

# **Structural Exclusion and Climate Finance Injustice in Kenya: Justifying a Rights-Based Benefit-Sharing Framework for Rural and Marginalized Custodians, analyzing the link between the custodianship crisis in the Voluntary Carbon Market (VCM) and the integrity of Kenya's Nationally Determined Contributions (NDCs)**

## **Section 1: The Nexus of Climate Finance, VCM Ambition, and NDC Integrity in Kenya**

### **1.1. Kenya's Climate Imperative and Conditional Ambition**

Kenya operates under a severe and escalating climate imperative, necessitating ambitious climate action despite contributing a relatively small share of global emissions. The country has already experienced significant macroeconomic and fiscal damage due to changing precipitation patterns, rising mean temperatures, and resulting extreme weather events such as droughts and floods. Between 2010 and 2020, adverse climate change-related events led to estimated annual socioeconomic losses ranging from 3–5 percent of the total Gross Domestic Product (GDP), primarily impacting the crucial agriculture and water sectors. This ongoing disruption underscores the urgency of investing in resilient infrastructure across all key economic sectors.

In response to this existential threat, Kenya has committed to ambitious climate mitigation goals, aiming for a 32% reduction in Greenhouse Gas (GHG) emissions by 2030 relative to the Business-as-Usual (BAU) scenario of 143 MtCO<sub>2</sub>e. The estimated funding requirement to support both mitigation and adaptation plans by 2030 stands at approximately USD \$62 billion, which is equivalent to about 55% of the 2023 GDP. The reliance on external funding to meet these targets is profound. The updated Nationally Determined Contribution (NDC) for 2030 indicates that only 21% of the estimated mitigation budget will be mobilized through domestic resources, leaving a critical balance of 79% conditional upon international support. This high degree of financial conditionality is projected to continue, with the proposed 2035 NDC target seeking a 35% abatement relative to BAU. Of the estimated USD 22.5 billion required for this 2031-2035 period, 81% (USD 18.34 billion) remains conditional on international support, including finance, technology transfer, and capacity building.

### **1.2. The VCM's Role and the Financial Imperative**

The Voluntary Carbon Market (VCM) is explicitly intended to serve as a principal vehicle for mobilizing the necessary private international capital to bridge this massive financial gap and implement Kenya's NDC. The Kenyan carbon credit market is projected to experience substantial growth, demonstrating its current and anticipated importance. The market size was estimated at USD 629.8 million in 2025 and is expected to surge to USD 4491.8 million by 2032, registering a Compound Annual Growth Rate (CAGR) of 32.4% during this period. The market has already issued approximately 52.4 million carbon credits through mechanisms like the Clean Development Mechanism (CDM) and various VCM standards.

Moreover, Kenyan VCM projects are projected to generate around 20 MtCO<sub>2</sub>e in reductions annually between 2021 and 2030, offering a cumulative mitigation potential of roughly 200 MtCO<sub>2</sub>e over the NDC period.

This reliance on the VCM indicates that the integrity and functionality of the market are not merely commercial issues but represent a **macroeconomic and sovereign financial risk** to the entire national climate agenda. The sheer scale of the required conditional financing—the 79% to 81% portion of the NDC budget—means that any systemic failure in the VCM threatens the country's ability to meet its global commitments and undermines its climate resilience efforts.

### **1.3. The Integrity-Injustice Link: How Social Failures Threaten NDC Credibility**

Despite its rapid expansion and significant projected value, the Kenyan VCM has attracted intense external scrutiny due to well-documented pitfalls concerning project quality and social equity. The global VCM has been criticized for generating low-quality credits based on inflated baselines and non-additional activities. If Kenya's domestic legislation does not robustly exclude such low-quality emission reductions, the overall market credibility suffers. Low-integrity credits enable corporate greenwashing and erode community trust, making it difficult for legitimate, high-impact projects to secure necessary investment.

The most critical threat, however, stems from the **custodianship crisis**. Many VCM projects in Kenya, particularly those involving Nature-Based Solutions (NbS) such as reforestation or soil carbon initiatives, depend entirely on the long-term cooperation and custodianship of rural, indigenous, and marginalized communities. Research consistently indicates that benefit sharing schemes in the Kenyan market have been exploitative, characterized by an unequal allocation of resource rights favoring developers and foreign institutions over the local communities whose land stewardship makes the credits possible.

This structural injustice directly translates into market and integrity risk. When communities feel disenfranchised and exploited, social conflicts arise, leading to project suspensions and reputational damage. This erosion of social license generates credit price volatility and constrains the necessary flow of private finance. Consequently, if Kenya's VCM cannot adhere to high-integrity social and environmental safeguards, such as those promoted by the Integrity Council for the Voluntary Carbon Market (ICVCM), the international finance required to meet the 79% to 81% conditional NDC target will remain volatile, insufficient, or simply fail to materialize.

Furthermore, resolving these social conflicts is crucial for Kenya's future ambition under the Paris Agreement. The transition from the largely unregulated VCM to compliance markets facilitated through bilateral Article 6 agreements promises greater scale, higher prices, and significantly enhanced revenue potential. However, this shift requires demonstrating robust domestic legal and institutional governance structures. Continued VCM social conflicts demonstrate a lack of preparedness for the stringent environmental and social safeguards of the operationalized Article 6.4 mechanism, potentially obstructing access to this superior compliance finance gateway.

Table 1 quantifies the financial dependency that makes VCM integrity an existential issue for Kenya's climate action plan.

Table 1: Kenya's Nationally Determined Contribution (NDC) Financial Reliance and VCM Scale

NDC Target Period	Total Mitigation Cost (USD)	Domestic Contribution (%)	Conditional International Support (%)	VCM Mitigation Potential (MtCO <sub>2</sub> e/year)
2020-2030	Approx. \$62 Billion (by 2030)	21%	79%	~20 MtCO <sub>2</sub> e (2021-2030)

NDC Target Period	Total Mitigation Cost (USD)	Domestic Contribution (%)	Conditional International Support (%)	VCM Mitigation Potential (MtCO <sub>2</sub> e/year)
2031-2035	\$22.5 Billion	19%	81%	<i>Requires high-integrity financing stream</i>

## Section 2: Manifestations of Structural Exclusion and the Custodianship Crisis

### 2.1. Defining Structural Exclusion in the Kenyan VCM Context

Structural exclusion describes the pervasive, systemic mechanisms that deny marginalized groups meaningful participation, equitable benefits, and control over resources essential for carbon projects, despite their function as indispensable custodians of critical carbon sinks. This dynamic reveals that existing benefit-sharing mechanisms are often exploitative and reflect a fundamental imbalance in resource rights, invariably favoring project developers and external entities over the communities that bear the opportunity costs of land-use restrictions.

### 2.2. Dispossession, Tenure Insecurity, and Resource Conflict

The expansion of carbon credit projects is fundamentally reshaping land use across Kenya. However, this expansion occurs in an environment where land tenure rules are frequently poorly defined, weakly enforced, or highly politicized, thereby exacerbating tensions and hindering effective climate change adaptation strategies for poor and marginalized communities. The security of land tenure is inextricably linked to access to other vital natural resources, such as water, even though the Constitution guarantees the right to clean and safe drinking water for every person.

For pastoralist communities, particularly in northern and arid regions, large-scale carbon offset projects have generated acute conflicts. These initiatives have been severely criticized for resulting in the dispossession of Indigenous communities, threatening traditional pastoralist livelihoods by restricting seasonal grazing routes, and prioritizing commercial interests above constitutionally protected local rights. In extreme instances, traditional territories of Indigenous Peoples, such as the Ogiek, have been subject to forced removals under the pretext of conservation, paving the way for carbon credits.

The legal system has affirmed these grievances through significant judicial action.

The *Osman & 164 Others* case served as a decisive intervention, challenging the establishment of conservancies associated with the Northern Rangelands Trust (NRT), particularly the Biliqo Bulesa Conservancy, which contributes a sizable portion of carbon credits to a major international offset project. The Isiolo Environment and Land Court ruled that the conservancies were established unconstitutionally, having lacked proper public participation and thereby violating the petitioners' constitutional property rights. This landmark ruling underscored that legal compliance and robust public participation are "non-negotiable pillars of equitable" development and resulted in the suspension of the affected carbon project. The court's decision established that social conflict stemming from inadequate consent and exclusion constitutes an unpriced financial and legal liability for developers and corporate buyers (e.g., Meta, Netflix). This means that the custodianship crisis directly feeds into a **product quality crisis**: credits derived from projects engaged in constitutional violations lack the integrity required for the high-value market.

### 2.3. Exclusion of Marginalized Groups: Gender and Youth Vulnerability

The structural exclusion extends acutely to marginalized demographic groups, notably women and youth. Women face profound challenges in claiming their share of VCM benefits due to entrenched land inequalities. They often lack title deeds, possess limited knowledge of their statutory rights, and are constrained by overlapping customary laws that dictate land control primarily through men. While Kenya's statutory laws, such as the Matrimonial

Property Act of 2013 and the Land Registration Act of 2012, grant women equal rights to land and property acquired during marriage, these egalitarian principles are seldom realized or enforced at the local level due to strong social norms discouraging their exercise. Indigenous communities and local people are frequently relegated to the status of mere "stakeholders to be consulted," rather than being treated as "equal partners" in the crucial decision-making processes governing carbon projects. This sidelining is compounded by a persistent deficiency in capacity-building initiatives, which leaves these communities, including persons with disabilities, ill-equipped to understand complex carbon contracts and defend their rights against land encroachments and economic exploitation. The existing legal provisions for resource sharing, while strong in the Constitution, suffer from a severe gap in **legal enforcement**, demonstrating that the mere existence of a right does not guarantee its operationalization in the face of deeply entrenched customary practices and power imbalances.

## **2.4. Social Integrity Failures and Reputational Damage**

The failure to establish just governance systems has led to severe social integrity crises that further compromise the Kenyan VCM's reputation. High-profile case studies reveal social harms extending beyond financial exploitation. For example, the Kasigau Corridor conservation project, certified by leading VCM standards and used by major global corporations, was subject to extensive allegations of sexual abuse, harassment, and exploitation by senior male staff over a period exceeding a decade.

Such incidents of social harm severely erode public and investor trust, generating massive reputational risk for the entire market. These failures confirm that the current system of safeguards, whether voluntary or newly regulatory, remains insufficient to protect vulnerable populations. As high-quality buyers increasingly demand credits verifiable through transparent and socially responsible benefit-sharing mechanisms, these governance failures directly undermine the VCM's ability to secure the long-term, high-integrity private investment necessary for Kenya's NDC fulfillment.

## **Section 3: Legal and Governance Deficiencies in Kenya's VCM Framework**

### **3.1. Constitutional Mandates and Gaps in Implementation**

The legal basis for equitable benefit sharing in Kenya is firmly anchored in the Constitution, specifically Article 69(1)(a), which mandates the State to ensure the "equitable sharing of the benefits accruing from the exploitation and utilisation of natural resources". This is a binding principle applicable to land, forests, water, and minerals.

However, historical reviews of natural resource policies have consistently highlighted a significant policy gap: a lack of adequate information and methodology for translating this constitutional mandate into tangible, equitable benefit-sharing arrangements. This failure has allowed VCM project proponents to define benefits narrowly—often confined to financial transfers or limited employment—with comprehensively addressing the full spectrum of costs borne by communities, such as foregone grazing rights or restrictions on water easements.

### **3.2. Analysis of Recent Legislative Developments (2023/2024)**

In an attempt to address the governance vacuum, the Kenyan government enacted the Climate Change (Amendment) Act 2023 and subsequently introduced the Climate Change (Carbon Markets) Regulations 2024. These laws are intended to provide a foundational regulatory framework for carbon trading, encouraging emission reduction projects, and explicitly supporting the implementation of Kenya's NDC. The legislation mandates the National Environmental Management Agency (NEMA) as the Designated National Authority (DNA), aligning domestic governance with UNFCCC guidance on Article 6 trading.

A key provision introduced to address community justice is the mandatory social contribution, requiring project proponents to provide an annual social contribution of at least **25% of the aggregate earnings** of the previous year to the impacted community. This

provision attempts to institutionalize financial benefit sharing and requires the proposed development of communities surrounding the project areas.

This approach, however, faces significant limitations. The attempt to fix social injustice through a specific, quantitative "rule" (the 25% ratio) fails to address the qualitative failure of governance—the dispossession of tenure rights and the exclusion from genuine decision-making (Free, Prior, and Informed Consent, or FPIC). Legal critiques suggest that this fixed ratio is simplistic; it may not adequately compensate for the complex costs and long-term stewardship contributions of the communities, nor does it necessarily reflect the crucial role of private investment in developing carbon projects.

This situation highlights the failure of a "rule-based" approach to achieve true equity compared to a comprehensive "rights-based" framework. Legislative action is necessary, but the current regulations risk being undermined by confusion and misinterpretation if they do not adequately address the root causes of resource conflict.

### **3.3. Governance Gaps and Accountability Failures**

Despite the new regulations, significant governance challenges persist, threatening the legal and financial certainty necessary for high-integrity investment. These include complex bureaucratic obstacles and weaknesses in climate governance capacity identified in earlier studies. Specifically, governance suffers from overlapping mandates between national and county governments, and persistent ambiguity regarding carbon ownership rights. This regulatory uncertainty increases the risk of market fragmentation, which complicates compliance for developers and deters high-integrity investors seeking clear, unified standards, such as those prescribed by the ICVCM Core Carbon Principles.

Furthermore, accountability and recourse mechanisms are critically weak:

1. **Integrity Assurance:** Verification and monitoring systems suffer from weaknesses, evidenced by instances of over-crediting, such as in certain cookstove projects. While a national registry infrastructure is under development to improve transparency, the absence of an operational Climate Change Council hinders unified oversight.
2. **Weak Grievance Mechanisms (GMs):** A major deficiency exists in providing timely, accessible, and effective justice for affected communities. A review of global VCM standards found that most have inadequate or non-existent grievance mechanisms, leaving Indigenous Peoples and local communities vulnerable and infringing upon their access to justice. While the UN Article 6.4 mechanism has recently adopted a robust Appeals and Grievances Procedure, its domestic applicability requires robust national governance structures. Kenya's reliance on complex, slow litigation (as demonstrated by the NRT cases) or non-mandatory project-level GMs is insufficient to ensure enforcement of social safeguards.

The limitations of the current accountability structure are detailed in Table 2.

Table 2: Gaps in Accountability and Grievance Mechanisms (GMs) in the Kenyan VCM Context

Mechanism/Standard	Level of Recourse for Communities	Core Deficiency	Applicable Governance Standard
Kenyan National Regulations (2024)	Enforcement dependent on NEMA (DNA) and County governments.	Lack of independent oversight; GMs are regulatory mandates without guaranteed enforcement or accessible legal aid for marginalized groups.	Climate Change Act/Regulations 2024
Voluntary Carbon Standards (VCS)	Highly varied; Gold Standard provides appropriate recourse,	Compliance is voluntary; recourse is often indirect and	Gold Standard/Other Standards

Mechanism/Standard	Level of Recourse for Communities	Core Deficiency	Applicable Governance Standard
	others are inadequate or non-existent.	standards-specific, leaving victims of non-GS projects vulnerable.	
UN Article 6.4 Supervisory Body	New Appeals and Grievance Procedure established May 2024.	Applicability limited to market mechanisms under Article 6; requires domestic legal framework (RBSF) to enable VCM project nesting and access to the international mechanism.	Paris Agreement Crediting Mechanism (Article 6.4)
ICVCM Core Carbon Principles (CCPs)	Mandates sustainable development benefits and robust safeguards.	Principles rely on Validation and Verification Bodies (VVBs). Compliance is voluntary and recourse is often indirect via VVB review, not a formal judicial channel.	High-Integrity Standard Setting

## Section 4: Justifying a Rights-Based Benefit-Sharing Framework (RBSF)

The structural necessity of moving from a deficient rule-based system to a comprehensive Rights-Based Benefit-Sharing Framework (RBSF) is justified by twin imperatives: domestic justice and international market credibility. The RBSF must simultaneously fulfill Kenya's constitutional mandate for equitable sharing and establish the governance standards required to unlock high-integrity, large-scale international climate finance.

### 4.1. Foundational Principles: Justice and Adaptation

#### Just Transition and Equity Principles

A just transition in Kenya requires mainstreaming the needs of gender, youth, vulnerable communities, and marginalized groups into climate action. The design of the RBSF must integrate and operationalize principles of justice, specifically by tackling the root causes of marginalization and inequality, ensuring that design and implementation are inclusive and transparent, and prioritizing interventions for the most at-risk communities. This approach prevents the unjust redistribution of climate risks and costs onto those least responsible for the crisis.

#### Alignment with the Global Goal on Adaptation (GGA)

The RBSF must legally integrate carbon finance with climate adaptation funding. Nature-Based Solutions (NbS), which underpin many VCM projects (such as REDD+ or soil carbon initiatives), are crucial pathways for adaptation, increasing the resilience and reducing the vulnerability of communities to climate impacts. The Global Goal on Adaptation (GGA), established under the Paris Agreement, emphasizes that adaptation strategies must integrate Indigenous and traditional knowledge, respect rights, and promote active involvement in local decision-making.

Since local communities bear significant costs from climate change (estimated 3–5 percent GDP loss annually) while simultaneously providing the crucial service of carbon

sequestration, the RBSF must legally recognize carbon revenue not solely as mitigation finance, but as a dedicated source of **adaptation compensation**. Benefit sharing must explicitly allocate funds toward critical local adaptation needs, such as ensuring water easements, improving access to clean water, and building resilient livelihood systems. This linkage ensures that VCM finance directly addresses immediate local vulnerabilities, enhancing long-term community resilience and fulfilling the goals of the GGA.

## **4.2. Comparative Analysis I: Lessons from Natural Resource Revenue Sharing**

The current approach to carbon benefit sharing in Kenya, exemplified by the fixed 25% mandatory ratio, borrows from simplistic resource revenue sharing models but lacks the legal and operational sophistication developed in the extractives sector (minerals, oil, and gas).

Globally, sophisticated frameworks exist where over 30 resource-rich countries utilize distinct rules to govern non-renewable resource revenue distribution, often transferring funds back to the area of origin to compensate for resource depletion and the associated social and environmental impacts. This model is designed to raise local living standards and compensate affected areas.

In the African context, countries like the Democratic Republic of the Congo (DRC) have adopted structured governance systems for forest carbon. The DRC's National REDD+ framework employs a hybrid centralized-decentralized "nesting" model. This system credits emissions reductions at both national and project levels, stimulating private investment while the government maintains control over the final distribution of benefits according to a pre-defined distribution key. This approach offers a precedent for integrating VCM projects into national NDC management while maintaining distributional equity. The IFC, in its guidance on benefit sharing in the natural resource sector, emphasizes that no single blueprint works, and equitable sharing requires informed judgment from diverse experts (legal, environmental, finance) tailored to local context, moving away from rigid, one-size-fits-all ratios.

## **4.3. Comparative Analysis II: Leveraging Biodiversity Protocols (Nagoya)**

The principles of the Nagoya Protocol on Access and Benefit-Sharing (ABS) from genetic resources offer a robust governance model directly transferable to NbS carbon projects. The Nagoya Protocol emphasizes the importance of legal certainty, predictability, transparency, fairness, and equity in negotiations.

Applying Nagoya's rigorous standards to the carbon sector would necessitate moving beyond mere "consultation" to mandating legally binding agreements. This would require project proponents to secure **Prior Informed Consent (PIC)** and establish **Mutually Agreed Terms (MATs)** with communities for utilizing their carbon sequestration capacity, mirroring the utilization of genetic resources. This elevates community engagement from a tokenistic exercise to a legally required, binding partnership status.

This emphasis on *ex-ante* legal certainty is critical. The judicial conflict seen in the NRT case demonstrates that attempting to fix social and land rights issues *post-hoc* leads to lengthy litigation, financial volatility, and project suspension. For Kenya to attract high-integrity finance (compliant with ICVCM CCPs and ready for Article 6 mechanisms), developers and communities require clear, enforced rules on carbon rights and benefit distribution enshrined in law *before* project inception. By aligning VCM governance with the sophisticated principles of Nagoya and existing natural resource laws, Kenya can establish a consistent jurisprudence for natural resource governance, mitigating conflict risks caused by disparate legal treatment of different resources.

# **Section 5: Architecture of the Proposed Rights-Based Benefit-Sharing Framework (RBSF) for Kenya**

The Rights-Based Benefit-Sharing Framework (RBSF) is designed to systematically dismantle structural exclusion by institutionalizing justice, thereby restoring VCM integrity and securing long-term conditional climate finance. The framework is built upon four mutually reinforcing pillars.

## **5.1. Pillar 1: Legal Certainty, Secure Carbon Tenure, and Co-Ownership**

The absence of clear ownership rights over carbon (the emission reduction or removal credit itself) is a primary driver of conflict and unequal benefit allocation.

### **Defining Carbon Rights and Co-Ownership**

The RBSF must mandate legislative amendments to national laws, such as the Community Land Act and the Carbon Market Regulations, to legally define and vest carbon rights in recognized collective governance structures, specifically the Community Land Management Committees, for projects situated on communal lands. This move uses the economic leverage of VCM finance as a catalyst for the formalization and enforcement of land tenure, tackling the root cause of marginalization.

Furthermore, the framework must move beyond consulting communities to legally mandating **co-development and co-management** structures. This means requiring indigenous and local communities to hold equity partnership status in project proponents, ensuring they share in the financial risk, governance decisions, and long-term economic rewards. This institutionalizes the judicial affirmation of community rights established in recent court rulings.

### **Addressing Gender-Sensitive Tenure**

Pillar 1 must explicitly address the structural exclusion of women and youth. Tenure security provisions must be gender-sensitive, legally overriding customary laws where they conflict with women's statutory rights to land and inheritance. The RBSF must impose regulatory requirements on VCM governance structures to mandate minimum quotas for the participation of women and youth in project decision-making and benefit allocation committees, ensuring financial benefits flow beyond traditional male leadership.

## **5.2. Pillar 2: Full Free, Prior, and Informed Consent (FPIC)**

### **Compliance**

The recurrent failure of VCM projects to secure genuine community consent, resulting in court injunctions and project suspension, necessitates the elevation of FPIC from an optional safeguard to a binding regulatory standard.

The RBSF must establish FPIC as a mandatory legal prerequisite for all VCM projects operating on community lands. This requirement must be coupled with comprehensive, neutral capacity building, funding independent experts to ensure local communities fully comprehend the complex financial, contractual, and environmental implications of carbon trading. Crucially, the process must mandate verifiable, context-specific consent mechanisms that ensure the inclusion of marginalized subgroups (women, youth, persons with disabilities), preventing proponents from obtaining superficial consent solely from a narrow set of traditional leaders.

## **5.3. Pillar 3: Equitable Distribution Metrics and Adaptation Compensation**

The current system, exemplified by the fixed 25% social contribution, fails to account for the diverse contributions and costs borne by custodians. The RBSF proposes replacing this rigid system with a flexible, context-specific formula that recognizes three distinct categories of compensation, enhancing both fairness and sustainability:

1. **Custodianship Cost Compensation:** This mandatory baseline payment compensates communities for the financial and non-financial opportunity costs incurred by participating in the project, such as foregone grazing rights, restrictions on resource use, or water easements. This element ensures communities are compensated for the costs they bear, whether or not credits are successfully sold.

2. **Mitigation Contribution Profit Share:** A share of the net profit tied to the actual performance and sale of verified carbon credits, reflecting the financial value created by the community's stewardship.
3. **Adaptation Dividend:** A legally ring-fenced percentage of the gross project revenue dedicated exclusively to a community-managed climate adaptation fund. This dividend links carbon finance directly to local resilience building, funding critical needs such as water harvesting infrastructure, climate-resilient agriculture, and educational programs, ensuring the finance aligns with the spirit of the GGA.

Furthermore, the RBSF must legally mandate the quantification and delivery of non-financial benefits (e.g., improved access to health care, clean water, education, and capacity building) as specified, verifiable outputs within the Benefit Sharing Plan (BSP).

#### **5.4. Pillar 4: Independent Accountability and Redress Mechanism**

The current reliance on slow, expensive court processes or inadequate project-level GMs exposes communities to continued injustice. To provide accessible and rapid justice, the RBSF requires the establishment of a specialized, independent institutional mechanism.

##### **Establishment of a VCM Integrity Tribunal**

This pillar mandates the creation of an independent, quasi-judicial body—the **VCM Integrity and Appeals Tribunal**. This Tribunal would be shielded from political and bureaucratic influence and staffed by experts in environmental law, land tenure, and climate finance.

##### **Mandate and Powers**

The Tribunal must possess comprehensive jurisdiction and enforcement powers, including the authority to:

1. Investigate allegations of structural exclusion, fraud, inflated baselines , and severe social harm (e.g., sexual misconduct ).
2. Mandate project suspension or cancellation and order compensation/restitution for victims of injustice, leveraging the precedent set by the Kenyan courts.
3. Provide accessible redress mechanisms for marginalized groups, overcoming existing capacity gaps.

##### **Integration with International Standards**

The Tribunal must serve as the mandated domestic gateway for external scrutiny, facilitating complaints to the international UN Article 6.4 Appeals and Grievances Procedure and ensuring national compliance with the high standards of the ICVCM Core Carbon Principles. The institutionalization of this mechanism transforms compliance from reactive litigation to proactive, enforceable safeguard assurance, which is a requirement for high-integrity investors seeking stability in emerging markets.

Table 3 summarizes the architecture of the proposed RBSF.

Table 3: Core Components of the Proposed Rights-Based Benefit-Sharing Framework (RBSF)

RBSF Pillar	Core Component/Goal	Required Legal Instrument	Outcome for Custodians
<b>Pillar 1: Carbon Tenure &amp; Co-Ownership</b>	Legal definition of carbon ownership vested in community land structures; mandatory co-development.	Amendment to Community Land Act; Binding Corporate Regulations on co-ownership.	Guaranteed control over resource utilization; secure compensation for mitigation services.
<b>Pillar 2: FPIC Compliance</b>	Mandatory, transparent, and capacity-supported Free, Prior, and Informed Consent process.	Binding regulatory requirement for all VCM projects above a minimum size/value.	Full decision-making power; protection against land encroachment and exploitation.

RBSF Pillar	Core Component/Goal	Required Legal Instrument	Outcome for Custodians
<b>Pillar 3: Equitable Distribution Metrics</b>	Flexible compensation model valuing Custodianship Costs, Mitigation Contribution, and Adaptation Dividends.	Formulaic approach enshrined in Carbon Markets Regulations, replacing rigid fixed percentages.	Compensation for foregone benefits (e.g., grazing rights) and dedicated adaptation financing (water, infrastructure).
<b>Pillar 4: Independent Accountability</b>	Establishment of an Independent VCM Integrity and Appeals Tribunal with judicial powers.	Specific legislation establishing the Tribunal and granting powers of investigation, restitution, and project suspension.	Accessible, rapid, and enforceable access to justice and redress, aligned with Article 6.4 GM.

## Section 6: Policy Recommendations and Pathway for Implementation

The implementation of the Rights-Based Benefit-Sharing Framework is an indispensable step to align Kenya's VCM operations with constitutional justice principles and secure the reliable international finance streams critical to meeting its conditional NDCs.

### 6.1. Immediate Legislative Alignment and Harmonization

Kenya must prioritize rapid legislative action to secure the integrity of the carbon finance stream. First, the development and operationalization of a National Carbon Registry must be expedited to ensure full transparency, prevent double counting, and provide visibility on all registered projects. Second, a comprehensive regulatory review is necessary to harmonize the new Climate Change (Carbon Markets) Regulations 2024 with existing laws, including the Community Land Act and the Water Act, and the constitutional mandate of Article 69. This harmonization must clarify the complex relationship between national, county, and community jurisdiction over carbon ownership rights. Finally, the principle of Free, Prior, and Informed Consent (FPIC) must be enshrined as a binding regulatory requirement for all projects on communal land, enforceable by the proposed VCM Integrity Tribunal.

### 6.2. Institutional Capacity Building and Tenure Formalization

Effective implementation requires substantial investment in institutional capacity at all levels. Targeted capacity building must be provided to regulatory bodies, including NEMA (the DNA) and County Government Public Investment Management (PIM) units, enabling them to effectively appraise and monitor climate resilience projects. Simultaneously, substantial resources must be dedicated to funding independent legal and financial literacy training for marginalized custodians. By legally linking carbon rights to secure land tenure (Pillar 1), the RBSF uses the economic necessity of VCM revenue to incentivize and drive the formalization of community and women's land rights, directly tackling the fundamental structural causes of marginalization, thereby mainstreaming gender and youth inclusion within the Just Transition pathway.

### 6.3. Strategies for Restoring Investor Confidence

The long-term viability of the VCM depends on attracting high-integrity finance. To achieve this, Kenya must explicitly commit to aligning the RBSF and national credit issuance standards with the Integrity Council for the Voluntary Carbon Market's (ICVCM) Core Carbon Principles (CCPs). Adopting the CCPs, particularly the provisions related to effective governance and robust safeguards, provides an internationally recognized standard of quality necessary to unlock investment.

A crucial measure to clean the market is the implementation of a national vetting process for existing VCM projects. This process must require immediate and retroactive compliance with the new RBSF standards for FPIC and the Independent Tribunal redress mechanism. This

proactive integrity assurance will serve to address and resolve ongoing social conflicts, such as the NRT project issues , and clear the market of legacy low-integrity credits, stabilizing the financial environment.

## **6.4. International Engagement**

By implementing a robust RBSF, Kenya establishes a globally credible foundation for participating in Article 6 cooperation. The existence of a specialized VCM Integrity Tribunal, coupled with clear national governance standards, demonstrates Kenya's readiness to manage the strict social and environmental requirements of the compliance market. This transition is vital, as compliance market transactions offer significantly greater scale and higher prices than the volatile VCM, ensuring a reliable source of the conditional finance required for the NDC. Furthermore, Kenya can leverage this rights-based approach at international forums, presenting the RBSF as an actionable model for the "implementation" phase emphasized at upcoming COPs , effectively connecting climate justice, adaptation financing (GGA) , and market integrity, thereby setting a high benchmark for global climate finance equity.

## **Conclusion**

The structural exclusion of rural and marginalized custodians from Kenya's Voluntary Carbon Market constitutes a profound social injustice that concurrently acts as the primary systemic risk to the integrity and viability of the market. This custodianship crisis jeopardizes Kenya's capacity to achieve its Nationally Determined Contributions, which are critically dependent on 79% to 81% conditional international climate finance. Judicial precedents, affirming the violation of constitutional rights in major carbon projects, underscore that social conflict translates directly into project suspension and financial liability, damaging market credibility and deterring high-integrity investors.

The current legal framework, marked by regulatory fragmentation and a reliance on a rigid, rule-based approach (the fixed 25% ratio), is insufficient to overcome deeply entrenched governance gaps, particularly concerning land tenure security and the exclusion of women and pastoralist communities from decision-making.

The analysis necessitates a fundamental shift toward a comprehensive Rights-Based Benefit-Sharing Framework (RBSF). By institutionalizing four critical pillars—securing carbon tenure and co-ownership, mandating full FPIC compliance, implementing flexible compensation metrics that compensate for custodianship costs and include an adaptation dividend, and establishing an independent VCM Integrity Tribunal—Kenya can transform its carbon economy. This prescriptive architecture provides the necessary legal certainty and rigorous accountability mechanisms demanded by high-integrity international standards. Through the RBSF, Kenya can convert its VCM from a source of volatile risk and social injustice into a verifiable, sustainable engine for high-integrity climate finance, ensuring that the benefits of climate action flow equitably to the rural custodians whose stewardship underpins the national climate ambition.

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