environment and the long standing conflicts between KFS and forest communities, the Panel finds that activities under the Project aimed at participatory management of forests and engagement with communities, which are aligned with the objective of OP 4.10, were not followed up and implemented, especially after restructuring, as required by paragraph 21 of OP 4.10. The Panel therefore finds non-compliance with Paragraph 21 of OP 4.10 because the proper steps required to address the potential loss of customary rights were not taken as provided by the Policy.

20. The Panel notes that the focus on livelihood support, whilst beneficial to recipients, represented a move away from a focus on the protection of customary rights to forest resources. The Panel notes that although the Project mapped these rights in its early stages, it then moved away from the concept of customary rights after restructuring. The Panel finds that overlooking customary rights after restructuring represents non-compliance with OP/BP 4.10.

21. The Panel received positive comments and appreciation regarding the benefits of the livelihood program implemented under the VMGPs. The most positive evaluations of livelihood support were aired by communities such as those in Chesebet and Kaibos, who did not claim forest land, did not fear eviction, had not experienced noticeable changes in user or access rights, and who therefore tended to regard livelihood support as "development projects" rather than as mitigation of harm.

22. On the question of whether or not non-indigenous peoples living in the mixed communities with indigenous people should have benefitted from livelihood activities under the Project, the Panel finds that by ensuring that benefits from livelihood activities in mixed communities reach IPs as well as non-indigenous peoples, the Bank is in compliance with OP/BP 4.10.

23. The Panel finds that the earlier Project documents including the PAD, IPPF and SA led to strong support from parts of the community, in a manner that was consistent with OP/BP 4.10, because of their wide coverage of key substantive issues in line with Indigenous Peoples' claims. The restructured Project, on the other hand, contrasted with OP 4.10's spirit

and letter because it was developed without proper consultation. The Panel finds that the absence of prior consultation as well as the delay in disclosure of information regarding Project restructuring raises an issue of compliance with OP/BP 4.10. By the time the concerned Cherangany-Sengwer community members were informed, all decisions had already been taken. In addition, as restructuring shifted away from a focus on customary rights, the VMGPs concentrated exclusively on livelihood activities, thus preventing the proper profiling of customary rights. In such a context, it became difficult to undertake effective free, prior and informed consultations leading to broad community support as required by OP/BP 4.10.

Conclusions

24. The Panel wishes to re-emphasize the critical importance and transformational nature of this Project and its development objectives in terms of capacity building of institutions to manage water and forest resources in a sustainable and participatory manner. These objectives are very relevant in a country with high population growth rates and unsustainable levels of pressure on its natural resources. Furthermore, the Panel recognizes the significant achievements under the Project to strengthen the management of water, forests, and other natural resources in the country.

25. The Panel recognizes that the aspirations inherent in the Project as elaborated in the initial Project documents (IPPF and PAD) to resolve the long-standing historical land claims of indigenous people were ambitious and commendable. The Panel is of the view, however, that these aspirations were not backed by sufficient analysis of potential risks during appraisal, and by the commensurate allocation of resources, both financial and human, that would have been required to plan, appraise, and implement such a complex undertaking, which were made even more complicated by an environment that required the engagement of actors beyond the forestry sector: intentions were thus not fully backed by actions.

26. The Panel commends the forceful and sustained response by Bank Management once it became aware of the evictions. Notwithstanding this, the question remains as to why the evictions were not foreseen and mitigated from the start of the Project, given that eviction of “encroachers” was a core activity of KFS’ predecessor, the Forestry Department, and repeatedly undertaken in the Cherangany Hills over many years.

27. Approximately one-half of the staff of KFS continues to be forest rangers in the Enforcement and Compliance Department whose responsibility is to enforce forest boundaries and prosecute offenders. In other words, eviction of encroachers was a main task of this Department of the KFS before, during, and after the conclusion of the NRMP. Thus, the introduction of the practice of forest co-management, an essential part of the reform under the new Forests Act as well as a key objective of NRMP, required a major paradigm shift in the culture and functioning of the KFS, a shift that would call for significant and longer-term support to capacity building.

28. While the Project provided some training in Participatory Forest Management and safeguard policies related to VMGs, the Panel is of the view that Management had not sufficiently identified the magnitude of what is required to make such a paradigm shift during appraisal, nor provided the corresponding support during implementation. The Panel considers that an in-depth appraisal of KFS could have led to a much more robust capacity

building component for supporting KFS, enabling it to make the transition towards better community work. Recent events indicate that this is yet to be fully achieved.

29. Furthermore, neither KFS nor its predecessor had a mandate to resettle the people they evicted, given that they regarded anyone living inside gazetted forests as illegal encroachers. Management recognized the need for involving additional government entities that would be required to undertake such resettlement activities. The Panel concludes that the issue of finding a permanent solution to the plight of Indigenous Peoples living in gazetted forests could not be approached “on the sidelines” of the Project or as an “add-on” to a NRMP which had a different focus, and whose main implementing agency did not have the mandate to address the issue. The Panel encourages the Bank to continue a policy level dialogue and support the appropriate agencies mandated to pursue this issue.

30. The Panel observes that there is a need to properly understand the complexities of long-standing historical conflicts, particularly when they relate to land issues and indigenous peoples’ claims. The NRMP raised expectations for land allocation and a long-awaited solution to what the Cherangany-Sengwer considered their long-term legitimate claims, which the Project was not able to solve. Likewise, the Project was not successful in incorporating indigenous people in the management of these forest resources, an approach that would have contributed towards the Project’s goals.

31. The Panel also recognizes and appreciates Management’s proactive stance towards the forceful evictions that are continuing to take place after the closure of the Project, as exemplified by the Bank President’s statement that the Bank is not a “bystander.” The Panel also appreciates the constructive and proactive engagement of the National Land Commission, as expressed by its Chairman, in resolving these issues.

32. Finally, the Panel acknowledges that the Project took place in the context of a very difficult political reality stemming from post-election violence that resulted in the displacement of hundreds of thousands of people, complex politics of ethnic struggles, as well as land ownership conflicts that have deep historical roots. This background compounded the issues that the Bank encountered during the implementation of the Project.

33. This is not to say that the Bank should have stayed away from tackling these complex issues. On the contrary, the Panel throughout its investigation has found that the Bank was well regarded by all actors and perceived as playing a critical role, to the point that clear expectations for solving these long-lasting issues through the NRMP were raised.

34. Going forward, Bank engagement, through the high level policy dialogue currently ongoing in pursuit of a longer term resolution to the issues of land rights of Indigenous Peoples, and others living in gazetted forests, is critical. It is the Panel’s firm view that, despite the complexities of the issues it reviewed in this case and the challenges involved, the World Bank continues to be best equipped in terms of expertise, mandate and resources to support the GoK in resolving these issues, and to follow through with the transformation process that was launched, in the interest of sustainable development, the natural environment, and the protection of vulnerable communities, including Indigenous Peoples.

Chapter 1

Introduction and Context

1.1. Organization of the Report

1. This report presents the Inspection Panel’s analysis and findings on issues raised by two Requests for Inspection of the “Kenya: Natural Resource Management Project” (hereinafter “NRMP” or “the Project”).

2. The Requests were submitted by members of the Cherangany-Sengwer community who live and represent others from four areas of the Cherangany Hills in the Western Highlands of Kenya (Map 1), claiming that they have suffered serious harm as a result of the Bank’s failure to comply with a number of its Operational Policies and Procedures during the design, appraisal and implementation of the Project, particularly Operational Policies 4.12 on Involuntary Resettlement (OP/BP 4.12) and 4.10 on Indigenous Peoples (OP/BP 4.10). In this Report, the Panel adopts the term Cherangany-Sengwer for both sets of Requesters, with the terms used alphabetically rather than in order of their significance.¹

3. The report includes four Chapters:

- Chapter 1 (this Chapter), briefly describes the Project and its restructuring, summarizes the claims made by the Requesters and the Bank’s Management Response and subsequent actions, describes the Panel’s investigation process, and outlines the geographic, political, and ethnographic context of the Project;
- Chapter 2 analyzes the first set of core claims by the Requesters, i.e., that the affected Cherangany-Sengwer indigenous communities in the Project area have been evicted from their homes and lands, and that plans were made for their resettlement without consultation, in violation of Bank Policies on Indigenous Peoples and Involuntary Resettlement;
- Chapter 3 analyzes the Requester’s second set of core claims, i.e., that the Project has failed to adequately recognize and protect the customary rights of the affected communities, in non-compliance with the Bank’s Policy on Indigenous Peoples;
- Finally, Chapter 4 provides the main conclusions of the Panel’s investigation and invites Management to respond with measures that might address still unresolved concerns and at the same time, to draw lessons that may be useful in the future.

4. In line with its mandate, the Panel investigation focuses solely on the issues raised by the Request related to allegations of violations of the World Bank’s operational policies and procedures and related harm arising from instances of non-compliance with them.

1.2. Description of the Project

5. According to the World Bank, Kenya has one of the most degraded natural resource bases in the Africa region, with nearly 70% of its population living on the 12% of total land

¹ See below for further discussion on this.

area classified as having medium to high potential for agriculture and livestock production. The rapidly growing population and increasing demand for land, energy, food and water results in tremendous pressure on natural resources, impacting on economic growth and poverty reduction efforts. A majority of the rural poor are reliant upon forest, cropland, grazing lands, and water resources for their livelihoods, which are directly affected in both the short and long terms by degradation of these natural resources including soil erosion, forest loss and fragmentation, and greater variability of water flow and reduced water quality.

6. The NRMP is a Specific Investment Loan (SIL) approved by the Bank's Board of Executive Directors on March 27, 2007 in the amount of SDR46.0M² to address these issues. Specifically, the Project was designed to support the management of some of Kenya's threatened natural resource base by strengthening policies and practices that would ensure the sustainable provision of water, improved irrigation, and enhanced forest management.

7. The PAD states that Kenya's endowment of water, forests, and minerals serves as the foundation of much of the country's economic activity, but that these resources are vulnerable to natural shocks, mismanagement, and depletion.³ Water shocks in the 1990s brought these issues to the attention of the Government, stimulating a new Water Act and an institutional framework to manage water resources. Similarly, and in recognition of acute problems in the forestry sector, the Government prepared a new Forest Policy and Forests Act. The Government requested Bank support to implement this new policy, which included institutional reforms that would create incentives for private sector and local community investment in forests, and to improve their management. Community engagement as partners in co-management of water and forest resources was a critical element of the NRMP.

8. The NRMP included four components:

- Component 1: Water Resources Management and Irrigation (US\$38.1M), intended to “strengthen the Government's capacity to implement the existing laws, policies, and regulations related to water resource management, following promulgation of the Water Act 2002” as well as to “contribute to the consolidation of reforms of the National Irrigation Board (NIB) and development of irrigation in the downstream part of the Nzoia basin.”
- Component 2: Management of Forest Resources (US\$21.1M), sought to operationalize the newly enacted Forest Resources Act of 2005 by facilitating the creation of a transparent and accountable regulatory and institutional framework for forest resources management. It aimed at transforming a Government conservation model into one that followed a joint management approach with local communities and the private sector. Sub-components included: (i) realigning and demarcating boundaries in selected gazetted forests, and (ii) supporting activities to transform the Forest Department into an accountable and semi-autonomous Kenya Forest Service (KFS) by initiating training and sensitization activities as well as providing equipment, etc. Project activities included identifying partnership models for community participation and benefit sharing in the forest sector; supporting the effective implementation of the Resettlement Policy Framework, and developing and implementing Resettlement

² US\$68.5M at the time

³ Kenya—Natural Resource Management Project, Project Appraisal Document (PAD): 1.

Action Plans (RAPs). The Forest Resources Component was managed by the KFS, which appointed a National Project Coordinator. This component is the subject of the Requests.

- Component 3: Livelihood Investments in the Upper Tana Catchment (US\$4.5M) involved investments in “livelihood enhancing micro-projects which support the natural resource base.” Financing for this component was provided using a Community Driven Development (CDD) approach where proposals were sought from various communities and funding was provided for small-scale projects which delivered support to the natural resource base; and
- Component 4: Management, Monitoring, and Evaluation (US\$4.8M) intended to “provide the resources necessary for effective management and monitoring of the project” by strengthening financial management and procurement functions. Two Government Ministries, Environment and Natural Resources (MENR), and Water and Irrigation (MOWI), supported by a Coordination Office and the relevant Implementation Agencies (IAs) managed the Project.

9. The Project was to be implemented through the MOWI and the MENR, with MENR and the KFS managing Component 2.

10. The Project was assigned a “Category B” under OP/BP 4.01 on Environmental Assessment on the basis that “the project involves the construction of small to medium size water storage structures and check dams in the upper catchment of the Tana River.” The Project triggered several other safeguard policies, including OP/BP 4.10 on Indigenous Peoples, OP/BP 4.12 on Involuntary Resettlement, OP/BP 4.36 on Forest Policy, and OP/BP 7.50 on International Waterways.

11. The Project became effective in December 2007, shortly before the 2007 general election, and “after delays in the elaboration of subsidiary credit agreements” between the Ministry of Finance (MOF) and the IAs.⁴ Project implementation was further delayed by the unrest that followed the 2007 general election, pushing back the start of implementation to April of 2008.⁵

1.3. Project Restructuring

12. On June 24, 2011, the Bank’s Board approved Management’s proposal to restructure the Project,⁶ which substantially revised and simplified the Project’s Development Objective (PDO), changing it from “to enhance the Recipient’s institutional capacity to manage water and forest resources, reduce the incidence and severity of water shocks such as drought, floods and water shortage in river catchments and improve the livelihoods of communities participating in the co-management of water and forest resources”⁷ to “improve the

⁴ Management Response, Request for Inspection of the Kenya: Natural Resource Management (IDA Credit No. 4277-KE), March 15, 2013: 7.

⁵ Management Response: 10.

⁶ Restructuring Paper on a Proposed Project Restructuring of the Natural Resource Management Project Approved on March 27, 2007 to the Republic Of Kenya June 10, 2011.

⁷ Financing Agreement between the Republic of Kenya and the International Development Association Dated May 7, 2007, Schedule 2.

management of water and forest resources in selected districts.”⁸ The restructuring also included a revision of the Results Framework to align the indicators with the revised PDO, and reallocated roughly 21% of Project funds. The restructuring also formalized the inclusion of the Cherangany Hills as part of the Project area; hence, funds could be reallocated towards implementation of activities there.⁹

13. The Project’s Restructuring Paper¹⁰ acknowledged that an expressed concern of communities around the forests related to land use and access issues. Therefore, the Project would make contributions to these issues through the preparation of an updated Process Framework and the preparation of Indigenous Peoples Development Plans (IPPs). However, it also recognized that a more comprehensive resolution of land issues associated with Kenya’s forests was beyond the remit and time horizon of the Project and would need to be addressed as part of the dialogue between the Government of Kenya and the World Bank. The Paper added that the restructured Project did not propose to address all vulnerability issues associated with Indigenous Peoples’ land access and tenure, but would support preparation of IPPs for communities in the Project area focusing on livelihood and CDD-type activities.¹¹ According to the Restructuring Paper, the preparation and implementation of VMPGs was to be made “as the equivalent of IPPs in Kenya.”¹²

14. As part of the rationale for restructuring, Bank Management stated that the revisions adjusted Project outcomes to fit a more realistically achievable set of objectives within the time span of the Project. The Project “would not be able to implement the land related commitments, i.e., (i) hasten the provision of titles for land presently occupied and used by the communities in the Project areas including support for necessary steps, such as land survey, demarcation and registration of titles, (ii) establish a comprehensive strategy to rehabilitate livelihoods of evicted people to the level of December 2002, and (iii) offer assistance within the land restitution process to indigenous peoples to claim all lands over which they have lost control between 1895 and 2002.”¹³

15. The Project closed on June 30, 2013.

1.4. Claims by the Requesters

16. The Panel received two Requests regarding the NRMP. The first Request was received on January 14, 2013 and was sent by members of the Sengwer community who “live and represent others who live” in the following four areas of the Cherangany Hills in the Western Highlands of Kenya: the Kapolet Forest (in Trans-Nzoia District), Talau and Kaipos (in West

⁸ Amendment to Financing Agreement, July 7, 2011: 1.

⁹ Management Response: 30.

¹⁰ Kenya: Natural Resource Management—Proposal to Restructure, Memorandum of the President (IDA/R2011-0240).

¹¹ Restructuring Paper 2011: 1.

¹² Restructuring Paper 2011: 3. The Project Paper adds that “*given particularities with respect to the term Indigenous Peoples in Kenya, the new Constitution of Kenya uses the term ‘vulnerable and marginalized groups’ (VMGs). Since adoption of the Constitution in 2010, the GoK [Government of Kenya] has requested that project instruments related to the implementation of OP 4.10 use the constitutionally-sanctioned terminology. OP 4.10 contemplates that different terminology may be applied in different countries without affecting the application or substance of the policy. It states: ‘Indigenous Peoples may be referred to in different countries by such terms as indigenous ethnic minorities; aboriginals, hill tribes, minority nationalities, scheduled tribes, or tribal groups.’*”

¹³ Management Response: 28.

Pokot District), and Embobut¹⁴ Forest (in Marakwet District). The Requesters asked for their identities to be kept confidential.

17. The Requesters assert that the Bank failed to comply with a number of its Operational Policies and Procedures during the design, appraisal and implementation of the Project, and allege that they and their communities have suffered and are likely to suffer harm as a result of these failures. The Request argues that the Embobut forest forms part of the ancestral land of the Sengwer people as an ethnic-minority, hunter-gatherer people. According to the Request, since 2007 the KFS has burned houses, destroyed property and carried out forceful evictions in the forest. They suggest that the Government intended to resettle the Sengwer outside of Embobut forest as part of the NRMP without carrying out free, prior and informed consultations as required by Operational Policy 4.10 on Indigenous Peoples. The Requesters further allege that the Bank violated OP 4.10 by adopting the use of the term “Vulnerable and Marginalized Groups” instead of “Indigenous Peoples” without carrying out adequate free, prior and informed consultations with the people themselves. They contend that this is also a violation of various international treaties including the United Nations Declaration on the Rights of Indigenous Peoples and the African Charter on Human Rights. They also suggest that this represents a failed implementation of the Project’s IPPF and Social Assessment.

18. The Requesters also allege that their attempts to raise issues regarding the implementation of various safeguard documents with the Government, namely the IPPF, have been to no avail. They note that Kenyan authorities informed them that the IPPF was “a mere memorandum of understanding” rather than any kind of binding project document. The Requesters observe that their attempts to communicate their concerns with Bank staff have been met with unsatisfactory responses. They note that they have sent numerous letters to Bank staff, in addition to meetings with Bank staff a number of times. They also suggest that the Bank has failed in its supervisory role by insisting on the protection of “their client even when there were clear facts and indications that the rights of Sengwer indigenous peoples were being violated.”

19. The Request documents a number of specific instances of harm including:

- In 2008, after “some hundreds of Sengwer families moved to settle in Kapolet forest” at the governments behest, 97 members of the community were arrested and charged with the intention to encroach on government protected forest lands. They noted that the resulting legal proceedings have placed a significant financial burden on the community.
- The arrests of 41 members of the Sengwer “indigenous peoples and 4 local community members in Kapolet Forest in 2009 charged with the cultivation of forests without a permit.”
- In 2009 a woman was shot in Kapolet Forest by members of the forest guards who entered the forest to arrest members of the Sengwer community.

¹⁴ *Embobut Forest* is also referred to as *Empoput*. This Report uses the term “Embobut.”

20. The Request makes a number of recommendations:

- That the Kenyan Government “respects and protects the rights of Sengwer forest indigenous peoples to live within their ancestral homes in Kapolet and Embobut forests” as an integral part of the forest ecosystems and in a manner that will promote sustainable use of natural resources and conservation as a general principle. This should involve a review of “all discriminatory policies, acts and laws that are against recognition and promotion of the rights of forest indigenous peoples to live harmoniously within their ancestral homes.”
- The provision of adequate compensation by the Kenyan Government to members of the Sengwer community whose houses and property were destroyed in Embobut Forest (at least since the NRMP IPPF was adopted in 2007).
- That appropriate compensation is provided to those arrested in Kapolet Forest as well as the woman who was shot in the Forest in 2009.
- That the Government “recognizes and promotes” the use of the term “indigenous peoples” as it is used in the NRMP IPPF and Social Assessment (SA) documents as well as various international “human rights instruments” such as the United Nations Declaration on the Rights of Indigenous Peoples.
- The transfer of a manager in Trans Nzoia County whom they suggest has been the primary instigator of the various arrests and destruction of property with regards to the Sengwer community.
- The suspension of all Project funding by the Bank until the issues raised in the Request are satisfactorily resolved.

21. On June 28, 2013 the Panel received a second Request submitted by four representatives of the Cherangany Indigenous Peoples Community on behalf of people living in the Cherangany Hills. It states that the Cherangany Indigenous Peoples Community suffered a “Community Identity Crisis” as a result of the “non-recognition of the Cherangany Indigenous Peoples Community by the Kenya Forest Service (KFS) and the World Bank who have not yet determined the real indigenous peoples.” They add that there are distortions in Project documents, such as the Indigenous Peoples Planning Framework (IPPF) and the Social Assessment, as to who are “the rightful owners of the Cherangany Hills Territory.” According to the Requesters, the Project did not recognize the Cherangany Indigenous Peoples Community as indigenous peoples affected by the Project, while Sengwer people were included. This, they state, has created “unfair competition and conflicts which might lead to internal friction and tribal war from prospecting tribes.”

22. The Second Request raises similar claims to those in the First Request, i.e., the harmful change of terminology from “indigenous peoples” to “vulnerable and marginalized groups,” evictions of people from the forest without free, prior informed consultations, and lack of disclosure of key Project documents. These Requesters claim that they have brought their concerns to the World Bank but that “there was a predetermined intention to sideline and totally misinform” them of the rights of Cherangany indigenous peoples.

23. On August 1, the Panel requested the Board to approve the Panel's recommendation to process this Request as part of the ongoing investigation relating to the first Request for Inspection. The Panel proposed to verify the technical eligibility of the Requesters and the Request during the planned investigation visit. The Board approved the Panel's request to process the second Request jointly with the first Request and, if deemed eligible, that the Panel address the claims presented in this additional Request in the context of the already approved investigation.

1.5. Management Response and Bank Actions

24. Management submitted its Response to the Request for Inspection on March 15, 2013. Upon being notified of the Second Request for Inspection, Management indicated to the Panel that it would not present a formal response to the Second Request, as it felt that the issues raised in it had been addressed in their Response to the first Request.

25. Management's Response addresses the key issues raised by the Requesters, as follows:

- *Historical Tension and Customary Rights.* Management acknowledges that the "project environment of the NRMP has been challenging from the outset," with "tension over historical land issues, longstanding grievances of indigenous communities, and unresolved conflicts between those communities and the KFS."
- Management suggests that these notions of historical tension have *compounded recent implementation challenges* including the ethnic unrest that followed the 2007 elections, which also resulted in a "significant influx" of displaced people into forest areas and created serious security and mobility issues.
- *Ambitious Project Design.* "The original project design was overly ambitious in several respects, including aspirations in safeguard documents concerning the resolution of long standing land and forest conflicts that were not realistic given the scope and time-frame of the project." The Project's safeguard documents, particularly the IPPF, "may have raised unrealistic expectations" that could "have contributed to the Request for Inspection."
- *Impractical commitments in the IPPF.* Management indicated that elements of the IPPF were not feasible within the Project scope and time frame including: (i) the provision of land titles for land occupied and used by communities in the Project areas; (ii) the establishment of a strategy to rehabilitate livelihoods of evicted people to December 2002 levels; and (iii) assistance with land restitution processes such as indigenous peoples' ability to claim lands they had lost from 1895 to 2002.
- *Beyond Project Scope.* Some complaints "are aimed towards the GoK and pertain to matters that go beyond the project," such as historic land claims issues and grievances of indigenous communities that originate well before the Project was initiated, citing eviction incidents in 2007 and 2008 prior to the Project becoming operational.
- *Resettlement Issues.* "Management emphasizes that no resettlement has been planned or financed under the NRMP in Cherangany Hills or in any other forested area in the Project area." Management also seeks to clarify that the Project did not support the preparation of any resettlement plans under the forest component, as the Requesters

suggest. They also assert that the resettlement planned under the Ministry of State for Special Programs is perhaps being mistakenly associated with Project activities.

- Management acknowledges that the original Project design *included provisions* for the Project to play a part in planning and implementation of resettlement activities regarding those who lived in the gazetted forest areas. Management continues to observe, however, that at the time of restructuring, this approach to resettlement was considered to be excessively ambitious and unrealistic under the Project provisions.
- *IP Terminology.* Replacing “vulnerable and marginalized groups” into the Project documents for “indigenous peoples” was a GoK decision and took place in order “to be consistent with the terminology used in the new Kenyan Constitution.” According to Management, “the change in terminology does not diminish the benefits and protections available to the people who meet the eligibility criteria” in accordance with the Indigenous Peoples Operational Policy 4.10.

26. Management claims that the Bank recognizes and has taken an active approach in responding to the concerns addressed in the Request. These include:

- *Investigation and Moratorium on Evictions.* Conducting field verifications of the various reported incidents, notifying the government of its obligations under the Project safeguard instruments, and “working with both Government and affected parties to prevent reoccurrences.” This included securing “fresh commitments from the GoK to refrain from further evictions that are not consistent with those obligations.”
- *The Facilitation of Better Communication and collaboration* involving the creation of an “avenue for any grievance from Project beneficiaries or locally affected communities to be considered through a good faith dialogue process” anchored by a professional mediator. This approach supported a Regional Consultation Workshop that took place in Nakuru in March 2012 aimed at gaining further insight into the concerns of relevant indigenous communities and discuss potential remedial measures. Management noted that initiatives such as these go “beyond the remit of the NRMP.”
- *Supporting Implementation of Livelihood Sub-Projects*, including the Vulnerable and Marginalized Group Plans (VMGPs) through an informed and consultative process.
- *Supporting the Government Inter-ministerial Task Force on Land and Legacy Issues*, by providing backing to the task force composed of indigenous groups and government agencies involved in facilitating better channels of communication between stakeholders.
- *Aiding in the Preparation of a Process Framework (PF)* aimed at helping “communities around the forests address issues related to land use and access.”

1.6. The Panel's Investigation Process

27. The Panel made its eligibility determination after reviewing the Request, Management's Response, and visiting the Project area.¹⁵ On May 29, 2013, the Panel submitted its Report and Recommendation to the Executive Directors confirming eligibility and recommending an investigation.¹⁶ The Board approved this recommendation on June 7th, 2013. The Request, Management Response, and the Panel's Report and Recommendation were made public shortly after the Board's approval. Subsequent to the Board's notification of the second Request for Inspection, and with the Board's approval, the Panel verified the eligibility of the second Request for Inspection. The Panel confirmed the eligibility of the second Request and considering that the concerns raised were similar in nature to those included in the first Request, the Panel has addressed them as part of this Investigation Report.

28. The investigation was conducted in two parts. The first one involved an examination of Bank documentation as well as meetings and interviews with Bank staff, both in Washington D.C. and in Nairobi. Three expert consultants were retained to assist in the investigation: Dr. Albert Kwokwo Barume (a legal expert on the rights of indigenous peoples in Africa); Dr. Gabrielle Lynch (a political scientist who has conducted extensive research on issues of ethnicity in Kenya); and Mr. Charles Meshak (a regional expert in forestry and conservation). Their biographies are included in Annex D.

Figure 1: Panel member Alf Jerve during investigation visit



29. The second part involved an in-country fact finding field visit. Panel Chairperson Eimi Watanabe and Panel Member Alf Jerve, together with the Panel's Executive Secretary Peter

¹⁵ As established in its founding Resolution and subsequent Clarifications.

¹⁶ Inspection Panel—Kenya: Natural Resource Management Project—Report and Recommendation, (INSP/R2013-0006): 11.

Lallas and Senior Operations Officer Tatiana Tassoni and the three expert consultants conducted the investigation visit between September 10th and 19th, 2013. Panel Member Jerve served as the Lead Inspector for the investigation. During the visit, the Panel met with the Requesters and with Government Authorities, including members of the Ministry of Finance and the National Treasury, Water and Natural Resources, and KFS. The Panel visited Project areas in the affected regions, including the Embobut and Kapolet Forest areas, and met with members of the local communities, including indigenous people. For the finalization of the investigation report, Panel Member Gonzalo Castro de la Mata took over as the Lead Inspector.

30. The Panel assessed whether the Bank complied with the following Operational Policies and Procedures:

- Environmental Assessment (OP/BP 4.01)
- Indigenous Peoples (OP/BP 4.10)
- Involuntary Resettlement (OP/BP 4.12)
- Project Appraisal (OMS 2.20)
- Project Supervision (OP/BP 13.05)

1.7. Project Context

Geographic Context: the Cherangany Hills

31. The Cherangany Hills are an old fault-block formation of non-volcanic origin that forms an undulating upland plateau on the western edge of the Rift Valley. To the east, the Elgeyo Escarpment drops abruptly to the bottom of the Kerio Valley, while westwards the land falls away gently to the plains of Trans-Nzoia District. The hills reach 3,365 m at Cheptoket Peak in the north-central section and are largely covered by a series of Forest Reserves, including 13 administrative blocks totaling around 95,000 ha in gazetted area (Map 1 and Table 1). Of these, about 60,500 ha is closed-canopy forest, the remainder being formations of bamboo, scrub, rock, grassland, moorland or heath, and approximately 4,000 ha of cultivation and plantations. Kapkanyar, Kapolet and Kiptaberr Forest Reserves together form a large western block of forests totaling ca. 20,000 ha.

32. To the east, the Forest Reserves of Lelan, Embobut, Kerrer, Kaisungor, Toropket, Chemurokoi, Kupkunurr, Cheboit, Sogotio and Kapchemutwa are less well connected. Apart from a large south-eastern block along the escarpment crest, the forests here are fragmented and separated by extensive natural grasslands, scrub and farmland, especially in the central part.

Figure 2 Cherangany Hills/Embobut Forest



Table 1: Gazetted Forests in the Cherangany Hills (See Map 1)

Forest block	Area (Hectares)
Kapolet	1,624.01
Kiptaberr	12,788.79
Kapkanyar	6,670.71
Kaisungor	1,087.22
Chemurokoi	3,973.61
Kipkunurr	15,868.77
Cheboit	2,523.60
Sogotio	3,549.70
Kapchemutwa	8,860.41
Embobut	21,655.65
Lelan	14,495.14
Kerrer	2,237.82
Toropket	119.48
Total	95,454.91

33. The Cherangany Hills are important for water catchment purposes, and are considered one of the five major “water towers” in Kenya. Streams to the west of the watershed feed the Nzoia river system, which flows into Lake Victoria; streams to the east flow into the Kerio River which in turn flows through the Cheploch gorge in Baringo to Lake Turkana, via the Turkwel gorge.

Ethnographic Context: the Cherangany-Sengwer in the Cherangany Hills

34. Cherangany-Sengwer is a sub-group of the larger Kalenjin-speaking people. While the majority of Kalenjin-speakers have strong oral histories of migration from the north, the oral histories of the Cherangany-Sengwer include references to both migrations from the north and original residence in and around the Cherangany Hills. One recurrent theme in their oral histories is that the Cherangany-Sengwer descended from a man called Sengwer who either entered Kenya through Mt. Elgon and then settled at Katalel in Trans Nzoia, or originated in the Cherangany Hills themselves. Sengwer had two sons (Sirikwa and Mitia) who moved to the plains and to the Cherangany Hills respectively. Sirikwa's descendants later dispersed southwards and became assimilated into neighboring communities following extended inter-communal violence at the hands of neighboring Karamojong, Maasai and Kalenjin-speaking cattle raiders.

35. Archaeological evidence potentially supports the idea that Cherangany-Sengwer may have a long history of moving in and out of the forest onto the plains to acquire cattle and then move back into the forest during dry seasons or at times of heightened insecurity. Sutton (1987)¹⁷ found "Sirikwa holes" dating to around 1100 to 1800 AD, which he argued were used as cattle kraals by a community known as the Sirikwa from the outer area of the Cherangany Hills around Kaisungerr down through the Central Rift to Hyrax Hill and Naivasha. The Cherangany-Sengwer in turn, claim an association with the Sirikwa as mentioned earlier through their oral traditions.

36. According to one of the Panel's consultants, although oral histories differ regarding precisely how long the Cherangany-Sengwer have lived in the forest and used its resources, and archaeological evidence is not definitive, it is clear that residence and use predates colonialism. There is near consensus that, during the pre-colonial period, the Cherangany-Sengwer were principally hunter-gatherers and relied on the forest for gathering fruits, hunting wild animals, and harvesting honey. It is also evident that for a long time, and at least before the beginning of colonial rule, community members also engaged in small-scale farming at the edge of the forest and in the plains, and kept some cattle, which they grazed within and outside the forest depending on the time of year and level of security.

37. As Cherangany-Sengwer acquired more cattle in the pre-colonial and colonial periods, they became less reliant on hunting but continued to use the forest to gather fruits and herbs, harvest honey, and graze their cattle. The result was a situation where many individuals would move between the forest and adjacent areas (for example, some would plant crops in the lowlands during the rains and then move into the forest with animals during the dry season) while some families would have some of their members living mainly in the forest and others living mainly outside. This situation continues to date to some extent.

38. With the setting aside of land for white settlers in colonial times, some Cherangany-Sengwer were pushed further into the forests. At the same time, the gazettement of forests in 1932 led these people to an increasingly precarious position, as individuals had to acquire permits to stay in the forests and graze cattle. Colonial officials encouraged the assimilation of hunter-gatherer people across the country into adjacent communities. In the Cherangany Hills, this was most explicit in West Pokot, where during the 1920s and 1930s many Cherangany-Sengwer were relocated and encouraged to "become" Pokot.

¹⁷ Sutton, J. E. G. (1987) Hyrax Hill and the Sirikwa: New excavations on Site II. *Azania* 22 (1): 1-36

39. Efforts to conserve forests by keeping people out of them led to a history of people moving in and out of the country's gazetted forests as they were periodically evicted but returned later, often joined by squatters. Monetization of local economies also changed people's relationship with the forests. As land in adjacent areas became more expensive and pressure built up for people to earn money for school fees, medical care, housing, or food, some Cherangany-Sengwer, together with neighboring communities, began to cut down more trees for charcoal and to clear forest land for planting crops.

40. Today, relatively few people reside inside the forests and most of those who do are located in the glades¹⁸ in Embobut or in deforested areas along the periphery. The level to which people's livelihood depends on the forest varies significantly. While some people still use the forest for grazing, gathering firewood, harvesting honey, and occasional hunting (which has been illegal since the 1970s), others engage in full-time farming outside the forest or in other livelihood activities including waged employment in the formal sector.

41. Despite these developments, many community members still have a strong attachment to the forest stemming from several factors: (i) the hills are home to a number of sacred sites where different rituals, including male circumcision ceremonies and associated initiation rites, take place; (ii) the hills are the source of various foodstuffs that are culturally significant. For example, honey gathered in the forest is eaten, but is also mixed with water to make a drink similar to beer. It is applied to the body to drive away mosquitoes and reduce muscle pain, and plays a major role in marriages and other ceremonies;¹⁹ (iii) the forest is still economically important, as some Cherangany-Sengwer use it for grazing and for gathering firewood, herbs, honey as mentioned above, and for hunting; and (iv) in a country where ethnic identities are associated with particular territories and are also assumed to be central to politics and the distribution of resources, the Cherangany Hills is the only place that Cherangany-Sengwer can claim as "theirs." Culture, economics, and politics ensure that community members retain a strong connection to the forest and wish to have recognized rights of access, use and ownership.

Politics of Ethnicity in the Cherangany Hills

42. During its investigation, the Panel learned that a division has emerged in recent years between people within the Project area who call themselves Sengwer and those who prefer the term Cherangany. The Panel adopts the term Cherangany-Sengwer, with the words used alphabetically rather than in order of their significance (See Box 1 for further discussion). The ethnic label "Kimala" is also used in some of the Project documents and, according to the Social Assessment, refers to residents of Embobut forest who gained this name from neighbors, but prefer the label Sengwer.²⁰

43. This conflict between self-proclaimed Cherangany and Sengwer was not captured in the original IPPF which simply states that the Sengwer are "also referred to as Cherangany, a nickname given to them by the Maasai."²¹

¹⁸ A glade is an open area within a forest.

¹⁹ Indigenous Peoples Planning Framework for the Western Kenya Community Driven Development and Flood Mitigation Project and the Natural Resource Management Project (IPPF), December 2006: 24

²⁰ Report of the NRM Social Analysis of IPs in Cherangany Hills and Mt Elgon, June 2010 (hereinafter Social Assessment): 16

²¹ IPPF: 23

44. The Sengwer have had some success in gaining recognition as indigenous people, both nationally and internationally, including in World Bank funded projects, such as the Indigenous Peoples Plan for the Kenya Agricultural Productivity-Sustainable Land Management Project (KAP-SLM) adopted by the GoK in January 2006, which the NRMP IPPF built upon.²²

Box 1: Cherangany and Sengwer

Cherangany and Sengwer. Both of these ethnic groups recognize that the labels constitute different names for the same ethnic community since they share a dialect, oral histories, a tradition of being forest-dwelling hunter-gatherers, and an identity of being indigenous to the Cherangany Hills. The division and tension revolve around the question of which ethnic label is the “correct one,” and the assumed motivations that “others” have for insisting upon a particular name.

In meetings with the Panel team, community members who advocate the name Sengwer were criticized by Cherangany for being too exclusive and for mainly comprising of members of one clan, with the underlying feeling that these individuals were trying to impose the name Sengwer onto the whole community so that they can control the community’s political economy, including access to external resources. Advocates of the Cherangany term also complained that the Sengwer label is less well known and is rarely used in colonial documents, and that its use could undermine community claims to land and resources in the Cherangany Hills which are by virtue of its name immediately associated with the Cherangany.

Those advocating the use of the term Cherangany were criticized by Sengwer for being too inclusive and for including many people who “really” hail from neighboring Kalenjin-speaking communities such as the Pokot, Sabao, and Marakwet. Under this view, they were allowing “others” undeserved access, rights and influence and not using a real name known to communities in the diaspora, but a derogatory name used by the Maasai. Cherangany rejected the latter and argued that the term actually stems from an old tradition of blessing the sun as it rises and sets.

Policy and Institutional Context

45. The Project’s design and implementation occurred during a period of significant institutional and legislative uncertainty and political change following Kenya’s December 2002 and 2007 elections. The 2002 election was won by Mwai Kibaki and the National Rainbow Coalition, defeating Uhuru Kenyatta and the Kenya African National Union, the ruling party since independence. This peaceful transfer of power ushered in a period of expectation which reinvigorated a debate about the need for wide-ranging constitutional and institutional reforms.

46. The new government did not introduce a new Constitution, but it did oversee some reforms, including the 2005 Forests Act (becoming effective in 2007) which led to the formation of the KFS to replace the former Forest Department (previously established to guard and manage gazetted forests by various means, including through the deployment of armed rangers). In contrast, the Forests Act provided for the co-management of gazetted forests by KFS and adjacent communities through the formation of Community Forest Associations (CFAs). The Act did not allow anyone to reside inside gazetted forests, including self-proclaimed indigenous peoples such as the Cherangany-Sengwer.

47. President Kibaki established a Commission of Inquiry into Illegal or Irregular Land Allocation of Public Land (the “Ndungu Commission” named after its Chair Paul Ndungu), which exposed a crisis in land management practices. In response, a draft National Land Policy (NLP) was formulated and published in October 2006. The draft was under discussion at the time of the Project’s design and among other things suggested that “land issues

²² IPPF: 15

requiring special intervention, such as historical injustices, land rights of minority communities (such as hunter-gatherers, forest-dwellers and pastoralists) and vulnerable groups will be addressed” and that “the rights of these groups will be recognized and protected.”²³

48. The developments of the 2002 election and these expectations of political transition served as an important context for the NRMP. The general election in 2007, however, with opposition supporters alleging electoral manipulation and the unprecedented violence that followed it, sparked targeted ethnic violence. Fierce rampages led to the death of over 1,000 people and the displacement of almost 700,000 others in just two months.²⁴ As mentioned above, these events delayed the start of the Project’s implementation from December 2007 to April 2008.

49. The 2007 election had additional ramifications that are relevant to this case. First, mass displacement across the country and opportunistic crimes (most notably cattle rustling in the Project area), and new incursions into forests (including the Cherangany Hills) fuelled a sense that the country was in a state of crisis.

50. Second, in the context of widespread concern regarding forest depletion, damage to the country’s “water towers,” and food insecurity, the post-election crisis led to increased attention being given to the management and conservation of forest resources. This was reflected in the country’s 2008 First “Mid – Term Plan” which cites the rehabilitation and protection of the country’s five water towers (which includes the Cherangany Hills) as one way to deal with a “national water crisis.”²⁵ This also prompted a renewed debate about encroachment into gazetted forests and destruction of water towers, and the need to evict illegal squatters from these forests. At the national level, this debate focused on the Mau Complex in the Central Rift and the evictions that took place there in 2009. However, it also provided the context for evictions from Embobut Forest in 2009 and the subsequent Embobut Task Force,²⁶ which led to forest dwellers (including a number of Cherangany-Sengwer) being moved into the forest glades until alternative land could be sourced as will be discussed later.

51. Third, the post-election violence created large numbers of internally displaced persons (IDPs). The government’s initial response was to move IDPs residing in camps back to where they had been living through “Operation Rudi Nyumbani” (“Operation Return Home”). Some IDPs, however, chose to form self-help groups and used the 10,000 and 30,000 KShs²⁷ resettlement payments made to heads of households to buy small patches of land. This policy attracted broad criticism for only helping self-help groups, which, with the exception of two, were predominately Kikuyu, and for ignoring other displaced people. In response, the GoK revised its policy to include a number of other beneficiaries in its IDP resettlement program, such as those evicted from gazetted government forests including Cherangany-Sengwer and others who had been evicted from Embobut forest in 2009.

²³ Kenya, National Land Policy, 2009: 6

²⁴ Lynch, Gabrielle (2009) Durable Solution, Help or Hindrance? The Failings and Unintended Implications of Relief and Recovery Efforts for Kenya’s Post-election IDPs. *Review of African Political Economy*, 2009: 604.

²⁵ Government of Kenya. 2008. First Medium Term Plan. Kenya Vision 2030.

²⁶ The Embobut Task Force was formed by the Minister of Forestry and Wildlife to investigate and identify “genuine and qualified squatters” in Embobut forest and recommend a lasting solution (hereafter referred to as “Embobut Task Force”).

²⁷ Equivalent to US\$160 to US\$480 at the time.

52. The NLP was finally approved by the GoK in December 2009. However, the legal situation was further complicated by the inauguration of a new Constitution in August 2010, which stated that “Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive, and sustainable.” Together with the NLP, the specifics of the new Constitution led to the proposal of three new bills: (i) the Land Bill 2012 which covers public and private land; (ii) the Land Registration Bill 2012 which sets out mechanisms to regulate land registration and transactions; and (iii) the Community Land Bill 2013. Land laws, including those affecting communal and traditional land rights, therefore, remained in a state of transition throughout the implementation of the NRMP.

53. The Project’s closing occurred at the time of yet another round of elections and the victory in March 2013 of Uhuru Kenyatta and William Ruto of the Jubilee Alliance, whose manifesto, among other issues, included a promise to resettle all post-2007 election violence IDPs and forest evictees within their first 100 days in power. Given difficulties in finding acceptable parcels of land for the resettlement of IDPs, the new government adopted a new policy whereby those selected groups of registered IDPs who had been earmarked for resettlement were compensated through the payment of KShs 400,000²⁸ per head of household.

54. In summary, the Project faced a challenging context from the beginning, with complex historic and ethnic conflicts as a general background, land issue policies in constant flux, and persistent political unrest resulting in internal population displacements and violence.

²⁸ Ca. US\$4,600.

Chapter 2

First Set of Core Claims: Evictions and Resettlement

55. The Requesters raise two sets of key claims: (i) that some Cherangany-Sengwer people have been forcibly evicted from their lands within the forests and the Project area as a result of Bank's non-compliance with its policies, and (ii) that there has been a lack of recognition and protection of Cherangany-Sengwer customary rights during Project implementation. This Chapter reviews the first of these claims and is divided in four sections: (i) a summary of the key concerns raised by the Request and the Management Response, (ii) a review of the facts and chronology relating to evictions in both Kapolet and Embobut forests, (iii) an analysis of the possible links between the Project and the claims, and (iv) the Panel's analysis and findings on issues of compliance and harm.

2.1. Requesters Claims and Management Response

Requesters Claims

56. The Requesters claim that several sets of evictions took place during the time of Project implementation, linked to and supported by the NRMP, and in non-compliance with World Bank Policies on Involuntary Resettlement and Indigenous Peoples. Their claim also raises the question of whether Bank supervision was adequate in responding to the reports and concerns about evictions during Project implementation.

57. Specifically, the first Request claims that as a result of the NRMP, the Requesters were evicted from Embobut forest, a part of the ancestral land of the Sengwer as an indigenous people and ethnic minority. According to the Request, KFS has burned over 500 houses and property in Embobut forest since 2007 in the process of carrying out forceful evictions. They add that the Government "planned to resettle the Sengwer from Embobut forest without carrying out free, prior, and informed consultations," and that these resettlement plans "go against World Bank Operational Policy 4.12 on Involuntary Resettlement." The Second Request complains about evictions in Embobut forest resulting from the Project, carried out without free, prior and informed consultations on resettlement, adding that "the Cherangany People are now living on small patches of forest glades as squatters."

58. The first Requesters claim that in Kapolet Forest, "KFS arrested 45 Sengwer people in 2009" because of allegedly illegal farming in the forest without permits. The Requesters state that the Kapolet forest "has been the Sengwer's ancestral home since time immemorial," although the British government had the forest gazetted "through discriminatory forest preservation policies [that] led to forceful eviction and displacement of Sengwer families (...)." When the guards entered the forest to make these arrests, they also shot at people and one woman was hit in the back and later treated at the Kitale district hospital. The Request indicates that this led to the arrest of community members, and that the case is pending in the Kitale Courts since 2009, having cost the community hundreds of thousands of Kenyan Shillings in legal fees and other expenses.

Management Response

59. Management indicates that it has viewed with concern the reports of evictions brought to its attention and that it has responded with diligence. Though evictions were not caused by

the Project, nor did the Project support any evictions, when it became aware of these incidents Management carried out field verifications, worked with the GoK and affected parties to prevent repetition of such occurrences, and secured a commitment from the GoK to refrain from further evictions that are not consistent with Government's obligations under safeguard instruments.²⁹

60. *Evictions from Embobut Forest in April and May 2009.* When the Bank learned of the eviction of 450 families from Embobut Forest in April and May 2009, it requested information from KFS and received a letter from the community. Management notes that these evictions were not part of the NRMP activities and were the result of Government action in response to an ongoing dispute over water resources between communities living downstream from Embobut and those living in the forest. The GoK established an Embobut Task Force in June 2009 (not financed by the NRMP, according to Management) to help find a solution for the evictees. The Task Force identified three categories of people living in Embobut: (i) Cherangany-Sengwer and other groups, (ii) landslide victims from the 1960s, and (iii) permit holders/associates. Those identified as eligible for resettlement were allowed to return to the forest (inside the glades) pending a final settlement, but had to respect a number of restrictions inside the forest.

61. *Burning of houses/dwellings in Embobut in July and August 2010.* Management states that in September 2010 Cherangany-Sengwer representatives informed the Bank that Cherangany-Sengwer people's houses and property in Embobut had been destroyed. KFS and affected people's account of the situation were different but both confirmed the burning of the dwellings. This prompted the Bank to write to the GoK to request "that the Government comply with social safeguard documents and refrain from carrying out or planning any evictions without following due process" as "non-compliance could result in remedial action by the Bank."³⁰ Management also sent its own fact finding mission, which found an unclear situation on the ground, but confirmed that the properties were inside the glades, rather than in the forest. KFS later indicated that these burnings have been carried out by unauthorized individual KFS staff.

62. In December 2010, and under the proposal for the Project restructuring, Management stressed the need for a moratorium on evictions.³¹ The Government confirmed in April 2011 that "there would be no evictions until alternative settlement was found" and some authorized persons, including Cherangany-Sengwer, could have access to the forest.³² With respect to this incident (burning of houses), Management also notes that community members did not express interest in seeking compensation but rather, in participating in livelihood activities under the VMGPs prepared under the NRMP. According to Management, they also expressed their willingness to be "voluntarily and permanently resettled by the Government."³³

63. *Actions against alleged forest encroachers in Kapoet in 2009.* Management states that in 2008, Cherangany-Sengwer community members constructed houses and started farming in Kapoet Forest, as they allegedly felt that "this part of the forest should have been sub-divided and given to them for settlement and for use without any restrictions."³⁴ KFS indicated to the

²⁹ Management Response : 59

³⁰ Management Response : 67

³¹ Management Response : 69

³² Management Response : 71

³³ Management Response : 72

³⁴ Management Response : 77

Bank that evictions were carried out to prevent encroachment in Kapolet forest, which is a gazetted forest and thus neither living nor cultivating of crops in it is allowed. During the evictions, 41 members of the communities were arrested and a Cherangany-Sengwer woman was shot. Management states that it requested documentary evidence to verify these facts but the community could not provide any evidence, and Management was not able to meet the woman that was shot despite various attempts to do so. According to Management, the matter is currently in court and the Kenyan judicial system is the appropriate forum for deciding such matters.

64. *Resettlement.* Management emphasizes that “no resettlement has been planned or financed under the NRMP in Cherangany Hills or in any other forested areas in the Project area. As a consequence, NRMP has not supported the preparation of resettlement plans under the forest component, as erroneously asserted in the Request.”³⁵ According to Management, when the Requesters refer to resettlement responsibility of the NRMP in the Project area, they may be referring to plans of the Ministry of State for Special Programs (MSSP) to carry out resettlement in Cherangany Hills as part of the resettlement of IDPs. This resettlement, Management asserts, is not financed by the NRMP, nor does it involve the KFS. Management also indicates that Cherangany-Sengwer people living in Embobut, who have been living in very difficult circumstances for years, are waiting for an “appropriate and consensual resettlement solution,” but they understand that this is independent of the NRMP.³⁶

65. Management acknowledges that the original Project design provided for the Project to have a direct role in planning and implementing resettlement of those who lived in the gazetted forests or had been the subject of evictions, but at the time of restructuring, recognized and indicated to the Board that the more comprehensive resolution of land issues was too complex and was beyond the remit and time-horizon of the Project, and would have to be addressed as part of a broader dialogue. Management chose to support an Inter-ministerial Task Force on Land and Legacy Issues, including indigenous groups as members, which would look at the land rights issues, and to support a Management-initiated dispute resolution approach.

2.2. Facts and Chronology Related to Evictions in Kapolet and Embobut Forests

Claims to Ownership

66. The Cherangany-Sengwer people claim rights of ownership and access to the entirety of the Cherangany Hills as indigenous people from times immemorial, as discussed in Chapter 1. Claims to Kapolet and Embobut forests are strengthened in the eyes of Cherangany-Sengwer by a number of factors:

- In Kapolet, the claim to the section of the forest that comprises the long promised phase II of Kapolet settlement scheme (see below) is tied to President Moi’s directive that Cherangany-Sengwer be settled in the area in 1993, and the fact that Cherangany-Sengwer relinquished claims to the Kilimani Agricultural Development Corporation in 1996 on the basis that they would be settled in both phase I and phase II of the Kapolet settlement scheme;

³⁵ Management Response : 81

³⁶ Management Response : 83

- In Embobut, some Cherangany-Sengwer have colonial grazing permits which are often regarded as title deeds, but which rather allowed individuals to stay within the forest on a temporary basis to graze their cattle. This “temporary basis,” however, has lasted for some beneficiaries and their descendants for approximately 80 years.
- For others, their claims are based on long-term residency or settlement and the reality of deforestation, particularly in the area in the Embobut forest known as “below the road” and the presence of government services. The Embobut Task Force listed a number of public institutions and facilities within the forest boundary including 15 market centers, 13 schools, 19 churches, 7 cattle dips, 5 health facilities, 2 recreational facilities, and 6 government offices.³⁷ In other areas such as Kapsero, claims of a right to reside within the alleged forest boundaries are based on the possession of title deeds.

67. In discussions with the Panel, many people seemed cognizant of the importance of forest conservation, and the majority seemed to have accepted that their use of the forest must be limited to activities that are compatible with the protection of the forests and that other activities, such as agriculture, can only take place outside of the gazetted forest boundary. Nevertheless, in Kapolet and Embobut some stated that they should have less restricted rights to the forest.

68. Similarly, people in Kapsero stress that they have received title deeds to land which KFS claims are within the gazetted forest boundary. KFS informed the Panel that when it encountered problems realigning the boundary in Kapsero, the process was stopped until further information could be obtained, although the KFS does not seem to have consulted local residents or to have kept them fully informed. As a result, those people in the area who have been told that their farms lie within the forest boundaries are living in constant fear that they will be evicted at some point in the future.

Evictions

69. *Kapolet Forest.* The specific claims to Kapolet stem from 1993, when President Moi directed that the Cherangany-Sengwer be given two thirds of an Agricultural Development Corporation (ADC) farm in Trans Nzoia, and 3,000 ha in the Kapolet area. In 1996, following allegations by Cherangany-Sengwer that they had been left out during the allocation of land in the ADC farm and the resulting protests, the GoK sought to placate community members by promising that while they had not benefited from the ADC farm as initially promised, they would be the only beneficiaries of land in the Kapolet settlement scheme.³⁸ This latter scheme comprised of trust land (Phase I), and gazetted forest (Phase II). Under Phase II, however, the forest was never de-gazetted and continues to be a source of contention between community members, KFS, and the GoK, and was the site of violent confrontations during the Project period.

70. In 2004, an unknown number of people, some of whom are said to have been on the waiting list for land in Phase II, moved into a largely deforested part of this area, put up small shelters, and started farming. Community members justified this action on the basis that the land was theirs since it had been promised to them by President Moi in 1993, and then by the

³⁷ Embobut Task Force 2010: 21

³⁸ See Social Assessment: 21, 22.

provincial administration in 1996. In contrast, KFS rangers denounced the move as an encroachment into gazetted forest and, at the beginning of 2005, forcibly evicted people from the area.

71. Between 2005 and 2009, there were repeated occurrences of evictions, or attempts to evict, from the Phase II area, followed by a return of Cherangany-Sengwer who started to farm and build small shelters again. As a response, KFS officers arrested between 39 and 45 people on 23 and 24 June 2009 on the basis that they were illegally farming within a gazetted forest, and a woman was shot in the back. Those arrested are still out on bail for this alleged offence and have spent much time and money travelling to Kitale to deal with legal proceedings. After this incident, it seems that security in the area was increased and that no further invasions onto Phase II or evictions took place. Local Cherangany-Sengwer, however, are still insistent regarding their rights to the Phase II area, while people in Phase I fear that the land allocated to them may be taken away since they have not yet been given allocation letters.

72. *Embobut Forest.* As with many of Kenya's gazetted forests, Embobut has been characterized by periodic evictions of people deemed to be residing in the forest illegally. The Report of the Embobut Task Force cited 20 such evictions since the 1980s.³⁹ During the NRMP period, Requesters claim that KFS participated in forceful evictions of Cherangany-Sengwer from Embobut in 2007, 2008, 2009, 2010, 2011 and 2013, with over 500 houses burned, and household belongings and crops destroyed. The most significant evictions took place in 2009, when over 400 families were evicted and a large number of houses, belongings, and crops destroyed by forest guards, regular and administrative police, and Kenya Wildlife Service rangers to prevent people from returning into the forest.⁴⁰

73. According to Management, evictions in 2007 and 2008 occurred before the Project became operational, while the eviction in April and May 2009 followed a meeting by local leaders in Marakwet District who blamed encroachment into Embobut Forest for the drying up of waterways and poor harvests. The leaders demanded that the GoK evict those living in the forest or face a situation where they themselves would carry out evictions.⁴¹ This threat was apparently taken seriously by government officials who were fearful of any further inter-communal strife following the post-election violence of the previous year.

74. It appears from various documents regarding this incident that there was significant opposition to people residing within the forest boundaries by downstream communities on the basis that they were "illegally living and unsustainably utilizing the forest hence undermining its ecological integrity" and that this led to calls for "serious and urgent measures to restore, protect and conserve the ecology and biodiversity of Embobut Forest."⁴²

75. These evictions took place without Resettlement Action Plans in place, leading to a humanitarian crisis which prompted the intervention of the Kenya Red Cross and "other well-wishers who provided clothing, food and medicine to the evictees who were already displaced and pleading for resettlement."⁴³ A number of people, including local political figures raised objections as to how the evictions had been conducted, and to the plight of forest evictees.

³⁹ Embobut Task Force 2010: 10

⁴⁰ Management Response, Annex 1 : 27

⁴¹ Management Response, Annex 1: 27.

⁴² Embobut Task Force 2010: 9

⁴³ Embobut Task Force 2010: 11. See also Management Response, Annex 1: 27.

This led to a high profile meeting in Embobut in June 2009, attended among others by the Minister for Forestry and Wildlife which led to the establishment of the Embobut Task Force.⁴⁴

76. The Embobut Task Force concluded that there were many illegitimate and opportunistic people attempting to benefit from potential compensation, but also “genuine squatters,” including 2,964 people falling into three groups: (i) 511 permit holders/associates, (ii) 1,546 forest dwellers (“Sengwer/Kimala”), and (iii) 907 landslide victims. According to its report, the Government should “allow temporarily the evictees to remain in the identified glades and below the road within the forest as holding grounds while awaiting Government decision on land allocation for alternative resettlement.”⁴⁵ It added that the process of resettling evictees on alternative land “should seek and incorporate the views of the affected people through consultation to avoid action which may disrupt community cultural cohesion,”⁴⁶ an issue of particular concern to the Cherangany-Sengwer.

77. The Task Force recommended that Cherangany-Sengwers should be allocated 5 acres of land (2.02 ha) on the basis that they were the forest dwellers and considered the forest as their home, even though they had no legal occupation documentation.⁴⁷ The Task Force also noted that there were a large number of people living in an area of the gazetted forest “below the road which was not affected by the current eviction but occupied by people who have been there for many years without formal allocation,” and recommended that their case “be addressed by the Government alongside the current evictee’s fate.”⁴⁸ In considering this, the Task Force recommended that the GoK de-gazette “parts of the forestland below the road towards the valley where people have stayed for a long time.”⁴⁹

78. *Moving People to the Glades in Embobut.* After the Task Force concluded its work, people who had been evicted in 2009 were allowed to return to the forest and stay within the glades until resettlement land could be found. Restrictions on the type of activities they could undertake in the glades were also imposed. The Panel was informed during its field visit that, over the following years, people who were still living within the forest or who had moved back into the forest were also persuaded to move into the glades by KFS and a local “Vulnerable and Marginalized Groups Coordination Committee” (VMGCC) was established in 2011 and supported by the NRMP, which also helped move people’s animals and building materials. According to information provided to the Panel, since then the VMGCC, which is formed of representatives of Cherangany-Sengwer in Embobut Forest and Marakwet District, together with individual glade committees which represents people in a particular glade, have played a key role in trying to ensure that residents stay within the glades and abide by associated rules, and have been involved in reporting transgressions to KFS.

⁴⁴ Embobut Task Force 2010: 4

⁴⁵ Embobut Task Force 2010: 22

⁴⁶ Embobut Task Force 2010: 23

⁴⁷ Embobut Task Force 2010: 21, 20. The Task Force recommended for permit holders and their associates to be allocated 10 acres (4.04 ha) per household and for landslide victims 2.5 acres (1.01 ha). This recommendation was based respectively on the fact that permit holders should be “treated as the first group with some kind of legal rights as they were given grazing and temporary occupation permits by the colonial government which they had erroneously considered as title deeds” and that landslide victims who became landless after they were affected by natural catastrophe have stayed in the forest for quite some time.

⁴⁸ Embobut Task Force 2010: 4

⁴⁹ Embobut Task Force 2010: 22

79. In persuading people to come to the glades and stay there, the Panel was informed that the VMGCC told the Cherangany-Sengwer that their residence within the glades would render them eligible for Project-funded livelihood support, which then became an incentive and compensation for the hardship experienced as a result of displacement and curtailed livelihood possibilities. They allegedly also promised that Cherangany-Sengwer would be relocated to alternative land as a community through a consultative process, and that resettlement would require their “free, prior, and informed consent” as stipulated by international standards.

80. *Moratorium on Evictions and Subsequent Events.* In April 2011, following additional evictions in Embobut in 2010, the World Bank obtained from the GoK agreement to refrain from further evictions until a permanent solution could be found, i.e., a “moratorium” on evictions.⁵⁰ The Bank also acquired an assurance that some authorized communities, including Cherangany-Sengwer, could have access to the forest for specific activities such as harvesting honey.⁵¹

81. Despite this moratorium, the Requesters allege that many houses were burned in Embobut in 2010, 2011, and April and May 2013, but are not able to specify the number of houses, their owners, or whether these houses were burned inside or outside of the glades. The Panel has been unable to verify these specific claims.

82. Bank Management suggests that, with the exception of two instances detailed below, any structures burned in Embobut since the 2009 evictions occurred outside of the glades, involved structures that had been erected illegally, and generally involved Marakwet encroachers rather than Cherangany-Sengwer. The exceptions acknowledged by Management include one incident in July or August 2010 where KFS rangers burned 8 dwellings with household property, 5 stores, and 3 maize plots in a glade. As mentioned above, Management suggests that this resulted from victimization, corruption, and an “unauthorized infringement by individual KFS staff members,” and was not linked to the NRMP.⁵²

83. The second incident occurred in November 2011 when one house was burned within the Kaptirbai glade. According to Management, this was done by a new ranger who was subsequently cautioned. Later, and through a grievance mechanism provided by the VMGCC, a public apology was provided and 4,000 Kshs (US\$46.29) compensation given to the affected person, at their request. In Management’s view, “the incident tested and confirmed the effectiveness of the grievance mechanism established under the Project” but “revealed weak communication between enforcement (to which rangers belong) and technical staff (to which Zonal Forest Managers and Project staff belong) within KFS.”⁵³ In reaction to this weakness, the Bank team recommended strengthening sensitization and training of forest rangers on ongoing developments under the Project “in order to ensure compliance with Project-related commitments made by KFS.” According to Management, this was carried out in the months following the incident.⁵⁴

84. Since the Embobut Task Force Report was published, there have been various attempts to resettle Cherangany-Sengwer from the Embobut glades, including at least one

⁵⁰ Management Response, Annex 2:37.

⁵¹ Management Response: 28.

⁵² Management Response: 17

⁵³ Management Response: 29.

⁵⁴ Management Response: 19

offer of land in Rongai, Nakuru County (deemed to be too far away), and land in Moiben in Uasin Gishu County (also rejected because it could only house 400 people). On all occasions, Cherangany-Sengwer rejected these offers on the basis that they wanted to stay within or close to the forest, and that they want to be relocated as a single group close to other community members to ensure that they do not lose their identity and their capacity to have a voice in local politics.

85. *Recent Events: Compensation and Reports of Large-Scale Evictions.* More recently, in 2013, the GoK announced that since it was proving difficult to find land to settle IDPs and forest evictees, they would give each household 400,000 KShs (US\$4,629) with which to purchase land plus a relocation amount of KShs 30,000.

86. During its field visit in September 2013, the Panel learned that this process of compensation was underway. On its way to visit the Kaptirbai glade in Embobut Forest, the Panel was informed that most people were not going to be in the glade that day because they were going to Maron to attend a public meeting and register as recipients of the cash compensation payment planned as part of an upcoming visit by the President within the next two or three days. The Panel had learned something about this possible approach two days earlier, but without details. Upon arriving in Maron, the Panel team observed that people were streaming toward this area, and that at least two Banks were there to facilitate the opening of accounts to receive cash compensation; this process, however, seems to have been delayed by local objections and by political developments, most notably the terrorist attack on Westgate mall in Nairobi in October 2013.

87. The Panel was told of a number of significant concerns about this one-time cash compensation, including a concern that if the people accepted compensation and were not allowed to live or be relocated together, then they would be “blown to the wind” resulting in great harm to their cultural identity. The Panel also heard concerns that the provision of compensation to individual families in lieu of a properly planned resettlement process is contrary to the vital importance of recognizing the collective nature of customary rights of indigenous peoples, including their collective attachment to the forests. Moreover, the Panel was told that there were major concerns about the accuracy of the lists of people identified for the initiative. Regarding the people living “below the road” in Embobut, mentioned in the Embobut Task Force Report, it was unclear whether they were going to be included in the relocation or compensation scheme and their future was therefore perceived as a matter of great uncertainty.

88. In early January 2014 the Panel received a letter signed by 40 organizations claiming that further evictions might be imminent. The letter stated that forest guards had arrived near Tangul “in readiness to start evicting the indigenous Sengwer and Cherangany communities from their ancestral forestlands.” The letter, which was sent to the GoK and to United Nations (UN) agencies, stated that “the situation was chaotic; people felt threatened and some were moving with their children and belongings to nowhere in particular.” The letter painted a grim picture of the situation on the ground and of the rights of Embobut communities.⁵⁵ The Panel

⁵⁵ In reaction to this letter, the UN Special Rapporteur for Indigenous Peoples Mr. James Anaya issued a statement on January 13, 2014 urging the GoK “to ensure that the human rights of the Sengwer indigenous people are fully respected, in strict compliance with international standards protecting the rights of indigenous peoples.” Mr. Anaya, quoting the United Nations Declaration on the Rights of Indigenous Peoples, also noted that since the 1970s Kenyan authorities have made repeated efforts to forcibly evict the Sengwer from the forest for resettlement in other areas, and concluded that “any removal of Sengwer people from their traditional lands should not take place without adequate consultations and agreement with them, under just terms that are fully protective of their rights.”

contacted affected people on the ground who confirmed that large-scale evictions were taking place in Embobut. The communities, however, won an injunction from the Eldoret High Court prohibiting evictions until at least February 6, 2014, when it would come up for renewal. The local press indicated in January 2014 that the Eldoret High Court issued an order for the police to arrest anybody breaking the injunction.

89. The Panel informed Bank Management of what it had learned about these events during its field visit in September 2013 and also about this new round of evictions. In response, Management stated that this was “high on its radar screen” and that it would inform the Panel of any actions taken with the GoK. On 21 January 2014, and “after having reviewed and ascertained the facts,” Management reiterated that the Bank was not involved in the Embobut evictions in any way, and noted that the Project is now closed. Management referred to paragraph 81 of its Response to the Request for Inspection, stating that it “clarifies that no resettlement has been planned, financed or carried out under the NRMP in the Cherangany Hills or in any other forest area in the project area” and added that current resettlement initiatives are being undertaken by the Government independently of the Project. Management also stated that it “remains concerned about the reports of evictions in the Embobut forest and that as part of its ongoing dialogue with the Government of Kenya, [...] [it] continues to urge the Government to adhere to good international practice for land acquisition and resettlement.”⁵⁶

90. On February 14th, 2014, the Bank issued a public statement responding to criticisms regarding continued evictions and among other issues, stated that “we are alarmed by reports of recently evicted families in the Embobut Forest and Cherangany Hills areas of Kenya....we strongly encourage the Kenyan authorities to thoroughly investigate claims made by civil society, including the affected communities, that the evictions are not following the legal process.... The World Bank is not involved in the reported evictions, nor has the Bank financed or supported these actions. Nevertheless, we are not bystanders.”⁵⁷ The Bank has since continued to be engaged,⁵⁸ including through its participation in a meeting on April 3, 2014 between Bank Management and the National Land Commission (NLC) to discuss the Embobut evictions, and land issues in general. The NLC affirmed that it had met with the elders and clan leaders from Embobut and that it was aware of the ancestral claims of the Sengwer. It added that it had commissioned a Committee on Historical Land Injustices and that the matter of the Sengwer and Embobut would be taken up.

91. These latest evictions caused renewed attention at the local and international levels, including open letters by Non-Governmental Organizations (NGOs) in the Kenyan media in late February 2014. In response, the NLC published its own open letter on April 10 and 14, 2014, using unequivocal language that recognized the rights of the Sengwer, while also recognizing the ecological functions of the forests, and stating, among other issues, that “those solutions must resolve the land rights and livelihood issues faced by traditional forest dwellers. They must also be structured so as not to jeopardize the conservation of forest resources precious to the whole nation.”⁵⁹

⁵⁶ In correspondence with representatives of Forest Peoples Program reiterates these points. World Bank communication dated January 21, 2014.

⁵⁷ <http://www.worldbank.org/en/news/press-release/2014/02/14/world-bank-group-statement-evictions-kenya>

⁵⁸ The Panel has received several updates from Management, including the results of a follow up mission by independent safeguards consultants that visited Embobut from February 28 to March 2, 2014 to meet provincial leaders.

⁵⁹ Available at www.nlc.or.ke/?wpdmact=process&did=MTMuaG90bGluaw==

2.3. Panel Observations and Analysis

92. In its Eligibility Report and Recommendation to the Board, the Panel identified three key areas of plausible linkages between the Project and the claims relating to evictions and resettlement: (i) Project design addressing issues of “Encroachment” and Resettlement; (ii) Demarcation and Alignment of Boundaries of Protected Forests, and (iii) Support to KFS. The following sections provide the Panel’s analysis of these issues based on the facts gathered during the investigation phase, including an analysis of the issues arising during the restructuring of the project.

Encroachment and Resettlement in the Original Project Design

93. *Resettlement-related Commitments in Key Project Documents.* The Project’s core conservation goals were to be achieved under Component 2 (Management of Forest Resources) through a number of activities including realigning and demarcating boundaries in selected gazetted forests, increasing community engagements in forest management, and identifying sustainable partnership arrangements with communities. One of the issues identified in the PAD as a barrier to achieving the project objectives was encroachment into forest areas by groups and individuals, leading to their conversion and degradation. To address this problem, the PAD considered the possibility of resettlement of communities to be found within the gazetted forests. There are many references in Project documents of the possible need for resettlement and actions to address encroachment into gazetted forests.

94. The PAD indicates that to address difficulties due to “encroachment” of certain forest areas “...the project will provide financial resources for compensation and/or resettlement, conflict mitigation approaches and assisting such households with alternative livelihoods.”⁶⁰ Taking note of earlier evictions, the PAD also states that the Project took it upon itself “...to assist the Government to address the resettlement issues in the project’s area of influence.”⁶¹ Component 2 of the Project included, among its list of activities, support to “a) the effective implementation of the Resettlement Policy Framework and b) the development and implementation of Resettlement Action Plans.”⁶²

95. The PAD notes that the Government was evicting encroachers of gazetted forest lands in an attempt to reclaim these areas. It states that “in several cases, eviction has aggravated the already tense relationship between these groups and the Government, and enforcing these evictions has been challenging. To comply with international standards, including the World Bank’s Operational Policies on Indigenous Peoples (OP/BP 4.10) and Involuntary Resettlement (OP/BP 4.12), and qualify for funding from the World Bank, the Government elaborated an IPPF and a RPF. [...] The frameworks will include a process for assessing the rights of persons residing in gazetted forests, categorizing forest encroachers, and selecting the appropriate method for addressing the problem.”⁶³

96. Similarly, the IPPF indicated that one of the issues to be solved by the Project in accordance with the Social Safeguards of the World Bank (especially OP/BP 4.10 Indigenous Peoples and OP/BP 4.12 Involuntary Resettlement) was the existence of a large group of people living in protected and gazetted forests. Accordingly, the IPPF added that the

⁶⁰ PAD: 13

⁶¹ PAD, 20

⁶² Financing Agreement, Schedule 1, Project Description, Part 2 Management of Forest Resources, 2007.

⁶³ PAD: 41

Resettlement Policy Framework (RPF) of the NRMP and the IPPF itself would become important elements to achieve the objectives of the Project. Consistent with the PAD and the IPPF, the 2008 RPF reiterated that the Project would finance a framework to mitigate land conflicts and stated that “no resettlement or restricted access to forest resources is put in place before detailed mitigation measures (resettlement action plans and resettlement process frameworks) are put in place.”⁶⁴

97. *Cherangany Hills.* Management states that the Cherangany Hills were not intended to be a Project intervention area at Project conception. In its Response, Management states that “neither the PAD nor the Financing Agreement references the Cherangany Hills as part of the Project.”⁶⁵ Nevertheless and given that the area was included in the IPPF (which forms an integrated element of Project documentation), the World Bank took the position in its discussions with the GoK that it was part of the Project intervention area.”⁶⁶ The inclusion of the Cherangany Hills was formalized in the Project Restructuring. The Panel notes that the IPPF was incorporated into the Project Financing Agreement, but other Project preparation documents such as the PAD and the RPF also mentioned the Cherangany Hills as part of the NRMP.⁶⁷

98. The Panel was informed by KFS staff that officials from the former Forest Department sent detailed comments to the IPPF’s authors concerning the draft documents, clearly indicating in more than one instance that the Cherangany Hills were not intended to be an intervention area of the NRMP. The Panel was able to confirm these statements through the review of these documents. For example, a communication from the Forest Department to the IPPF consultant emphasizes that “it would be important to clearly focus on the Project area to exclude areas such as Cherangani and Nandi Hills which are not covered under the forest component.”

99. The Panel also met with Bank staff who noted that the issue of the Cherangany Hills as part of the Project areas arose during Project appraisal because of comments of the former Forest Department. While KFS comments were in turn answered by the IPPF authors (who believed that the NRM could indeed cover the Cherangany Hills during implementation once specific sub-projects would be identified), the safeguards documents were cleared by the Bank and then approved by Kenya’s MOF, and these documents referred to the Cherangany Hills as mentioned above.

⁶⁴ Resettlement Policy Framework for the Western Kenya Community-driven Development and Flood Mitigation Project, and the Natural Resources Management Project, Final Report, January 2007 (RPF): 14

⁶⁵ Management Response: 9.

⁶⁶ Management Response: 31.

⁶⁷ See for example: PAD: 156 “...comprehensive resettlement policy and rehabilitate in the operational areas (Aberdares, Upper Tana, Kakamega, Mt Elgon as well as the Nandi and Cherangany hills) the livelihoods of populations which have been evicted from forests after the new Government was sworn in December 30, 2002.” RPF: “project operational area includes all districts of the Central Province with a special focus on the middle and lower Tana water catchment and the forested areas within the WKCDD operational area (Mt. Elgon, Cherangani Hills, Nandi Hills and Kakamega forest).”

Boundary Realignment and Demarcation

100. An important activity of the Project was to survey, re-align and mark the boundaries of gazetted forests in the Project areas. According to the KFS Boundary Demarcation Report, the NRMP facilitated surveys and the mapping of sections to realign and/or demarcate beacons and maps of various forest blocks, which included the Cherangany complex and other mountain blocks of Elgon, Bunyala Malaba and Abedares. The Boundary report indicates that the exercise in Cherangany started on August 30, 2009 and lasted until September 15, 2010. The report indicates that the demarcation team performed the following activities:

- Determine and demarcate the forest boundary,
- Determine the correct position of the beacons,
- Place concrete monuments to locate the beacons in their correct position,
- Prepare maps based on the collected data,
- Arbitration was done or carried out where community members had encroached onto the forests.⁶⁸

101. The Panel recognizes that a key objective of the Project in this regard was not necessarily to modify or establish new boundaries, but to clearly mark pre-existing ones. Even in the absence of the establishment of new boundaries, however, the Panel considers that officially marking these boundaries requires giving consideration to the people living inside the forest boundary and preparing an action plan to mitigate potential risks, in accordance with the applicable safeguard policies. This is especially clear in cases where indigenous peoples are present and their homes have been inside such boundaries over many years.

Figure 3 Typical small agricultural plot in the Cherangany Hills



102. The Panel met with a number of people living within the gazetted forest boundaries who would clearly be affected by any attempts to enforce a realigned boundary. The most notable examples are people living in the glades within the Embobut forest and those people living “below the road” in Embobut. The Panel team also met in Kapsero with community

⁶⁸ Natural Resource Management Project, Report on Realignment/Demarcation of Forest Boundaries, KFS Survey and Mapping Section, 2010:2.

members who said that 50 farms are situated within the forest boundary where some residents have title deeds. People recounted that a title deed offered little protection from potential evictions in instances when KFS officials insisted that it was up to those affected to prove that the land in which they resided had been de-gazetted and that their title was legitimate, as opposed to the burden of proof being on the GoK to demonstrate that the title deed held by the affected household is not legitimate.

Project Support to KFS

103. The Project focused on the changes necessary to transform the Forest Department into a semi-autonomous KFS in accordance with the new 2005 Forests Act. The Project provided support to build the capacity of KFS, including sensitization training, specifically for enhancing Participatory Forest Management (PFM), private sector investment and entrepreneurship. In addition, the PAD states that the Bank was to support sensitization of KFS staff in resettlement issues and that the Government had started training key staff on issues of resettlement and human rights.⁶⁹

104. The Panel recognizes the challenge involved in such an institutional reform. Such challenges lay not only in addressing the governance aspects, but also in shifting the focus from protecting the forests from “encroachers” and other “illegal uses” through enforcement, to recognizing people’s attachments and use of the forest, as well as working with communities in forest protection and management. The Panel also recognizes that fundamental institutional and functional reforms of this kind take years to implement.

105. The Panel notes that, with the support of the NRM Project, KFS hired a social development expert to deal with safeguard issues and that the training of KFS staff was, among other things, directed at improving relationships with communities and finding an approach to common issues.⁷⁰ In this context, the Process Framework (PF) developed at restructuring spelled out the details for a grievance redress mechanism where KFS would address grievances of communities living in and around the forest. The PF also acknowledged that forest laws and policies may be implemented without taking into account that some people live inside the forest, and while KFS field officers execute the Forests Act, conflicts were bound to arise with forest people who believe that the Project and its IPPF have different objectives.

106. During the Panel’s field visits, authorities described an evolution in their approach to address issues of relocation and land use rights during the years of Project implementation. Among other issues, they reflected on the importance of meeting both the conservation objectives in light of the serious issues of water scarcity, and the need for addressing the rights of affected communities. Government authorities met by the Panel confirmed their understanding that Bank safeguard policies applied to activities related to the relocation of affected communities living within forest areas covered by the Project, including those in Kapolet and Embobut.

107. These officials also expressed an appreciation for the positive work under the Project to support their capacity efforts and to emphasize building dialogue and relations with local people, indicating that this had helped enhance their work and relations with these communities. The Panel recognizes the positive shift in KFS’ approach throughout the

⁶⁹ PAD: 43

⁷⁰ Mid Term Review Mission, March 2010.

Project, but it also notes that the need to improve communication between those KFS staff in the field, mainly the rangers who are mandated with compliance and enforcement tasks, and technical staff including Zonal Forest Managers and Project staff,⁷¹ could have been recognized at an earlier stage.

Issues during Project Restructuring

108. Management notes that restructuring “sought to address unrealistic aspirations in Project documents concerning the resolution of long-standing land issues.”⁷² While some of the more ambitious goals were put aside, activities under Component 2 remained largely unchanged, including the realignment and demarcation of gazetted forests. Given that people were clearly living within the forest boundaries (for example in the glades and in areas “below the road” in Embobut and in the Kapsero area of the Cherangany Hills), this raised concerns that evictions could still occur and resettlement would have to take place. As a result, even though the restructuring narrowed the scope of the Project, it did not remove the risk of evictions and the need to address resettlement for communities within the Project area.

109. During restructuring, and following additional evictions in Embobut, the Bank secured a moratorium from the GoK according to which no evictions and relocation would take place until applicable safeguards instruments, satisfactory to the Bank, (including a Vulnerable and Marginalized Groups Plan, Process Framework and, where displacement is envisaged, a Resettlement Action Plan) could be developed and disclosed. However, the Restructuring document noted that despite the moratorium and GoK assurance “there is still the risk that evictions may occur.”⁷³

110. Management further indicated that the original Project approach to resettlement was excessively ambitious and unrealistic and as a result resettlement related activities in the original Project, namely supporting the effective implementation of the RPF and developing and implementing RAPs, were dropped from the Project as restructured.

111. The Panel notes that contrary to statements in Management’s Response, the Restructuring Paper states that “...the RPF also applies to the forest communities in Cherangany Hills and Mt. Elgon forests, and once the specific areas and number of dwellers to be relocated have been identified, a RAP will be developed.”⁷⁴ Similar statements are included in the updated 2011 RPF as noted below. In addition, the Paper indicated that under the restructured Project a PF would be prepared for forest areas because of Project-related restriction of access to forest resources.

112. The Panel also notes that the GoK’s obligation to implement the Project in accordance with the Environmental and Social Framework (ESMF), the RPF and even the IPPF, in order to ensure that the rights of indigenous peoples and the displaced persons from land are safeguarded and the environment protected, remained unchanged in the amended Financing Agreement.⁷⁵ The Panel finds, however, that in practice under the Project as restructured there was no planning for the preparation of Resettlement Action Plans.

⁷¹ Management Response: 19

⁷² Management Response: vii.

⁷³ Restructuring Paper: 36

⁷⁴ Restructuring Paper: 33

⁷⁵ Amended Financing Agreement dated 2011

113. The Panel notes that, similarly to the PAD, the IPPF and the Project Restructuring Paper already mentioned in this chapter, both the first 2007 RPF and the updated 2011 RPF state that “the forest related activities (NRM Component 2) might require the physical and/or economic resettlement from protected forests (gazetted forests, etc.) and non-protected forests ...the guidelines for access to these resources will be established for all protected forests through process frameworks (PFs) to address the issue of restricted access to resources, and through RAPs for actual relocations.”⁷⁶

114. Thus, while the Panel has noted Management Response statement that “no resettlement has been planned or financed under the NRMP in Cherangany Hills or in any other forested area in the Project area” the Panel found incongruity between this stated position and the Project documents mentioned above even after restructuring.

Relevant Provisions in Bank Policies

115. OP 4.01 on Environmental Assessment requires a project EA to evaluate potential environmental risks and impacts of the Project in its area of influence and to include a process to mitigate and manage adverse environmental impacts throughout project implementation, favoring preventive measures over mitigatory or compensatory ones if possible. The policy indicates that an EA also takes into account social aspects of the project, including the need for involuntary resettlement, the presence of indigenous peoples, and cultural property and considers natural and social aspects in an integrated way.

116. OMS 2.20 on Project Appraisal⁷⁷ spells out the need to carry out a risk analysis. It specifies that “the appraisal normally includes assessing the sensitivity of the projects viability to changes in the key parameters of the project” and “where necessary, the appraisal also includes recommendations regarding precautionary measures which should be undertaken to reduce the risks.”

117. In addition, a key provision in OMS 2.20 states that “Appraisal covers both the project and the entity or entities which will implement and operate it.”⁷⁸ Section C of OMS 2.20 covers “Institutional Aspects” which includes elements such as “project management and organizational arrangements, indicating (a) the responsibilities, authority and accountability of the implementing agency; (b) the role of other entities involved and the provisions for adequate cooperation; and (c) the workload, staffing levels and other resources required and the adequacy of incentives to assure their efficient utilization.”⁷⁹

118. Bank Policy related to Project Supervision is set out in Operational Policy 13.05 (OP 13.05).⁸⁰ It calls on the Bank to monitor whether the borrower is carrying out the project in accordance with the legal agreements, to identify major issues that arise during project implementation, and recommend steps and actions to address those issues, including changes to project design and appropriate and as the project evolves or the circumstances change.

⁷⁶ RPF 2007: 22. See also Republic of Kenya Resettlement Policy Framework Natural Resource Management Project (NRMP) January 2007 updated 2001 (hereinafter RPF 2011): 13.

⁷⁷ OMS 2.20: 17

⁷⁸ OMS 2.20: 7

⁷⁹ OMS 2.20: 33

⁸⁰ In April 2013, OP/BP 13.05 was replaced by OP 10.00 (investment project financing).

119. OP 4.10 on Indigenous Peoples requires the project to take measures not only to mitigate, minimize or compensate for adverse effects, but also to avoid them in the first place. Especially relevant in this context is paragraph 20: “Because physical relocation of Indigenous Peoples is particularly complex and may have significant adverse impacts on their identity, culture, and customary livelihoods, the Bank requires the borrower to explore alternative project designs to avoid physical relocation of Indigenous Peoples. In exceptional circumstances, when it is not feasible to avoid relocation, the borrower will not carry out such relocation without obtaining broad support for it from the affected Indigenous Peoples’ communities as part of the free, prior, and informed consultation process. In such cases, the borrower prepares a resettlement plan in accordance with the requirements of OP 4.12, Involuntary Resettlement that is compatible with the Indigenous Peoples’ cultural preferences, and includes a land-based resettlement strategy. ...”

120. OP 4.12 defines Bank Policy on Involuntary Resettlement with the following overarching principles: (a) Involuntary resettlement should be avoided where feasible, or minimized, exploring all viable alternative project designs; (b) Where it is not feasible to avoid resettlement, resettlement activities should be conceived and executed as sustainable development programs, providing sufficient investment resources to enable the persons displaced by the project to share in project benefits. Displaced persons should be meaningfully consulted and should have opportunities to participate in planning and implementing resettlement programs; (c) Displaced persons should be assisted in their efforts to improve their livelihoods and standards of living or at least to restore them, in real terms, to pre-displacement levels or to levels prevailing prior to the beginning of project implementation, whichever is higher.

121. Key relevant sections of OP 4.12 include paragraph 7: “In projects involving involuntary restriction of access to legally designated parks and protected areas (see para. 3(b)), the nature of restrictions, as well as the type of measures necessary to mitigate adverse impacts, is determined with the participation of the displaced persons during the design and implementation of the project,” paragraph 9: “Bank experience has shown that resettlement of indigenous peoples with traditional land-based modes of production is particularly complex and may have significant adverse impacts on their identity and cultural survival. For this reason, the Bank satisfies itself that the borrower has explored all viable alternative project designs to avoid physical displacement of these groups. When it is not feasible to avoid such displacement, preference is given to land-based resettlement strategies for these groups (see para. 11) that are compatible with their cultural preferences and are prepared in consultation with them,” and paragraph 14: “...the borrower also develops a procedure, satisfactory to the Bank, for establishing the criteria by which displaced persons will be deemed eligible for compensation and other resettlement assistance. The procedure includes provisions for meaningful consultations with affected persons and communities, local authorities, and, as appropriate, nongovernmental organizations (NGOs), and it specifies grievance mechanisms.

2.4. Panel’s Findings on Issues of Compliance and Harm

Evictions and Risk Management

122. The Panel notes that the Cherangany-Sengwer have land claims in the Cherangany Hills dating back many generations and, despite these claims, evictions in these areas have been a common occurrence for a long time. According to the Embobut Task Force, there have been repeated evictions in the Cherangany Hills since the 1980s (including a total of 21

incidents in Embobut alone) of different scales and involving various segments of the Cherangany-Sengwer community, with the pace of evictions accelerating since the year 2000. The Embobut Task Force noted that these evictions created a vicious cycle of destruction both for the people and for the forest, because the evictees would eventually go back to the forest, procure wood to rebuild their houses, and then be evicted again sometime later.⁸¹

123. The Panel therefore acknowledges that evictions have been occurring in the Cherangany Hills before, during, and after the Project. **The Panel finds that no evictions were supported as part of the NRMP.** At the same time, the Panel finds that the risks of evictions were not properly understood, and that a correct application of the Bank's safeguard policies may have prevented or mitigated some of the harms caused by these evictions, as discussed below.

124. First, in reviewing the ESMF for the Project, the Panel notes that the document may not have properly reflected the safeguard risks associated with managing an extremely complex situation with indigenous peoples, particularly given the very complex history of land claims and historic evictions associated with the Cherangany-Sengwer in the Project area.

125. Second, the Panel notes that the inclusion in the Project of an area ridden with long-standing land conflict issues and where indigenous peoples are present warranted an adequate analysis of Project impacts and risks. During the appraisal stage, there is correspondence identifying the "reputational risk" that could arise from "public knowledge of these evictions and the Bank connection." In the Panel's view, the issue goes beyond "reputational risks" as it relates to the need to adequately assess and design mitigation measures, including capacity building, to support the institutional reforms required for addressing these risks.

126. Third, and although the original Project design includes frameworks to address the risk of evictions through the IPPF and the RPF, no planning for their implementation occurred, and no resettlement plan was prepared for any forested area under the Project. While commending Management for securing a moratorium on evictions in 2011,⁸² the Panel notes that the moratorium could instead have been a critical risk mitigation measure during the original Project preparation.

127. Management notes that as a follow up to incidents of evictions, the Bank team recommended strengthening sensitization and training of forest rangers on ongoing developments under the Project "in order to ensure compliance with Project-related commitments made by KFS."⁸³ Although the Panel recognizes Management's immediate follow-up, given the complexity of the situation, these measures were clearly not sufficient.

128. Therefore and in the Panel's view, given the long history of forcible evictions from forest areas, the clear difficulties of bringing about institutional change through legislative means, the draft nature of the National Land Policy, and the acknowledged presence of Indigenous People within the boundaries of the gazetted forests, the Panel finds that **more attention should have been given from the outset to identify risks for affected people and adequately mitigate for such risks as required by Bank Policies on Environmental Assessment, Project Appraisal, Indigenous Peoples, and Involuntary Resettlement. The**

⁸¹ Embobut Task Force 2010: 10.

⁸² Letter from the WB to GoK, November 15, 2010.

⁸³ Management Response: 19

Panel also finds that the lack of follow-up actions to the RPF through a RAP represents an instance of non-compliance with OP/BP 4.12.

Identification of Institutional Risks during Project Preparation

129. In accordance with OMS 2.20, an important aspect of Project preparation is the appraisal of the implementation entity. This requirement allows for the proper assessment of whether or not the implementing agencies chosen for implementing the Project are mandated to and capable of conducting the activities set out in the Project, including the institutional capacity and experience required to properly do so.

130. In this context, Management noted in supervision reports that the lack of ownership of the IPPFs by the GoK was noticeable. Furthermore, many issues pertaining to indigenous peoples went beyond the narrow mandate and expertise of a given implementing agency; some overall guidance and coordination at a national level was needed, as there were no government expertise or resource persons that could assist the implementing agencies in addressing these complex issues.

131. The Panel finds that given the historical mission of KFS and its predecessor (the Forestry Department), which primarily used a compliance and enforcement approach, the risks associated with the lack of past experience of this institution in implementing the Project through a collaborative and community based approach were not properly understood. It is widely acknowledged that KFS did not have a history of conducting its activities through processes that involved community participation, but rather a tradition of enforcement.

132. Furthermore, the Panel notes that while KFS was the implementing agency of activities under the management of forest resources component of the Project, KFS had no mandate, capacity, or experience to implement resettlement related activities under the Project, including the identification and allocation of land for resettlement, or to assist in resettlement of families while guarding their livelihoods and their rights to access forest resources. To this end, the Panel observes that when commenting the IPPF, Bank staff pointed out a lack of analysis as to whether each unit to which responsibility was being assigned had the mandate, skills, and motivation to carry out the assigned action. Nevertheless, the Panel found no evidence that there was follow up on these issues.

133. Therefore, **the Panel finds non-compliance with the key provisions of OMS 2.20 during initial Project design, as they relate to the adequate institutional analysis of the capacities of KFS.** In this context, the Panel particularly highlights the issue of the implementation challenges resulting from the implementation of activities that would have required multi-agency interventions, given that Component 2 of the NRMP did not target any agencies beyond KFS.

Bank Supervision

134. Supervision reports show that Bank Management was aware and concerned about evictions during Project implementation and made serious and repeated efforts to deal with the issue once it became aware of it. For example, as early as May 2009, the Bank reported that recent evictions from part of the Embobut Forest (Marakwet District) highlighted the fact that Project implementation had not focused on the implementation of agreed upon safeguard instruments, in particular the IPPF and the RPF. The mission further noted that the

implementation agencies (in particular KFS) had recognized this shortcoming and were in the process of finalizing a revised version of the action plan to implement both IPPF and RFP.”⁸⁴

135. The Mid-Term Review report of March 2010 shows that Management planned a review of all relevant land-related policies and laws with respect to resettlement and proposed that the NRMP would co-finance the elaboration of guidelines on eviction, displacement and resettlement. The report refers to the ongoing development of the eviction and resettlement guidelines.

136. In December 2010, Management reported that ongoing efforts by KFS to engage in dialogue with indigenous peoples had suffered a setback due to allegations against KFS staff for taking actions to evict individuals from the Embobut Forest. On November 15, 2010, Bank Management sent a letter to the GoK stressing the urgency of providing remedial action to address the complaints. The MOF then wrote to the relevant Ministries requesting strict compliance with OP 4.12, including free, prior and informed consultation, the discontinuation of any unscheduled eviction in Project intervention activities and the introduction of adequate compensation measures. The Bank also hired a consultant to prepare a report looking at the circumstances and living conditions of those persons who were allegedly evicted.⁸⁵

137. The restructuring mission of January 2011⁸⁶ discussed the alleged evictions in the Cherangany Hills and Mt. Elgon, and indicated that KFS committed not to carry out further evictions until the PF was in place. In July 2011, another mission referred to several issues that contributed to Project delays, including the recognition that KFS, in line with its mandate, carried out and continued to carry out evictions of illegal forest dwellers. Management stated that “this has caused conflicts which are largely unrelated to the Project, but which nonetheless negatively impact mutual trust and willingness between the two parties to cooperate within this project.”⁸⁷

138. Following the Indigenous Peoples Workshop in Nakuru in April 2012, Management recounted that tensions between KFS and forest dwellers and encroachers have affected Project implementation, as a result of alleged recent evictions and displacements that occurred before the Project but re-emerged as an issue in the post-2008 election violence. Management explained that “these issues have been the subject of extensive discussions and correspondence between the Bank, KFS and indigenous communities, resulting in the fielding of several missions to verify alleged violations of the IPPF.”⁸⁸ In 2011, the Bank had obtained written assurances from the government that confirmed that no further evictions would be carried out until the development and disclosure of applicable safeguard instruments satisfactory to the Bank.

139. In April and May 2013 Management met with the Policy Advisor of the Forest Peoples Program but reported back that it could not verify information about the recent burning of 81 houses in Embobut.⁸⁹ Management was informed by the Zonal Manager for Marakwet, the Vulnerable and Marginalized Groups Coordination Committee (VMGCC) and

⁸⁴ BTOR, Implementation Support Mission, May 25-29, 2009. Email dated June 23, 2009, p.1.

⁸⁵ Implementation Support Mission 2010.

⁸⁶ Report of the Technical Restructuring Mission 2011.

⁸⁷ Feedback from QACU/LEGEN Mission to the Kenya NRMP. Email dated July 6, 2011, p.3.

⁸⁸ BTOR – Indigenous Peoples (IP) Workshop under the NRMP. Email dated February 21, 2013, p. 3.

⁸⁹ Safeguards Mission, 2013.

the Marakwet West Member of the National Assembly that no evictions and burnings of houses had taken place since the Bank had secured the moratorium.

140. In summary, the World Bank was aware and concerned regarding evictions during Project implementation, and took several actions, including: (i) advising the GoK to establish a moratorium on evictions from Embobut forest until a permanent solution for resettlement of people from the glades could be found; (ii) obtaining an assurance that some communities, including Cherangany-Sengwer, could have access to the forest; (iii) strengthening of the Project's sensitization and training of forest rangers following the incident when a house and property was burned in the area in November 2011; and (iv) supporting the Inter-Ministerial Task Force on Land and Legacy issues to provide a basis for further conflict resolution.

141. The Panel therefore finds that Management responded repeatedly and firmly and brought to the attention of the Borrower instances of non-compliance with social safeguards obligations, and in doing so, it is in compliance with OP/BP 13.05 on Project Supervision.⁹⁰

Indigenous Peoples and the Relevance of the Project Objectives

142. The Panel was informed during its investigation that there was an effort by Bank staff to prepare an IPPF that would reflect a "state of the art" approach under the recently revised OP 4.10. The IPPF proposed the setting up of a commission of a high level group of experts to undertake an "option assessment" to explore, to the extent possible, the feasibility of reestablishing the indigenous peoples on their lands and in their forests. The IPPF also proposed that if this was not possible, the Project would commission, for each forest, a resettlement action plan to elaborate a land-based resettlement plan compatible with the Indigenous Peoples' cultural preferences.⁹¹

143. The Panel fully recognizes the desirability of such approaches to resolve the outstanding issues over land. Nonetheless and as noted above, there is no indication that such proposals were followed up with careful assessment and planning to determine if such processes were feasible, including the issue that KFS, the Project's implementing agency, was not the entity within the Government of Kenya that could have planned, assisted, and implemented the identification and allocation of land for resettlement as would have been required by a RAP. Resettlement and land tenure issues would have required coordination with other government agencies.

144. The Panel considers that there seems to have been a degree of dissonance in the initial Project design: on the one hand, the IPPF reflected ambitious goals to recognize and protect the land rights and other interests of indigenous communities in the Project area; on the other,

⁹⁰ According to BP 13.05 at paragraph 13, 14, if the borrower does not comply with its obligations under the legal agreement, the Bank works with the borrower to remedy the situation. The BP recommends first pursuing a dialogue with the borrower and when a project is in a "problem status" working with the borrower to address the situation, including with assistance in restructuring the project if appropriate. According to the BP, contractual remedies may then be pursued by the Bank as appropriate. The Panel notes that Management indicates in its Response (at page 17) that, following information about evictions in Embobut in 2010, "the Bank wrote on November 15, 2010 to the MoF: (i) stating its concern and requesting that the Government comply with the social safeguard documents and refrain from carrying out or planning any evictions without following due process; and (ii) warning that non-compliance could result in remedial action by the Bank." As noted, in 2011 the Project was restructured.

⁹¹ IPPF: 8.

the PAD and other documents framed the objectives in terms of the need to address the problem of “encroachers” within protected areas who posed a problem for the conservation objectives of the Project. Management acknowledges that the IPPF lacked clarity and triggered unrealistic expectations and made efforts to clarify the role and function of the IPPF. However, some individuals and community groups continue to maintain the view that the IPPF, in particular those provisions aimed at clarifying and securing the legal status of IPs occupying forest land, needed to be implemented as a prerequisite of any NRMP implementation.

145. The Panel is fully appreciative of the significance of the Project objectives, and recognizes Management’s efforts to respond to events as they evolved. The Panel notes that the Bank displayed a very high level of aspiration in attempting to respond to an intractable issue and support the long-standing claims of Indigenous Peoples. When the Bank recognized the difficulty in attaining these goals, it was forthright in informing the Board in the Restructuring Paper that in retrospect, the Project could not find a comprehensive resolution to the land issues within its scope and time-frame.

146. In this context, the Panel does not question the determination made at the time of restructuring that it would not be feasible to comprehensively resolve the longstanding claims to land of the Cherangany-Sengwer within the NRMP. The Panel also acknowledges that NRMP funds were used to provide technical assistance to facilitate the creation of an Inter-Ministerial Task Force on Lands and Resources Rights that would tackle these issues. Nevertheless, the implications of separating the land issues at the time of restructuring lessened the focus of the Project to progressively seek a good application of Bank safeguard policies for communities facing the possibility of eviction or resettlement.

Figure 4 Project affected people The Panel met with during its visit



147. The Panel therefore notes validity in concerns raised by Requesters that the decisions at restructuring made some of the Project’s goals, including identifying sustainable partnership arrangements with communities for the protection and management of the forest, and safeguards, more difficult to achieve. The Panel recognizes that the moratorium on evictions served as an important safety measure carried through restructuring, but the more

recent events in the field since the Project closed indicate that the inability to address core issues related to land rights and resettlement continue to have long reaching consequences.

148. This is not to say that the Bank should have stayed away from tackling these complex issues. On the contrary, the Panel throughout its investigation has found that the Bank was well regarded by all actors and continued playing a critical role, to the point that clear expectations for solving these long-lasting issues through the NRMP were raised.

149. It is the Panel's view that the Bank has a key role to play in such a case, but it must do so fully equipped and committed to follow through with the transformation process that was launched. As the Bank itself has said, in this case the Bank "is not a bystander." It needs to be recognized that such intractable issues probably require a much longer time frame than available under the Project and could not be resolved by simple restructuring. Given the substantive work undertaken in the Project and progress made, the Panel heard testimonies from the affected communities regarding their hope that the Bank will remain engaged in this sector as it is well equipped to play a vital and positive role in the future.

Chapter 3

Second Set of Core Claims: Customary Rights

150. This chapter reviews the second set of claims, i.e., that there has been lack of recognition and protection of the Cherangany-Sengwer's customary rights during Project implementation. The chapter is divided into five sections: (i) a summary of the key concerns raised by the Requesters and the Management Response, (ii) a review of the concept of Indigenous Peoples in the African context, (iii) a review of customary rights in the NRMP, (iv) the issue of Participatory Forest Management, and (v) the Panel's analysis and findings on issues of compliance and harm.

3.1. Summary of Requesters Claims and Management Response

Requester's Claims

151. The two separate Requests raised similar claims. The first Request asks for the recognition, respect, and protection of "the rights of Sengwer forest indigenous peoples to live within their ancestral homes in Kapolet and Embobut Forests while carrying out livelihood activities that promote sustainable conservation and protection of natural resources." During the Panel's visit to the Project area, the Requesters claimed that actions taken during Project implementation failed to safeguard their customary rights in these forests, in non-compliance with Bank policy. They also believe that the IPPF prepared under the Project, which in their view is still "in force," should be implemented.

152. Both the first and second Requests also argue that the Bank violated its policies by adopting the use of the term "Vulnerable and Marginalized Groups" instead of "Indigenous Peoples" without carrying out free, prior, and informed consultations with the people. They claim that this is a violation of the indigenous people's rights as stipulated in international treaties and in the Bank Policy on Indigenous Peoples, OP 4.10.

Management Response

153. Bank Management notes that the Cherangany-Sengwer people have asserted ancestral rights to live and use the forest without restrictions, while successive governments have prioritized the protection of forests by gazettement. This has created conflicts that have intensified in recent years with an increasing pressure on Kenya's forests. Management adds that during this period there has been an "emerging recognition by both the Government and the Cherangany-Sengwer that a permanent solution to this problem will require the resettlement of forest-dwelling Cherangany-Sengwer to suitable land outside the gazetted forest,"⁹² albeit with an agreement on rules regarding access to the forests. Management notes that attempts to find these solutions so far have stalled.

154. The Project as restructured in 2011 would however remain committed to developing Vulnerable and Marginalized Groups Plans (VMGPs)⁹³ (equivalent to Indigenous Peoples Development Plans or IPPs) to address livelihood needs and based on free, prior and informed consultations. A Process Framework to address restriction of access to forests and use of

⁹² Management Response: 20.

⁹³ Activities eligible under the livelihood program and detailed in the VMGPs include CDD-type such as livestock breeding, bee keeping, poultry keeping, fish farming etc. This builds on the Social Assessment undertaken in 2010. Management indicates that the VMGPs supersede the IPPF in the areas they cover.

forest products was also developed. Management indicates that during consultations it was clarified that the PF would not address land and resettlement issues.

155. Management notes that “the use of the term “VMGP” does not in any way diminish the benefits and protections available under the policy to the people who meet the eligibility criteria accorded to IPs under OP 4.10.” Furthermore, “Paragraph 3 of OP 4.10 acknowledges that there is no universally accepted definition of the term “Indigenous Peoples.” The policy therefore contemplates the possibility of using alternative terminology taking into account the varied and changing contexts in which IPs live.”

156. Management also notes that “in the course of supervising the NRMP, the Bank was requested by the GoK to use the term “Vulnerable and Marginalized Groups” to be consistent with the terminology of the 2010 Constitution of Kenya. Although the words “Vulnerable and Marginalized Groups” are not used verbatim in the Constitution; both terms “vulnerable groups” and “marginalized groups” are used separately in various sections of the Constitution to include indigenous communities.⁹⁴ In addition, Article 260 of the Constitution interprets “marginalized community” to mean and include an “indigenous community.” Finally, Article 21 (3) of the Constitution, which makes reference to “vulnerable groups,” includes “marginalized communities.” The use of the term “VMGP” does not represent any change in the application of OP 4.10 in Kenya and captures the spirit of the Constitution.

3.2. Indigenous Peoples and Vulnerable and Marginalized Groups (VMGs)

157. The application of the term “Indigenous Peoples” in the African context is complex, and therefore a full analysis by one of the Panel’s expert is presented in Annex B. The following is a summary of the main issues:

158. According to the Panel’s expert, the Kenyan legal and policy framework is currently one of the most advanced on indigenous people’s rights in Africa. The country’s Constitution (2010) defines an “indigenous community” as one “that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer community” and includes it as one form of “marginalized community.” There are also Kenyan laws and policy documents, however, such as the Land Act 2012 that guarantees substantive rights of indigenous peoples but refrains from using the term.

159. The World Bank’s OP 4.10 adopts a pragmatic approach to the use of the term. It focuses on the substantive rights that need to be protected and guaranteed instead of the terminology. The Policy does not mandate the use of the term “indigenous peoples” but instead recognizes that “because of the varied and changing contexts in which Indigenous Peoples live and because there is no universally accepted definition... this policy does not define the term.” The Policy acknowledges that Indigenous People “may be referred to in different countries by such terms as “indigenous ethnic minorities,” “aboriginals,” “hill tribes,” minority nationalities,” “scheduled tribes,” or “tribal groups,” terms that all imply a particular kind of identity as a distinct, vulnerable, social and cultural group.

160. The African Commission on Human and Peoples Rights (ACHPR) recommends the same approach and calls upon African states to focus on the substantive rights that should be guaranteed for indigenous peoples, instead of the terminology: “Whatever the specific term to

⁹⁴ See also Management Response at note 6.

analyze and describe their situation will be, it is highly important to recognize the issue and to urgently do something to safeguard fundamental collective human rights. Debates on terminology should not prevent such action.”⁹⁵

161. In discussions with Management and KFS officials, the Panel consistently heard that the insistence for a change in terminology within the Project came from the GoK and that this change would have no substantive implications for the Project. The Bank “explained repeatedly that the use of the term “VMGP” does not in any way diminish the benefits and protections available” to members of the Cherangany-Sengwer community who opposed the change.⁹⁶

162. Nevertheless, Indigenous Peoples leaders remained concerned, and at a Regional Consultation Workshop held in Nakuru in March 2012 supported by a Management-initiated dispute resolution process,⁹⁷ it was recommended that the term VMGCC be changed to Indigenous People’s Group Coordinating Committee (IPGCC), recognizing that while IPs have a distinctive culture and way of life, marginalized group refers to communities that are sidelined in terms of resource allocation and development, and vulnerable group refers more generally to communities that cannot provide for themselves in terms of basic needs and are faced with certain threats.⁹⁸

163. During Panel interviews it also became clear that an important issue for Indigenous People leaders was not just the implication of this change in terminology for the NRMP, but for the Cherangany-Sengwer to retain access to, and participate in regional and global IP forums and networks that promote and protect their rights. In short, and in the view of the Cherangany-Sengwer, World Bank recognition as Indigenous Peoples was important to community members for a variety of reasons, and was not just directly related to the NRMP.

3.3. Customary Rights

Key Definitions and Policy Context

164. The customary rights of Indigenous Peoples are mostly aimed at preserving their social and cultural identity, and often are a foundation of their livelihoods. They are also considered as deriving from the overriding right to self-determination by virtue of which Indigenous Peoples should “decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use and to exercise control to the extent possible over their own economic, social and cultural development.”⁹⁹

⁹⁵ African Commission on Human and Peoples’ Rights (ACHPR). 2006. Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission’s work on indigenous peoples in Africa: 29 Pp.

⁹⁶ Management response: 23.

⁹⁷ Management Response states that two approaches for grievance redress were adopted: a Project-level Grievance Redress Mechanism (GRM) established and managed by KFS, and a Management-initiated broader dispute resolution approach parallel to KFS’s GRM and managed by the Bank. The Management-initiated dispute resolution approach employed an external mediator to support Project stakeholders in resolving disputes. These dispute resolution approaches also supported a Regional Consultation Workshop that took place in Nakuru in March 2012 with the aim of understanding key concerns of the indigenous communities and discuss opportunities to address long standing issues. See Management Response: 12.

⁹⁸ Action Matrix arising from Group Discussion, Nakuru, 2012: 10.

⁹⁹ International Labour Organization, C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169): Article 7.1.

165. Culture is understood as a “cluster of social and economic activities, which gives a community its sense of identity.”¹⁰⁰ With regard to Indigenous Peoples, it has been specified that “to enjoy a particular culture may consist in a way of life which is closely associated with territory and use of its resources. This may be particularly true of members of indigenous communities....culture manifest itself in many forms, including a particular way of life associated with the use of land resources especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.”¹⁰¹

166. The multiple functions that lands play for Indigenous People reveal the complex and wide scope of Indigenous Peoples’ customary rights.¹⁰² For them, land provides not only material benefits such as food, medicine, fuel, grazing spaces, fish and game, but also non-material services such as initiation sites, sacred areas, a connection to ancestors, and as spiritual ceremony sanctuaries.¹⁰³ It is widely accepted that “the survival of indigenous peoples’ cultures throughout the World is heavily dependent on protection of their lands.”¹⁰⁴

167. Article 63 of the 2010 Kenyan Constitution provides for a wide scope of land rights based on customary occupation. It defines “Community Land” as including: “(d) land that is.... (i) Lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities.”¹⁰⁵ The Kenyan Land Act 2012 states that customary rights exist regardless of whether they are recognized or not: “Customary land rights refer to rights conferred by or derived from Kenyan customary law whether formally recognized by legislation or not.”¹⁰⁶ It also lists customary rights as of Kenyan land tenures and its Section 37 provides that “community land shall be managed in accordance with the law relating to community land enacted pursuant to Article 63 of the Constitution.”¹⁰⁷

168. The Kenyan Forests Act provides a narrow scope of customary rights but still recognizes their importance: “...Nothing in this Act shall be deemed to prevent any member of a forest community from taking, 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.”¹⁰⁸ It states also that any forest with high cultural value or “a major source of livelihood for the local community” should be protected.

169. OP 4.10 embraces a holistic understanding of Indigenous Peoples’ land-based customary rights. It specifies that “customary rights to lands and resources refers to patterns of long-standing community land and resource usage in accordance with Indigenous Peoples’ customary laws, values, customs and traditions, including seasonal and cyclical use, rather

¹⁰⁰ Nigel Rodley, “Conceptual problems on the protection of minorities: International Legal Development,” *Human Rights Quarterly* 17 (1995), p.59

¹⁰¹ U.N. Human Rights Committee, General Comment 23, Article 27 (Fiftieth session), 1994

¹⁰² Indigenous peoples’ customary rights over lands are of different nature and types. International standards use different terms, including ownership, possession, occupation, usage, participation and access. Concepts such as collective aspects, territories, natural resources, immemorial occupation, and traditional land tenure systems add to the complexity and specificities of the concept “land rights of indigenous peoples.”

¹⁰³ Albert Barume. 2010. Land rights of indigenous peoples in Africa, IWGIA, p.52

¹⁰⁴ Erica-Irene A. Daes. 2001. Study on indigenous peoples and their relationship to land. U.N. Doc. E/CN.4/Sub.2/2001/21.

¹⁰⁵ The Constitution of Kenya, Revised 2010: Article 63.

¹⁰⁶ Land Act, No. 6 of 2012, Revised Edition 2012, available at www.kenyalaw.org: Article 2.

¹⁰⁷ Kenya Land Act: Article 37.

¹⁰⁸ Kenya Forests Act, 2005: Article 21.

than legal title to land and resources issued by the State.” It requires that these rights should be identified, recognized and protected against encroachment: “the borrower pays particular attention to: (a) customary rights, (b) the need to protect such land and resources against illegal intrusion and encroachment, (c) the cultural and spiritual values that the indigenous peoples attribute to such lands and resources; and (d) indigenous peoples’ natural resources management practices and long-term sustainability of such practices.”¹⁰⁹

170. OP 4.10 also recognizes that “the identities and cultures of Indigenous Peoples are inextricably linked to the lands on which they live and the natural resources on which they depend.” According to the Policy, therefore, particular attention should be paid to the individual and collective customary rights on lands and natural resources that indigenous peoples traditionally owned or customarily used or occupied. For projects involving (a) activities that are contingent on establishing legally recognized rights to lands and territories that Indigenous Peoples have traditionally owned or customarily used or occupied (such as land titling projects), or (b) the acquisition of such lands, the IPP sets forth an action plan for the legal recognition of such ownership, occupation, or usage.”

171. Particularly relevant in this context is paragraph 21 of OP 4.10: “...lands set aside as legally designated parks and protected areas may overlap with lands and territories that Indigenous Peoples traditionally owned, or customarily used or occupied. The Bank recognizes the significance of these rights of ownership, occupation, or usage, as well as the need for long-term sustainable management of critical ecosystems. Therefore, involuntary restrictions on Indigenous Peoples’ access to legally designated parks and protected areas, in particular access to their sacred sites, should be avoided. In exceptional circumstances, where it is not feasible to avoid restricting access, the Borrower prepares, with the free, prior, and informed consultation of the affected Indigenous Peoples’ communities, a process framework in accordance with the provisions of OP 4.12. The process framework provides guidelines for preparation, during project implementation, of an individual park’s and protected areas’ management plan, and ensures that the Indigenous Peoples participate in the design, implementation, monitoring and evaluation of the management plan, and share equitably in the benefits of the...protected areas. The management plan should give priority to collaborative arrangements that enable the Indigenous, as the custodians of the resources, to continue to use them in an ecologically sustainable manner.”

Customary Rights in the Original NRMP

172. The concept of Indigenous Peoples customary rights to forests and the need to safeguard them is spelled out in appraisal documents. The original Financing Agreement made explicit reference to the concepts of indigenous peoples and their rights: “In order to ensure that the rights of indigenous peoples and the displaced persons from land are safeguarded and the environment protected ...the recipient shall implement the project in accordance with ...Indigenous People’s Policy Framework and the relevant national legal and policy requirements.”

173. The PAD was also explicit on customary rights, with specific reference to hunter gatherers and pastoralist communities: “The Land Policy recognizes and protects customary rights to land. Land issues such as historical injustices, land rights of minority communities, forests dwellers, pastoralists, hunters and gatherers and vulnerable groups have been

¹⁰⁹ OP 4.10: 16.

appropriately addressed and shall be given particular attention.” As also clearly articulated in the IPPF, “the rights of these people will be recognized and protected and measures will be taken to identify such groups and to ensure that their access to land and participation in decision making over land and land resources is secured.”¹¹⁰

174. The Social Assessment made equally strong reference to customary rights of the Cherangany-Sengwer, tapping into both their history and oral account. It listed in detail several cultural and spiritual functions of the forest as socio-cultural activities and consumption or utilization of forest resources, including for religious rites, medicines, and artifacts. The SA touches upon a number of indigenous peoples’ practices on resource management, including restriction on tree cutting because they consider trees as sacred.¹¹¹ The SA also discusses that the forest is a source of livelihood and economic activities for Cherangany-Sengwer people, and provides them with honey, wild game, fire and firewood and herbs for sale.¹¹² The SA undertook a mapping exercise showing the ancestral territories and land uses, e.g., areas for beehives, herb collection, shrines, hunting, etc.

175. The PAD noted that in some forest areas, the implementation of sustainable partnership arrangements and increasing community engagement in forest management would be negatively affected by “forest encroachment,” given the high number of conflicts over land rights and use of resources by Indigenous Peoples. The PAD therefore stated that the Project would finance “coherent and transparent frameworks [...] to mitigate current and future conflicts over land, customary rights and rights of indigenous people, [which] will include a process for assessing the rights of persons residing in gazetted forests, categorizing the forest encroachers, and selecting the appropriate approach for addressing the problem.” The PAD added that the “approaches that support alternative livelihoods and improved forest management will be identified and formalized through the Participatory Forest Management Plans (PFM) preparation process.”¹¹³

176. Similarly, the Resettlement Policy Framework developed during Project preparation stated that “sustainable natural resource and forest management is only possible if all stakeholders are taking part and this is not possible as long as they have no shelter, and or legal access to land and resources.”¹¹⁴

Customary Rights in the Restructured Project

177. According to Management, the Project restructuring reviewed and adjusted the Project expected outcomes by “twinning forest control measures with rural development schemes” and thus supporting community-driven livelihoods in forest-adjacent communities, while allowing sustainable access to forest resources. To this end, the restructuring focused on updating the safeguards documents and improving their implementation to respond to Indigenous People’s needs. Upon recognizing that communities around the forests are particularly concerned with land use and access issues, the Project provided for updating the Process Framework and preparing Vulnerable and Marginalized Group Plans (VMGPs),¹¹⁵ and improving forest management with guidelines for vulnerable and marginalized

¹¹⁰ PAD: 101

¹¹¹ Social Assessment: 14

¹¹² Social Assessment: 38.

¹¹³ PAD: 8 (Annex 5, Project Description)

¹¹⁴ RPF 2007: 35.

¹¹⁵ Management Response: 16

communities. Management added that through the preparation of the VGMPs and the Process Framework, along with the development of the grievance redress mechanism, the NRMP was able to help communities participate in forest management activities, which would continue beyond the Project.¹¹⁶

178. The Process Framework states that it “specifically deals with restriction of access to forests and use of forests products and resources”¹¹⁷ and adds that it “covers restrictions of access to legally designated forest conservation areas, which results in adverse impacts on livelihoods of the affected people” It recognizes that the Forests Act spells out how people can access and use forest resources, but also that in World Bank funded projects, when project activities may result in loss of access to natural resources, the policy on Involuntary Resettlement is applied. For this reason, the Government undertook to develop the framework “to establish a process by which members of potentially affected communities can participate in planning of project components.”¹¹⁸

179. The Process Framework was tasked with recommending ways to fill gaps “that may be identified in the [Forests] Act in relation to access rights of the VMGs.” The PF recommended the establishment of a conflict resolution mechanism for affected people’s grievances and described examples of grievances that could arise during Project implementation and could be related to KFS or could result from conflicts between groups affected by the Project. Among the grievances that the mechanism could address, the Process Framework included: “policy contradictions and gaps,” “negative impacts of (new) restrictions on physical access to forest and forest resources,” and “disagreement on excising forest areas and certain boundaries.”

180. Specifically, with respect to the identified gaps the Process Framework recommends, among others: (i) institute affirmative action to secure participation of PAPs in particular VMGs in forest governance structures suggesting that through a review of the Forests Act the active involvement of VMG, in particular forest dwellers, should be secured; (ii) mount a dialogue and sensitization campaign to enable informed participation by VMGs in the governance structures; and (iii) operationalize and apply the provisions of Participatory Forest Management (PFM) guidelines to ensure free, prior and informed consultations of affected people.

3.4. Participatory Forest Management and Customary Rights

Forest Management and Co-Management

181. Project documents underlined the need for protecting Indigenous Peoples’ customary rights to the forests to ensure people’s participation in forest resources management. In its original design, the Project provided for “identifying and prioritizing an array of partnership models for community participation and benefit sharing in the forest sections” and the preparation of “participatory forest management plans.”¹¹⁹ The PAD recognized that given the importance of forests in the lives of people living in and around the forests, participation of stakeholders in the decision making process concerning management of forest resources and

¹¹⁶ Management Response: 55

¹¹⁷ Process Framework for NRM Project in Mount Elgon and Cherangany Hills, July 2011 Updated 13th February 2013, Executive Summary.

¹¹⁸ Process Framework: section 1.4

¹¹⁹ Financing Agreement, Schedule 1, Part 2 (e) (f).

sharing of benefits was critical to these resources' sustainable use and conservation, and that community forestry associations were to be recognized as "partners in management."¹²⁰ It also stated that community participation and benefit sharing required involving forest communities and communities living adjacent to forests in decision making, and protecting customary access and use of forest resources for Indigenous Peoples.¹²¹

182. The PAD acknowledged that while the new Forests Act provided for participation of stakeholders in the management of forests, it did not spell out their rights and responsibilities and the benefit sharing arrangements.¹²² Therefore, focusing initially on areas such as Kakamega Forest, Mt. Elgon, Aberdares and Upper Tana, the Project was to provide assistance to identify partnership models that could improve benefit sharing by emphasizing sustainable and participatory forest management. The Project's IPPF (which included the Cherangany Hills), stated that the measures proposed would also promote the effective management of natural resources to offer benefits to the entire population as well as to environmental sustainability and biodiversity.

183. Protected forests provide a wide range of goods and services to people living in and around them, and to the society as a whole,¹²³ but the rural poor are largely dependent on access to natural resources to sustain their livelihoods. Participatory Forest Management can be practiced in various forms and provides for the involvement of local communities in the management and conservation of forests with appropriate user rights as incentives. Co-management is a collaborative management approach that divides forest management responsibilities and benefits between government authorities (whether local or central) and forest adjacent communities, and takes place in Government owned forests, i.e. Forest Reserves.

184. The parameters of co-management are set out by legally binding agreements developed by the forest management authority and a Community-Based Organization (CBO). The sharing of costs and benefits that accrues to each party depends on how the agreements are negotiated. Benefits may vary from site to site, but the overall aim is to provide people with legal and regulated access to forest products. The benefit to the management authority is improved forest management and protection at a reduced cost. A critical issue on which the success or failure of PFM rests is the equitable sharing of benefits. Some benefits accruing from sustainable forest management are not only enjoyed by CBOs and the communities, but also by other national, regional and global stakeholders. Forest management agreements typically provide Community Forest Associations (CFAs) or CBOs with forest user rights for the collection of non-timber forest products, harvesting of timber or wood fuel, ecotourism and recreational activities, contracts to carry out specified silvicultural operations (controlling the establishment, growth, composition, health, and quality of forests), etc.

185. The target of the NRMP was to support the establishment of CFAs in the Project area. In the Cherangany Hills, the implementation of Project activities concerning the identification of partnership models and the preparation of management plans lagged behind during Project implementation. The Panel was informed that no participatory management plans were prepared for the Cherangany Hills.

¹²⁰ PAD: 97 and 7

¹²¹ PAD: 17

¹²² PAD: 32

¹²³ Millennium Ecosystem Assessment, 2003.

186. The Process Framework developed after Project restructuring notes that the VMGs, especially those residing in the forest, were “excluded” from participating in CFAs because “they were living in the respective forests illegally and therefore could not participate.” The PF adds, however, that the situation was changing and KFS was in the process of “sensitizing them through the VMGCCs to become actively involved in the CFAs.”¹²⁴

187. By contrast, Cherangany-Sengwer people interviewed by the Panel stated that they are not interested to form a CFA because they believe it does not recognize their rights as Indigenous Peoples. This sentiment was also noted in the SA which reports that Indigenous People’s fear further marginalization if they are not allowed to be the sole managers of the forest. For the Cherangany-Sengwer, agreeing to participate in CFAs before issues of land are resolved could have eclipsed issues of land ownership.¹²⁵

188. The Panel was informed by some Cherangany-Sengwer in the location of Kipsiro that a CFA was indeed formed with Cherangany-Sengwer who do not live inside the forest, but that Cherangany-Sengwer people in general oppose its model and functioning. They disagree with the fact that not only indigenous people, but all forest dwellers can participate in the CFA, while they believe that they are the ancestral owners of the forest, they are its guardians, and thus they should be given preference in forest management and conservation activities.¹²⁶ In interviews with Cherangany-Sengwers, the Panel was told that the CFA of Cherangany (Cherangany Community Forest Association) prepared a management plan but no agreement was signed with the KFS.

189. The Panel notes that establishing forest co-management is a long-term process with sequential requirements that applicants must satisfy. It can be daunting if not impossible for rural communities to successfully navigate it without assistance. The SA noted IPs’ fear that they would not be able to negotiate on an “even ground”.¹²⁷ Additional difficulties could arise because forest co-management represents a new approach with which many existing KFS staff members and managers are still unfamiliar. Indeed, conflicts occurred between KFS staff (familiar with the traditional “command and control” approach), and communities (previously known as “enemies” or forest encroachers).

190. Section 45 of the Forests Act includes a limited list of activities that can be undertaken through a CFA including “use of forest resources,” “methods of conservation of biodiversity,” and “methods of monitoring and protecting wildlife and plant populations and enforcing such protection.” This restricted scope of activities and the fact that any Kenyan can join a CFA made Cherangany-Sengwer resent this mechanism, feeling that it could not deliver on their wide-ranging customary rights, and a sense that it would maintain the *status quo* of their marginalization and landlessness. The SA captured this same fear back in 2010, when they indicated that the “formation of CFAs before issues of land and resettlement are resolved may overshadow the key issue of land ownership.”¹²⁸

¹²⁴ Process Framework: 15.

¹²⁵ Social Assessment: 57.

¹²⁶ Social Assessment: 21. The SA reports that for the Cherangany-Sengwer, “the formation of CFAs by non IP communities is yet another clear and open sign of the government’s determination to sustain their marginalization. According to them, *“although the IPs claim ancestral ownership of the forests, other people who have neither any attachment nor knowledge of the forests are given the mandate to be managers of the forest, in exclusion of the owners”*.”

¹²⁷ Social Assessment: 57.

¹²⁸ Social Assessment: 57.

191. The Panel also notes that the issue of costs and benefit sharing emerged as a serious bottleneck because a clear and equitable revenue sharing policy between communities and KFS was not elaborated. As noted, the value of benefits shared with the communities depends on their negotiation abilities, a situation which has led to some communities not realizing tangible benefits and hence leading to low community participation.

Livelihood Support Activities

192. As part of the restructured NRMP and in order to operationalize the IPPF, the Project undertook to develop Vulnerable and Marginalized Groups Plans (VMGPs), which as mentioned earlier and according to the Bank, are equivalent to Indigenous Peoples Development Plans (IPPs) as referred to in OP 4.10.¹²⁹ The VMGP for Markwet aimed at “ensuring that IPs could receive culturally appropriate social and economic benefits and that potential adverse effects resulting from Project activities could be identified, avoided, minimized, mitigated, or compensated for.”¹³⁰

193. The VMGPs were developed based on the findings of the SA, which recognized that historically the Cherangany-Sengwer were hunter-gatherers, dependent on the forest for its socio-cultural and economic sustenance, and that while they are still a community with strong ties to the forest, they have changed over the years engaging also in conventional farming and small scale enterprises. The SA also noted that project activities resulting in restriction or loss of access to the forest could result in adverse effects on the livelihood of the whole community. It also mentioned that the Cherangany-Sengwer lacked a mechanism to engage effectively with KFS and thus recommended to establish an institutional framework within the community that could develop an ongoing dialogue between KFS and the VMGs.

194. Following these recommendations, KFS facilitated the establishment of “clear structures of engagement with the Cherangany-Sengwer communities in Mt. Elgon and Cherangany Hills respectively.”¹³¹ The Project area was divided into four conservation zones which would be represented by four Vulnerable and Marginalized Groups Coordinating Committees (VMGCCs), elected by the people through community forums in the four zones.

195. A process, aided by the VMGCCs, was then established to develop the VMGPs and select livelihood support activities that “should act as mitigation measures against adverse impacts that may result from restrictions to the use of forest resources, e.g., payment of fees for various permits and licenses, by putting money in the pockets of the affected VMG and thus enabling them to put food on the table and generally uplift their livelihood status.”¹³² The following three types of actions were to be implemented through this VMGP: “(1) Actions aimed at capacity building of various VMGs’ groups and institutions as well as other stakeholders in various fields, including sensitization on NRMP/KFS activities; (2) Actions that are aimed at supporting organized VMGs’ groups to initiate livelihoods sub-projects (income generating activities) which are culturally appropriate and friendly to conservation objectives of NRMP/KFS; and (3) Actions that are geared towards employment creation for VMGs’ youth.”¹³³

¹²⁹ Restructuring Paper 2011: 8.

¹³⁰ Vulnerable and Marginalized Group Plan (VMGP) for Marakwet, 2011 (hereinafter VMGP for Marakwet): 1

¹³¹ Project Framework, Section 3.3.

¹³² VMGP for Marakwet 2011 : 9

¹³³ VGMP for Marakwet 2011: 9

196. The Process Framework, which informs the VMGPs, further noted that it was “imperative to tie the livelihoods support activities to the already existing livelihoods as much as possible.”¹³⁴ Selected activities included bee keeping, dairy and poultry farming, horticultural farming, sheep upgrading, and fish farming. The VMGP also proposed options such as water bottling and eco-tourism, but these were not implemented.

197. The Panel heard positive comments and appreciation regarding the benefits of the livelihood program implemented under the VMGPs. This appreciation was to such a great extent that many community members requested the Panel to convey to Management and KFS that the Project should be extended beyond its closing date and that identified beneficiaries should not be penalized because of procurement delays that have occurred at the Project level.

198. The most positive evaluations of livelihood support were aired by communities such as those in Chesebet and Kaibos, who did not claim forest land, did not fear eviction, had not experienced noticeable changes in user or access rights, and who therefore tended to regard livelihood support as a development project rather than as mitigation for harm. In turn, the most significant concerns were raised by community members in Kapolet and Kapsiro who feared and objected to the idea that livelihood support could mitigate for a loss of residence rights to land they claimed was rightfully theirs.

199. An additional objection was that livelihood projects had benefited some non-Cherangany-Sengwer. Requesters felt that other communities should not benefit in the same way from these projects, which in their view were designed for them. Due to the difficulties of distinguishing Cherangany-Sengwer from others, however, the allocation of benefits was conducted through local VMGCCs who were comprised of elected members of the Cherangany-Sengwer community. It was therefore the VMGCCs, rather than World Bank or KFS officials, who decided who would be a beneficiary.

200. On the other hand, in discussions with community members in other parts of the Cherangany Hills, it became clear that while some livelihood benefits had gone to non-Cherangany-Sengwer, this was not generally regarded as a problem but instead as a necessary measure to ensure cultural cohesion and to curtail complaints by non-Indigenous People communities that the Cherangany-Sengwer were enjoying unfair benefits.

3.5. Panel Analysis and Findings on Issues of Compliance and Harm

201. From the outset, the Panel notes the many positive comments expressed by community members with whom the Panel interacted during its visits regarding the benefits of the livelihood support program implemented under the Project following the restructuring. It is clear to the Panel that through the support for alternative and culturally appropriate livelihoods, the VMGPs had a significant and positive impact on many members of the affected communities who received benefits under the Program. The Panel also heard comments by KFS officials who appreciated the VMGP as it provided a more constructive platform for communication and interaction with communities.

¹³⁴ Process Framework, Section 3.3

Use of the Term “Indigenous Peoples”

202. **The Panel finds that the use of the term VMGs instead of Indigenous Peoples does not in itself amount to non-compliance with OP/BP 4.10** because the policy does not require its use to ensure the protection of the rights included therein. It is noted that the African legal framework¹³⁵ does not require States to use the term “Indigenous Peoples” either. Thus, in the context of the NRMP, Bank policy can be implemented in the absence of the use of the term Indigenous Peoples.

203. At the same time, the Panel notes that for the Cherangany-Sengwer the term Indigenous Peoples is central to their self-identity and therefore for the protection of their customary rights. The Panel fully recognizes the complexity of applying the term Indigenous People to many communities, particularly when, according to Management, the GoK has already expressed its position about these designations. The Panel is also cognizant that in some contexts or countries, its use (or omission thereof) could have political ramifications with consequences that go beyond any given specific project.

204. Nonetheless, it is the Panel’s view that meaningful compliance with the Indigenous Peoples Policy calls for more consideration to be given to a community’s attachment to a particular designation through greater consultation and, in ensuring that the use of any other designation does not dilute the full customary rights of IPs as enshrined in OP 4.10.

Livelihood Support and Customary Rights

205. Livelihood support is presented in the Project documents and in Panel interviews with Management as having two objectives: (i) to “improve the livelihoods of communities participating in the co-management of water and forest resources,” and (ii) as a “mitigation measure for reduced access of IP communities to reside within and use forest resources.”¹³⁶ In the restructuring design, it was the Process Framework that was intended to address access to forest and user rights of affected people.

206. The Panel notes that the focus on livelihood support, whilst beneficial to recipients, represented a move away from a focus on the protection of customary rights to forest resources. This shift was apparent in the Vulnerable and Marginalized Group Plans (VMGPs), presented as “the equivalent to IPPs in Kenya.” The VMGP for Marakwet, for instance, made no reference to customary rights as an intervention area. The concept of “customary rights” was not mentioned in the document, which instead used the term “customary livelihoods.”

207. Regarding the specific consequences of restructuring, the VMGPs of Marakwet, for example, listed a series of livelihoods-centered activities including water bottling, rehabilitation of degraded forest areas and farm forestry, bee keeping, dairy farming, and the like. In contrast, the SA had captured a very different view of the concerned indigenous peoples with regards to livelihoods, where they argued for an integrated approach to livelihoods which cannot be sustainably supported without redressing their situation of landlessness: “In their own words: The most important mitigation measure which will calm down our fears and concerns is to give us land: *Bila makao, siwezi kufanya kazi na wewe.*”

¹³⁵ African Commission on Human and Peoples Rights, 2005, Report of the African Commission’s Working Group on indigenous populations/communities, Banjul, the Gambia.

¹³⁶ VMGP for Marakwet: 8.

208. While acknowledging the difficult environment and the long standing conflicts between KFS and forest communities, the Panel finds that Project activities aimed at participatory management of forests and engagement with communities, which are aligned with the OP 4.10's objectives, were not followed up and implemented, especially after restructuring, as required by paragraph 21 of OP 4.10. **The Panel therefore finds non-compliance with Paragraph 21 of OP 4.10 because the proper steps required to address the potential loss of customary rights were not taken as provided by the Policy.**

209. This issue stems in part from the ambitions of the original IPPF to use the Project to bring forest policy in line with the draft land policy. Given that the land policy remained a draft and that these ambitions of the original IPPF were not owned by KFS and integrated into the design and preparation of the Project, this instance of non-compliance with paragraph 21 of OP 4.10 noted above became almost inevitable.

210. Finally, and regarding the objection raised by the Requesters that livelihood projects had benefited some non-Cherangany-Sengwer, and that other communities should not benefit in the same way from the livelihood components, the Panel notes that the selection of the beneficiaries was undertaken by the VMGPs, and not by the Project itself. Furthermore, OP 4.10 (in a footnote to paragraph 12) states that when non-indigenous peoples live in the same area with Indigenous peoples, the IPP should attempt to avoid creating inequities for other poor and marginal social groups. The Panel acknowledges that from a development perspective, it would neither be feasible, nor desirable for the benefits of the VMGP to be given exclusively to one particular group, especially when communities are mixed or live in close proximity to each other, as in this case. Therefore, **the Panel finds that by ensuring that benefits from livelihood activities in mixed communities reach IPs as well as non-indigenous peoples, the Bank is in compliance with OP 4.10.**

Figure 5 Panel team meeting with Cherangany/Sengwer community



Adequacy of Consultation

211. Consultation and participation of indigenous peoples is particularly important in the context of OP 4.10 and its requirement of free, prior, and informed consultation leading to broad community support (see Annex for a full discussion of the FPIC concept). This provision requires the existence of opportunities for consultation at each stage of project preparation and implementation, for consultation methods appropriate to the social and cultural values of the affected communities, and for providing communities with all relevant information about the Project including potential negative impacts, in a culturally appropriate manner at each stage of Project preparation and implementation. When Indigenous Peoples are likely to be present in the Project area but their presence cannot be determined until subprojects are identified, the policy requires preparation of an Indigenous Peoples Planning Framework (IPPF), which is then integrated into the Project design.

212. OP 4.10 specifies that the IPPF document should be made “available to the affected indigenous peoples’ communities in an appropriate form, manner, and language....” and that “the document is disseminated using IPOs [Indigenous Peoples Organizations] and the appropriate national, regional, or local levels to reach indigenous peoples who are likely to be affected by the Project. Where IPOs do not exist, the document may be disseminated using other CSOs as appropriate.”

213. The IPPF, prepared by a GoK-hired international consultant, was drafted between November and December 2006. The Consultant’s plan of activities indicates a one day discussion with national stakeholders, a discussion with indigenous peoples of Mt. Elgon, and an all-inclusive IPPF workshop in Nairobi. The IPPF’s Annex 3 lists indigenous peoples, organizations, and experts that were consulted, including Ogiek and Cherangany-Sengwer indigenous organizations, community leaders and experts, including those from UN agencies and the African Commission. Annex 5 of the IPPF highlights indigenous peoples’ general comments captured during a validation workshop held in December 2006, indicating that “the indigenous peoples were generally pleased with the document.”¹³⁷

214. The IPPF covered a wide range of substantive issues, including customary land rights that were considered by the concerned indigenous communities as central to their cultural existence. The number of indigenous peoples involved in its drafting process, however, was limited, with representatives of some indigenous peoples’ organizations involved but not the communities themselves. There is no evidence of involvement of the concerned communities’ representatives of traditional institutions.

215. Similarly, the SA needs to be undertaken through “consultation methods appropriate to the social and cultural values of the affected indigenous peoples’ communities and their local conditions [with] special attention to concerns of indigenous women, youth, and children.” By “consultation methods,” the Policy refers to “methods (including using indigenous languages, allowing time for consensus building, and selecting appropriate venues) to facilitate the articulation by indigenous peoples of their views and preferences.”

216. The SA should be assessed on the basis of both the substantive issues that it addressed, as well as its approach to consultation with indigenous peoples’ communities. On substance, the SA covered a wide range of issues as required by OP 4.10, including historical land claims

¹³⁷ IPPF: 57.

by the Cherangany-Sengwer, their traditional political structures, various customary uses of the forests, existing legal national and policy framework, and implementation challenges facing indigenous peoples' rights in Kenya. Notably, the SA focused essentially on Cherangany-Sengwer and Ogiek, who were identified as indigenous peoples by the IPPF.

217. The SA captured the views of indigenous peoples' communities on several issues through matrixes showing both communities fears and suggestions in terms of mitigation measures. On the specific issue of forest demarcation, the SA specified that "forest boundary demarcation is one of the activities that NRM has slated for implementation which drew a lot of interest and hope during the consultative meetings.... This act of ignoring whole communities as if they don't exist has utterly shocked and disturbed the IPs over the years. For them, their independence will come when they are finally and amicably settled in a place of their choice, not far from the forest, and together as a community, especially for the Sengwer."¹³⁸

218. In terms of methodology, the SA took a broad approach, combining semi-structured interviews, focus group discussions, participatory sketch mapping, and validation, verification, and feedback workshops. The SA report indicates that "a total of 1,695 people participated in the consultative meetings in Cherangany Hills and Mt. Elgon. The consultative meetings were open to all segments of IPs, FACs¹³⁹ and CFA stakeholders including men, women, elders and the youth."¹⁴⁰ Most of the public meetings were also held in Swahili, a language used by most of the concerned indigenous peoples.

219. A weakness of the IPPF, PAD and SA is that they were all drafted in English and never translated into Swahili. During the field visit, the Panel team met several community members who asserted not knowing the content of the IPPF or the PAD. These documents were therefore accessible only to a limited number of the concerned indigenous community members. There is also no evidence of traditional institutions involvement in the consultations processes that led to these three documents.

220. Nonetheless, the wide coverage of substantive issues that met the concerned indigenous peoples' aspirations, and their dissemination through IPOs, resulted in these documents enjoying enthusiastic support by many members of the concerned communities and in a manner that was consistent with OP 4.10. Not surprisingly, none of these documents are questioned by the Requests. The Requesters informed the Panel that core Project documents developed during Project design, such as the IPPF and the PAD, contained elements of Project activities that were considered favorably by the Cherangany-Sengwer.

221. Following the approval of the restructuring by the Bank's Board of Executive Directors on June 24, 2011, the Bank's Country Office in Kenya organized a meeting with representatives of the Cherangany-Sengwer. This meeting discussed several issues, but the Bank did not disclose that the NRMP had just been restructured. The Summary Notes of this meeting indicate that Management observed that "the project was not intended to solve, nor was it capable of solving, longstanding land issues affecting historical land rights and resettlement." As a way forward, the participant Indigenous Peoples recommended a multi stakeholders dialogue, "including Ministry of Land [so as] to identify an action plan for addressing the bigger issues of resettlement and addressing historical land claims."

¹³⁸ Social Assessment: 41.

¹³⁹ Forest-Adjacent Communities.

¹⁴⁰ Social Assessment: 8.

222. On August 10, 2011 (i.e., more than 8 months after the restructuring was first suggested), the Bank informed representatives of Cherangany-Sengwer for the first time of the restructuring through a letter stating that the documentation is available upon request and will be posted on the GoK and the Bank's external website." **The Panel finds that the absence of prior consultation as well as the delay in disclosure of information regarding Project restructuring raises an issue of compliance with OP 4.10.** By the time the concerned Cherangany-Sengwer community members were informed, all decisions had already been taken.

223. Unlike the IPPF, PAD and SA, therefore, Project restructuring did not achieve any level of community support both because of a lack of appropriate consultation and because of the shift away from land rights issues as already discussed. There were important disagreements between the Cherangany-Sengwer and the NRMP on the focus and approach of VMGPs, as shown by an intensive exchange of correspondence.

224. Not surprisingly, restructuring became a turning point in the relationship between the Cherangany-Sengwer and the NRMP because of its negative impact on the trust between the GoK and the Bank on one side, and the Cherangany-Sengwer on the other. While Indigenous Peoples continued to argue for NRMP to keep land rights' issues within its overall objectives, even though KFS could not deliver on these, the implementing mechanisms of the restructuring, notably the VMGPs, focused on livelihoods instead.

225. Following the restructuring, the processes of adoption of VMGPs, however, were participatory. In the case of the VMGP for Marakwet for instance, 882 people participated in its consultation process that consisted of numerous steps, including schedules for the development of activities, meetings with the Zonal Manager and the District Commissioner, planning meetings with the VMGCC, and public consultations. The VMGPs of Marakwet indicates that: "the development of this VMGP was undertaken in a highly participatory manner. It involved consultations with various stakeholders including the NRMP staff at the headquarters level, the Zonal Manager and his staff and relevant government department at the district level including the District Commissioner and his staff, the department of livestock and the department of social services. High level consultations were also held with the VMGCC and the VMGs." In addition, as noted above, a dispute resolution process employing the assistance of an external mediator was initiated in 2011 to facilitate dialogue with communities.

Concluding Remarks

226. In summary, **the Panel finds that the earlier Project documents including the PAD, IPPF and SA led to strong support from parts of the community because of their wide coverage of key substantive issues in line with Indigenous Peoples' claims in a manner that was consistent with OP/BP 4.10.** The restructured Project, on the other hand, contrasted with OP 4.10's spirit and letter because it was developed without proper consultation. In addition, restructuring shifted away from a focus on customary rights. The VMGPs concentrated exclusively on livelihood activities, thus preventing the proper profiling of customary rights. In such a context, it became difficult to undertake effective free, prior and informed consultations leading to broad community support.

227. Regarding customary rights, therefore, the Panel notes that although the Project mapped these rights in its early stages, it then moved away from the concept of customary rights after restructuring. **The Panel finds that overlooking customary rights after Restructuring represents non-compliance with OP/BP 4.10**, particularly in relation to provisions in the Policy stating that, “the identities and cultures of Indigenous Peoples are inextricably linked to the lands on which they live and the natural resources on which they depend,” and that particular attention needs to be paid to “the individual and collective customary rights on lands and natural resources that indigenous peoples traditionally owned or customarily used or occupied.” Furthermore, and while the Panel appreciates the difficulties in the formation of CFAs, it notes that setting up PFM with forest-dependent people was central to the Project, and that by not pursuing this further, the Bank missed an opportunity to advance the Project’s objectives.

Chapter 4

Conclusions

228. This section presents the main conclusions of the report, building upon the main findings of the previous chapters.

229. At the outset, the Panel wishes to re-emphasize the critical importance and transformational nature of this Project and its development objectives in terms of capacity building of institutions to manage water and forest resources in a sustainable and participatory manner. These objectives are even more relevant in a country with high population growth rates, coupled with unsustainably high pressure on its natural resources. Furthermore, the Panel recognizes the significant achievements under the project to strengthen the management of water, forests, and other natural resources in the country.

230. The Panel recognizes that the aspirations inherent in the Project as elaborated in the initial Project documents (IPPF and PAD) of using the Project to resolve the long-standing historical land claims of Indigenous People were ambitious and commendable. The Panel is of the view, however, that these aspirations were not backed by sufficient analysis of potential risks during appraisal, and by the commensurate allocation of resources, both financial and human, that would have been required to plan and implement such a complex undertaking, made even more complicated by an environment that required the engagement of actors beyond the forestry sector; intentions were not fully backed by actions.

231. In the Panel's view, the Project's objective of improved management and protection of forests also required addressing the status of people (including Indigenous Peoples) that currently resided inside gazetted forests. This could have either entailed their relocation outside of the forests, the proper regulation of their access to resources, or allowing them to stay there. Forest realignment and demarcation, an activity under the Project, could also have potentially accelerated the need for resettlement of forest dwellers. Accordingly, the Project initially included (under subcomponent 2.2), financial resources for compensation and/or resettlement, conflict mitigation, and assisting such households with alternative livelihoods.

232. The Project therefore triggered OP 4.12, with the required preparation of a Resettlement Policy Framework (RPF), in addition to the Indigenous Peoples Policy Framework prepared in accordance with OP 4.10 on Indigenous Peoples. Consequently, measures were put in place to ensure that resettlement (if needed) would occur following Bank Policy, giving special consideration to Indigenous Peoples' customary rights and participation, and based on free, prior and informed consultations leading to broad community support. The RPF, however, was never operationalized in the form of a Resettlement Action Plan.

233. The Project experienced substantial delays in the startup period due to the disturbances following the 2007 elections, which also had an impact on Indigenous Peoples communities. As the Project was starting its implementation, there were incidents of forced evictions, triggered by complaints from downstream communities against the growing numbers of people in the forests following the influx of internally displaced people in the Cherangany Hills. The Panel commends the swift and consistent response of Bank Management when it became aware of these evictions. These actions included securing a moratorium on evictions in 2011, through which the GoK confirmed that no further evictions of people from the forests will be carried out until applicable safeguard instruments were put in place. Unfortunately, the

moratorium did not extend beyond the end of the Project and evictions resumed immediately thereafter.

234. Notwithstanding the swift response by the Bank, the question remains as to why the evictions were not foreseen and mitigated from the start of the Project, given that eviction of “encroachers” was a core activity of KFS’ predecessor, the Forestry Department, and had been repeatedly undertaken in the Cherangany Hills over many years.

235. While the original Project included supporting resettlement of people living in gazetted forests, the Bank decided during restructuring that resettlement activities would be taken out of the Project, with support for the more comprehensive resolution of land issues being limited to technical assistance and logistics support for national processes. The Panel notes that Bank Management in its Response stated that “no resettlement has been planned or financed under the NRMP in Cherangany Hills or in any other forested areas in the Project area. As a consequence, NRMP has not supported the preparation of resettlement plans under the forest component, as erroneously asserted in the Request.” Nevertheless, restructuring did not eliminate the GoK’s contractual obligation to carry out resettlement under the provisions of the Resettlement Policy Framework.

236. Approximately one-half of the staff of KFS continues to be forest rangers in the Enforcement and Compliance Department whose responsibility is to enforce forest boundaries and prosecute offenders. In other words, eviction of encroachers was a main task of this Department of the KFS before, during, and after the conclusion of the NRMP. Thus, the introduction of the practice of forest co-management, an essential part of the reform under the new Forests Act as well as a key objective of NRMP, required a major paradigm shift in the culture and functioning of KFS, a shift that called for significant and longer-term support to capacity building.

237. While the Project provided training to some NRMP staff in Participatory Forest Management and safeguard policies related to VMGs, the Panel is of the view that Management had not sufficiently identified the magnitude of what is required to make such a paradigm shift during appraisal, nor provided the corresponding support during implementation. The Panel considers that an in-depth appraisal of KFS could have led to a much more robust capacity building component for supporting KFS and to enable it to make the transition towards better community work. Recent events indicate that this yet to be fully achieved.

238. Furthermore, neither KFS, nor its predecessor, had a mandate to resettle the people they evicted as they had regarded anyone living inside gazetted forest as illegal encroachers. To regularize the situation of people living inside the gazetted forests, they would either have to be given the right to remain inside (in which case that portion of the forest would have to be de-gazetted through an act of Parliament), or to be allocated land to be resettled by the Land Commission (and presumably, local authorities), and facilitated in their resettlement by the Ministry of State for Special Programs. Management recognized the need for involving additional government entities that would be required to undertake such resettlement activities. The Restructuring Paper proposed “targeted contributions,” recognizing that a more comprehensive resolution of land issues will need to be addressed as part of the overall GoK-Bank dialogue, and through the provision of technical assistance at the ministerial level to support the functioning of the Inter-Ministerial Task Force to continue the land tenure and legacy related commitments. The Panel was informed by Management, however, that this

Task Force was dissolved in 2013 and its mandate absorbed by the Land Commission which is now starting to address these issues.

239. It is the view of the Panel that the issue of finding a permanent solution to the plight of Indigenous Peoples living in gazetted forests could not be approached “on the sidelines” of the Project, or as an “add-on” because the NRMP had a different focus and its implementing agency did not have the mandate to address the issue. The Panel welcomes the Bank’s assurance that it will continue its policy-level dialogue and support to the GoK’s processes and institutions mandated to pursue these issues.

240. In relation to the Requesters objections regarding the use of the term Vulnerable and Marginalized Groups rather than Indigenous Peoples, the Panel recognizes that the application of the term, Vulnerable and Marginalized Groups, is not in itself contrary to OP 4.10, nor is the inclusion of non-Sengwer community members as beneficiaries in the VMGP. Numerous non-Sengwers are living side by side with the Cherangany-Sengwers in the same or adjacent communities, and may be equally vulnerable or marginalized. The Panel recognizes the intermingling of communities that has taken place in and around the Cherangany forest areas. Nonetheless, it is the Panel’s view that the Restructuring Paper shifted the focus from customary rights to livelihoods support, and thus what followed in the Project was not in full compliance with the application of OP4.10. In addition, the lack of consultation of Indigenous Peoples during restructuring further alienated the Cherangany-Sengwer people, especially given the removal of their designation as “Indigenous People.”

241. At restructuring, rather than trying to address directly the issues of potential conflict between people’s customary rights and the need for protection of catchment forests, the Bank emphasized the implementation of small scale development benefits in the name of development plans for vulnerable and marginalized groups. The livelihood restoration measures attempted to play the role of fulfilling some of the requirements of a duly designed and implemented resettlement mitigation effort resulting from a restriction of access to resources. While the beneficiaries obviously appreciated these small projects, they were not part of a broader strategy on how to manage forest-people and conflicts that may arise, or to protect customary rights.

242. Nonetheless, the Panel notes the many positive comments expressed by community members with whom the Panel interacted during its visits regarding the benefits of the livelihood support program. The Panel also recognizes that the positive interaction between KFS and communities in the context of VMGP is likely to have contributed to better understanding and communication in what had been a tense relationship. The Panel notes that Management took a courageous decision to restructure the Project instead of simply cancelling it, which could have been an “easier way out” of the emerging situation.

243. The Panel observes that there is a need to properly understand the complexities of long-standing historical conflicts, particularly when they relate to land issues and Indigenous Peoples’ claims. The NRMP raised expectations regarding the potential for land allocation and a long-awaited solution to what the Cherangany-Sengwer considered their long-term legitimate claims that the Project was not able to meet. Neither was the NRMP successful in taking advantage of the opportunity to incorporate indigenous people in the management of

these forest resources, an approach that would have contributed towards the project's goals while also strengthening their historic claims and customary rights.¹⁴¹

244. The Panel also recognizes and appreciates Management's proactive stance towards the forceful evictions that are taking place after the closure of the Project, encapsulated in the Bank President's statement that the World Bank is not a "bystander." The Panel also appreciates the constructive and proactive engagement of the National Land Commission, as recently expressed by its Chairman, in resolving these issues.

245. Finally, the Panel acknowledges that the Project took place in the context of a very difficult political reality stemming from post-election violence that resulted in the displacement of hundreds of thousands of people, complex politics of ethnic struggles, as well as land ownership conflicts that have deep historical roots. This background greatly compounded the issues that the Bank encountered during the implementation of the Project.

246. Going forward, Bank engagement, through the high level policy dialogue currently ongoing, in pursuit of a longer term resolution to the issues of land rights of Indigenous Peoples and others living in gazetted forests is critical. It is the Panel's firm view that, despite the complexities of the issues it reviewed in this case and the challenges involved, the World Bank continues to be best equipped in terms of expertise, mandate and resources to support the GoK in resolving these issues, in the interest of sustainable development, the natural environment, and the protection of vulnerable communities, including Indigenous Peoples.

¹⁴¹ The Panel has previously encountered challenges related to land-use conflicts and has already presented its own recommendations to Management in the context of the Bank's ongoing review of its Safeguard Policies. The Panel has commented regarding Land Management: "Over the past years, there have been a growing number of complaints related to land use and land management projects. Panel cases have revealed a policy lacuna with respect to impacts from land management projects. How to address consequences for people's livelihoods from changes in rights to land and land based resources is not clear within the Bank's safeguards framework. Bank Management issued a Guidance Note on Land Use Planning noting that the Involuntary Resettlement Policy does not apply to such projects. In its investigation reports on projects dealing with land registration and land use management, the Panel has noted: (i) Inadequate assessment of social, political, institutional and legal risks during project preparation, (ii) Impact of such projects may warrant application of the policies on Involuntary Resettlement and Indigenous Peoples, (iii) Projects involving indigenous peoples should carefully assess the social and legal importance of collective titles for certain groups, (iv) Longer term impacts of land titling for tenure security of poor and marginal communities need careful consideration, (v) The importance of paying greater attention to changing social, political, institutional and legal circumstances in land related projects." The Panel considers that the above comments apply equally to NRMP in that the Project critically impacted on the rights to land and land based resources of IPs.

Annex A

Table of Findings

Issue	Panel Findings
1. Evictions Risks	<p>The Panel finds that no evictions were supported as part of the NRMP.</p> <p>More attention should have been given from the outset to identify risks for affected people and adequately mitigate for such risks as required by Bank Policies on Environmental Assessment, Project Appraisal, Indigenous Peoples, and Involuntary Resettlement.</p> <p>While commending Management for securing a moratorium on evictions in 2011, and acknowledging the challenges posed by the political and ethnic complexities as background, the Panel notes that the moratorium could instead have been identified as a critical risk mitigation measure during Project preparation.</p>
2. Resettlement in the NRMP	<p>The original Project design included frameworks to address the risk of evictions through the IPPF and the RPF, but no planning for their implementation occurred, and no resettlement plan was prepared for any forested area under the Project.</p> <p>The Panel finds that the lack of follow-up actions to the RPF through a RAP represents non-compliance with OP/BP 4.12 on Involuntary Resettlement.</p> <p>The Panel found incongruity between the Project documents and Management's position that no resettlement was planned under the NRMP.</p>
3. Analysis of Institutional Aspects	<p>The Panel finds non-compliance with the key provisions of OMS 2.20 (Project Appraisal), during initial Project design as they relate to the proper institutional analysis of the capacities of KFS. In this context, the Panel particularly highlights the challenges resulting from the implementation of activities that would have required multi-agency interventions, such as resettlement operations, given that Component 2 of the NRMP did not target any agencies beyond the KFS.</p>
4. Project Supervision	<p>The Panel finds that Management responded repeatedly and firmly and brought to the attention of the Borrower instances of non-compliance with social safeguards obligations, as required by OP/BP 13.05, including securing a moratorium on evictions.</p>
5. Use of VMGs instead of IPs	<p>The Panel finds that the use of the term VMGs instead of Indigenous Peoples does not in itself amount to non-compliance with OP/BP 4.10 because the policy does not require its use to ensure protection of the rights included therein.</p> <p>At the same time, the Panel notes that for the Cherangany-Sengwer the term Indigenous Peoples is central to their self-identity and therefore for the protection of their customary rights. It is the Panel's view that meaningful compliance with the Indigenous Peoples policy calls for more consideration to be given to a community's attachment to a particular designation through greater consultation and, in ensuring that the use of any other designation does not dilute the full customary rights of IPs as enshrined in OP 4.10.</p>

6. Customary Rights and Livelihood Program	<p>The Panel notes that the focus on livelihood support, whilst beneficial to recipients, represented a move away from a focus on the protection of customary rights to forest resources. The Panel finds that overlooking customary rights after restructuring represents non-compliance with OP/BP 4.10</p> <p>On the question of whether or not non-indigenous peoples living in the mixed communities with indigenous people should have benefitted from livelihood activities under the Project, the Panel finds that by ensuring that benefits from livelihood activities in mixed communities reach IPs as well as non-indigenous peoples the Bank is in compliance with OP/BP 4.10.</p>
7. Consultations	<p>The Panel finds that the earlier Project documents including the PAD, IPPF and SA led to strong support from parts of the community because of their wide coverage of key substantive issues in line with Indigenous Peoples' claims in a manner that was consistent with OP/BP 4.10.</p> <p>The restructured Project, on the other hand, contrasted with OP 4.10's spirit and letter because it was developed without proper consultation. The Panel finds that the absence of prior consultation as well as the delay in disclosure of information regarding Project restructuring raises an issue of compliance with OP 4.10.</p>

Annex B
The Concept of Indigenous Peoples in Africa and Customary Rights in the NRMP
Dr. Albert K Barume

1. The term “indigenous peoples” is a human rights construct, which has been contextualized and given a specific meaning for Africa by the regional human rights body, known as the African Commission on Human and Peoples’ Rights (hereafter the African Commission). In post-colonial Africa, the term “indigenous peoples” does not mean first habitants of a given land, country or region. Instead, the concept refers to a limited number of African communities, whose land-based cultures and livelihoods face extinction as a result of prejudiced opinions of their ways of life that lead to non-recognition of their rights over ancestral lands. These are mostly hunter-gatherers and nomadic pastoralist communities.

2. As put by the African Commission, “the term indigenous peoples is a term through which those groups ... who experience particular forms of systematic discrimination, subordination and marginalisation because of their particular cultures and ways of life and mode of production can analyse and call attention to their situation. It is a term through which they can voice the human rights abuses they suffer from - not only as individuals but also as groups or peoples. If genuinely understood in this way, *it is a term through which the concerned groups can seek to achieve dialogue with the governments of their countries over protection of fundamental individual and collective human rights.*”¹⁴²

3. This human rights-based meaning of the term “indigenous peoples” should not be confused with its etymological or generic one, presented in most dictionaries as meaning “originating from” “native of”, in exclusion of those who came from elsewhere to settle in the land or country. This is the meaning that comes to the minds of most people in Africa when they hear the word indigenous peoples. Consequently, “all Africans are indigenous as compared to the European colonialists who left all of black Africa in a subordinate position”¹⁴³, but this is not the meaning of the term “indigenous peoples” under African international human rights law.

4. The types of particular discriminations and historical injustices that lead some African communities to claim indigenous status, as understood by the human rights framework, include the fact that, most post-colonial African land laws were based on a premise that for traditional use and occupation of lands to be legally recognized and protected, it needed to be visible, permanent and sedentary. It was never taken into account that certain African traditional communities use and occupy lands almost invisibly and in a non-sedentary way, leaving behind almost no sign. These are mostly hunter gatherers and pastoralist communities that have a nomadic lifestyle, move around large areas, and whose livelihoods are based on hunting, gathering and continuing search for pastures, and thereby cannot be tied to one fixed place. The lands traditionally used and occupied by these communities looked thus as if they were unoccupied, empty, unused or belonging to no-one (*terra nullius*). Consequently, these lands were either declared States owned, declared protected areas for conservation, given to private owners or simply taken by neighboring dominant communities. This explains partly why most lands claimed as ancestral lands by communities that self-identify as indigenous

¹⁴² African Commission on Human and Peoples Rights, 2005, Report of the African Commission’s Working Group on indigenous populations/communities, Banjul, the Gambia, p.102

¹⁴³ Idem, p.92

peoples in Africa (mostly hunter gatherers and nomadic pastoralists) are either public lands, protected areas, privately owned or occupied by other communities.

5. Furthermore, negative ideologies and discriminatory views underpin the land dispossessions suffered by hunter-gatherers and nomadic pastoralists. Nomadic lifestyle, relentless search for pastures, hunting and gathering were and continue to be stereotyped as backward, outdated, unfriendly to national development and destined to disappear or fully integrated into the mainstream sedentary way of life construed around cropping and erecting durable structures on privately owned lands. Yet, hunting and gathering as well as nomadic pastoralism are livelihoods like any other on which millions of Africans depend and that should enjoy equal consideration and protection. The African Commission also concluded that “the favouring of settled agriculture over hunting, gathering and nomadic cattle herding has been instrumental in both marginalising and stigmatising some people and inspiring them to identify as indigenous groups”.

6. In a number of African countries, certain aspects of hunting, gathering and nomadic pastoralism have been transformed into criminal offences. In other cases, racial ideologies are often used to deny members of these African communities the right to human dignity or to be considered as full human being entitled to all rights, including over lands. A 2008 Report by African Commission noted that “practice of ‘Pygmies’ masters’ still persists in [some African countries]. This consists of an individual or a family holding Aka individuals or entire Aka families in their home or on their lands. The beneficiaries of this practice often talk about the Aka as “my Pygmies”, implying a proprietary relationship. Some of these ‘Pygmies’ have been passed down the family as inheritance to their current ‘masters’, whilst other ‘masters’ have returned from the forests accompanied by ‘Pygmies’ who then become theirs masters”. Can one expect such a ‘master’ to accept that he or she can own land on the same footing as “their pygmies”?

7. The international human rights regime on indigenous peoples is almost the only existing framework designed to redress social exclusion based on historical injustices, such as loss ancestral lands and collective identity, unrecognized livelihoods, disregarded traditional economies, cultures and ways of life.

8. In conclusion of its conceptual analysis and departing from the above human rights-based meaning of the term “indigenous peoples in Africa”, the African Commission made the following key remarks:

- The term “indigenous peoples” in Africa does not mean first habitants of a given land, country or region;
- Indigenous peoples are not found in all African countries because the historical injustices mentioned above did or do not occur in all of them, and consequently, not all African can claim to be indigenous under the human rights-based meaning of the term;
- Indigenous peoples in Africa do not seek special or new rights. Instead, they demand no more than enjoyment of all rights on an equal footing with their fellow nationals, including recognition and protection of their customary land rights;
- Indigenous peoples in Africa do not seek the right to self-determination for the purpose of secession. On the contrary, the concept is reputed to be a tool for inclusive governance, conflict resolution and sustainable development;

- Indigenous peoples in Africa are not just minorities, considering that in many African countries several ethnic groups can qualify as minorities, a concept which is also growing in scope to include religious, linguistic and other groups.

9. The contextualization of the concept “indigenous peoples” by the African Commission has enhanced dialogue and eased tensions between several African States and sections of their national populations that self-identify as indigenous peoples. It has also started to inspire domestic legal and policy frameworks on the continent, with a view to ensuring equality. In 2011, the Republic of Congo (Congo-Brazzaville) became the first African country to adopt a specific law on indigenous peoples targeting specifically “pygmies” peoples. In 2010, Central African Republic became the first African State to ratify the ILO Convention No.169 on indigenous and tribal peoples. Numerous other African countries, including Namibia, Cameroon, DR Congo, Morocco, Kenya and Burundi have either adopted specific policies, programmes, institutions or ensure that their communities that self-identify as indigenous people are represented in key political institutions, such as Parliaments.

10. Relevance of the term Indigenous Peoples in Kenya. Kenya is one of the African countries, where several communities self-identify as indigenous peoples. This section traces the Kenyan State’s practice and relevant provisions through its international obligations, domestic laws, national policies and programs. Kenya has ratified several key international instrument that guarantee indigenous peoples’ rights, including the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on Elimination of All Forms of Racial Discrimination (ICERD). The General Comment No.23 on Article 27 of the ICCPR specifies that “to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities.” The General Recommendation No.23 of the UN Committee on Elimination of Racial Discrimination (CERD) states that: “discrimination against indigenous peoples falls under the scope of the Convention and that ...indigenous peoples have ...lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.”

11. In 2008, the UN Committee on Economic, Social and Cultural Rights recommended the Kenyan State to “address disparities in the enjoyment of economic, social and cultural rights, including access to land, which particularly affect poor people in urban areas and minority and indigenous communities in rural areas”. The Convention on the Rights of the Child, through its article 30, makes explicit reference to indigenous children. On this specific article, a 2006 Kenyan Government Report indicated that “the life style of many of these minorities makes it difficult for the Government to develop suitable support programs for them. Most are nomadic from pastoral communities while others are hunter-gatherers. (para.466, CRC, CRC/C/KEN/2, 4 July 2006).

12. Similarly, the Convention on Biological Diversity (CBD) provides for indigenous peoples’ rights and requires States to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity”. Kenya has represented the Africa region in the CBD Technical Advisory Committee on Article 8(J) and one of its periodic reports reads: “the government involves indigenous and local communities in decision making and policy planning” The Report specifies further that under “Goal 9:

Maintain socio-cultural diversity of indigenous and local communities. ...the ministry of culture and social services has programmes... which examine the livelihoods of indigenous and local communities in connection with their utilization of biodiversity.

13. The ILO Convention No. 111 on discrimination (employment and occupation), another international instrument ratified by Kenya, provides for specific protection of indigenous peoples' traditional occupations, economies and industries deriving from their land rights. In 2010, the ILO Committee of Experts on Application of Conventions and Recommendations (CEACR) requested the Government of Kenya to provide "information on the legislative and policy measures taken in accordance with the constitutional provisions on the rights of minorities, including the land policy, and the impact of such measures in ensuring that indigenous peoples are able to engage in their traditional occupations and livelihood activities"

14. The African Charter on Human and Peoples' Rights (the African Charter), which is named after Kenya's capital city Nairobi where it was adopted in 1981, seeks to foster human rights on the continent, "taking into consideration the virtues ... historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights". At its 41st ordinary session, the African Commission made observations to a Kenyan Government report, underlining the continuing marginalization of indigenous peoples and the need for their legal protection.

15. In 2006, Kenya became the second African country to officially invite for a visit the United Nations Special Rapporteur on the rights of indigenous peoples, whose report recommended among others that "the rights of indigenous pastoralist and hunter-gatherer communities to their lands and resources, effective political participation and distinct cultural identity should be constitutionally recognized. Specific legislation should be correspondingly enacted, including affirmative action where necessary." Similarly, the Government of Kenya is reputed to have proposed and supported one of its national as member the United Nations Permanent Forum on Indigenous Issues (UNPFII)

16. Neither has the State of Kenya objected to the African Commission's ruling in the Endorois case, which states that "...violations of the African Charter by the Respondent State are those that go to the heart of indigenous rights – the right to preserve one's identity through identification with ancestral lands, cultural patterns, social institutions and religious systems. The African Commission, therefore, accepts that self-identification for Endorois as indigenous individuals and acceptance as such by the group is an essential component of their sense of identity."¹⁴⁴ On the contrary, in 2010, the Kenyan State submitted a report to the Human Rights Council-led Universal Periodic Review (UPR) and agreed to a number of recommendations, including to "implement the recommendations and decisions of its own judicial institutions and of the African Commission on Human and Peoples' Rights, particularly those relating to the rights of indigenous peoples;"¹⁴⁵

¹⁴⁴ African Commission on Human and Peoples' Rights, 276/03 : Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya, para.157

¹⁴⁵ UN Human Rights Council, Report of the Working group on the Universal Periodic Review, Kenya, 17 June 2010, A/HRC/15/8

17. The new Kenyan Constitution of 2010 defines “marginalized community” as including: “(c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or (d) pastoral persons and communities, whether they are— (i) nomadic; or (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole;”

18. The 2007 Kenyan Land Policy provides also for the rights of indigenous peoples, even if it calls them minorities: “Minority communities are culturally dependent on specific geographical habitats. Over the years, they have lost access to land and land-based resources that are key to their livelihoods. This follows the gazettement of these habitats as forests or national reserves or their excision and allocation to individuals, who subsequently obtain titles to the land. These communities have not been represented adequately in governmental decision making at all levels since they are relatively few in number. Their political and economic marginalization has also been attributed to the fact that colonial policies assimilated them into neighboring communities. In addition, the colonial Government alienated their lands through forest preservation policies, which effectively rendered them landless as they were denied the right to live in the forests. Colonial capitalism also led to the marginalization of hunter-gatherer communities at the expense of agricultural expansion.”

19. The Kenyan current Constitution and Land Policy adopt hence a pragmatic approach to the rights of indigenous peoples. They do not use the term “indigenous peoples” but they both firstly recognize historical injustices as justification for a particular attention required for hunter gatherers and pastoralist, whose traditional use and occupation of lands were unfairly not recognized and protected. Secondly, they enshrine constitutional, legal and policy mechanisms aimed at addressing the imbalances and protecting indigenous peoples’ rights to their land-based cultures, livelihoods and equal participation in the national affairs.

20. The 2010 Kenyan Government’s REDD Readiness Preparatory Proposal (R.RPP) related to climate change refers widely to the term “indigenous peoples”, as one of the key stakeholders different from local communities. It states, for instance, that “the Consultation and Participation Working Group to ensure a satisfactory process in terms of consultation and securing input from local communities and indigenous peoples.”¹⁴⁶

21. The current Kenyan legal and policy framework, including its Constitution and Land Policy, is favorable to substantive rights of indigenous peoples. This, has to do not only with the country’s international obligations, as summarized above, but also with the resilience of indigenous peoples, for example, through land claims made by several Kenyan communities. As early as 1911, Maasai communities went to court against the then colonial Kenyan Government, asserting the importance of their lands for the survival of their cultural identity and livelihoods that they felt were being pushed to extinction by competing interests. Furthermore, the numerous land-related national Commissions that Kenya has known, including the Kenyan Land Commission of 1931, the Lawrence Mission on Land consolidation and registration of 1965, and the Ndugu Report of 2003 recorded land claims based on long-standing occupation by hunter gatherers and pastoralist communities.

22. Kenyan domestic courts have also not been insensible to indigenous peoples’ land claims. In a High Court case filed by the Ilchamus community, which alleged violation of its

¹⁴⁶ Republic of Kenya, REDD Readiness Preparation proposal, Kenya, 2010, p.15

rights as guaranteed under international standards on indigenous peoples, the Court ruled that: “on the basis of evidence presented to this court... we find their description by the Electoral Commission of Kenya (ECK) as sub-clan of the Maasai extremely casual and unfortunate...the literature presented to us demonstrates exceptional solidarity in preserving their culture. In addition they proudly have all the attributes of the internationally recognized indigenous peoples”¹⁴⁷ The Kenyan Government has not appealed against the Ilchamus ruling. In a similar unprecedented ruling by a Kenyan Court in 2014, the Ogiek community was recognized as indigenous peoples. The Court concluded as follow:

“An indigenous community on the other hand has been defined in Article 1 of ILO Convention No. 169 on The Rights of Indigenous and Tribal Peoples, 1989 as :

“a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

“b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”

*This court adopts the said definition for the purposes of this case, and It is apparent from the definition that the distinguishing factor for indigenous communities is their historical ties to a particular territory”*¹⁴⁸ The Government of Kenya is reputed to have appealed against this ruling.

23. Concluding Remarks. The Concept “indigenous peoples” has been clarified and given a specific meaning that is consistent with the African context. This work by the African Commission has prompted dialogue between indigenous peoples and several African governments. A better understanding of what “indigenous peoples” means in Africa, has also led to relevant laws and policies in a number of countries, such as the Republic of Congo. The Kenyan legal and policy framework could be seen as one of the most progressive on indigenous peoples’ rights in Africa, even if it is yet to endorse and use consistently the term “indigenous peoples”. There are Kenyan laws and policy documents that guarantee substantive rights of indigenous peoples, as enshrined in international law. These include the current Constitution, Land Act and Land Policy. Other Kenyan policy and legal documents use the term “indigenous peoples”, including Kenyan governments on climate change and biodiversity issues. Overall, the state of Kenya could thus be considered as progressive and pragmatic on the issue of “indigenous peoples”, by paying little attention to terminologies and focusing of substantive rights of the concerned communities.

24. OP 4.10 adopts a similar pragmatic approach. It focusses on the substantive rights that should be protected and guaranteed to indigenous peoples, instead of the terminology. The Policy does not make the use of the term “indigenous peoples” mandatory. The African Commission recommends the same approach and calls upon African States to focus on the substantive rights that should be guaranteed to indigenous peoples, instead of the terminology.

¹⁴⁷ Ilchamus community v. Electoral Commission of Kenya and Attorney General of Kenya (judgment of 18 December 2006), Nairobi High Court Miscellaneous Civil Application no. 305, 2004.,

¹⁴⁸ Joseph Letuya & 21 others v Attorney General & 5 others [2014], ELC CIVIL SUIT NO. 821 OF 2012 (OS)

“Whatever the specific term to analyse and describe their situation will be, it is highly important to recognize the issue and to urgently do something to safeguard fundamental collective human rights. Debates on terminology should not prevent such action.”¹⁴⁹

25. All NRMP documents recognized Cherangany-Sengwer as indigenous peoples, whose culture and livelihoods were dependent on the concerned forest lands. The PAD indicated that “members of the Sengwer ethnic group are found in a structurally subordinate position in four of the project districts” (para.36, Project Appraisal Document, February 26, 2007). The Social Assessment pointed to the fact that “the Indigenous People living within (and the surrounding areas of) the Cherangany Hills and Mount Elgon forests are the Sengwer (also known as Cherangany)...” (para. 11). Similarly the IPPF underlined that “the Sengwer are the indigenous peoples to be addressed in the IPPF.” (P.15) and that “the Government of Kenya, recognizes that, given, their close association with land, forests, water, wildlife, and other natural resources, the physical relocation of indigenous peoples, or other measures which reduce their access to livelihood-related resources, has complex implications, and may entail significant adverse impacts on their identity, culture, and customary livelihoods.” (P.44)

26. The Restructuring documents referred also to Sengwer but as “vulnerable and marginalized groups” (VMGs), with a view to being consistent with the current Kenyan Constitution. “The restructured project will support preparation and implementation of what would be equivalent to IPPs in Kenya, called Vulnerable and Marginalized Group Plans (VMGPs).” This has raised the issue of whether the change of term amounted to a breach of O.P.4.10 and the African legal framework on indigenous peoples. Had the Restructuring not shifted away from the rights-based approach to addressing the Sengwer claims as done by the PAD and IPPF, the mere use of the terms “vulnerable and marginalized groups” (VMGs), would not have raised the issue compliance with the African international legal framework on indigenous peoples and O.P.4.10, which put emphasis on substantive rights instead of the terminology.

¹⁴⁹ African Commission on Human and Peoples Rights, 2005, Report of the African Commission’s Working Group on indigenous populations/communities, Banjul, the Gambia, p.102

Annex C
Free, Prior, and Informed Consent (FPIC)
Dr. Albert K Barume

1. The principle of free, prior and informed consent is interlinked to the State duty to consult indigenous peoples. It seeks to redress their exclusion from decision making processes. The right to be consulted is expected to enable indigenous peoples “decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation, and evaluation of plans and programs for national and regional development which may affect them directly.”
2. The right to be consulted is also seen as deriving from the overarching right to self-determination, by virtue of which indigenous peoples are entitled to “freely [pursue] their economic, social and cultural development.” The right to free, prior and informed consultation or consent is understood as a procedural right aimed at reinforcing enjoyment of substantive rights by indigenous peoples, including on lands and natural resources. The right to consultation should therefore not be an end in itself or serve other purposes than securing substantive rights for indigenous peoples, including over lands.
3. The principles of consultation and participation of citizens in public affairs are embedded in the Kenyan legal and policy framework. The 2010 Kenyan Constitution provides that “the State shall...encourage public participation in the management, protection and conservation of the environment.” The Constitution seeks also “to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; (d) to recognize the right of communities to manage their own affairs and to further their development.”
4. The Kenyan Land Policy, seeks to achieve, among others, “an economically, socially equitable and environmentally sustainable allocation and use of land”. The Policy is explicit on the participation of communities in decision making processes on lands and natural resources. “Land issues requiring special intervention, such as historical injustices, land rights of minority communities (such as hunter-gatherers, forest-dwellers and pastoralists) and vulnerable groups will be addressed. The rights of these groups will be recognized and protected. Measures will be initiated to identify such groups and ensure their access to land and participation in decision making over land and land based resources.”
5. The Kenyan Forests Act does not recognize land rights of communities residing within or dependents on forests. To operationalize the Forests Act 2005 principle of participatory forest management and benefit sharing, KFS has elaborated 8-step Participatory Forest Management Guidelines which are expected to deliver on the free, prior and informed consent and consultations of the PAPs/VMG in decision-making. The rights-based approach to the principles of free, prior and informed consent and consultation implies those indigenous peoples’ rights including over lands and natural resources should be identified, recognized and protected first before undertaking consultation. Otherwise, a consultation or FPIC exercise would likely serve other interests than those of the communities concerned. As a matter of fact, an effective FPIC or consultation is almost impossible in a context where indigenous peoples’ rights over lands and resources are not recognized and protected.

6. Policy 4.10 on indigenous peoples states that it “contributes to the Bank’s mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, human rights, economies and cultures of indigenous peoples.” OP 4.10 also recognizes the correlation between the substantive rights of indigenous peoples, including on lands, and their right to be consulted through free, prior and informed consultation: “The Bank recognizes that the identities and cultures of indigenous peoples are inextricably linked to the lands on which they live and the natural resources on which they depend. These distinct circumstances expose indigenous peoples to different types of risks and levels of impacts from development projects, including loss of identity, culture, and customary livelihoods.”

7. OP 4.10 sets the standards for consultation by stating that it must be free, prior, informed and lead to broad community support: “A project proposed for Bank financing that affects indigenous peoples requires... a process of free, prior, and informed consultation with the affected indigenous peoples’ communities at each stage of the project, and particularly during project preparation, to fully identify their views and ascertain their broad community support for the project.” The “Free” element requires indigenous peoples to be given an opportunity to freely express their views and opinions and without deception, duress, or pressure. The concerned indigenous peoples must be given needed time to develop and express their views. The “Prior” element provides for timing when indigenous peoples’ view should be sought. This should occur well before, as the whole consultation seek to ensure indigenous peoples take part in the decision making process. The “Informed” component of FPIC is of a wide scope and includes information disclosure in a culturally appropriate manner and language.

8. The type and forms of consultation should be shaped by the nature of the right or interest of indigenous peoples that are at stake as well as the national context. OP 4.10 indicates that “the level of detail necessary to meet the requirements specified [above] is proportional to the complexity of the proposed project and commensurate with the nature and scale of the proposed project’s potential effects on the indigenous peoples.

Annex D

Brief Biographies of Panel Consultants

Dr. Albert K Barume is an Africa-trained human rights lawyer with more than twenty years work experience in indigenous peoples' rights in Africa. He holds a PhD from a British University of the subject; he has published several books and articles on the situation of indigenous peoples on the African continent and he has worked for several national and international organisations, including the International Labour Organisation (ILO) as Senior Specialist on indigenous and tribal issues. Dr. Albert K. Barume is a current member of the African Commission's Working Group on indigenous populations/communities and he is actively involved in several international processes on indigenous peoples both at the regional and global levels.

Dr. Gabrielle Lynch is an Associate Professor of Comparative Politics at the University of Warwick and Chair of the *Review of African Political Economy* editorial working group. Her research interests include ethnic identities and politics, the indigenous peoples movement, elections and democratization, and transitional justice with a particular focus on Kenya. Gabrielle has published numerous journal articles and book chapters, and her first monograph – *I Say to You: Ethnic Politics and the Kalenjin in Kenya* – was published by the University of Chicago Press in 2011.

Mr. Charles Meshack is Head of the Tanzania Forest Conservation Group (TFCG) and has more than 15 years research and management experience in the field of participatory forest management, forest governance and forest land tenure. He has worked for different national ministries like the Ministry of Natural Resources & Tourism, Tanzania and international donors (World Bank, SIDA, Norwegian Embassy) and worked in the field in Mufundi as a Project Manager. Currently he acts as a Quality Control Adviser in different projects on improved village land tenure and governance and has formerly worked as a Participatory Forest Management expert in various projects. Currently he is co-implementing the research project 'Is Tanzania's Participatory Forest Management Program a Triple Win? Understanding Causal Pathways for Livelihoods, Governance and Forest Conservation Impacts', funded by the International Initiative for Impact Evaluation (3ie). Another research project currently underway refers to forest tenure in the country with the title 'Will REDD be successful in Tanzania? Practical issues of REDD implementation.

Annex E

About the Panel

1. The Inspection Panel was created in September 1993 by the Board of Executive Directors of the World Bank to serve as an independent mechanism to ensure accountability in Bank operations with respect to its policies and procedures. The Inspection Panel is an instrument for groups of two or more private citizens who believe that they or their interests have been or could be harmed by Bank-financed activities to present their concerns through a Request for Inspection. In short, the Panel provides a link between the Bank and the people who are likely to be affected by the projects it finances.

2. Members of the Panel are selected “*on the basis of their ability to deal thoroughly and fairly with the request brought to them, their integrity and their independence from the Bank’s Management, and their exposure to developmental issues and to living conditions in developing countries.*”¹⁵⁰ The three-member Panel is empowered, subject to Board approval, to investigate problems that are alleged to have arisen as a result of the Bank having failed to comply with its own operating policies and procedures.

Processing Requests

After the Panel receives a Request for Inspection it is processed as follows:

- The Panel decides whether the Request is *prima facie* not barred from Panel consideration.
- The Panel registers the Request—a purely administrative procedure.
- The Panel sends the Request to Bank Management, which has 21 working days to respond to the allegations of the Requesters.
- The Panel then conducts a short 21 working-day assessment to determine the eligibility of the Requesters and the Request.
- If the Panel recommends an investigation, and the Board approves it, the Panel undertakes a full investigation, which is not time-bound.
- If the Panel does not recommend an investigation, the Board of Executive Directors may still instruct the Panel to conduct an investigation if warranted.
- Three days after the Board decides on whether or not an investigation should be carried out, the Panel’s Report (including the Request for Inspection and Management’s Response) is publicly available through the Panel’s website and Secretariat, the Bank’s Info Shop and the respective Bank Country Office.
- When the Panel completes an investigation, it sends its findings and conclusions on the matters alleged in the Request for Inspection to the Board as well as to Bank Management.
- The Bank Management then has six weeks to submit its recommendations to the Board on what actions the Bank would take in response to the Panel’s findings and conclusions.
- The Board then takes the final decision on what should be done based on the Panel’s findings and the Bank Management’s recommendations.
- Three days after the Board’s decision, the Panel’s Report and Management’s Recommendation are publicly available through the Panel’s website and Secretariat, the Bank’s Project website, the Bank’s Info Shop and the respective Bank Country Office.

¹⁵⁰ IBRD Resolution No. 93-10; IDA Resolution No. 93-6.