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The Legal Status and Role of Safeguards

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Abstract

The past decade has seen remarkable evolution in the field of international law in relation to the protection of human rights, though much of the law reflecting this evolution is either soft law or only binding at the domestic level. Businesses formerly insulated by the cover of private law, are receiving greater attention for their role in human rights abuses, a field generally defined and defended by public law. Almost in parallel, the role of states in protecting human rights outwith their borders has also shifted. Gone are the days when states simply looked the other way as the populations of another state suffered due to the neglect or offenses of their government. A collective conscience has evolved – a conscience that no longer tolerates human deprivation and suffering at the hands of actors that were formerly ‘off-limits’ for the purposes of global human rights scrutiny. This paper examines the expanding recognition of business as a human rights duty-bearer and how this expansion reflects the transitioning role of states through the responsibility to protect concept. The key to both developments lies in the need for states to focus on prevention by carrying out effective due diligence.

The Legal Status and Role of REDD+ Safeguards

Annalisa Savaresi

Introduction

The implementation of REDD+ activities and policies may have significant social and environmental impacts. On the one hand, restrictions upon forest uses associated with avoided deforestation and degradation may affect indigenous peoples and other forest-dependent communities' livelihood and means of subsistence. On the other, activities carried out to enhance forest carbon stocks, such as afforestation, may have negative impacts on biodiversity, by replacing biodiversity-rich non-forested landscapes with biodiversity-poor forest plantations. Furthermore, the implementation of REDD+ activities could be difficult in the context faltering regulatory environments that tend to characterise forest governance in developing countries. Awareness of these potential trade-offs and risks prompted the Intergovernmental Panel on Climate Change to warn that forest-based mitigation activities need to avoid negative impacts associated with competition between land uses.¹

Negotiations on REDD+ have witnessed a lively debate on how to avoid perverse outcomes and combine REDD+ activities and policies with the pursuit of co-benefits (or multiple benefits, as they have also been termed),² such as biodiversity conservation, improved forest governance and a wide array of societal advantages.

UNFCCC Parties' understanding on how to pursue this potential has evolved over time and is still in the process of forming. At the beginning of negotiations on REDD+, UNFCCC Parties merely recognised that REDD+ could promote co-benefits and complement the aims and objectives of other relevant international agreements and conventions.³ They subsequently recognized the importance of promoting co-benefits,⁴ and, eventually, of incentivizing so-called "non-carbon benefits" for the long-term sustainability of REDD+ activities.⁵ The term non-carbon benefits has been generically used to refer to social, environmental and governance benefits produced by REDD+ activities that go beyond mere carbon storage, such as, for example, biodiversity

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¹ Gert J Nabuurs and others, 'Forestry' in B Metz and others (eds), *Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2007), at 543.

² UN-REDD Programme, 'Multiple Benefits-Issues and Options for REDD' (UN-REDD 2009) <http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=472&Itemid=53> accessed 10 January 2015.

³ Decision 2/CP.13, Reducing emissions from deforestation in developing countries: approaches to stimulate action, UN Doc FCCC/CP/2007/6/Add.1, Preamble.

⁴ Decision 4/CP.15, Methodological guidance for activities relating to reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries, UN Doc FCCC/CP/2009/11/Add.1, Preamble.

⁵ Decision 9/CP.19, Work programme on results-based finance to progress the full implementation of the activities referred to in decision 1/CP.16, paragraph 70, UN Doc FCCC/CP/2013/10/Add.1, para 22.

conservation, poverty relief, or secure land and resource tenure. At the time of writing, the debate on non-carbon benefits of REDD+ is still ongoing, and UNFCCC Parties are in the process of debating what non-carbon benefits are; whether they should be reported and monitored, and if so how; and whether non-carbon benefits should attract specific payments.⁶

This range of ‘collateral’ considerations has enjoyed great prominence in the literature⁷ and in policy discourses on REDD+.⁸ Some commentators have emphasized how these considerations have taken center-stage, threatening to obfuscate the main purpose of REDD+.⁹ Others, however, have noted how failure to consider the wider environmental and societal impacts of REDD+ would undermine forest carbon sequestration.¹⁰

This latter perspective prevailed and in 2010 the UNFCCC COP adopted a list of broadly worded safeguards that Parties should promote and respect in the implementation of REDD+ activities (Table 1).¹¹ These safeguards acknowledge that REDD+ activities should avoid causing harm and enhance “other social and environmental benefits.”¹² Therefore, REDD+ safeguards aim to ensure that REDD+ activities both avoid negative impacts, and provide benefits to host countries and affected communities, beyond mere carbon sequestration.

From the perspective of international law, these safeguards raise two fundamental questions. The first is that of the role of safeguards in the emerging legal framework on REDD+. The second is that of the relationship of safeguards with the well-established bodies of international law on forests, the protection of human rights and the conservation of biodiversity.

This chapter analyses these two questions. First, it assesses the legal nature of REDD+ safeguards and their role in the climate regime. Then, it places REDD+ safeguards in the context of general international law, assessing their relationship with other areas of the law, most saliently, those on biodiversity, forests and human rights. Even though it remains to be seen how REDD+ safeguards will be concretely interpreted in practice and how much weight will be attached to their implementation in result-based payments, the conclusions provide some reflections on the role of safeguards in the emerging legal framework on REDD+.

⁶ See Report of the Subsidiary Body for Scientific and Technological Advice on its thirty-eighth session, UN Doc FCCC/SBSTA/2013/3, paras 45–47; and Methodological guidance for activities relating to reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries, UN Doc FCCC/SBSTA/2014/L.8, para 6.

⁷ Compare the summary in Ingrid J Visseren-Hamakers and others, ‘Trade-Offs, Co-Benefits and Safeguards: Current Debates on the Breadth of REDD+’ (2012) 4 *Current Opinion in Environmental Sustainability* 646.

⁸ See e.g. UN-REDD Programme (n 3); Lera Miles, Emily Dunning and Nathalie Doswald, ‘Safeguarding and Enhancing the Ecosystem Derived Benefits of REDD+’ (UNEP World Conservation Monitoring Centre 2010) <<http://www.unep-wcmc.org/resources-and-data/safeguarding-and-enhancing-the-ecosystem-derived-benefits-of-redd>> accessed 10 January 2015.

⁹ See for example, Arild Angelsen and Desmond McNeill, ‘The Evolution of REDD+’ in Arild Angelsen and others (eds), *Analyzing REDD+: Challenges and Choices* (CIFOR 2012), at 39 and 42.

¹⁰ See e.g. Frances Seymour, ‘Forests, Climate Change and Human Rights: Managing Risks and Trade-Offs’, *Human Rights and Climate Change* (Cambridge University Press 2009).

¹¹ Decision 1/CP.16, Cancun Agreements, UN Doc FCCC/CP/2010/7/Add.1, Appendix I, para 2.

¹² *Ibid.*, para 2(e).

Table 1. REDD+ safeguards in the Decision 1/CP.16, Cancun Agreements, Appendix I, para. 2

When undertaking the activities referred to in paragraph 70 of this decision, the following safeguards should be promoted and supported:

- (a) That actions complement or are consistent with the objectives of national forest programmes and relevant international Conventions and agreements;
- (b) Transparent and effective national forest governance structures, taking into account national legislation and sovereignty;
- (c) Respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the United Nations General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples;
- (d) The full and effective participation of relevant stakeholders, in particular indigenous peoples and local communities, in the actions referred to in paragraphs 70 and 72 of this decision;
- (e) That actions are consistent with the conservation of natural forests and biological diversity, ensuring that the actions referred to in paragraph 70 of this decision are not used for the conversion of natural forests, but are instead used to incentivize the protection and conservation of natural forests and their ecosystem services, and to enhance other social and environmental benefits;¹
- (f) Actions to address the risks of reversals;
- (g) Actions to reduce displacement of emissions.

1. Taking into account the need for sustainable livelihoods of indigenous peoples and local communities and their interdependence on forests in most countries, reflected in the United Nations Declaration on the Rights of Indigenous Peoples, as well as the International Mother Earth Day.

The status of REDD+ safeguard in general international law

There is no standard definition of safeguard in international law. The term is widely used in the practice of States and international organisations, such as the World Bank, to refer to measures making financial aid conditional to the prevention and mitigation of “undue harm to people and their environment” that may result from funded activities.¹³ These safeguards are typically part of conditions imposed upon countries receiving aid, and their fulfilment is a prerequisite for the provision of funding. Safeguards are often coupled with arrangements to monitor and verify their implementation. The consequences attached to lack of compliance with safeguards depend on whether

¹³ Cf. for example the World Bank environmental and social safeguard policies, <<http://go.worldbank.org/WTA1ODE7T0>>.

conditionality is based on policy dialogue, agreement and support, or, rather, on recourse to sanctions or aid withdrawal.¹⁴

The UNFCCC COP is not in the habit of adopting safeguards or conditionalities for the provision of climate finance. The practice under the UNFCCC has instead been to leave such guidance to institutions entrusted to handle climate finance.¹⁵ Controversially, the Parties to the Kyoto Protocol have not adopted specific safeguards under the Clean Development Mechanism, in spite of serious concerns regarding the environmental integrity and the contribution to sustainable development of registered project activities.¹⁶

Cognizant of lessons learnt through the CDM and of the specific potential trade-offs associated with forest-based mitigation, the UNFCCC COP has adopted an unprecedented list of safeguards for REDD+ activities.¹⁷ These safeguards are not phrased like actual conditionalities for the provision of REDD+ funding. The wording introducing the safeguards merely says that they should be “promoted and supported” with no specific sanctions for lack of compliance. Nevertheless, the UNFCCC COP has subsequently clarified that, regardless of the source or type of financing, all REDD+ activities should be “consistent with” safeguards.¹⁸

An embryonic system to monitor and verify the implementation of safeguards has also been laid out. Developing country Parties intending to undertake REDD+ activities are asked to adopt a system for providing information on how safeguards are being “addressed and respected”.¹⁹ Such information should be transparent, consistent, accessible by all relevant stakeholders, updated on a regular basis, country-driven and build upon existing systems “as appropriate.”²⁰ The provision of information on the implementation of safeguards is a requirement to receive REDD+ payments.²¹ However, there is no indication on how compliance with this requirement will be assessed and what consequences may follow, should a party fail to comply with safeguards.

Information concerning compliance with safeguards is to be included in periodical national communications to the UNFCCC COP²² and may also be published, on a voluntary basis, via a web platform on the UNFCCC website.²³ Developing

¹⁴ Cesare Pinelli, ‘Conditionality’, *Max Planck Encyclopaedia of Public International Law* (Oxford University Press 2013).

¹⁵ Compare e.g. Global Environmental Facility Policy on Agency Minimum Standards on Environmental and Social Safeguards (2013); and Adaptation Fund Environmental and Social Policy (2013).

¹⁶ Joelle de Sepibus, ‘The Environmental Integrity of the CDM Mechanism – A Legal Analysis of Its Institutional and Procedural Shortcomings’ (Swiss National Centre of Competence in Research 2009) <[http://phase1.nccr-](http://phase1.nccr-trade.org/images/stories/research/header_ip6/environmental%20integrity%20CDM.pdf)

[trade.org/images/stories/research/header_ip6/environmental%20integrity%20CDM.pdf](http://phase1.nccr-trade.org/images/stories/research/header_ip6/environmental%20integrity%20CDM.pdf)> accessed 8 January 2015; Lena Ruthner and others, ‘Study on the Integrity of the Clean Development Mechanism (CDM)’ (2011) <http://ec.europa.eu/clima/policies/ets/linking/docs/final_report_en.pdf> accessed 8 January 2015.

¹⁷ Decision 1/CP.16, Appendix I, at 2

¹⁸ Decision 2/CP.17, Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, UN Doc FCCC /CP/2011/9/Add.2, para 63.

¹⁹ Decision 1/CP.16, para 71.

²⁰ Decision 12/CP.17, Guidance on systems for providing information on how safeguards are addressed and respected and modalities relating to forest reference emission levels and forest reference levels as referred to in decision 1/CP.16, UN Doc FCCC /CP/2011/9/Add.2, para 2.

²¹ Decision 9/CP.19, para 4.

²² *Ibid.*, paras 3-4.

²³ Decision 12/CP.19, The timing and the frequency of presentations of the summary of information on

country Parties should start providing such information after the start of the implementation of REDD+ activities. The frequency of subsequent submissions of information should be consistent with general arrangements for developing country Parties national communications.²⁴

The reporting requirements concerning the implementation of REDD+ safeguards, therefore, fall into the broader context of developing country Parties' obligations concerning measuring, reporting and verification. Under the UNFCCC, developing country Parties are generally required to submit their first national communications within three years of entering the convention, and every four years thereafter.²⁵ The UNFCCC COP has subsequently established that developing country Parties should also submit biennial update reports, starting with December 2014.²⁶ These reports are to be subjected to an expert review process of international consultation and analysis.²⁷ Whether and how this process will specifically review the implementation of REDD+ safeguards, however, remains to be seen.

At the time of writing, only six developing country parties have submitted biannual update reports.²⁸ It is therefore too early to say how implementation of REDD+ safeguards is being reported and how this is reviewed in the context of international consultation and analysis processes. More generally, UNFCCC COP guidance on REDD+ safeguards does not provide details on the types of evidence that countries might use to show compliance with safeguards or the ways in which such evidence should be collected, verified or reported. These matters are in the process of being further discussed in the context of the Subsidiary Body for Scientific and Technical Advice (SBSTA), which since 2011 has been considering whether and how to give more guidance to Parties on the type of information to be provided on compliance with safeguards.²⁹

In the meantime, the Green Climate Fund (GCF), which is expected to function as the main source of REDD+ finance in the climate regime,³⁰ agreed on an initial framework for REDD+ results-based payments.³¹ The framework reiterates that the provision of summaries of information on how safeguards are implemented is a prerequisite for REDD+ results-based payments.³² Nevertheless, it is not clear how the content of these summaries will be assessed. Furthermore, there is a need to ascertain the compatibility the GCF Environmental and Social Safeguards with REDD+

how all the safeguards referred to in decision 1/CP.16, appendix I, are being addressed and respected, para 3.

²⁴ Decision 12/CP.19, para 4.

²⁵ UNFCCC, Article 12.5.

²⁶ Decision 2/CP.17, at 39-44.

²⁷ *Ibid.*, paras 56-62.

²⁸ The reports are available at: <http://unfccc.int/national_reports/non-annex_i_natcom/reporting_on_climate_change/items/8722.php>

²⁹ The issue of types of information from systems for providing information on how the safeguards are being addressed and respected was addressed at the forty-first session of the SBSTA in December 2014, but conclusions on the issue could not be adopted. The matter will be taken up again at the forty-second session of the SBSTA, in 2015.

³⁰ Decision 9/CP.19, Preamble and para 5.

³¹ GCF, Initial logic model and performance measurement framework for REDD+ results-based payments, GCF/B.08/08/Rev.01 (2014), Annex III.

³² *Ibid.*

safeguards³³ and the consequences of lack of compliance. The GCF is therefore likely to assume a very prominent role in overseeing the implementation of REDD+ safeguards.

Taken together, all these elements provide important but inconclusive elements to ascertain the status of REDD+ safeguards in international law. UNFCCC COP decisions, such as that including REDD+ safeguards, have over the years filled the ‘open-textured’ provisions in the climate treaties with content, by adopting both ‘hard’ rules that Parties are expected to uphold,³⁴ as well as ‘soft’ guidance that Parties should take into account while interpreting their obligations.³⁵ Ultimately, whether decisions adopted by the UNFCCC COP acquire the guise of binding law is a matter of interpretation.³⁶

In the case of REDD+ safeguards, the language in UNFCCC COP decisions is far from univocal. The Cancun Agreements do not say that safeguards are a prerequisite to carry out REDD+ activities. Subsequent COP decisions have however clarified that REDD+ activities should be consistent with safeguards, regardless of the source of funding,³⁷ and that Parties should provide information on how safeguards are addressed and respected to obtain results-based payments.³⁸ Together, these elements may be read in the sense to suggest that compliance with REDD+ safeguards is an actual legal obligation for UNFCCC Parties that decide to carry out REDD+ activities and that ask for international payments to do so. While some UNFCCC Parties have argued in favour of this interpretation,³⁹ only the practice of implementation will reveal whether implementation of safeguards is closely scrutinised and treated as a requirement for receiving REDD+ payments. In the meantime, much uncertainty surrounds what types of information should be provided concerning the implementation of safeguards. Parties’ views on this issue greatly diverge,⁴⁰ and an evident tension

³³ GCF, Guiding framework and procedures for accrediting national, regional and international implementing entities and intermediaries, including the fund’s fiduciary principles and standards and environmental and social safeguards, GCF/B.06/09 (2014).

³⁴ Building upon the mandate conferred upon them by the treaties, as for example, Kyoto Protocol, Articles 3.4 and 12.7.

³⁵ Cf. Alan E Boyle, ‘Some Reflections on the Relationship of Treaties and Soft Law’ (1999) 48 *The International and Comparative Law Quarterly* 901, at 905. See also: Robin R Churchill and Geir Ulfstein, ‘Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law’ (2000) 94 *The American Journal of International Law* 623, at 642; and Jutta Brunnée, ‘COPing with Consent: Law-Making Under Multilateral Environmental Agreements’ (2002) 15 *Leiden Journal of International Law* 1, at 38.

³⁶ See Harro van Asselt, Francesco Sindico and Michael Mehling, ‘Global Climate Change and the Fragmentation of International Law’ (2008) 30 *Law & Policy* 423, at 430. On the increasing informalization of the climate regime, see also Harro van Asselt, Michael Mehling and Clarisse Siebert, ‘The Changing Architecture of International Climate Change Law’ in Geert van Calster, Wim Vanderberghe and Leonie Reins (eds), *Research Handbook on Climate Change Mitigation Law* (Edward Elgar Publishing 2015), at 5; and Duncan French and Lavanya Rajamani, ‘Climate Change and International Environmental Law: Musings on a Journey to Somewhere’ (2013) 25 *Journal of Environmental Law* 437, at 446.

³⁷ Decision 2/CP.17, para 63.

³⁸ Decision 9/CP.19, para 4.

³⁹ The EU, for example, has argued: “Safeguards are an inherent, integral part of REDD+ and therefore a requirement that must be fulfilled in order to obtain results-based payments.” See: Views on the issues referred to in decision 1/CP.18, paragraph 40. Submissions from Parties and admitted observer organizations, UN Doc FCCC/SBSTA/2014/MISC.4, at 33.

⁴⁰ Views on types of information from systems for providing information on how the safeguards are being addressed and respected and that may be provided by developing country Parties, FCCC/SBSTA/2014/MISC.7.

exists between the need to ensure comparability and some degree of streamlining in the information Parties provide, on the one hand; and that to enable a country-driven approach that is not overly burdensome, on the other.

More generally, the overall uncertainty characterising the status of REDD+ under the climate regime reflects also on the legal status of REDD+ safeguards. As the next sections will show, the decision on whether to turn REDD+ into an offset mechanism à la CDM, or rather, into a means to provide financial assistance to developing countries in complying with their own emission reduction obligations is likely to have profound implications on the legal status of REDD+ safeguards.⁴¹

Another complicating factor is that the broad wording of REDD+ safeguards leaves much room for discretion to UNFCCC Parties. REDD+ readiness practice has already provided ample evidence of the diverse ways in which REDD+ safeguards may be interpreted. Numerous developing countries have undertaken to create the conditions to perform REDD+ activities, either by adhering to inter-State initiatives,⁴² or by entering into partnerships with international agencies. So while no actual results-based payments for REDD+ activities have been made, a vast REDD+ readiness process has unfolded, resulting in a myriad of REDD+ readiness arrangements established beyond the institutional scope of the UNFCCC, with no formal relation to it.

The REDD+ readiness process has been mainly (although not exclusively) driven by two *ad hoc* international agencies:⁴³ the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation (UN-REDD), constituted by the Food and Agriculture Organization of the United Nations, the United Nations Development Programme and United Nations Environmental Programme;⁴⁴ and the World Bank's Forest Carbon Partnership Facility (FCPF).⁴⁵ These international agencies have entered into agreements with a large number of UNFCCC Parties willing to undertake REDD+ activities.⁴⁶

In lack of more specific guidance from the UNFCCC Parties, the UN-REDD and the FCPF have adopted standards to guide their partner countries in the REDD+ readiness process, including on how to operationalize safeguards. In doing so, both the FCPF and the UN-REDD Programme have interpreted and filled with more precise content REDD+ safeguards, working as *de facto* alternative law-making *fora*, supplementing and complementing the decisions taken by the UNFCCC COP on the issue. While in fact the FCPF and the UN-REDD standards are mere internal rules, their incorporation into partnership and borrowing agreements makes them a crucial source of legal obligations for partner countries and a determinant factor in the emerging body

⁴¹ Annalisa Savaresi, 'Forests and Climate Change: An International Law-Making Odyssey' (2015).

⁴² For an overview, see: <<http://reddplusdatabase.org>> (last accessed 10 January 2015).

⁴³ International agencies have been defined as international bodies constituted on the basis of a decision by an international organization, as opposed to a treaty or a form of bottom-up cooperation between national regulators. See Ayelet Berman and Ramses A Wessel, 'The International Legal Form and Status of Informal International Lawmaking Bodies: Consequences for Accountability' in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012), 35, at 44.

⁴⁴ FAO, UNDP and UNEP, 'UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD) Framework Document' (2008).

⁴⁵ The FCPF was launched by the World Bank in 2007, World Bank, Charter establishing the Forest Carbon Partnership Facility (2013 edition).

⁴⁶ At the time of writing, the UN-REDD has partnered with 58 countries: http://www.un-redd.org/Partner_Countries/tabid/102663/Default.aspx. 47 countries have adhered to the FCPF: <https://www.forestcarbonpartnership.org/redd-country-participants>.

of law on REDD+.⁴⁷ Indeed, in the absence of more detailed guidance by the UNFCCC COP, standards by the UN-REDD and the FCPF have become the principal source to interpret REDD+ safeguards. The next section will investigate the chasm in the interpretation of REDD+ safeguards by these two institutions and the questions it raises on the relationship between REDD+ safeguard and other areas of international law.

For the present purposes, it is possible to conclude that REDD+ safeguards are unprecedented in the climate regime and broke new grounds on several counts. Five years after their adoption, there is little clarity on their overall legal status. As part of a UNFCCC COP decision, formally REDD+ safeguards are not legally binding. The language used to formulate safeguards is not univocal in conveying a sense on whether they ought to be regarded as such. The fact, however, that information on the implementation of safeguards is a requirement for receiving result-based payments seems to indicate that compliance with safeguards is mandatory and therefore a legal obligation for Parties seeking REDD+ results-based payments. Nevertheless, UNFCCC COP guidance says little on how compliance with safeguards will be assessed and what consequences may be associated with it. Therefore, unless the UNFCCC COP or the GCF provide further clarification on these issues, only when REDD+ results-based payments start to be disbursed will it be possible to gauge whether and how compliance with safeguards is treated as a legally binding obligation for developing country Parties asking for REDD+ results-based payments.

REDD+ safeguards and other areas of international law

The safeguards embedded in the Cancun Agreements focus on four core elements: the ecological and carbon integrity of REDD+ emission reductions; forest governance; the environmental and social impact of REDD+ activities; and their potential co-benefits.

The safeguards on the ecological and carbon integrity of REDD+ activities focus on avoiding reversal and reducing the displacement of emissions⁴⁸ and closely relate to UNFCCC Parties' reporting obligations.⁴⁹ The reporting of emissions and emission reductions in the land sector has long been a vexed question in the climate regime.⁵⁰ Presently, these matters are only sparsely covered in reporting obligations under the UNFCCC and the Kyoto Protocol, leaving a wide margin of discretion to reporting Parties and a substantive gap in the frequency of reporting and level of detail required from developed and developing countries.⁵¹ This matter could be looked at afresh in

⁴⁷ Laurence Boisson de Chazournes, 'Policy Guidance and Compliance: The World Bank Operational Standards' in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Cambridge University Press 2000), at 282.

⁴⁸ Decision 1/CP.16, Appendix I, para 2(f-g).

⁴⁹ Decision 4/CP.15; and Decision 11/CP.19, Modalities for national forest monitoring systems UN Doc FCCC/CP/2013/10/Add.1.

⁵⁰ For a summary, see Peter Iversen, Donna Lee and Marcelo Rocha, 'Understanding Land Use in the UNFCCC' (Climate and Land Use Alliance 2014); Zoya E Bailey, 'Sink That Sank the Hague: A Comment on the Kyoto Protocol' (2002) 16 *Temple International & Comparative Law Journal* 103; Eveline Trines, 'History and Context of LULUCF in the Climate Regime' in Charlotte Streck and others (eds), *Climate Change and Forests. Emerging Policy and Market Opportunities* (Chatham House 2008).

⁵¹ The EU, for example, has maintained that continued implementation of existing rules would lower the actual stringency of the current emission reduction pledges and imply that reductions can be claimed without additional actions, which brings no real environmental benefit. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic

context of the new climate agreement to be adopted in 2015.⁵² In this context, the succinct reference to addressing the risks of reversals in REDD+ safeguards could be translated into more specific reporting obligations to secure the ecological and carbon integrity of REDD+ emission reductions.

The nature of these obligations will greatly depend on whether REDD+ will eventually become a mere forest carbon offset program à la CDM, or rather, a means to assist developing countries in complying with their own emission reduction obligations under the 2015 agreement. While in the first scenario, the imposition of conditionalities concerning carbon integrity would be associated with the tradability of offsets on carbon markets; in the second, a certain level of equivalence between the reporting obligations of developed and developing countries would need to be ensured. It would, in other words, be necessary to ensure that developing countries Parties obligations are not disproportionately burdensome, when compared with those of developed ones.

The remainder of REDD+ safeguards has both a negative dimension— that connected to the prevention of harm— as well as a positive dimension —that related to the promotion of co-benefits and the pursuit of synergies with other forest-related instruments. From the perspective of international law, these safeguards raise interesting questions on the interplay between international law instruments.

In this regard, REDD+ safeguards specify that REDD+ actions should “complement” or be “consistent with” the objectives of “relevant international conventions and agreements.”⁵³ This is a significant piece of interpretative guidance concerning the relationship between UNFCCC Parties’ extant international obligations and those concerning REDD+. When faced with “implementation conflicts” – i.e. conflicts engendered by implementation of perfectly compatible treaty obligations –⁵⁴ REDD+ activities and policies should be carried out in such a way as to support, rather than conflict with, the objectives of relevant international conventions and agreements. As the next sections will show, a wide range of treaties and practice may be regarded as relevant in this connection, as the plural formulation (“conventions and agreements”) also suggests.

Before analyzing in detail the interplay between these bodies of law, it necessary to highlight how REDD+ safeguards are also inextricably linked with the ongoing unresolved debate on the non-carbon benefits of REDD+. While in fact some Parties argue that non-carbon benefits are to be considered as integral part of REDD+ safeguards,⁵⁵ others argue that they are a collateral issue that should *not* be reported in the context of safeguard information systems, and, most crucially, should be addressed

and Social Committee and the Committee of the Regions. ‘International climate policy post-Copenhagen: Acting now to reinvigorate global action on climate change,’ COM/2010/0086, at 2.2.3.

⁵² Charlie Parker and others, ‘The Land-Use Sector within the Post-2020 Climate Regime’ (Nordic Council of Ministers 2014); Manuel Estrada and others, ‘Land Use in a Future Climate Agreement’ (Meridian Institute 2014).

⁵³ Decision 1/CP.16, Appendix I, para 2(a).

⁵⁴ This term is used to refer to conflicts that are engendered by implementation of perfectly compatible treaty obligations. See Rudiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Springer 2003), at 24 and 96.

⁵⁵ The Philippines, for example, have argued: “There is a clear linkage between NCBs and REDD-Plus safeguards. Reporting on NCBs could be partially covered by safeguards reporting mechanisms or safeguards information systems.” Views on the issues referred to in decision 1/CP.18 (2014), paragraph 40. Submissions from Parties and admitted observer organizations, at 33. Views on the issues referred to in decision 1/CP.18, paragraph 40. Submissions from Parties and admitted observer organizations, FCCC/SBSTA/2014/MISC.4, at 33.

in other *fora* with relevant mandates, such as the CBD, the GCF or the FCPF.⁵⁶ Ultimately, if Parties to the UNFCCC decide to include non-carbon benefits in the information system that has been devised for REDD+ safeguards, this would be an important tool to scrutinize the flow of benefits to developing countries associated with REDD+. This would be particularly important if REDD+ should turn into an offset mechanism, like the CDM. The perceived lack of a system to ensure that countries hosting CDM projects receive concrete benefits, in fact, has been a major shortcoming in the functioning of that mechanism.⁵⁷

While Parties to the UNFCCC are yet to make up their minds on this issue, standards adopted in the framework of the REDD-readiness processes provide important insights to foresee how this complex matter may be addressed. For example, the UN-REDD has not attempted to draw a distinction between carbon and non carbon-benefits of REDD+ activities. Instead, the FCPF has distinguished carbon and non-carbon benefits,⁵⁸ deciding that only the first be reported in Benefit-sharing Plans to be prepared to receive REDD+ results-based payments.⁵⁹ The FCPF has thus anticipated the UNFCCC Parties' decision on the delicate and controversial issue of non-carbon benefits by deciding what they are (at least in the context of FCPF payments), and that they should not be subjected to the same reporting requirements as carbon-related benefits.

The solution to these delicate questions makes it even more important to interpret REDD+ safeguards in a way that is consistent with the objectives of "relevant international conventions and agreements." Guidance provided in these instruments usefully complements REDD+ safeguards, supplementing them with an internationally agreed understanding on matters upon which States have already reached painstakingly negotiated consensus, such as forest biodiversity and the rights of forest dependent communities. It is here argued, that UNFCCC Parties should rely more systematically on this guidance, without attempting to "reinvent the wheel."⁶⁰ The next sections highlight points of synergies with existing bodies of law, as well as matters upon which further guidance may be needed, distinguishing between environmental and social impacts and co-benefits.

⁵⁶ Compare the submission by the EU, *ibid.*, at 28: "the EU is of the opinion that there is no need for dedicated payments or price premiums for NCBs under the UNFCCC. Moreover, at international level this would add complexity (conceptually, technically and financially) to the REDD+ mechanism, thereby complicating and thus delaying implementation of REDD+' primary objective and possibly even deviating from it. The EU does however see merit in (encouraging) discussions on NCBs in *fora* with relevant mandates such as the CBD, the GCF and the FCPF and is interested to learn from pilot experiences how NCBs can be incentivized best."

⁵⁷ High-Level Panel on the CDM Policy Dialogue, 'Climate Change, Carbon Markets and the CDM: A Call to Action' (2012),18.

⁵⁸ The FCPF has defined non-carbon benefits as benefits "produced by or in relation to the implementation and operation of" a REDD+ program, such as "the improvement of local livelihoods, the building of transparent and effective forest governance structures, progress on securing land tenure, and enhancing or maintaining biodiversity and/or other ecosystem services. FCPF Carbon Fund Methodological Framework (2013), at 32.

⁵⁹ *Ibid.*, at 25.

⁶⁰ This expression is used by Elisa Morgera, 'No Need to Reinvent the Wheel for a Human Rights-Based Approach to Tackling Climate Change: The Contribution of International Biodiversity Law' in Erkki Hollo, Kati Kulovesi and Michael Mehling (eds), *Climate Change and the Law* (Springer 2013).

Environmental safeguards

As negotiations progressed, much literature drew attention to biodiversity trade-offs associated with REDD+ activities, suggesting that they be applied selectively to different forest types.⁶¹ This matter has only been partially addressed by the UNFCCC COP, which initially stated that REDD+ demonstration activities should be “consistent with” sustainable forest management, noting, *inter alia*, the “relevant provisions” of the United Nations Forum on Forests and the CBD.⁶² This acknowledgement of the relevance of international biodiversity and forest instruments, however, does not appear in subsequent UNFCCC COP decisions dealing with REDD+. A few UNFCCC Parties have supported building on synergies between REDD+, the CBD and international forest instruments.⁶³ REDD+ safeguards, instead, do not mention the matter. Instead, they generically indicate that REDD+ activities should be “consistent with the conservation of natural forests and biological diversity”; and should not be used for the conversion of natural forests,⁶⁴ but, rather, to incentivize their protection and conservation and to enhance other “environmental benefits.”⁶⁵ Thus safeguards only timidly address the matter of overlaps between REDD+ and the vast body of law concerning forests and biodiversity. These two bodies of international law have inherently different characteristics.

On the one hand, no comprehensive international treaty on forests exists. Instead, States have cyclically rejected proposals to negotiate an all-encompassing forest treaty and, ultimately, to subject themselves to greater international scrutiny on how they manage their forests. Rather tellingly, there is no internationally agreed definition of what a forest is, and the understanding of this term is highly context-specific.⁶⁶ As a result, forest issues are addressed in an uncoordinated manner by a large number of international instruments and institutions.⁶⁷ The resulting legal landscape is greatly fragmented and consists of a heterogeneous set of instruments, which include treaties,⁶⁸

⁶¹ See e.g. Till Pistorius et al., ‘Greening REDD+. Challenges and Opportunities for Forest Biodiversity Conservation,’ University of Freiburg. (Freiburg, Germany 2010), at 21; and Secretariat of the Convention on Biological Diversity, ‘REDD-plus and Biodiversity. CBD Technical Series No. 59’ (Secretariat of the Convention on Biological Diversity 2011). For a detailed review, see Annalisa Savaresi, ‘Reducing Emissions from Deforestation in Developing Countries under the UNFCCC: Caveats and Opportunities for Biodiversity’ (2010) 21 *Yearbook of International Environmental Law* 81; and Annalisa Savaresi, ‘Reducing Emissions from Deforestation in Developing Countries under the United Nations Framework Convention on Climate Change. A New Opportunity for Promoting Forest Conservation?’ in Frank Maes and others (eds), *Biodiversity and Climate Change: Linkages at International, National and Local Levels* (Edward Elgar 2013).

⁶² Decision 2/CP.13, Annex, para 8.

⁶³ See, UNFCCC, Views on methodological guidance for activities relating to reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries. Submissions from Parties, UN Doc FCCC/SBSTA/2011/MISC.7, Submissions by Australia, at 6; European Union, at 59; El Salvador on behalf of Dominican Republic, El Salvador, Honduras and Panama, at 38-42; and Japan, at 82.

⁶⁴ Decision 1/CP.16, Appendix I, para 2(e).

⁶⁵ *Ibid.*

⁶⁶ CBD SBSTTA, Background Report on Improving Forest Biodiversity Monitoring and Reporting, UN Doc UNEP/CBD/SBSTTA/16/INF/25, at 5.

⁶⁷ For a comprehensive overview, see Juergen Blaser and others, ‘Independent Assessment of the International Arrangement on Forests. Report of the Team of Independent Consultants’ (2014).

⁶⁸ Such as the various editions of the International Tropical Timber Agreements of 1983, 1994, and 2006. ITTA 2006, into force 7 December 2011, UNTS vol. 2801, p. 1.

as well an array of informal instruments.⁶⁹ This fragmented body of law centers around two key notions: that of States' sovereign right to exploit their forest resources; and that of sustainable forest management.⁷⁰ However, due to the considerable multiplication of standards on sustainable forest management, a common understanding of this crucial concept has remained surprisingly elusive and largely seems to lie in the eye of the beholder.⁷¹ States' obligations in this regard are context specific and depend on the interpretation of a layered set of international instruments of various legal natures.

On the other hand, the CBD is the main international treaty charged with protecting biodiversity. As seen with the UNFCCC, the body of law under the CBD has significantly grown by virtue of the work of its conference of the Parties (CBD COP). Much like the guidance of the UNFCCC COP, the legal significance of CBD COP decisions is a matter of interpretation. A distinguishing feature, however, is that CBD decisions are characterized by a markedly hortatory tone and rarely infuse a sense of legally binding obligation into their guidance.⁷² Still, CBD COP decisions are a precious source of inter-governmentally agreed guidance on the interpretation of the CBD and on the means to achieve its objective. Most importantly, Parties to the UNFCCC and the CBD are virtually the same—with the sole exception of the US.

Both conventions deal with global environmental problems and establish regimes of almost universal application, which prohibit Parties from making specific reservations to their provisions.⁷³ The objectives of the conventions are not mutually exclusive, and provide several areas for mutually supportive action.⁷⁴ The existence of common interests is, *inter alia*, confirmed by the establishment of a Joint Liaison Group as an informal forum for exchanging information, exploring opportunities for synergistic activities, and increasing co-ordination.⁷⁵

The CBD and the UNFCCC, however, view forests from different perspectives. While the CBD is concerned with forests as habitats and as components of biodiversity, under the UNFCCC they are chiefly carbon sinks and sources. Despite these different approaches, both conventions address forest management to a certain degree and, when implementing REDD+ activities, Parties to both conventions are faced with

⁶⁹ These include: Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (Forest Principles), 31 I.L.M. 881 (1992); and Non-legally Binding Instrument on Sustainable Forest Management of all Types of Forests, UNGA/Res/62/98; as well as decisions by treaty bodies, such as those adopted under the CBD and the ITTA.

⁷⁰ Forest Principles, at 1(a); and 2 (a).

⁷¹ Diana Davenport, 'Forests and Sustainability' in Jeremy Rayner, Alexander Buck and Pia Katila (eds), *Embracing Complexity: Meeting the Challenges of International Forest Governance* (IUFRO 2011), at 87.

⁷² On CBD COP decisions, see: Stuart R Harrop and Diana J Pritchard, 'A Hard Instrument Goes Soft: The Implications of the Convention on Biological Diversity's Current Trajectory' (2011) 21 *Global Environmental Change* 474.

⁷³ CBD, Article 34; and UNFCCC, Article 24.

⁷⁴ See Concetta M Pontecorvo, 'Interdependence between Global Environmental Regimes: The Kyoto Protocol on Climate Change and Forest Protection' (1999) 59 *Heidelberg Journal of International Law* 705, at 742; and Frederic Jacquemont and Alejandro Caparrós, 'The Convention on Biological Diversity and the Climate Change Convention 10 Years After Rio: Towards a Synergy of the Two Regimes?' (2002) 11 *Review of European Community & International Environmental Law* 169, at 178; and Harro van Asselt, 'Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes' (2012) 44 *New York University Journal of International Law and Politics* 1205, at 1228-1242.

⁷⁵ Decision 13/CP.8, Cooperation with Other Conventions, UN Doc FCCC/CP/2002/7/Add.1.

implementation conflicts, as a focus on maximizing carbon sequestration may have negative impacts on biodiversity conservation. When faced with such implementation conflicts, Parties to both the CBD and the UNFCCC should consider the obligations and guidance adopted under both, interpreting them in a mutually supportive way, rather than in a conflicting fashion. This is explicitly conveyed in REDD+ safeguards and has been further elaborated upon in a series of CBD COP decisions, which, in a typically hortatory tone, draw attention to synergies and complementarities between the UNFCCC and the CBD on REDD+. ⁷⁶

Firstly, CBD Parties are encouraged to implement ecosystem-management activities, including the protection of natural forests, natural grasslands, and peatlands, and the sustainable management of forests, with consideration of the use of native communities of forest species in reforestation activities. ⁷⁷ Secondly, CBD Parties are invited to carry out REDD+ activities selectively; limiting the degradation and clearing of primary and secondary forests; converting only land of low biodiversity value or ecosystems largely composed of non-native species; avoiding invasive alien species; preventing the net reduction of carbon stocks in all organic carbon pools; and strategically locating afforestation activities within the landscape to enhance connectivity. ⁷⁸ Most crucially, CBD Parties are invited to use strategic environmental assessments and environmental impact assessments to increase the positive impacts and to reduce the negative impacts of climate-change mitigation and adaptation measures on biodiversity. ⁷⁹

In sum, CBD COP decisions have integrated guidance provided in REDD+ safeguards, taking a “holistic” and proactive stance on the matter, which is fitted with the all-encompassing objective of the CBD and its efforts to promote concerted action under the Rio Conventions. ⁸⁰ The CBD COP has, nevertheless, been cautious in underscoring that its guidance should not pre-empt any future decisions taken under the UNFCCC. ⁸¹ Its guidance is phrased in a hortatory tone and hardly conveys a sense of legal bindingness. Still, it provides very important elements on how CBD Parties should carry out REDD+ activities in light of their obligations under the CBD. And, as all UNFCCC Parties eligible to carry out REDD+ activities are also Parties to the CBD, these States should, by virtue of their obligations under the CBD, perform REDD+ activities in line with CBD guidance.

In addition to this interpretative work, the CBD treaty bodies have engaged in the debate on REDD+ safeguards under the UNFCCC by submitting views on methodological guidance for REDD+. ⁸² The submitted material includes a review of

⁷⁶ Decision IX/16, Biodiversity and Climate Change UN Doc UNEP/CBD/COP/9/29; CBD Decision X/33, Biodiversity and Climate Change UN Doc UNEP/CBD/COP/10/27; CBD Decision X/36, Forest Biodiversity UN Doc UNEP/CBD/COP/DEC/X/36; CBD Decision XI/19, Biodiversity and climate change related issues UN Doc UNEP/CBD/COP/11/35; and CBD Decision XI/21, Biodiversity and climate change UN Doc UNEP/CBD/COP/11/35.

⁷⁷ Decision X/33, at 8(n).

⁷⁸ *Ibid.* at 8(o-p).

⁷⁹ *Ibid.*, at 8(u).

⁸⁰ See Elisa Morgera, ‘Faraway, So Close: A Legal Analysis of the Increasing Interactions between the Convention on Biological Diversity and Climate Change Law’ (2011) 2 *Climate Law* 85, 91-92.

⁸¹ Decision X/33, at 9(g-h).

⁸² See e.g. CBD Secretariat, ‘Submission by the Secretariat of the Convention on Biological Diversity to the Secretariat of the United Nations Framework Convention on Climate Change on methodological guidance for activities relating to reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in

REDD+ safeguards and UN-REDD and the FCPF standards, finding that they do not cover all biodiversity-related risks equally or in sufficient detail.⁸³ Identified gaps include risks associated with afforestation in areas of high biodiversity value; the displacement of deforestation and forest degradation to areas of lower carbon value and high biodiversity value; and potential loss of traditional ecological knowledge.⁸⁴ The submission mentions that guidance provided in the framework of the CBD could partially fill these gaps, but emphasizes the need for improved guidance.⁸⁵

In sum, the CBD Parties have engaged in the debate on REDD+ safeguards, making concrete efforts to build bridges between issues that are closely related both under the mandate of the CBD and the UNFCCC. Their proactive approach, however, has been countered with apathy by UNFCCC Parties. A major obstacle affecting the integration of guidance supplied by the CBD within REDD+ is that the Parties have tended to interpret the conventions' mandate restrictively.⁸⁶

Social safeguards

The UNFCCC COP safeguards require that REDD+ activities promote and support transparent and effective national forest governance, public participation, and respect the knowledge and rights of indigenous peoples and local communities; and, more generally, that they enhance other social benefits.⁸⁷ This *de minimis* guidance has not been further elaborated upon by the UNFCCC COP. Yet the notions of public participation, traditional knowledge and rights of indigenous peoples and local communities are conceptually linked to a diverse body of international law and practice concerning, inter alia, non-discrimination,⁸⁸ self-determination,⁸⁹ a wide range of

developing countries (REDD-plus), specifically related to systems for providing information on how safeguards referred to in appendix I to UNFCCC decision 1/CP.16 are addressed and respected,' (2011).

⁸³ Ibid. This review is included in the summaries of a series of expert workshops on the links between biodiversity and REDD+ organized to support CBD Parties' efforts to address REDD+ in a way that contributes to the implementation of the CBD.

⁸⁴ Ibid., at 19.

⁸⁵ Ibid., at 29. For a detailed review, see Savaresi, 'Reducing Emissions from Deforestation in Developing Countries under the United Nations Framework Convention on Climate Change. A New Opportunity for Promoting Forest Conservation?' (n 63).

⁸⁶ See van Asselt, 'Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes,' at 41, where the author quotes as an example the fact that Australia has expressed the view that the CBD and the Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 33 ILM1273 (1994), do not have a legitimate role in climate change mitigation. Compare UNFCCC SBSTA, 'Views on the Paper on Options for Enhanced Cooperation among the Three Rio Conventions, Submissions from Parties,' UN Doc FCCC/SBSTA/2006/MISC.4, submission by Australia, at 5. Along similar lines, see Brazil's recent submission on REDD+ non-carbon benefits, according to which 'discussions regarding non-carbon benefits should be fully *consistent* with the respective mandates of each international regime, while preserving the *primacy* of UNFCCC over REDD+.' See Submissions from Parties and admitted observer organizations, at 33. Views on the issues referred to in decision 1/CP.18, paragraph 40. Submissions from Parties and admitted observer organizations, FCCC/SBSTA/2014/MISC.4, at 3-4 (emphasis added).

⁸⁷ Decision 1/CP.16, Appendix I, paras 2(c-e).

⁸⁸ International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966, in force 4 January 1969) 660 UNTS 195.

⁸⁹ United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), UN General Assembly Resolution, Declaration on the Rights of Indigenous Peoples (2007) A/RES/61/295.

substantial and procedural human rights;⁹⁰ and natural resources, land and property law.⁹¹

The UNFCCC and REDD+ safeguards do not specifically mention human rights. Nevertheless, the implementation of climate change response measures, like REDD+, may have a host of implications on the enjoyment of several human rights. The Human Rights Council and its Special Rapporteurs and Independent Experts have increasingly drawn attention to the need to take into account the human rights implications of climate change response measures,⁹² including REDD+.⁹³ In this regard, they suggested that international human rights law might strengthen international, regional and national climate change policymaking, promoting policy coherence, legitimacy and sustainable outcomes.⁹⁴

So far there has been little uptake of these exhortations in international climate change law making. In its sole reference to human rights to date, the UNFCCC COP has generically recognized that Parties should fully respect human rights “in all climate change related actions.”⁹⁵ Since the UNFCCC does not contain any conflict clause, this assertion is a significant statement concerning the relationship between international climate and human rights law. When faced with implementation conflicts, obligations under the UNFCCC should be interpreted in such a way as to support, rather than conflict with, human rights. However, not all Parties to the UNFCCC have ratified human rights treaties, and adherence to the UNFCCC may not become an instrument to impose upon States obligations contained in instruments they have not adhered to. Therefore, the identification of relevant human rights law and practice depends on a host of circumstances, and most crucially, on the human rights treaties each UNFCCC Party has ratified.

In the case of REDD+, virtually all developing country Parties to the UNFCCC eligible to participate in REDD+ have ratified some human rights treaties.⁹⁶ In this vein,

⁹⁰ Such as those embedded in the International Covenant on Civil and Political Rights (New York, 16 December 1966, in force 23 March 1976), 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966, 3 January 1976) 993 UNTS 3; and International Labour Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (Geneva, 27 June 1989, in force 5 September 1991) ILO/C169, as well as in regional human rights treaties.

⁹¹ Such as the International Treaty on Plant Genetic Resources for Food and Agriculture (Rome, 3 November 2001, in force 29 June 2004) 2400 UNTS 303; CBD Decision X/42, *Tkarihwaï:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities*, UN Doc UNEP/CBD/COP/10/27; and CBD Decision VII/16, *Akwé: Kon voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Sacred Sites and Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*, UN Doc UNEP/CBD/COP/DEC/VII/16; and FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (FAO, 2012).

⁹² See the collection of references in Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*. Focus report on human rights and climate change (2014).

⁹³ See e.g. Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, A/HRC/10/61 (2009), at 68.

⁹⁴ Human Rights Council Resolution 26/L.33 (2014), Preamble.

⁹⁵ See Decision 1/CP.16, para 8.

⁹⁶ Virtually all developing country Parties to the UNFCCC eligible to participate in REDD+ have ratified the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Several have also ratified regional human rights treaties.

REDD+ safeguards may be regarded as *sui generis* conflict avoidance devices, drawing attention to the international human rights treaties UNFCCC Parties have ratified.⁹⁷

There however seems to be little consensus amongst UNFCCC Parties on making specific reference to human rights law and practice in REDD+ safeguards information systems. Only few UNFCCC Parties have opined that the interpretation of REDD+ safeguards and their reporting be more closely linked with extant human right law obligations.⁹⁸ This matter has been addressed in greater detail by the UN-REDD and the FCPF, which have adopted almost opposite approaches to the issue.

The UN-REDD has adopted standards to support partner countries in developing national approaches to REDD+ safeguards.⁹⁹ The standards interpret the UNFCCC COP safeguards in light of human rights law and practice, drawing a human-rights-based approach to the work of the UN-REDD.¹⁰⁰ Firstly, UN-REDD-funded programs should respect and promote the recognition and exercise of the rights of indigenous peoples, local communities and other vulnerable and marginalized groups “to land, territories and resources, including carbon.”¹⁰¹ The standards also make specific reference to the need to respect and protect traditional knowledge¹⁰² and cultural heritage and practices, and to ensure that the benefits from this knowledge are equitably shared.¹⁰³ Secondly, the design, planning and implementation of UN-REDD funded programs must “promote sustainable livelihood and poverty reduction,”¹⁰⁴ and take into account potential synergies and trade-offs, respecting “local and other stakeholders’ values.”¹⁰⁵ There is an evident link between these standards and economic social and cultural rights, but also with the rights of indigenous peoples and tribal communities to benefit from development,¹⁰⁶ and with notions, like that of benefit-sharing, which have been used in international human rights law and practice as a means to ensure that funded activities

⁹⁷ Annalisa Savaresi, ‘The Role of REDD in Harmonizing Overlapping International Obligations’ in Erkki Hollo, Kati Kulovesi and Michael Mehling (eds), *Climate Change and the Law. A Global Perspective* (Springer 2013), 412.

⁹⁸ Namely, those by El Salvador (on behalf of the Dominican Republic, El Salvador, Honduras and Panama); and Switzerland. Views on Methodological Guidance for Activities Relating to Reducing Emissions from Deforestation and Forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries. Submissions from parties, UN Doc FCCC/SBSTA/2011/MISC.7. For example, Switzerland suggested that “information systems for safeguards embody and reinforce the guidance and rules of existing environmental and human rights treaties, particularly UNDRIP and FLEGT, when relevant.” *Ibid.*, p. 100. Similarly, Chad, on behalf of Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Rwanda, and Sao Tome and Principe, suggested that safeguard information systems ensure consistence with international human rights law. Views on experiences and lessons learned from the development of systems for providing information on how all the safeguards are being addressed and respected and the challenges faced in developing such systems UN Doc FCCC/SBSTA/2014/MISC.6, at 17.

⁹⁹ UN-REDD, ‘Social and Environmental Principles and Criteria,’ (2012) at 3.

¹⁰⁰ *Ibid.*, at 2: “The SEPC reflect the UN-REDD Programme’s responsibility to apply a human-rights based approach to its programming, uphold UN conventions, treaties and declarations, and apply the UN agencies’ policies and procedures” (emphasis added).

¹⁰¹ *Ibid.*, Principle 2, Criterion 7.

¹⁰² *Ibid.*, at 13.

¹⁰³ *Ibid.*, Criterion 11, footnote.

¹⁰⁴ *Ibid.*, Principle 3.

¹⁰⁵ *Ibid.*, Criterion 21.

¹⁰⁶ UNDRIP, Article 32.

contribute to indigenous and other vulnerable communities' livelihoods.¹⁰⁷ Thirdly, UN-REDD standards require that the design, planning and implementation of national REDD+ programs comply with "democratic governance,"¹⁰⁸ going beyond the UNFCCC COP safeguards, to encompass a range of elements that are typically associated with procedural rights to access to information, justice and public participation.¹⁰⁹

These standards are further elaborated upon in guidelines that partner countries should use to seek and obtain the Free, Prior and Informed Consent (FPIC) of affected stakeholders for all activities supported by the UN-REDD. In line with established human rights law and practice,¹¹⁰ the guidelines treat FPIC as a means to empower indigenous peoples, as well as other forest-dependent communities,¹¹¹ to determine the outcome of decision-making that affects them, rather than merely a right to be involved in such processes.¹¹² They also specify that no involuntary resettlement should take place as a result of REDD+ activities and/or policies.¹¹³ The identification of indigenous peoples should take place by means of self-identification and not be dependent upon whether the national government has recognized a community as indigenous.¹¹⁴

As the UN-REDD standards have only recently been adopted, little evidence exists on how they have been implemented in practice. It already seems clear, however, that the UN-REDD has gone to great lengths to expand upon the UNFCCC COP safeguards, drawing on human rights law and practice. While the UN-REDD does not request partner countries to sign up to human rights treaties they have not ratified already, its standards openly draw upon human rights law and practice. And, although these standards are mere internal rules, their incorporation into partnership agreements makes them a crucial source of legal obligations for partner countries.

There are no specific sanctions attached to breaches of UN-REDD standards. Still, agreements with partner countries include general clauses concerning suspension and resolution.¹¹⁵ Coupled with the requirement that partner countries report information on implementation of the UN-REDD guidelines, in practice these standards

¹⁰⁷ Report of the Special Rapporteur on the Rights of Indigenous Peoples, Extractive industries and indigenous peoples (2013) A/HRC/24/41, 88; Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, Advice No. 2, Indigenous peoples and the right to participate in decision-making, with a focus on extracting industries (2012) A/HRC/21/55, 42; IACtHR, *Saramaka People v. Suriname* (Case No. 172), Judgment of 28 September 2008, 138-140; and ACHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, (Comm. No. 276/2003), Decision of 4 February 2010, 297. See discussion Annalisa Savaresi, *The Emergence of Benefit-Sharing under the Climate Regime. A Preliminary Exploration and Research Agenda*. (2014) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524335> accessed 8 January 2015, at 4.

¹⁰⁸ UN-REDD Social and Environmental Principles and Criteria, Principle 1.

¹⁰⁹ *Ibid.*, Criteria 1-6, and at 8.

¹¹⁰ Compare: UNDRIP, Article 32.2; Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, Advice No. 2, Indigenous peoples and the right to participate in decision-making, (2011), para 1; and *Saramaka People v. Suriname*, at 79-86. On the status of FPIC in international law, see International Law Association, 'Sofia Conference Report. Rights of Indigenous Peoples' (2012), at 43-52.

¹¹¹ UN-REDD Social and Environmental Principles and Criteria, at 12.

¹¹² *Ibid.*, at 20.

¹¹³ *Ibid.*, at 10.

¹¹⁴ *Ibid.*, at 29.

¹¹⁵ For example, Indonesia's National Joint Programme Document (2009), at 71, available at <www.un-redd.org/AsiaPacific_NationalProgrammeDocument/tabid/106607/Default.aspx>.

may well work as conditionalities for the provision of assistance to partner countries. This in turn raises the question of the legitimacy of such conditionalities, since the UN-REDD standards draw from obligations embedded in international treaties that not all Parties to the UNFCCC have ratified.¹¹⁶ However, as States enter voluntarily into partnerships with the UN-REDD, they are expected to abide by its standards.

Similar considerations apply to the recently adopted GCF Environmental and Social Safeguards, which explicitly mention ensuring full respect of the human rights of indigenous peoples, and their free, prior and informed consent, at least in certain circumstances.¹¹⁷ While not all partner countries to the UN-REDD may have adhered to human rights treaties protecting the rights of indigenous peoples, the protection of these rights is expected to be a relevant criterion to obtain REDD+ results-based payments from the GCF.

Contrary to the UN-REDD, the FCPF has not elaborated specific standards for REDD-readiness activities. Instead, funded activities should comply with the World Bank's general Operational Policies and procedures,¹¹⁸ taking into account the need for "effective participation" of forest-dependent indigenous peoples and forest dwellers in decisions that may affect them, respecting their rights "under national law and applicable international obligations."¹¹⁹

The World Bank Operational Policies have long raised criticism for subjecting the protection of the rights of indigenous peoples to a series of distinctions.¹²⁰ For example, indigenous peoples' FPIC is required only when the partner country has ratified ILO Convention 169¹²¹ or adopted national legislation on the issue.¹²² Partner countries are merely required to engage in a process of free, prior, and informed "consultation", rather than "consent".¹²³ When avoidance is not feasible, adverse effects should be "minimized, mitigated, or compensated."¹²⁴ Involuntary resettlement is openly contemplated.¹²⁵

The FCPF approach has attracted some criticism. The UN Permanent Forum on Indigenous Issues has emphasized that "displacement and exclusion of indigenous peoples from their forests, which may be triggered by projects funded by the Partnership Facility, should be avoided at all costs" and that the choice not to participate in REDD+ or in FCPF supported projects "should be respected".¹²⁶ An evaluation of the

¹¹⁶ Kirsty Gover, *The Impact of Climate Change Mitigation on Indigenous and Forest Communities: International, National and Local Law Perspectives on REDD+* (11 November 2014).

¹¹⁷ GCF, Guiding framework and procedures for accrediting national, regional and international implementing entities and intermediaries, including the fund's fiduciary principles and standards and environmental and social safeguards, at 1.7.

¹¹⁸ FCPF, Readiness Fund Common Environmental and Social Approach among Delivery Partners, at 14.

¹¹⁹ World Bank, Charter establishing the Forest Carbon Partnership Facility (2013 edition), Article 3, section 3.1(d).

¹²⁰ Press Release, UN Special Rapporteur on the Rights of Indigenous Peoples, (27 March 2013).

¹²¹ To date the Convention has been ratified by 22 states. See <www.ilo.org/ilolex/cgi-lex/ratific.pl?C169>.

¹²² Guidelines on Stakeholder Engagement in REDD+ Readiness with a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities, (2012), at 7.

¹²³ World Bank OP 4.10 - Indigenous Peoples (2013 ed.), at 1.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, at 20; and FCPF, Incorporating Environmental and Social Considerations into the Process of Getting Ready for REDDplus. Revised Draft, (2010), at 2.

¹²⁶ See United Nations Permanent Forum on Indigenous Issues, Impact of Climate Change Mitigation Measures on Indigenous Peoples and on Their Territories and Lands (2008) E/C.19/2008/10, at 88.

FCPF has specifically underscored the need to strengthen coordination with UN-REDD, and resolve differences with regard to advice given to participating countries on implementation of social safeguards. The reluctance of the World Bank to deal with human rights, however, is a major hindrance towards greater coordination with the UN-REDD.

The divergence in safeguards adopted under the FCPF and the UN-REDD has resulted in the fact that the same activities in the same countries may be subject to different standards, depending on which institution is handling the funding. To address this problem, the FCPF has decided that when the fulfillment of the partnership agreements is delegated to third institutions that deploy more stringent standards than its own, the more stringent standards prevail.¹²⁷ While this solution addresses questions associated with conflicts between standards, it also means that States that are partners solely to the FCPF can abide to the less stringent ones. So countries partners to the UN-REDD Programme are expected to adhere to standards outlined in key relevant international instruments, and ensure that activities follow a “human rights based approach” and FPIC. Instead, only when a partner country has ratified ILO Convention 169 or adopted national legislation on the issue does the FCPF require that FPIC be obtained.¹²⁸

The interpretation of REDD+ safeguards by REDD-readiness processes has thus led to a fragmented landscape, where the UN-REDD and the FCPF have taken diverging stances on fundamental issues, such as involuntary resettlement and FPIC. The chasm in the approach to REDD+ safeguards adopted by the UN-REDD and the FCPF is ultimately down to the different institutional cultures and practices. Such discrepancy in standards is hardly conducive to the establishment of a level playing field enabling countries to carry out REDD+ activities on an equal footing. Therefore, further guidance from the UNFCCC COP on these crucial issues seems indispensable.

The UN-REDD experience has confirmed that there is ample scope to build upon human rights to interpret REDD+ safeguards. The added value of making reference to human rights lies in avoiding duplications and exploiting the consensus underpinning existing human rights law. Building explicit links with extant human rights instruments and practice, however, may be difficult, because not all State Parties eligible to carry out REDD+ activities are parties to the same human rights treaties. The FCPF has reflected this fundamental challenge in its standards, which, very much like UNFCCC COP safeguards, merely make reference to “relevant” international law, thus leaving it to partner countries to identify relevant law and its interplay with safeguards. This reluctance may, nevertheless, be superseded in the context of negotiations on a new climate agreement to be adopted in 2015, where the relationship between climate change and human rights is being looked anew.¹²⁹

¹²⁷ FCPF, *Readiness Fund Common Environmental and Social Approach among Delivery Partners* (2011), at 9.

¹²⁸ See *Guidelines on Stakeholder Engagement in REDD+ Readiness with a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities* (2012), at 6-7. For a commentary, see Annalisa Savaresi, ‘The Human Rights Dimension of REDD’ (2012) 21 *Review of European Community & International Environmental Law* 102, at 112.

¹²⁹ For a review, see, Annalisa Savaresi and Jacques Hartmann, ‘Human Rights in the 2015 Agreement’ (Legal Response Initiative 2015).

Conclusions

This chapter has analyzed REDD+ safeguards, and the challenge of interpreting them in light of States' extant obligations concerning biodiversity, forests, and human rights. Presently, ensuring that REDD+ safeguards are interpreted in line with States' international law obligations remains a matter left to the autonomous efforts of national decision-makers and single institutions, in what Sebastian Oberthür has aptly described as "autonomous" or, at best, "unilateral interplay management." This approach is opposed to more systemic forms of interplay management, where coordination is carried out by a set of institutions together, or by an overarching international institution.¹³⁰ The risk that autonomous and unilateral interplay management endeavors end in incoherence is already palpable when one considers the divergence in REDD-readiness standards. This state of affairs poses considerable challenges for developed countries wishing to access funding, and faced each time with different standards. While this is not a matter arising only with regard to REDD+,¹³¹ it is particularly concerning that such incoherence affects standards that are ultimately aimed at tackling the risk of perverse outcomes. It would therefore seem wise for UNFCCC Parties adopt more specific guidance on this issue.

Experience accumulated with human rights, biodiversity and forest law and practice provides a precious aid on how to avoid perverse outcomes and pursue REDD+ co-benefits. So far guidance adopted by the UNFCCC COP has made little effort to draw upon these bodies of law. It has instead left a wide margin of discretion to UNFCCC Parties, by adopting a succinct list of very broadly worded safeguards.

Are these safeguards imposing actual conditionalities for UNFCCC Parties receiving REDD+ results-based payments? For the time being, very little is known on the legal consequences to be attached to lack of compliance with safeguards, even though the suspension and withdrawal of funding would be an obvious sanction for lack of compliance. The extent of obligations concerning the reporting of safeguards implementation is equally unclear. Presently little clarity exists on how to report the implementation of REDD+ safeguards. In this state of uncertainty, there has been a proliferation of interpretations of REDD+ safeguards, which has engendered a great deal of confusion.

The complex debate on REDD+ safeguards boils down to concerns over striking the right balance between, on the one hand, avoiding perverse outcomes and pursuing co-benefits, and, on the other, ensuring the feasibility of REDD+. There is furthermore an inherent tension between the need for international coordination and the respect for States' sovereignty. Ultimately, the solution to these questions greatly depends on whether REDD+ will be a mere facilitative mechanism to create the circumstances for developing countries to comply with their own emissions reduction obligations; or, rather, a mechanism for forest carbon offsets à la CDM. An exhaustive answer therefore will only be possible when the nature of REDD+ under the climate regime will be eventually clarified. Two main scenarios may be envisioned.

¹³⁰ Sebastian Oberthür, "Interplay Management: Enhancing Environmental Policy Integration Among International Institutions," *International Environmental Agreements: Politics, Law and Economics* 9, no. 4 (2009): 371–91, at 376.

¹³¹ Compare the review of social and environmental safeguards adopted by bodies entrusted to handle climate finance under the UNFCCC in Annalisa Savaresi *The Emergence of Benefit-Sharing under the Climate Regime. A Preliminary Exploration and Research Agenda* (n 109).

In the first scenario, the inclusion of REDD+ in the scope of the finance mechanism of the Convention would entail bringing REDD+ safeguards into line with those adopted by the Green Climate Fund and/or the Global Environmental Facility, subjecting them to the same reporting and compliance regime.¹³² Serious questions would, however, arise with regard to the legitimacy of REDD+ conditionalities concerning the pursuit of co-benefits: why should developing countries be asked to produce co-benefits when they reduce their emissions, when developed countries are not?

In the second scenario, REDD+ safeguards would become part of the legal framework established to render carbon credits generated with REDD+ activities fungible with the others traded on carbon markets, ensuring that they all comply with a minimum set of requirements, like those adopted in the context of the CDM.¹³³ In this context, safeguards would operate as actual conditionalities for REDD+ payments, and special premiums could be designed to reward the provision of co-benefits.¹³⁴

UNFCCC Parties are still engaged in a soul-searching exercise on these issues. Whilst they have unequivocally acknowledged the desirability to ask Parties implementing REDD+ activities to avoid perverse outcomes and pursue environmental and social co-benefits, they have been reluctant to provide guidance on how to go about it, and to draw upon other existing international instruments designed to achieve these objectives. This is hardly surprising, and indeed is in line with the established law-making practice under the UNFCCC, which normally avoids providing detailed guidance to Parties on concrete action they should undertake in order to reduce their emissions. Implementation of climate response measures, however, has already provided ample evidence that there is a need to be especially vigilant over the risk of perverse outcomes. An obvious point of departure to tackle this risk would therefore be to vigorously explore ways to ensure that UNFCCC Parties' obligations concerning REDD+ are implemented in a mutually supportive fashion with those under related international instruments.

¹³² GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards (2013); and Green Climate Fund, Guiding Framework and Procedures for Accrediting National, Regional and International Implementing Entities and Intermediaries, Including the Fund's Fiduciary Principles and Standards and Environmental and Social Safeguards (2014).

¹³³ Decision 5/CMP.1, Modalities and procedures for afforestation and reforestation project activities under the clean development mechanism in the first commitment period of the Kyoto Protocol, UN Doc FCCC/KP/CMP/2005/8/Add.1.

¹³⁴ Savaresi, 'Reducing Emissions from Deforestation in Developing Countries under the UNFCCC' (n 50), at 22-23.

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