



MEMORANDUM ON THE CLIMATE CHANGE (AMENDMENT) BILL 2023

PRESENTED TO:

MINISTRY OF ENVIRONMENT, CLIMATE CHANGE AND FORESTRY

SUBMITTED TO:

PRINCIPAL SECRETARY,

STATE DEPARTMENT OF ENVIRONMENT AND CLIMATE CHANGE

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PURSUANT TO PUBLIC NOTICE FOR PUBLIC COMMENTS ON THE CLIMATE CHANGE BILL 2023

SUBMITTED COLLABORATIVELY BY:

TRANSPARENCY INTERNATIONAL KENYA (TI-KENYA)

AFRICAN GROUP OF NEGOTIATORS EXPERT SUPPORT (AGNES)

AND

CENTRE FOR MINORITY RIGHTS DEVELOPMENT (CEMIRIDE)

BACKGROUND

Transparency International Kenya (TI-Kenya), the African Group of Negotiators Expert Support (AGNES), and the Centre for Minority Rights Development (CEMIRIDE) have collaborated to prepare a joint memorandum for the Climate Change (Amendment) Bill 2023.

To facilitate progress and achievement of the mandate of the Paris Agreement, Article 6 of the Paris Agreement provides cooperative approaches which countries can use to achieve the ambition of their Nationally Determined Contributions as communicated to the United Nations Framework Convention on Climate Change (UNFCCC). Article 6 describes two market approaches and one non-market approach for “voluntary cooperation”, which Parties use, that is, Bilateral or multilateral cooperative approaches, where Parties can transfer “internationally transferred mitigation outcomes” (ITMOs) to facilitate the achievement of their NDCs (Article 6.2); A centrally governed crediting mechanism to support sustainable development under the auspices of the Paris Agreement (Article 6.4). Emission reduction units can be issued for activities authorised by Parties and then be acquired by other Parties; and A framework to promote non-market approaches (Article 6.8).

Further guidance, rules, modalities, and procedures for the operation of the market approaches, and a work programme under the non-market approach have been concluded by Parties under the UNFCCC. Individual Parties are therefore expected to develop relevant policies, laws, regulations, and institutional frameworks to facilitate the implementation of the decisions taken under the UNFCCC on cooperative approaches.

In 2023, the Ministry of Environment, Climate Change and Forestry published the Draft Climate Change (Amendment) Bill of 2023, inviting comments. According to the Memorandum of Objects and Reasons accompanying the Bill, the proposed legislation seeks to provide a framework for the development and implementation of market and non-market approaches as well as benefit-sharing mechanisms relating to the said approaches.

OVERALL ASSESSMENT

After a careful look, we made the following observations.

1. Scope of the Amendment Bill

The proposed law focuses on carbon markets and the appointment of representatives of non-state actors to the council. We believe the scope should accommodate other sections that have not been implementable since the Parent Act was enacted. Other than the Council, it has not been possible to establish and operationalize the climate change fund provided for under Section 25 of the Parent Act.

2. Role of the Climate Change Council

The Parent Act assigned administrative responsibilities to Council, which we believe was ill-advised. We believe the Council should be an advisory body providing overarching oversight. We have therefore proposed a new governance structure that introduces a technical committee chaired by the Cabinet Secretary responsible for Climate Change Affairs to perform administrative responsibilities and report to the Council. The Technical Committee is broad and accommodates all the key sectors through State Departments.

3. Alteration to the representation of non-state actors in the Climate Change Council

We note that this has been a challenge since the Act was enacted. However, we still believe that with defined nomination criteria, non-state actors can have a role in the nominations of their representatives. We have proposed new language and a nomination criterion for your consideration.

4. Benefit Sharing Mechanism

The conversation on benefit sharing has been ongoing in the country, especially under the Mining Act. The Natural Resources (Benefit Sharing) Bill, 2022, is before Parliament. This bill should cross-reference the relevant sections of the Natural Resources Benefit Sharing Bill as appropriate. It should also borrow from the CDA Regulations under the Mining Act for consistency and to avoid duplicity.

According to decision 2/CMA.3, a Party participating in the Cooperative Approaches under article 6.2 shall ensure that its participation contributes to the implementation of its NDC and long-term low-emission development strategy and the long-term goals of the Paris Agreement. The benefit-sharing mechanism should be designed in a manner that facilitates the implementation of the conditional component of Kenya's NDC through the implementation of priority areas identified in the National Climate Change Action Plan. This should also factor in the provision for a share of proceeds for adaptation which is strongly encouraged in 2/CMA.3. It might help to have separate clauses for the Compliance Market and Voluntary Market since benefit-sharing under each might take a different form.

5. Carbon Market Standards

While some international Institutions/Bodies develop standards, it is imperative to have a national body/institution responsible for the development of standards.

6. Integration of Indigenous People and their Issues in the Act

While the parent act provides for the representation of Indigenous People in the Council through the representative of Marginalized Groups, we believe that the unique circumstances of these people should be integrated into the amendment bill as appropriate. For example,

- The bill should recognize indigenous peoples and their rights, as this will provide for the need for consultation and consent in the implementation of climate change projects.
- Appreciate the place of the National Action Plan (NAP) on Business and Human Rights (BHR) that provides for the need for protection of the rights of indigenous peoples and their prior consultation and consent to development projects in the implementation of Climate Change Projects.

SPECIFIC COMMENTS TO THE BILL AND ADDITIONAL PROPOSED AMENDMENTS

Part in the Amendment Bill	Title and Clause in the Amendment Bill	Current Provision in the Amendment Bill	Proposed Recommendations	Rationale/ justification for amendment recommendation
Amendment of section 2 of No. 11 of 2016	“whitelist” means	No provision	“whitelist” should have a clear definition.	This will ensure uniformity in interpretation as the word is used in other sections of the bill.
		No provision	We propose an inclusion of the definition of “Impacted Community”.	This accounts for inclusion in the carbon markets and provides reference points in cases of the community development agreement and conflict resolution the definition of who impacted community are
Amendment of section 4 of No. 11 of 2016.	Section 4	Section 4 of the principal Act is amended in subsection (2) by deleting the words “in accordance with the Schedule” appearing in paragraph (f).	The current provision implies the deletion of the schedule. The schedule should not be deleted from the parent act.	The schedule provides the criteria through which public participation should take place. Public participation is paramount and it is not only a constitutional right but it is also provided for in Article 6 of the Paris Agreement
	Section 6 a (iv)	<i>Deleting the words “nominated by the most representative registered national umbrella)</i>	Reject the amendment. The provisions of the Act to remain as it is	CSOs should be allowed to choose their representatives.
Amendment of section 8 No. 11 of 2016.	Section 7	(bd) authorize the establishment of the REDD+ Registry and other sector registries to feed into the National Carbon Registry.	Provide for the establishment of County registries as well	County registries promote regional identification of carbon markets projects. This will increase access to carbon market information within the County as well facilitation of negotiations and agreements
Amendment of section 9 No. 11 of 2016.	Section 8 (a)	<i>Deleting the words “and shall report to the Cabinet Secretary”</i>	reject the amendment	The directorate should be checked and held accountable by the ministry.
OTHER PROPOSED AMENDMENTS IN THE PARENT ACT				

Amendment of the description of No. 11 of 2016		AN ACT of Parliament to provide for a regulatory framework for enhanced response to climate change; to provide for mechanism and measures to achieve low carbon climate development, and for connected purposes	The Principal Act is amended in its description by deleting the description and replacing it with the following: “AN ACT of Parliament to provide for a regulatory framework for enhanced response to climate change; to provide for mechanism and measures to achieve low carbon climate resilient development, and for connected purposes. It is also the instrument to facilitate implementation of national and international commitments.”	This is in consistency with the Paris Agreement
Amendment of section 2 of No. 11 of 2016	Interpretation	“Fund” means the Climate Change Fund established under section 25;	“the principal Act”, is amended in section 2 by deleting the definition of “Fund” and substituting therefore with the following definition “Fund” means the Fund established under section 25 of the Climate Change Act, 2016 pursuant to Section 24 of the Public Finance Management Act, 2012.	This is consistent with the provisions of the PFM Act, 2012
Amendment of section 3 of No. 11 of 2016	Objects and Purposes	(1) This Act shall be applied for the development, management, implementation, and regulation of mechanisms to enhance climate change resilience and low carbon development for the sustainable development of Kenya.	The Principal Act is amended by deleting the phrase ‘for the sustainable development of Kenya’ and replacing it with ‘for sustainable development and eradication of poverty in Kenya.’	This is in consistency with the Paris Agreement
Amendment of section 6 of No. 11 of 2016	Functions of the Council	(g) administer the Climate Change Fund established under this Act; and	Section 6 of the principal Act is amended by deleting paragraph (g) and replacing with the following: “advise the Climate Change Fund Board on legislative, policy and other measures regarding climate finance, as appropriate”.	This is consistent with the provisions of the PFM Act, 2012
		The Council shall provide an overarching national climate change coordination mechanism and shall— (a) ensure the mainstreaming of the climate change function by the national and county governments; (b) approve and oversee implementation of the National Climate Change Action Plan;	Section 6 of the principal Act is amended by deleting the section and replacing it with “The Council shall provide overarching climate change advisory and shall – (a) oversee the mainstreaming of the climate change function by the national and county governments; (b) advise the national and county governments on legislative, policy and other measures	The functions proposed fit the advisory role that the Council should undertake

		<ul style="list-style-type: none"> (c) advise the national and county governments on legislative, policy and other measures necessary for climate change response and attaining low carbon climate change resilient development; (d) approve a national gender and intergenerational responsive public education awareness strategy and implementation programme; (e) provide policy direction on research and training on climate change including on the collation and dissemination of information relating to climate change to the national and county governments, the public and other stakeholders; (f) provide guidance on review, amendment and harmonization of sectoral laws and policies in order to achieve the objectives of this Act; (g) administer the Climate Change Fund established under this Act; and (h) set the targets for the regulation of greenhouse gas emissions. 	<p>necessary for climate change response and attaining low carbon climate change resilient development;</p> <ul style="list-style-type: none"> (c) provide policy direction on research and training on climate change including on the collation and dissemination of information relating to climate change to the national and county governments, the public and other stakeholders; (d) provide guidance on review, amendment and harmonization of sectoral laws and policies in order to achieve the objectives of this Act; (e) Provide guidance on multilateral processes on climate change (f) advise the Climate Change Fund Board on legislative, policy and other measures regarding climate finance, as appropriate (g) Provide guidance on carbon markets“ 	
Amendment of section 7 of No. 11 of 2016	Members of the Council	<ul style="list-style-type: none"> (1) The Council shall comprise not more than nine members who shall be appointed by the President. (2) The Council shall be constituted as follows <ul style="list-style-type: none"> (a) The Cabinet Secretary responsible for environment and climate change affairs; (b) The Cabinet Secretary responsible for the National Treasury; (c) The Cabinet Secretary responsible for economic planning; (d) The Cabinet Secretary responsible for energy; (e) The chairperson of the Council of Governors; 	<p>Section 7 of the principal Act is amended by deleting the section and replacing it with</p> <p>“(1) The Council shall comprise not more than eight members who shall be appointed by the President.</p> <p>(2) The Council shall be constituted as follows</p> <ul style="list-style-type: none"> a) The Cabinet Secretary responsible for environment and climate change affairs; b) The Cabinet Secretary/Secretaries responsible for the National Treasury and Economic Planning; c) The chairperson of the Council of Governors; d) A representative of the private sector nominated in consultation with the Private Sector; 	The proposed new structure will be more effective in facilitating the implementation of the Climate Change Act

		<ul style="list-style-type: none"> (f) A representative of the private sector nominated by the body representing the largest number of institutions in the private sector; (g) A representative of the Civil Society nominated by the most representative registered national umbrella association of civil societies working on climate change; (h) A representative of the marginalised community within the meaning of Article 260 of the Constitution who has knowledge and experience in matters relating to indigenous knowledge; and (i) A representative of the academia nominated by the Commission for University Education. 	<ul style="list-style-type: none"> e) A representative of the Civil Society nominated in consultation with Civil Society Organizations; f) A representative of the marginalised community within the meaning of Article 260 of the Constitution who has knowledge and experience in matters relating to indigenous knowledge nominated in consultation with the marginalised community; and g) A representative of the academia nominated in consultation with the Commission for University Education.” <p>Note: Qualifications of appointees and conditions for appointment in Section 7 (3-6) of the Parent Act shall apply</p>	
Section 7bis			<p>Propose an additional section after section 7 as below.</p> <p>“</p> <ul style="list-style-type: none"> (1) There is established a Climate Change Technical Committee (2) The Committee shall be chaired by the Cabinet Secretary for the time being responsible for Climate Change Affairs (3) The Climate Change Secretary shall be the secretary to the Committee. <p>Functions of the Committee (Subsequent Section) The Committee shall provide an overarching national climate change coordination mechanism and shall—</p> <ul style="list-style-type: none"> a) ensure the mainstreaming of the climate change function by the national and county governments; b) approve and oversee implementation of the National Climate Change Action Plan; 	<p>The functions proposed fit the technical role that the Committee should undertake.</p> <p>The Climate Change Secretary is a new position created in the amendment bill.</p>

- c) approve a national gender and intergenerational responsive public education awareness strategy and implementation programme;
- d) set the targets for the regulation of greenhouse gas emissions and implementation of adaptation actions.
- e) Oversee the implementation of the carbon markets framework
- f) Approve proposals for funding through the Climate Change Fund.
- g) Facilitate implementation and tracking of the Kenya Nationally Determined Contribution
- h) Oversee the implementation of the Monitoring, Reporting, and Verification of Climate Change
- i) Provide technical guidance on climate change action and support as appropriate.

Members of the Climate Change Technical Committee (Subsequent section)

- (1) The Climate Change Technical Committee shall comprise not more than fifteen members who shall be appointed by the Cabinet Secretary for the time being responsible for Climate Change.
- (2) The Committee shall be constituted as follows.
 - a) The Permanent Secretary responsible for Climate Change;
 - b) The Permanent Secretary/Secretaries responsible for the National Treasury and Economic Planning;
 - c) The Permanent Secretary responsible for Energy;
 - d) The Permanent Secretary/Secretaries responsible for Crop Development and Livestock Development;

			<ul style="list-style-type: none"> e) The Permanent Secretary responsible for Industry f) The Permanent Secretary responsible for Blue Economy; g) The chairperson of the Committee responsible for Climate Change at the Council of Governors; h) A representative of the private sector nominated in consultation with the Private Sector; i) A representative of the Civil Society nominated in consultation with Civil Society Organizations; j) A representative of the youth, within the meaning of Article 260 of the Constitution, nominated in consultation with youth organizations/networks working on climate change; k) A representative of indigenous people, within the meaning of Article 260 of the Constitution, nominated in consultation with the indigenous peoples' organizations; and l) A representative of the academia nominated in consultation with the Commission for University Education <p>Note: Qualifications of appointees and conditions for appointment in Section 7 (3-6) of the Parent Act shall apply</p>	
		<p>2) The Council shall be constituted as follows</p> <ul style="list-style-type: none"> f) A representative of the private sector nominated by the body representing the largest number of institutions in the private sector; g) A representative of the Civil Society nominated by the most representative registered national umbrella association 	<p>Section 7 (2) (f-i)</p> <p>Introduce new subsection. “The Cabinet Secretary responsible for environment and climate change affairs shall develop regulations to guide the selection of the representatives in section 7(2)(f-i).”</p>	<p>1. The provision is creates uncertainty and vagueness since it is difficult to define, for example, “most representative registered national umbrella</p>

		<p>of civil societies working on climate change;</p> <p>h) A representative of the marginalised community within the meaning of Article 260 of the Constitution who has knowledge and experience in matters relating to indigenous knowledge; and</p> <p>i) A representative of the academia nominated by the Commission for University Education.</p>		<p>association of civil societies working on climate change”</p> <p>2. The provision may also lock out more CSO members than those allowed. There is the possibility of the most representative registered association having less numbers than the collective others which may include several other registered associations.</p> <p>3. The amendment creates a process that is not designed and owned by CSOs.</p> <p>4. The proposed amendment proposes a more detailed process which will allow the following;</p> <p>i. Consultations and negotiations between all stakeholders to develop a selection process that is participatory.</p> <p>ii. Regular review of the process of selection through regulations which are more flexible and amendable.</p>
Amendment of section 25	Climate Change Fund	(1) There is hereby established the Climate Change Fund which shall be a financing mechanism for priority climate change	The principal Act is amended in section 25 by: a) deleting subsection 1 and replacing with the following words “there is hereby established	This is consistent with the provisions of the PFM Act, 2012

of No. 11 of 2016		actions and interventions approved by the Council. (2-9) Other financial provisions	the Climate Change Fund for financing priority climate change actions, under section 24 of the Public Finance Management Act, 2012”. b) deleting subsections 2-9	
PART IVA—REGULATION OF CARBON MARKETS Carbon Markets				
Principles governing trade in carbon markets	Section 23B (c)	Carbon offset projects shall ensure that emissions are kept out of the atmosphere for a reasonable length of time	We propose an amendment of the section to include indicative time frames	Reasonable length of time is subject to different interpretations therefore vital to give a timeframe
Participation in carbon markets.	23C(2)(a)	The Cabinet Secretary may enter into a bilateral or multilateral agreement with another State Party to trade carbon for emission reductions and removals;	The bill is amended in section 23C(2)(a) by inserting the phrase “in consultation with the Attorney General, and with the approval of the cabinet” after ‘may’ and before ‘enter into’. The new paragraph will read. “The Cabinet Secretary may, in consultation with the Attorney General, and with the approval of the cabinet, enter into a bilateral or multilateral agreement with another State Party to trade carbon for emission reductions and removals;”	The AG’s office in charge of the country’s agreement hence should be involved in the process. The Cabinet should be involved in this to ensure there is consultation.
	23C(2)(b)	The Cabinet Secretary may with the approval of the Cabinet, enter into an agreement with a private entity to offset carbon emissions;	The bill is amended in section 23C(2)(b) by inserting the phrase ‘in consultation with the Attorney General, and’ between ‘may’ and ‘with the’. The section will read. “The Cabinet Secretary may in consultation with the Attorney General, and with the approval of the Cabinet, enter into an agreement with a private entity to offset carbon emissions;”	The AG’s office in charge of the country’s agreement hence should be involved in the process.
	23C (4)	The Cabinet Secretary shall, in the national reporting mechanism to the UNFCCC, include any emission reduction resulting from agreements entered into under this section.	Section 23C (4) of the bill is amended by replacing “the Cabinet Secretary” with “the National Designated Authority.” The section will read as below. “The National Designated Authority shall, in the national reporting mechanism to the UNFCCC,	The Cabinet Secretary does not report to UNFCCC in his/her capacity as a Cabinet Secretary. This is the role of the National Designated Authority

			include any emission reduction resulting from agreements entered into under this section.”	
Provision of social and environmental benefits.	Section 23 E (5) (b)	Provision of an annual social contribution of at least twenty five percent (25%) of the aggregate earnings of the previous year to the community, to be managed and disbursed for the benefit of the community	It is suggested that this section of the Bill references the relevant provisions of the Natural Resource Benefit Sharing Bill for consistency. It is also suggested that clarity be provided on benefit sharing in the context of who shares the benefits, the buyer, the seller, or both. The body disbursing these funds should be specified.	Since this clause deals with allocation of resources, it should be very clear to allow for the highest levels of accountability. The body disbursing these funds should be specific for accountability and redress purposes
	23 E (5) (f)	manner of its review or amendment, which shall be at least every two years	The section of the bill is amended by replacing ‘two years’ with ‘five years.’	Two years is a very short time for a carbon project to have borne results. More time necessary to ensure the review is beneficial.
	23E (6)	A community development agreement entered into pursuant to this section shall be recorded in the National Carbon Registry.	The section is amended by including County Registry. The section therefore reads “A community development agreement entered into pursuant to this section shall be recorded in the County and National Carbon Registries.”	Having county registries will make reporting efficient, at the national level. It will also promote accountability and transparency.
	23 E (9)	The cabinet secretary may prescribe additional requirements relating to the formulation of the community development agreement	The section is amended by including “in consultation with the County Government.” The section will read, “The Cabinet Secretary in consultation with county government where the project is situated, may prescribe additional requirements relating to the formulation of the community development agreement.”	This will ensure checks and balance on the additional requirements that may be prescribed by the Cabinet Secretary. It will ensure that the requirements do not infringe on the rights of the impacted community and takes into consideration specific interests and needs of the community.
	23I (1)	Any dispute arising under this part shall be referred to the Principal Secretary responsible for climate change matters.	It is proposed that, In case of conflict as a result of carbon trade, ADR should be used before the case can be forwarded to the Principal Secretary. The national government, the county government, the investor and the community to get an arbitrator or mediator to lead the ADR. If the conflict is among community members, the community leaders (elders, chiefs) should lead the ADR.	

PROPOSED REGULATIONS FRAMEWORK FOR THE NOMINATION OF NON-STATE ACTORS' REPRESENTATIVES FOR THE COUNCIL AND TECHNICAL COMMITTEE

- i. Definition of civil societies working on climate change –
 - Registration? Focus area
- ii. Recognition
 - Association or individual organizations.
- iii. Mode of identifying representative;
 - Election or Selection
- iv. Composition of selection/election panel
 - Reporting? Diversity? Registration? Individuals? Institutions?
 - Selection criteria
 - My proposal is a selection process where the CS appoints a selection panel composed of different members who will interview the representative. Similar to the process for selection of commissioners of independent commissions.
- v. If elections; qualifications, officials, outcome, etc (Not advisable. Elections can yield undesirable results)
- vi. Process & grounds for removal of representative
 - Petition the CS?
 - Special meeting?
- vii. Terms of service
 - Period, renewable/non-renewable?