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Rights and REDD+ in International and Transnational Law

2.1 THE EMERGENCE OF RIGHTS IN THE FIELD OF REDD+

As was the case in other domains of climate governance until the second half of the 2000s, human rights issues were not accorded much importance in the initial development of REDD+.[261] For instance, the UNFCCC COP's first decision on REDD+ in December 2007 avoided rights-based language and merely acknowledged that "the *needs of local and indigenous communities* should be addressed when action is taken to reduce emissions from deforestation and forest degradation in developing countries."[262] In addition, the UNFCCC COP failed to recognize the status and rights of Indigenous Peoples under international law in the decision on REDD+ that it adopted in December 2008,[263] prompting the Indigenous Peoples' caucus to walk out of the UNFCCC negotiations under the rallying cry "No rights, no REDD."[264] Ultimately, as I detail in this chapter, human rights standards have become an integral part of the legal framework for REDD+ developed within the UNFCCC and other international and transnational sites of law such as the World Bank FCPF, the UN-REDD Programme, the REDD+ SES, and the CCBA.

Two main processes can help explain the emergence of rights in the field of REDD+. To begin with, the neglect of human rights concerns in the UNFCCC and the subsequent propagation of REDD+ programs and activities around the world prompted IPOs and NGOs to initiate research

[261] Jodoin, *supra* note 17.

[262] UNFCCC COP, Decision 2/CP.13, preamble [emphasis added].

[263] Jodoin, *supra* note 17 at 167–168.

[264] Lang, *supra* note 1. See also Victoria Tauli-Corpuz, "International Human Rights Day 2008: A sad day for indigenous peoples" (10 December 2008), available at: www.forestpeoples.org/topics/un-framework-convention-climate-change-unfccc/news/2011/05/international-human-rights-day-200 (accessed 13 September 2014).

and advocacy efforts in this new domain of transnational climate law.[265] Throughout 2008 and 2009, a growing array of civil society organizations began to press for greater recognition of the rights of Indigenous Peoples and local communities in the context of REDD+ through a range of actions, including by releasing analysis and reports,[266] and issuing statements and declarations,[267] sharing information and coordinating advocacy efforts within civil society networks and caucuses,[268] and lobbying governments within the UNFCCC, the REDD+ Partnership, the FCPF, and the UN-REDD Programme.[269] In doing so, IPOs and NGOs most notably sought acknowledgment and protection of the rights enshrined in the *UN Declaration on the Rights of Indigenous Peoples*, including the right to free, prior, and informed consent, as well as in the wider set of international instruments that supported the collective rights of Indigenous Peoples and forest-dependent

[265] See den Besten, Arts & Verkooijen, *supra* note 169 at 43–44; Linda Wallbott, "Indigenous Peoples in UN REDD+ Negotiations: 'Importing Power' and Lobbying for Rights through Discursive Interplay Management" (2014) 19:1 Ecology & Society, art. 21.

[266] See, *e.g.*, Victoria Tauli-Corpuz & Aqqaluk Lynge, "Impact of climate change mitigation measures on indigenous peoples and on their territories and lands" E/C.19/2008/10 (19 March 2008); Rights & Resources Initiative, *Seeing People Through The Trees: Scaling Up Efforts to Advance Rights and Address Poverty, Conflict and Climate Change* (2008), available at: www.rightsandresources.org/documents/files/doc_737.pdf (accessed 13 September 2014).

[267] See, *e.g.*, Accra Caucus on Forests and Climate Change, "Accra Caucus Statement for COP 14" (December 2008), available at: http://unfccc.int/resource/docs/2008/smsn/ngo/074.pdf (accessed 13 September 2014); Declaration on Climate Change and Indigenous Peoples of El Salvador (CCNIS 2009), Indigenous Peoples' Global Summit on Climate Change, "The Anchorage Declaration" (24 April 2009), available at: http://unfccc.int/resource/docs/2009/smsn/ngo/168.pdf (accessed 13 September 2014); and Tebtebba, "Press Statement of Tebtebba: Assessment of What Indigenous Peoples Have Gained So Far in the Negotiations in Bonn 2" (11 June 2009), available at: www.tebtebba.org/index.php/all-resources/category/84-redd-and-ad-and-indigenous-peoples?download=421:tebtebba-press-statement-on-the-bonn-climate-talks-11-june-2009 (accessed 13 September 2014).

[268] Interview 81 at 1. Key networks in the early stages were the Indigenous Peoples caucus, the Climate Action Network, the Accra Caucus on Forests and Climate Change, and the Human Rights & Climate Change Working Group (Observations gathered during participation in the 15th session of the UNFCCC (Copenhagen, Denmark, December 2009)). In particular, the Accra Caucus was formed in August 2008 by a coalition of forty NGOs from close to thirty countries for the explicit purpose of discussing and monitoring the development and implementation of REDD+ within the UNFCCC and beyond. See Interview 84 at 1–2 and Rainforest Foundation, UK, "The Accra Caucus on Forests and Climate Change," available at: www.rainforestfoundationuk.org/Accra_Caucus (accessed 13 September 2014).

[269] Interview 33 at 6; Interview 41 at 5–6; Interview 42 at 2; Interview 81 at 1–2; Interview 94 at 1. See also Wallbott, *supra* note 265 at 5–9; Victoria Tauli-Corpuz & Lars-Ander Baer, "The Copenhagen Results of the UNFCCC: Implications for Indigenous Peoples' Local Adaptation and Mitigation Measures" E/C.19/2010/18 (2 March 2010) at para. 23.

communities.[270] These efforts eventually succeeded in having Indigenous rights issues included on the agendas of several key international and transnational sites of law for REDD+. These most notably included the UNFCCC, where governments began to incorporate references to Indigenous Peoples, their rights, and the *UN Declaration on the Rights of Indigenous Peoples* in their submissions on draft negotiating texts for REDD+.[271]

In addition, the launch of an extensive array of multilateral, bilateral, and nongovernmental finance, research, and capacity-building programs also supported the integration of human rights norms across the field of REDD+. Indeed, many actors in these other sites of law were already committed to the protection of human rights in their activities as a result of the spread of rights-based approaches to conservation[272] and development assistance[273] as well as the growing importance accorded to the rights of Indigenous Peoples in the wake of the adoption of the *UN Declaration of Indigenous Peoples*.[274] In turn, initial experiences with the implementation of REDD+ activities supported by multilateral, bilateral, and nongovernmental actors generated important insights about the utility of adopting social safeguards to govern the implementation of REDD+ activities. They also elucidated the range of legal obligations and standards by which these safeguards might protect the rights

[270] Interview 3 at 1; Interview 41 at 4–5; Interview 81 at 2. See, *e.g.*, "Indigenous Peoples and Local Communities' Global Strategy on REDD" Adopted at the Global Indigenous Peoples Consultation on Reducing Emissions from Deforestation and Forest Degradation (REDD) on 14 November 2008, available at: www.unutki.org/default.php?doc_id=133 (accessed 13 September 2014).

[271] With respect to governments, see the submissions by Bolivia, Ecuador, the European Union, Guatemala, Mexico, Panama, Costa Rica, Switzerland (on behalf of the Environmental Integrity Group), and Tuvalu (UNFCCC SBSTA, "Issues relating to indigenous people and local communities for the development and application of methodologies. Submissions from Parties." FCCC/SBSTA/2009/MISC.1 (10 March 2009); UNFCCC SBSTA, "Issues relating to indigenous people and local communities for the development and application of methodologies. Submissions from Parties. Addendum." FCCC/SBSTA/2009/MISC.1.Add.1 (17 April 2009); UNFCCC SBSTA, "Issues relating to indigenous people and local communities for the development and application of methodologies. Submissions from Parties. Addendum." FCCC/SBSTA/2009/MISC.1.Add.2 (27 May 2009)).

[272] Thomas Sikor & Johannes Stahl, "Introduction: The Rights-Based Agenda in International Forestry" in Sikor & Stahl, *supra* note 11, 1–18; Sébastien Jodoin, "Can Rights-based Approaches Enhance Legitimacy and Cooperation in Conservation? A Relational Account" (2014) 15(3) Human Rights Review 283–303.

[273] Bridgitte Hamm, "A Human Rights Approach to Development" (2001) 23 Human Rights Quarterly 1005.

[274] See generally Xanthaki, *supra* note 38; James Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon, Saskatchewan: Purich Publishing, 2008); Rhiannon Morgan, *Transforming Law and Institution. Indigenous Peoples, the United Nations and Human Rights* (Surrey, UK: Ashgate Press, 2011).

of Indigenous Peoples and local communities.[275] Government officials and civil society representatives reporting on initial experiences with the pursuit of REDD+ on the ground shared these insights across the UNFCCC, the World Bank FCPF, the UN-REDD Programme, and other sites of law through formal and informal channels.[276]

In what remains of this chapter, I analyze the recognition of Indigenous and community rights in the context of three international sites of law (the UNFCCC, the World Bank Forest Climate Partnership Facility, and the UN-REDD Programme) and two transnational sites of law (the REDD+ SES and the CCBA). I conclude by highlighting some of the key differences that have emerged in relation to rights-related issues across these different sites of law.

2.2 INDIGENOUS AND COMMUNITY RIGHTS IN UNFCCC DECISION-MAKING ON REDD+

2.2.1 *The UNFCCC and the Transnational Legal Process for REDD+*

The UNFCCC is an international treaty that aims "to stabilize atmospheric concentrations of GHG at a level that would prevent human-induced actions from leading to 'dangerous interference' with the global climate system."[277] In line with the "convention/protocol" model that is typical of many other multilateral environmental agreements, the UNFCCC establishes a set of common objectives and a forum for intergovernmental cooperation and dialogue on climate change. In turn, it is through the adoption of follow-up protocols that states may develop and take on binding obligations in relation to climate mitigation and adaptation efforts.[278] As the "supreme body" of the UNFCCC, the COP is tasked with adopting decisions that promote its effective implementation.[279] The COP meets annually and its decision-making requires the

[275] den Besten, Arts & Verkooijen, *supra* note 169 at 46.

[276] Interview 33 at 7 and 9; Interview 41 at 2–4 and 7; and Interview 94 at 2. Wallbott, *supra* note 265 at 7–8. For an example of how such insights were shared within the UNFCCC see, *e.g.*, UNFCCC SBSTA, "Report on the expert meeting on guidance on systems for providing information on how safeguards for REDD-plus activities are addressed and respected" UN Doc. FCCC/SBSTA/2011/INF.17 (10 November 2011).

[277] UNFCCC, art. 2.

[278] Elisabeth DeSombre, *Global Environmental Institutions* (Abingdon, UK: Routledge, 2006) at 124.

[279] UNFCCC, art. 7.2.

consensus (or near-consensus) of the 196 state parties to the UNFCCC.[280] Relying upon the scientific and technical guidance provided by its Subsidiary Body for Scientific and Technological Advice (SBSTA),[281] the COP adopts decisions that develop and operationalize new legal instruments (such as the *Kyoto Protocol*) and mechanisms (such as the CDM) in accordance with the UNFCCC's broader objectives and principles. Over the last two decades, existing research has shown that the legal norms developed through the decisions adopted by the COP have influenced the behavior and interactions of a range of public and private actors operating in the domain of climate change,[282] under the auspices of the UNFCCC[283] and beyond.[284]

The UNFCCC has played a critical role in the emergence of the transnational legal process for REDD+ by serving as the primary site for the construction of an initial set of legal norms for REDD+. These legal norms have spread to a variety of sites of law around the world and have prompted the development of myriad multilateral, bilateral, and nongovernmental schemes, tools, and programs to support jurisdictional as well as project-based REDD+ activities in developing countries.[285] Although its influence has diminished within a broader transnational legal process that has grown more decentered and heterogeneous since 2007, the UNFCCC has nonetheless remained an important international site of law for jurisdictional REDD+ activities. As part of the *Cancun Agreements* in 2010,[286] the *Durban Platform* in 2011,[287] and the

[280] In fact, the UNFCCC COP has never managed to adopt rules of procedure and has therefore operated on the basis of an informal practice of consensus-based decision-making. However, at a number of sessions, the rule of consensus has not been interpreted to mean unanimous consent and decisions have been adopted over the objections of one party (Duncan French & Lavanya Rajamani, "Climate Change and International Environmental Law: Musings on a Journey to Somewhere" (2013) 25 *Journal of Environmental Law* 1 at 13–15).

[281] Comprised of technical experts appointed by parties to the UNFCCC, the SBSTA provides guidance on scientific and technical matters identified by the COP (UNFCCC, art. 9).

[282] This is not to say that the legal norms constructed by the UNFCCC COP have succeeded in actually resolving the problem of climate change. The point that I am making here is simply that the decision-making of the UNFCCC COP amounts to a form of law that has been found to steer the behavior of actors and influence other sites of law.

[283] French & Rajamani, *supra* note 280 at 7–12; Jutta Brunée, "COPing with Consent: Law-Making Under Multilateral Environmental Agreements" (2002) 15:1 *Leiden Journal of International Law* 1 at 33–50.

[284] Jessica F. Green, "Order out of Chaos: Public and Private Rules for Managing Carbon" (2013) 13:2 *Global Environmental Politics* 1 (arguing that the rules for CDM developed by the UNFCCC COP have been embedded in the private standards developed for voluntary carbon markets). See also Abbott, *supra* note 158 at 587.

[285] Jodoin & Mason-Case, *supra* note 162 at 272–274.

[286] Decision 1/CP.16, paras 68–79.

[287] Decision 2/CP.17, paras 63–73.

Warsaw Framework for REDD+ in 2013,[288] the UNFCCC COP has adopted a series of decisions that provide the core modalities and requirements for the pursuit of jurisdictional REDD+ activities in developing countries. To be sure, the construction and implementation of these legal norms has been influenced by developments and processes emanating from other sites of law at the international, transnational, and national levels.[289] All the same, the UNFCCC COP has served as a venue in which legal norms for jurisdictional REDD+ activities have received the endorsement of states through a formalized process in a multilateral setting. As such, a wide range of actors in other sites of law have viewed the decisions of the UNFCCC as providing an authoritative set of international legal norms for the pursuit of jurisdictional REDD+ activities.[290]

2.2.2 *The Rights of Indigenous Peoples and Local Communities in UNFCCC Decision-Making on REDD+*

Although Indigenous Peoples formed an officially recognized caucus within the UNFCCC, the rights of Indigenous Peoples were largely absent from the negotiations and decisions of the UNFCCC COP until the second half of the 2000s.[291] The only references to rights in the UNFCCC itself are to the rights of states to "exploit their own resources pursuant to their own environmental and developmental policies" and to "promote sustainable development."[292] In particular, the rules and guidance adopted for the implementation of CDM projects under the *Kyoto Protocol* do not include any references to human rights standards.[293] Numerous CDM projects, especially large hydro-electric projects, have thus been criticized for encroaching upon the rights of Indigenous Peoples and local communities.[294] In fact, the deficient manner

[288] UNFCCC COP, Decisions 9/CP.19, 10/CP.19, 11/CP.19, 12/CP.19, 13/CP.19, 14/CP.19 and 15/CP.19.

[289] See, *e.g.*, Reinecke *et al.*, *supra* note 251 (discussing the role and influence of the REDD+ Partnership in relation to the UNFCCC).

[290] Interview 8 at 5; Interview 21 at 1; Interview 76 at 4; Interview 79 at 15.

[291] Lavanya Rajamani, "The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change" (2010) 22:3 *Journal of Environmental Law* 391 at 394.

[292] UNFCCC, preamble and art. 3.4.

[293] For instance, neither Decision 17/CP.7, which provides the modalities and principles for the CDM, nor the CDM Executive Board, "Clean Development Mechanism Validation and Verification Manual" (Version 01.2), available at: https://cdm.unfccc.int/Reference/Standards/accr_man01_2.pdf (accessed 16 September 2014) include any references to rights, Indigenous Peoples, or local communities.

[294] Roht-Arriaza, *supra* note 39 at 216–219.

in which the UNFCCC's CDM regime addressed human rights issues prompted the development of private certification programs, such as the CDM Gold Standard, that include standards that recognize and aim to protect the rights of Indigenous Peoples and local communities.[295] While the initial discussions of REDD+ were no exception to the general neglect of human rights issues that characterized the UNFCCC until the second half of the 2000s, Indigenous and community rights eventually became an important aspect of the UNFCCC's decision-making on REDD+.[296]

The *Cancun Agreements*, adopted by the UNFCC COP in December 2010, served as the vehicle for the first major decision on REDD+ within the UNFCCC. On the whole, the *Cancun Agreements* offered unprecedented levels of recognition of the linkages between human rights and climate change.[297] The preamble to the *Cancun Agreements* most notably emphasizes that "Parties should, in all climate change-related actions, fully respect human rights."[298] As far REDD+ is concerned, the *Cancun Agreements* specify that a national REDD+ strategy must address "drivers of deforestation and forest degradation, land tenure issues, forest governance issues, gender considerations and [environmental and social safeguards]" in a manner that ensures "the full and effective participation of relevant stakeholders, *inter alia*, indigenous peoples and local communities."[299] Furthermore, the *Cancun Agreements* provide that the implementation of REDD+ should "promote" and "support" a set of social and environmental safeguards,[300] including the following two safeguards that are relevant to the rights of Indigenous Peoples and local communities:

> (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;

[295] Gold Standard Foundation, "The Gold Standard Principles," available at: www.goldstandard.org/wp-content/uploads/2013/08/The-Gold-Standard-Principles-FINAL-270513.pdf (accessed 16 September 2014), at Indicator 1.1: "The project shall assess the risk of potential harmful impacts against a series of safeguarding principles on human rights, labour standards, environmental protection and anti-corruption. These safeguarding principles are derived from the UNDP MDG Carbon Facility, UN Millennium Development Goals and international conventions. Projects shall identify potential negative impacts based on these safeguarding principles and avoid, mitigate, or repair them."

[296] Jodoin, *supra* note 17 at 166–170.

[297] See Edward Cameron & Marc Limon, "Restoring the Climate by Realizing Rights: The Role of the International Human Rights System" (2012) 21:3 *Review of European Community & International Environmental Law* 204.

[298] Decision 1/CP.16, para. 8. [299] *Ibid*, para. 72. [300] *Ibid*, para. 69.

(d) The full and effective participation of relevant stakeholders, in particular, indigenous peoples and local communities in [REDD+ activities].[301]

In addition, the *Cancun Agreements* also include a safeguard that aims to ensure that REDD+ activities serve, among other purposes, to "enhance other social and environmental benefits." This safeguard includes a footnote that indicates these purposes are to be achieved "[t]aking 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."[302] Finally, it is worth noting that the fourth element of a developing country's readiness for jurisdictional REDD+ consists of the development of an information system for reporting on the way that these and other environmental and social safeguards are "being addressed and respected" in REDD+ activities "while respecting sovereignty."[303]

Decisions subsequently adopted by the UNFCCC COP have further developed the safeguards regime set out in Cancun and addressed the related issue of incentivizing the provision of "non-carbon benefits" such as poverty reduction. As part of the *Durban Platform* adopted in December 2011, the UNFCCC COP specified that safeguard information systems must be implemented at the national level for all REDD+ activities "regardless of the source or type of financing"[304] and through a "country-driven approach" that ultimately provides "transparent and consistent information that is accessible by all relevant stakeholders and updated on a regular basis."[305] In the *Warsaw Package for REDD+*, adopted in November 2013, the UNFCCC COP established that developing countries have to provide periodical summaries of this information to the COP through national communications or some other channel, and on a web platform, on a voluntary basis.[306] Most significantly, the *Warsaw Package* provided that developing countries seeking to obtain and receive results-based payments for REDD+ activities are obliged to "provide the most recent summary of information on how all of the safeguards [...] have been addressed and respected before they can receive results-based payments."[307] Finally, during

[301] *Ibid*, Annex I, para. 2 (c) and (d). [302] *Ibid* at para. 2 (e).
[303] Decision 1/CP.16, para. 71(d). [304] Decision 2/CP.17, para. 63.
[305] Decision 12/CP.17, para. 2.
[306] Decision 12/CP.19, "The timing and the frequency of presentations of the summary of information on how all the safeguards referred to in decision 1/CP.16, appendix I, are being addressed and respected" UN Doc. FCCC/CP/2013/10/Add.1 (31 January 2014).
[307] 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 (31 January 2014) at para. 4.

the Paris Climate Conference held in December 2015, the UNFCCC COP adopted two decisions on REDD+ that relate to Indigenous and community rights. It reaffirmed the importance of incentivizing non-carbon benefits associated with the pursuit of REDD+ and decided that developing countries should be able to seek and obtain support for the integration of such benefits into their jurisdictional REDD+ activities.[308] The UNFCC COP also reiterated that developing country governments should provide information on how social and environmental safeguards are being addressed and respected "in a way that ensures transparency, consistency, comprehensiveness and effectiveness," and encouraged them to include information on how each safeguard has been defined, addressed, and respected in the context of national circumstances.[309]

UNFCCC decision-making on the implementation of jurisdictional REDD+ activities has directly and indirectly addressed several types of participatory and substantive rights held by Indigenous Peoples and local communities. A few caveats are worth mentioning, however. With respect to the rights of Indigenous Peoples, the safeguards adopted in Cancun do not specifically refer to the right to free, prior, and informed consent and only "note" the adoption of the *UN Declaration of the Rights of Indigenous Peoples*.[310] With respect to the rights of local communities, the use of the term "members of local communities" suggests that these communities do not hold the sort of *sui generis* collective rights held by Indigenous Peoples under international law.[311] More broadly, the UNFCCC safeguards regime for REDD+ is built on the voluntary participation of developing countries and its application is not subject to an independent mechanism.[312] As a result, IPOs and NGOs have shifted much of their focus to monitoring whether and to what extent developing countries are establishing safeguards information systems and effectively respecting the rights of Indigenous Peoples and local communities as part of the pursuit of jurisdictional REDD+.[313]

[308] Decision 18/CP.21, "Methodological issues related to non-carbon benefits resulting from the implementation of the activities referred to in decision 1/CP.16, paragraph 70" UN Doc. FCCC/CP/2015/10/Add.3 (29 January 2016).

[309] Decision 17/CP.21, "Further guidance on ensuring transparency, consistency, comprehensiveness and effectiveness when informing on how all the safeguards referred to in decision 1/CP.16, appendix I, are being addressed and respected" UN Doc. FCCC/CP/2015/10/Add.3 (29 January 2016) at paras 3 and 5.

[310] The use of the term "note" to refer to an international instrument makes it clear that the instrument in question does not have any autonomous formal legal standing within the UNFCCC. See French & Rajamani, *supra* note 280 at 446 (discussing the use of this term with respect to the adoption of the *Copenhagen Accord*.)

[311] Gilbert & Doyle, *supra* note 60. [312] Jodoin, *supra* note 17 at 170–171.

[313] In early 2013, IPOs and NGOs formed the REDD+ Safeguards Working Group. Based at the Ateneo School of Government in the Philippines and bringing together more than thirty

2.3 INDIGENOUS AND COMMUNITY RIGHTS IN THE WORLD BANK FCPF

2.3.1 *The World Bank FCPF in the Transnational Legal Process for REDD+*

Launched at the 13th session of the UNCCC in December 2007 and operational since June 2008, the FCPF is a global partnership program of the World Bank.[314] The FCPF was created to achieve four principal aims: (1) the provision of financial and technical assistance to build the capacity of developing countries to achieve emissions reductions through jurisdictional REDD+ activities; (2) the piloting of performance-based payments for REDD+ activities; (3) experimentation with approaches for sustaining or enhancing local livelihoods and biodiversity conservation through REDD+ activities; and (4) the dissemination of knowledge developed through the FCPF and its experience with supporting REDD+ readiness and jurisdictional activities.[315] The FCPF comprises two funds for which the World Bank serves as trustee and provides a secretariat: a Readiness Fund that supports developing country capacity-building and preparedness for REDD+ activities and a Carbon Fund to test eventual performance-based payments for emissions reductions generated through REDD+ activities.[316]

As a mechanism for the delivery of finance and capacity-building, the FCPF has been criticized for its ineffectiveness, most notably because of the slow process for the disbursal of funds.[317] As of June 2016, more than eight years after its launch, thirty-eight countries have managed to sign grant agreements to receive readiness support from FCPF and only thirteen countries have made enough progress in their readiness efforts to be in a position to apply for

NGOs from the around the world, it seeks "to ensure effective implementation of safeguards and the achievement of benefits for communities, climate and biodiversity through the global REDD+ mechanism" (REDD+ Safeguards Working Group, "What We Do," available at: http://reddplussafeguards.com?page_id=103 (accessed 8 January 2014)).

[314] FCPF, "Forest Carbon Partnership Facility. Information Memorandum" (18 June 2008), available at www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/FCPF_Info_Memo_06-13-08.pdf at 11.

[315] *FCPF Charter*, *supra* note 191 at Section 2.1.

[316] The FCPF currently has forty-seven partner countries in Africa, Asia, Latin America, and the Caribbean as well as seventeen developed countries, private sector, and NGO donors and approximately 1.057 billion US dollars have been pledged to the trust funds under its management. FCPF, "About FCPF," available at: www.forestcarbonpartnership.org/about-fcpf-0 (accessed 5 May 2016).

[317] Independent Evaluation Group, *The Forest Carbon Partnership Facility: Global Program Review* (August 2012), available at: https://ieg.worldbankgroup.org/Data/reports/fcpf_gpr.pdf (accessed 22 September 2014) at 11.

funding from the Carbon Fund.[318] On the other hand, the FCPF has emerged as a central international site of law for jurisdictional REDD+ in two respects. First, the set of rules and policies that govern the delivery of finance within the World Bank,[319] especially those relating to social and environmental safeguards, have not only applied to the jurisdictional REDD+ readiness efforts of FCPF developing country partners, but have also influenced the design of other multilateral and bilateral mechanisms for REDD+.[320] Second, the FCPF has made significant contributions to the organization, development, and dissemination of knowledge, methodologies, and tools for the implementation of jurisdictional REDD+ activities in developing countries.[321]

2.3.2 *The Rights of Indigenous Peoples and Local Communities in the World Bank FCPF*

The World Bank has traditionally resisted the notion that human rights obligations and principles are applicable to its work based on the notion that political considerations are excluded from its mandate as a multilateral agency focused on economic development.[322] Unlike many other multilateral and bilateral aid agencies, the World Bank does not have a standalone policy on human rights, nor has it adopted a rights-based approach to development. To the extent that human rights issues are incorporated into the World Bank's programming, they tend to be conceived in instrumental terms as "a means towards achieving other objectives such as economic

[318] FCPF, "FCPF Dashboard: Revised March 31, 2016," available at: www.forestcarbonpartnership.org/sites/fcp/files/2016/May/PC21%20FCPF%20Readiness%20Progress__MASTERec.pdf (accessed 6 May 2016).

[319] On the contribution of the World Bank's Operational Policies to international law-making, see, Benedict Kingsbury, "Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples" in Guy S. Goodwin-Gill & Stefan Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford: Clarendon Press, 1999) 323.

[320] Indeed, other international organizations, such as the UNDP, have applied to serve as delivery partners under the FCPF readiness mechanism and have had to develop safeguards policies and procedures that are broadly equivalent with those of the World Bank.

[321] A formal evaluation of the FCPF most notably concluded that "the FCPF has been very effective in defining what REDD readiness means, in creating knowledge and disseminating lessons, in opening up a space for dialogue on REDD between governments and civil society, and in raising awareness globally and in countries about REDD" (Independent Evaluation Group, *supra* note 317 at 23). See also NORAD, *supra* note 423 at 432 (concluding that "the FCPF has played a significant role in contributing to the establishment of global standards for REDD+.")

[322] Galit A. Sarfaty, "Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank" (2009) 103 *American* 647 at 657–649.

development."[323] Human rights concerns are specifically addressed at the World Bank through the application of safeguards that aim to prevent, mitigate, and address the adverse environmental and social impacts and risks of the Bank-financed projects.[324] These safeguards form part of the Operational Policies and Procedures that serve to guide the work of the Bank's staff. They are also frequently incorporated into the loan agreements that the Bank signs with borrower countries as well as the instruments that govern the mechanisms and trust funds overseen by the Bank.[325] Their application is monitored by the Inspection Panel, a permanent quasi-judicial body that considers complaints made by groups affected by Bank-financed projects.[326]

The FCPF Charter clearly specifies that the World Bank's Operational Policies and Procedures apply to the FCPF's activities, "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."[327] As such, both the jurisdictional readiness efforts of developing countries that are funded through the FCPF Readiness Mechanism and the jurisdictional REDD+ activities and transactions that may be financed by the FCPF Carbon Fund must comply with the World Bank's set of social and environmental

[323] Galit A. Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford, CA: Stanford University Press, 2012) at 13.

[324] This safeguards regime was first adopted in the 1980s in response to a decades-long campaign led by NGOs around the significant and harmful social and environmental impacts of Bank-financed projects in developing countries. See generally Jonathan Fox & L. David Brown (eds.), *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements* (Cambridge, MA: MIT Press, 1998).

[325] 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* (Oxford, UK: Oxford University Press, 2000) 281.

[326] If the Inspection Panel decides that a complaint falls within the scope of its jurisdiction and that all other remedies have been exhausted, it may launch an investigation and issue a report to establish whether a project has complied or not with applicable policies and procedures and whether it has resulted in harm to the complainants. In carrying out its work, an Inspection Panel can reach findings that publicize particular instances of noncompliance with the operational standards and can issue recommendations on steps to remedy such instances. The World Bank's management team then prepares a response or action plan that sets out the remedial measures that it intends to adopt to address the violations of the Operational Policies and their consequences. See International Bank for Reconstruction and Development, *Accountability at the World Bank. The Inspection Panel at Fifteen Years* (2009), available at: http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/380793-1254158345788/InspectionPanel2009.pdf (accessed 30 December 2013).

[327] *FCPF Charter*, *supra* note 192 at Section 3.1(d).

safeguards.[328] In addition, other multilateral organizations such as the Inter-American Development Bank (IADB) and the UNDP that act as delivery partners under the FCPF must "achieve substantial equivalence" to these Operational Policies and their associated procedures under what is known as the "Common Approach."[329]

Five of these safeguards policies are especially relevant to the participatory and substantive rights of Indigenous Peoples and local communities in the context of FCPF. First, Operational Policy 4.10 on Indigenous Peoples (1) requires that the proponents of Bank-funded projects ensure the full and effective participation of Indigenous Peoples and carry out processes of free, prior, and informed consultation, (2) makes the delivery of Bank finance contingent on broad community support among affected Indigenous Peoples for the project, and (3) avoids or minimizes negative effects from the project for Indigenous communities.[330] Second, Operational Policy 4.01 on Environmental Assessment mandates the consideration of social and environmental aspects in the design, management, and implementation of Bank-funded projects.[331] Third, Operational Policy 4.11 on Physical and Cultural Resources aims to ensure that Bank-funded projects assist in preserving resources with archaeological, paleontological, historical, architectural, religious, aesthetic, or cultural significance.[332] Fourth, Operational Policy 4.12 on Involuntary Resettlement aims to avoid or minimize the involuntary resettlement of persons and related impacts from Bank-funded projects.[333] Finally,

[328] *Ibid.*

[329] FCPF, *Common Approach to Environmental and Social Safeguards for Multiple Delivery Partners* (9 August 2012), available at: www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/PDF/Aug2012/FCPF%20Readiness%20Fund%20Common%20Approach%208-9-12.pdf (accessed 30 December 2013), at para. 3.

[330] World Bank, "Operational Policy 4.10 – Indigenous Peoples," available at: http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html (accessed 27 November 2014).

[331] World Bank, "Operational Policy 4.01 – Environmental Assessment," available at: http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064724~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html (accessed 27 November 2014).

[332] World Bank, "Operational Policy 4.11 – Physical Cultural Resources," available at: http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20970737~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html (accessed 27 November 2014).

[333] World Bank, "Operational Policy 4.12 – Involuntary Resettlement," available at: http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064610~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html (accessed 27 November 2014).

Operational Policy 4.36 on Forests seeks to realize the potential of forests for poverty reduction and sustainable economic development and accords "preference to small-scale community-level management approaches where they best reduce poverty in a sustainable manner."[334]

To the extent that these social and environmental safeguards were created for the delivery of actual projects rather than through a policy development process, their application to a country's REDD+ readiness phase is not necessarily straightforward.[335] In order to ensure jurisdictional REDD+ readiness efforts funded through the FCPF pro-actively respect these safeguards, the FCPF has required participating developing countries to carry out a Strategic and Environmental Assessment (SESA) and produce an Environmental and Social Management Framework (ESMF) as an integral part of their process for applying for funding under the Readiness Mechanism.[336] A SESA aims "to assess the broader strategic environmental and social impacts, including potential cumulative impacts, which may ensue from future REDD+ activities or projects, and to develop sound environmental and social policies and the necessary safeguards instruments that will apply to subsequent REDD+ investments and carbon finance transactions."[337] In practical terms, a SESA involves a combination of diagnostic and consultative activities aimed at contributing to the development of a country's national REDD+ strategy.[338] These are intended to ensure that social and environmental safeguards are integrated "at the earliest stage of decision making" and

[334] World Bank, "Operational Policy 4.36 – Forests," available at: http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064668~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html (accessed 27 November 2014).

[335] Interview 72 at 4; Interview 94 at 1.

[336] Readiness Preparation Proposal Template Document, Version 6, (23 November 2011), available at: www.unredd.net/index.php?option=com_docman&task=doc_download&gid=6869&Itemid=53 (accessed 30 December 2013), Annex 4.

[337] FCPF, *Forest Carbon Partnership Facility (FCPF) Readiness Fund Common Approach to Environmental and Social Safeguards for Multiple Delivery Partners*, 9 June 2011, rev. 10 August 2011, para. 17.

[338] These activities include: new or existing diagnostic work to address "the drivers of deforestation and the key social and environmental issues associated with the drivers, [including] issues such as land tenure, sharing of benefits, access to resources, and the likely social and environmental impacts of REDD+ strategy options"; diagnostic work on the legal, policy and institutional aspects of REDD+ readiness; an assessment of existing capacities to address these issues; the integration of this diagnostic work and assessment in the development of national REDD+ policies; the development of risk mitigation and management frameworks for REDD+ policies and future activities; and engagement and consultations with stakeholders throughout the above steps as part of existing consultations for national REDD+ readiness (*ibid* at para. 20).

that the strategy itself "reflects inputs from key stakeholder groups and addresses the main environmental and social issues identified."[339] In addition, a SESA should result in the adoption of an ESMF that serves as distinct output from a national REDD+ strategy and provides a "framework for managing and mitigating the potential environmental and social impacts and risks related to policy changes, investments and carbon finance transactions in the context of the future implementation of REDD+."[340]

2.4 INDIGENOUS AND COMMUNITY RIGHTS IN THE UN-REDD PROGRAMME

2.4.1 *The UN-REDD Programme and the Transnational Legal Process for REDD+*

The UN-REDD Programme is a collaborative initiative jointly established in June 2008 by the United Nations Development Programme (UNDP), the United Nations Environment Programme (UNEP), and the Food and Agriculture Organization (FAO).[341] The central objective of the UN-REDD Programme is to "promote the elaboration and implementation of National REDD+ Strategies to achieve REDD+ readiness, including the transformation of land use and sustainable forest management and performance-based payments."[342] The UN-REDD Programme carries out two main sets of activities. It runs a series of "National Programmes" that provide direct financial and technical support to the jurisdictional REDD+ readiness efforts of developing countries.[343] These programs focus on six key work areas: the development of MRV systems; national REDD+ governance; stakeholder engagement; multiple benefits; REDD+ finance and benefit-sharing; and the transformation of forestry and other relevant sectors.[344] In addition, the UN-REDD Programme has a global program that seeks to elaborate and

[339] *Ibid* at para. 19. [340] *Ibid*.

[341] UN-REDD Programme, "The UN-REDD Programme Strategy. 2011-2015," available at: www.unep.org/forests/Portals/142/docs/UN-REDD%20Programme%20Strategy.pdf (accessed 28 November 2014) at 26–27.

[342] *Ibid* at 6.

[343] As of June 2016, more than 281 million US dollars have been committed to the UN-REDD Programme, which currently supports national REDD+ readiness programs in 64 partner countries. See Multi-Partner Trust Fund Office, "UN REDD Programme Fund," available at: http://mptf.undp.org/factsheet/fund/CCF00 (accessed 5 May 2016); UN-REDD Programme, "Regions and Countries Overview" www.un-redd.org/Partner_Countries/tabid/102663/Default.aspx (accessed 5 May 2016).

[344] UN-REDD Programme Framework Document, *supra* note 193 at 10–11.

disseminate common methodologies and approaches for operationalizing jurisdictional REDD+ based on the experience gained in the readiness efforts of developing countries and in line with the decisions of the UNFCCC COP.[345]

Unlike the FCPF, the UN-REDD Programme was able to launch and operationalize several national programs in developing countries in the early stages of the global rollout of REDD+ in 2009.[346] However, the support and technical assistance provided by the UN-REDD Programme for jurisdictional REDD+ readiness efforts has been criticized for the tendency of international staff and consultants to impose their own set of goals and solutions rather than working with developing countries to generate country-driven approaches to the implementation of jurisdictional REDD+.[347] The effectiveness of the UN-REDD Programme's contributions to jurisdictional REDD+ readiness efforts has also been limited by the challenges involved in adapting its plans and activities to an evolving international conception of REDD+, fostering tri-agency collaboration, and coordinating its work with other multilateral and bilateral donors.[348] While the results achieved by the UN-REDD Programme with respect to supporting the jurisdictional REDD+ readiness efforts of developing countries have generally been underwhelming, the UN-REDD Programme has played an important role in generating and spreading legal norms relating to the core elements of jurisdictional REDD+ readiness.[349]

2.4.2 *The Rights of Indigenous Peoples and Local Communities in the UN-REDD Programme*

In accordance with the United Nations' broader commitment to the integration of human rights in its development programming,[350] the UN-REDD Programme has adopted a "rights-based approach" to its work.[351] In the early stages of the development of the UN-REDD Programme, its activities

[345] *Ibid* at 23–24. [346] NORAD, *supra* note 423 at 471 and 475–476.

[347] Alain Fréchette *et al.*, "External Evaluation of the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (the UN-REDD Programme)" available at: www.unep.org/eou/Portals/52/Reports/UN-REDD%20Evaluation%20Final%20Report%20July%202014%20%28ENG%29.pdf (accessed 28 November 2014) at 20–21.

[348] Ibid. at 26–29; NORAD, *supra* note 423 at 468–469. [349] *Ibid.* at 473–474.

[350] UNDP, *The Human Rights-based Approach to Development Cooperation: Towards a Common Understanding among the UN Agencies* (2003), available at: www.undp.org/governance/docs/HR_Guides_CommonUnderstanding.pdf (accessed on 28 November 2014).

[351] Fréchette *et al.*, *supra* note 347 at 62.

were guided by a set of social and environmental principles that reflected its "responsibility to apply a human rights based approach, uphold UN conventions, treaties and declarations, and [. . .] apply the UN agencies' policies and procedures."[352] The principles most notably included the following criteria: "a) All relevant stakeholder groups are identified and enabled to participate in a meaningful and effective manner; b) Special attention is given to the most vulnerable groups and the free, prior and informed consent of indigenous peoples."[353] Accordingly, the UN-REDD Programme therefore provides as follows:

> To be eligible for funding, activities at both the national and international level should support the participation of Indigenous Peoples, other forest dependent communities and civil society in national readiness and REDD+ processes in accordance with: (1) the UN-REDD Programme Operational Guidance and social standards; (2) negotiated REDD+ safeguards arrangements; and (3) a country's commitment to strengthen the national application of existing rights, conventions and declarations.[354]

Although there was some interest, especially among UNDP staff members, in the UN-REDD Programme developing or adopting a set of mandatory standards and safeguards to govern its activities, this approach was not supported by the FAO and the UNEP.[355] Instead, since March 2012, the activities of the UN-REDD Programme have been governed by a nonbinding set of Social and Environmental Principles and Criteria (SEPC) that were developed through extensive consultations with international experts, development country governments, and stakeholders.[356] The SEPC are meant to apply to the design, planning, implementation, and monitoring of national REDD+ activities supported by the UN-REDD Programme as well as serve as inspiration for the development of REDD+ safeguards systems by developing country governments participating in a UN-REDD National Programme.[357] The principles and criteria incorporate commitments drawn from a range of international instruments as well as the

[352] UN-REDD Programme, "Update on Social and Environmental Principles" UN-REDD Programme 5th Policy Board Meeting, November 2010, UN Doc. UNREDD/PBS/2010/12, available at: www.unredd.net/index.php?option=com_docman&task=doc_download&gid=3554&Itemid=53 (accessed 28 November 2014) at 2.

[353] *Ibid* at 5. [354] UN-REDD Programme Framework Document, *supra* note 193 at 12.

[355] Interview 66 at 5–6.

[356] UN-REDD Programme, "Social and Environmental Principles and Criteria" UN-REDD Programme Eighth Policy Board Meeting (25–26 March 2012, Asunción, Paraguay), available at: www.unredd.net/index.php?option=com_docman&task=doc_download&gid=6754&Itemid=53 (accessed 28 November 2014) at 3.

[357] *Ibid* at 3.

interpretative guidance provided by their associated bodies.[358] The SEPC includes seven principles, and twenty-four associated criteria that lay out associated conditions that the activities of the UN-REDD Programme must meet to respect or fulfil these principles. Some of the principles and criteria most relevant to the participatory and substantive rights of Indigenous Peoples and local communities include the following:

- "Principle 1 – Apply norms of democratic governance, as reflected in national commitments and Multilateral Agreements" and the related "Criterion 4 – Ensure the full and effective participation of relevant stakeholders in design, planning and implementation of REDD+ activities, with particular attention to indigenous peoples, local communities and other vulnerable and marginalized groups";
- "Principle 2 – Respect and protect stakeholder rights in accordance with international obligations" and the related "Criterion 7 – 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"; and
- "Principle 3 – Promote sustainable livelihoods and poverty reduction" and the related "Criterion 12 – Ensure equitable, non-discriminatory and transparent benefit sharing among relevant stakeholders with special attention to the most vulnerable and marginalized groups."

In order to guide UN-REDD staff members, national government civil servants, and stakeholders in the application and monitoring of a government's SEPC, the UN-REDD Programme has developed a Benefit and Risks Tool (BERT).[359] The BERT sets out questions that may guide users in the identification of social and environmental risks and opportunities throughout the design, implementation, and monitoring of a UN-REDD National Programme. The BERT includes several questions and related guidance materials from third parties that provide opportunities to highlight and consider the importance of respecting the participatory and substantive rights of Indigenous Peoples and

[358] This includes: the UNFCCC, the UN Convention on Biological Diversity, the Non-Legally Binding Instrument on all Types of Forest, the Convention on the Elimination of All Forms of Discrimination against Women, the International Labour Organization Convention 169, the United Nations Convention Against Corruption, the United Nations Declaration on the Rights of Indigenous Peoples, the United Nations Convention on the Elimination of All Forms of Racial Discrimination, and the Millennium Development Goals.

[359] UN-REDD Programme, "Draft Social and Environmental Principles and Criteria – Benefit and Risks Tool Using the SEPC" (2013), available at: www.unredd.net/index.php?option=com_docman&task=doc_download&gid=6380&Itemid=53 (accessed 28 November 2014).

local communities in REDD+ activities.[360] It should be emphasized that the BERT is a new tool that is still being tested and refined by the UN-REDD Programme, in consultation with country partners and stakeholders, and its effectiveness in monitoring adherence to the SEPC is an open question.[361]

In addition, the UN-REDD Programme has developed and released several other tools and guidelines that outline the normative, policy, and operational standards and frameworks that can guide jurisdictional REDD+ readiness activities with respect to the participation and rights of Indigenous Peoples and local communities.[362] Three such efforts are particularly worth mentioning. First, the UN-REDD Programme has emerged "as one of the primary instigators and advocates of FPIC in REDD+."[363] From 2010 to 2013, the UN-REDD Programme organized an extensive series of regional workshops in Asia, Africa, and Latin America in which multiple stakeholders (developing country governments, IPOs, CSOs, and aid agencies) discussed the challenges and opportunities involved in operationalizing the right to free, prior, and informed consent in the context of REDD+.[364] These consultations have led to the preparation and release of a set of guidelines that define the elements of free, prior, and informed consent and provide a concrete operational framework for respecting this principle in the context of REDD+ programs.[365] In accordance with the feedback received from IPOs as well as international lawyers within the UN system,[366] the guidelines clearly differentiate between the obligations owed to Indigenous Peoples and those owed to forest-dependent communities, recognizing that FPIC primarily applies to the former and only applies to the latter in limited circumstances.[367]

[360] For instance, under Principle 2 – Criterion 7, the BERT requires consideration of whether there are "existing policies and measures in place that help to respect and promote the recognition and exercise of equitable land tenure and carbon rights by indigenous peoples and local communities," whether "the REDD+ programme include[s] specific actions to respect and promote the recognition and exercise of equitable land tenure and carbon rights by indigenous peoples and local communities," and whether "the REDD+ programme ha[s] provisions to improve access to legal systems for indigenous peoples and local communities, where necessary" (*Ibid*, Principle 2, Criterion 7, questions 1, 2, and 3).

[361] Interview 66 at 6–8. [362] Fréchette *et al.*, *supra* note 347 at 62–64. [363] *Ibid* at 63.

[364] Interview 66 at 16–17.

[365] UN-REDD Programme, "Guidelines on Free, Prior and Informed Consent" (January 2013), available at: www.unredd.net/index.php?option=com_docman&task=doc_download&gid=8717&Itemid=53 (accessed 7 January 2014).

[366] Interview 66 at 22.

[367] *Ibid* at 11: "Consistent with international law, **States are required to recognize and carry out their duties and obligations to give effect to the requirement of FPIC as applicable to indigenous peoples**; and recognizing the right of forest-dependent communities to effectively participate in the governance of their nations, at a minimum **States are required to consult forest-dependent communities in good faith regarding matters that affect them**

Second, in collaboration with the FCPF, the UN-REDD Programme has produced joint guidelines for stakeholder engagement for jurisdictional REDD+ readiness that set out a step-by-step guide for undertaking consultations, provide a comprehensive overview of relevant international policies on Indigenous peoples and other forest-dependent communities, and offer guidance on how countries should reconcile inconsistent policy commitments between the approach adopted by the UN-REDD Programme and the FCPF.[368] For the purposes of understanding its implications for the recognition and protection of the rights of Indigenous Peoples and local communities, the following passage addressing the initiation of participatory processes for REDD+ is worth mentioning:

> Special emphasis should be given to the issues of land tenure, resource-use rights and property rights because in many tropical forest countries these are unclear as indigenous peoples' customary/ancestral rights may not necessarily be codified in, or consistent with, national laws. Another important issue to consider for indigenous peoples and other forest dwellers is that of livelihoods. Thus clarifying and ensuring their rights to land and carbon assets, including community (collective) rights, in conjunction with the broader array of indigenous peoples' rights as defined in applicable international obligations, and introducing better access to and control over the resources will be critical priorities for REDD+ formulation and implementation.[369]

with a view to agreement. Appreciating that international law, jurisprudence and State practice is still in its infancy with respect to *expressly* recognizing and requiring an affirmative obligation to secure FPIC from all forest-dependent communities, **a blanket application of FPIC is not required for all forest-dependent communities**. That said, the Guidelines soberly recognize that, in many circumstances, REDD+ activities may impact forest-dependent communities, often similarly as indigenous peoples, and that the circumstances of certain forest-dependent communities may rise to a threshold such that it should be seen as a requirement of States to secure FPIC when an activity may affect the communities' rights and interests. [. . .] As such, **States should evaluate the circumstances and nature of the forest-dependent community in question, on a case by case basis, through among others a rights-based analysis, and secure FPIC from communities that share common characteristics with indigenous peoples and whose underlying substantive rights are significantly implicated.**" [Emphasis in original].

368 UN-REDD Programme, "Guidelines on Stakeholder Engagement," available at: www.un-redd.org/Stakeholder_Engagement/Guidelines_On_Stakeholder_Engagement/tabid/55619/Default.aspx (accessed 28 November 2014). The main difference between these two approaches is that the UN-REDD Programme is committed to a rights-based approach (as reflected in its social and environmental principles and criteria) and most notably recognizes and promotes the right of Indigenous Peoples to free, prior, and informed consent. By contrast, the FCPF is governed by a risk-based approach (as reflecting in its mandatory safeguard policies) and only recognizes the rights of Indigenous Peoples to free, prior, and informed *consultations*.

369 R-PP Template Document Annex B, at 10.

Third, the UN-REDD Programme has developed a Country Approach to Safeguards Tool (CAST) that enables developing countries to design, plan, and implement a process for the elaboration of social and environmental safeguards for REDD+ as well as the creation of a safeguard information system.[370] CAST provides a methodology for implementing the *Cancun Agreements*' requirement with respect to social and environmental safeguards for REDD+ and is thus meant to serve all developing countries carrying out jurisdictional REDD+ readiness efforts, whether or not they are partners of the UN-REDD Programme.[371] CAST is organized as a series of questions that pertain to the different stages in the establishment of social and environmental safeguards for REDD+, and provides a range of sources and guidance materials for, among other things, implementing safeguards information systems or leading stakeholder engagement processes.[372]

2.5 INDIGENOUS AND COMMUNITY RIGHTS IN THE CCBA

2.5.1 *The CCBA and the Transnational Legal Process for REDD+*

The CCBA is a nongovernmental standard-setting program that was established in 2003 by Conservation International, CARE International, the Rainforest Alliance, The Nature Conservancy, and the Wildlife Conservation Society with a view to fostering "land management activities that credibly mitigate global climate change, improve the wellbeing and reduce the poverty of local communities, and conserve biodiversity."[373] From 2003 to 2005, the CCBA facilitated the drafting of the Climate, Community and Biodiversity (CCB) Standards in order to promote "development of, and investment in, site-based projects that deliver credible and significant climate, community and biodiversity benefits in an integrated, sustainable manner."[374] The CCB Standards were subsequently revised in a second edition launched in

[370] UN-REDD Programme, "Country Approach to Safeguards Tool (CAST). User's Guide" available at: www.unredd.net/index.php?option=com_docman&task=doc_download&gid=12996&Itemid=53 (accessed 28 November 2014).

[371] *Ibid* at 1–2.

[372] UN-REDD Programme, "Country Approach to Safeguards Tool (CAST)" available at: www.unredd.net/index.php?option=com_docman&task=doc_download&gid=12997&Itemid=53 (accessed 28 November 2014).

[373] CCBA, *Rules for the Use of the Climate, Community & Biodiversity Standards*, 2013, available at: https://s3.amazonaws.com/CCBA/Third_Edition/Rules_for_the_Use_of_the_CCB_Standards_December_2013.pdf (accessed 24 September 2014) at 1.

[374] *Ibid*. at 1.

December 2008.[375] By 2012, the CCB Standards had become the leading multiple-benefit standard for land-based climate mitigation projects and their use has become standard practice for project-based REDD+ activities.[376] Since the release of the second edition in 2008, the CCBA had received substantial feedback from project developers and other stakeholders regarding ways to improve and strengthen the CCB Standards.[377] In response, the CCBA launched a revision process in 2012 to develop a third edition with the specific objective of fostering "market interest and confidence in carbon credits from smallholder- and community-led projects."[378] The drafting of the third edition of the CCB Standards from April 2012 to December 2013 employed a participatory and transparent process that entailed the creation of a multi-stakeholder steering committee, a stakeholder mapping exercise, and public exchanges with interested parties.[379] This time around, the composition of the CCB Standards Committee was expanded to include a second Indigenous member as well as two representatives of non-Indigenous communities.[380] Moreover, the greater uptake and prominence of the CCB Standards at this point in time meant that the CCBA received much more significant feedback from a broader number and variety of interested parties.[381]

375 CCBA, *Guidance for the Use of CCB Standards*, available at: https://s3.amazonaws.com/CCBA/Guidance_for_the_Use_of_the_CCB_Standards_May_2013.pdf (accessed 24 September 2014) at 1.

376 Molly Peters-Stanley, Katherine Hamilton & Daphne Yin, *Leveraging the Landscape. State of the Forest Carbon Markets 2012* (Washington, DC: Ecosystem Marketplace, 2012) at 31.

377 CCBA, "Terms of reference, procedures and work plan for revision of CCB Standards including modifications that support smallholder- and community-led projects" (16 November 2012), available at: https://s3.amazonaws.com/CCBA/Upload/Revision+and+small/TOR+and+workplan+for+CCB+Standards+revision+11-19-12.pdf (accessed 24 September 2014) at 3.

378 *Ibid* at 4.

379 The second revision included a supplementary element: the establishment of a mechanism for resolving potential complaints regarding the process by which the CCB Standards would be revised (*ibid* at 5–6).

380 CCBA, "CCB Standards 'Standards Committee' Composition" (15 January 2013), available at: https://s3.amazonaws.com/CCBA/Upload/Revision+and+small/CCB+Standards+Committee+composition+02-04-13.pdf (accessed 1 October 2014).

381 See CCBA, "Compilation by principle of all comments on the Draft Third Edition of the CCB Standards of 22nd March 2013 received during the first 60-day public comment period 22nd March to 31st May 2013" (26 July 2013), available at: https://s3.amazonaws.com/CCBA/Upload/Revision+and+small/Second+Comment+Period+%26+Rules/CCB+Standards+Third+Edition+response+to+comments+31st+July+2013.pdf (accessed 1 October 2014); CCBA, "Compilation by principle of all comments on the Draft Third Edition of the CCB Standards of 31st July 2013 received during the second 60-day public comment period 1st August to 29th September 2013" (26 October 2013), available at: https://s3.amazonaws.com/CCBA/History_of_the_Standards/CCB+Standards_Second+Public+Comment+Period_Response+to+Comments.pdf (accessed 1 October 2014).

Along with the VCS, the CCBA has emerged as an important transnational site of law for the pursuit of project-based REDD+ activities.[382] While the CCB Standards do not lead to the issuance of carbon credits,[383] verification and validation that a REDD+ project has met the CCB Standards will enable that project to tag any carbon credits issued through a carbon accounting standard such as the VCS AFOLU with a CCB label. The CCB Standards thus offer project developers with rules and guidance for the design and implementation of land-based climate mitigation projects "that simultaneously reduce or remove greenhouse gas emissions and generate positive impacts for local communities and the local environment"[384] and, moreover, provide an independent demonstration to potential donors or investors that projects have delivered additional net environmental and social benefits.[385] As of June 2016, thirty-five REDD+ projects had been fully validated and verified under the CCB Standards, ten REDD+ projects are currently undergoing verification, and fifty-four REDD+ projects have been validated, but not yet verified.[386]

2.5.2 *The Rights of Indigenous Peoples and Local Communities in the CCBA*

While the first edition of the CCB Standards may have been perceived as inclined toward the environmental objectives of land-based carbon mitigation activities, the third edition of the CCB Standards can be seen as reflecting a sustained and comprehensive focus on human rights and social development.[387] The third edition of the CCB Standards comprise seventeen required criteria that are divided into four sections covering general matters relating to the establishment of a project, its positive climate impacts, its benefits for communities, and its impacts for the preservation of biodiversity. It also includes three optional requirements relating to the provision of climate adaptation benefits and "exceptional" benefits for communities and biodiversity. When one of these optional requirements is met, a project can be tagged with gold level certification.[388]

[382] Seventy-one percent of all forest carbon projects and transactions in 2013 were certified under both the VCS and the CCB Standards (Molly Peters-Stanley, Gloria Gonzalez & Daphne Yin, *Covering New Ground. State of the Forest Carbon Markets 2013* (Washington, DC: Ecosystem Marketplace), 2013 at xiv).

[383] CCBA, *Rules for the Use of the CCB Standards*, *supra* note 372 at 3.

[384] *Ibid.*

[385] CCBA, *CCB Standards Third Edition*, 2013, available at: https://s3.amazonaws.com/CCBA/Third_Edition/CCB_Standards_Third_Edition_December_2013.pdf at 7–8.

[386] CCBA, "Projects," available at: www.climate-standards.org/category/projects/ (accessed 14 June 2016).

[387] On the evolution of the CCB Standards, see Jodoin, *supra* note 17 at 175–181.

[388] CCBA, *supra* note 385 at 13.

The third edition of the CCB Standards applies an expansive approach to the protection of the rights and interests of Indigenous Peoples and local communities. It is primarily concerned with the well-being of "communities" and "community groups." Communities are defined as "as all groups of people – including Indigenous Peoples, mobile peoples and other local communities – who derive income, livelihood or cultural values and other contributions to well-being from the Project Area at the start of the project and/or under the with-project scenario."[389] Community groups are described "as sub-groups of Communities whose members derive similar income, livelihood and/or cultural values and other contributions to well-being from the Project Area and whose values are different from those of other groups; such as Indigenous Peoples, women, youth or other social, cultural and economic groups."[390] The CCB Standards also include consideration of groups known as "other stakeholders," defined as "all groups other than Communities who can potentially affect or be affected by the project activities and who may live within or outside the Project Zone."[391]

The CCB Standards incorporate Indigenous and community rights in four important ways. First, the CCB Standards include a criterion requiring the full and effective participation and consent of affected communities and stakeholders:

> Communities and Other Stakeholders are involved in the project through full and effective participation, including access to information, consultation, participation in decision-making and implementation, and Free, Prior and Informed Consent (. . .). Timely and adequate information is accessible in a language and manner understood by the Communities and Other Stakeholders. Effective and timely consultations are conducted with all relevant stakeholders and participation is ensured, as appropriate, of those that want to be involved.[392]

This criterion most notably includes specific and comprehensive indicators relating to participatory rights, including access to information, consultation, participation in decision-making, and grievance procedures.[393] In addition, this criterion contains an indicator on anti-discrimination, and requires a description of "the measures needed and taken to ensure that the project proponent and all other entities involved in project design and implementation are not involved in or complicit in any form of discrimination or sexual harassment with respect to the project."[394]

[389] *Ibid* at fn 18. [390] *Ibid* at fn 19. [391] *Ibid* at fn 20.
[392] CCBA, *supra* note 385 at G3. [393] *Ibid* at G3.1-G3.6 and G3.7. [394] *Ibid* at G3.6.

Second, the CCB Standards provide enhanced protections for the customary land and resource rights of local communities. They mandate that the free, prior, and informed consent of "relevant Property Rights Holders has been obtained at every stage of the project"[395] (from design to implementation), in line with the comprehensive guidance that is now included among its indicators.[396] They also require that project developers ensure their project "respects and supports rights to lands, territories and resources, including the statutory and customary rights of Indigenous Peoples and others within Communities and Other Stakeholders."[397] In particular, the CCB Standards require project developers to "[d]escribe and map statutory and customary tenure/use/access/management rights to lands, territories and resources in the Project Zone including individual and collective rights and including overlapping or conflicting rights," "describe measures needed and taken by the project to help to secure statutory rights," and "[d]emonstrate that all Property Rights are recognized, respected, and supported."[398]

Third, the CCB Standards require that projects generate "net positive impacts on the well-being" of affected communities.[399] Project developers must therefore evaluate the direct and indirect benefits, costs, and risks of a project for communities living within the project area, carry out measures to mitigate any negative impacts, and demonstrate that the net well-being impacts of a project are positive for groups within affected communities.[400] The CCB Standards also mandate that projects must "do no harm" to the well-being of other stakeholders.[401] The evaluation of well-being in this context is explicitly restricted to compliance with statutory or customary rights.[402] In addition, project developers seeking certification under the CCB Standards must develop and implement a monitoring plan to evaluate the project's impacts on the well-being of communities and stakeholders as well as the effectiveness of measures adopted to maintain or enhance community well-being.[403]

Finally, the CCB Standards include two optional criteria that further advance the rights and interests of local communities. The optional criterion in climate benefits mandates that projects identify and implement strategies to assist communities in adapting to the impacts of climate change.[404] Most importantly, the third edition of the CCB Standards includes an optional criterion on exceptional community benefits that applies only to projects that are either led by communities or are explicitly aimed at reducing poverty.[405] This criterion is focused on the equitable sharing of benefits *with* as

[395] *Ibid* at G5. [396] *Ibid* at G5.2. [397] *Ibid* at G5. [398] *Ibid* at G5.1.
[399] *Ibid* at CM2. [400] *Ibid* at CM2.1–CM_{23}. [401] *Ibid* at CM3. [402] *Ibid* at fn. 100.
[403] *Ibid* at CM4.1–2. [404] *Ibid* at GL1. [405] *Ibid* at GL2.

well as *within* communities.[406] The indicators related to this criterion include a special focus on demonstrating net positive impacts, in terms of well-being and increased levels of participation in decision-making, for marginalized or vulnerable communities, marginalized or vulnerable members of communities, and women.[407]

2.6 INDIGENOUS AND COMMUNITY RIGHTS IN THE REDD+ SES

2.6.1 *The REDD+ SES and the Transnational Legal Process for REDD+*

The REDD+ Social and Environmental Safeguards (REDD+ SES) is a multi-stakeholder initiative launched in May 2009 to develop a set of voluntary social and environmental safeguards for government-led REDD+ programs and activities.[408] The purpose of the REDD+ SES is to "support the design and implementation of REDD+ programs that respect the rights of Indigenous Peoples and local communities and generate significant social and biodiversity benefits."[409] The development and application of the REDD+ SES is overseen by an international secretariat provided by the Community, Climate & Biodiversity Alliance (CCBA) and CARE International, with the support of the ProForest Initiative.[410] A first version of the REDD+ SES was developed in 2009 and 2010 through an iterative process involving workshops and consultations bringing together representatives from governments participating in or contributing to REDD+ readiness efforts, international and non-governmental organizations, Indigenous Peoples and forest-dependent communities, and the private sector.[411] A second version released in September 2012 drew on

[406] *Ibid* at GL2: "Well-being benefits are shared equitably not only with the Smallholders/Community Members but also among the Smallholders/Community Members, ensuring that equitable benefits also flow to more marginalized and/or vulnerable households and individuals within them."

[407] *Ibid* at GL2.4 and GL2.5.

[408] REDD+ SES, "About the REDD+ SES," available at: www.redd-standards.org (accessed 15 December 2013).

[409] REDD+ SES, "REDD+ Social & Environmental Standards" Version 2, 10 September 2012, available at: www.redd-standards.org (accessed 4 April 2016) at 3.

[410] REDD+ SES, "Governance," available at: www.redd-standards.org/governance (accessed 4 April 2016).

[411] REDD+ SES, "About the REDD+ SES," available at: www.redd-standards.org (accessed 4 April 2016).

early experiences with the application of the REDD+ SES, the comments received from a range of stakeholders, and the guidance on safeguards provided by the UNFCCC.[412] The proponents of the REDD+ SES argue that it offered added value due to three considerations: (1) the safeguards were developed through an inclusive multi-stakeholder process that has provided them with a high level of credibility; (2) they go beyond risk-mitigation to promote the multiple benefits achievable through REDD+; and (3) they provide a broad and flexible framework for meeting the requirements set by a wide range of standard-setting bodies for REDD+.[413] The REDD+ SES has also served as an important site for developing and sharing insights on the interpretation and application of safeguards in the context of the pursuit of jurisdictional REDD+ readiness activities.[414]

The REDD+ SES apply to a broad range of jurisdictional REDD+ activities, including "government-led programs implemented at national or state/provincial/regional level and for all forms of fund-based or market-based financing."[415] The REDD+ SES provide a voluntary set of social and environmental standards as well as a methodology for developing country governments looking to interpret and apply international guidance on REDD+ safeguards and to build capacity in this aspect of jurisdictional REDD+ readiness.[416] Several jurisdictions have thus far voluntarily decided to participate in the development or implementation of the REDD+ SES, most notably the State of Acre in Brazil, the Province of Central Kalimantan in Indonesia, Ecuador, Nepal, and Tanzania.[417] In November 2015, the State of Acre became the first jurisdiction to have completed all ten steps of the REDD+ SES and have received a certificate of approval from the REDD+ SES Initiative Secretariat.[418]

[412] REDD+ SES, "REDD+ Social and Environmental Safeguards. Version 2," available at: www.redd-standards.org/standards/redd-social-and-environmental-standards-version-2/5-redd-ses-version-2-english/file (accessed 4 April 2016) at 2.

[413] Proforest, *REDD+ SES Standards: Briefing on complementarities with other REDD+ social and environmental safeguards mechanisms* (Oxford, UK: Proforest, 2010) at 5–6.

[414] Interview 77 at 11. See also REDD+ SES, "Exchange & Learning," available at: www.redd-standards.org/exchange-learning (accessed 4 April 2016).

[415] *Ibid* at 3.

[416] REDD+ SES, "REDD+ Social and Environmental Safeguards," available at: www.redd-standards.org/process-for-using-redd-ses (accessed 4 April 2016).

[417] REDD+ SES, "Country Overview," available at: www.redd-standards.org/index.php?option=com_content&view=article&id=16&Itemid=19 (accessed 24 September 2014).

[418] REDD+ SES, "State of Acre, Brazil: First country to have completed the full ten-step process," available at: www.redd-standards.org/what-is-new/150-state-of-acre-brazil-first-country-to-have-completed-the-full-ten-step-process (accessed 4 April 2016).

2.6.2 The Rights of Indigenous Peoples and Local Communities in the REDD+ SES

The REDD+ SES are comprised of eight principles and thirty-four criteria and related indicators that set expectations for the achievement of high social and environmental performance in the context of jurisdictional REDD+ activities. Most of the REDD+ SES can be seen as broadly supportive of the rights of Indigenous Peoples and local communities. On the whole, the REDD+ SES apply to "rights holders," defined as "those whose rights are potentially affected by the REDD+ program, including holders of individual rights and Indigenous Peoples and others who hold collective rights."[419] Five of the eight principles in the REDD+ SES are specifically designed to ensure the recognition and protection of a range of participatory and substantive rights:

- "The right to lands, territories and resources are recognized and respected" (principle 1);
- "The benefits of the REDD+ program are shared equitably among all relevant rights holders and stakeholders" (principle 2)
- "The REDD+ program improves long-term livelihood security and well-being of Indigenous Peoples and local communities with special attention to the most vulnerable people" (principle 3);
- "All relevant rights holders and stakeholders participate fully and effectively in the REDD+ program" (principle 6); and
- "All rights holders and stakeholders have timely access to appropriate and accurate information to enable informed decision-making and good governance of the REDD+ program" (principle 7).

Furthermore, the criteria and indicators in REDD+ SES most notably mandate the following requirements for jurisdictional REDD+ programs:

- identification of different rights and rights-holders, including through an inventory and mapping exercise (criteria 1.1);
- recognition of, and respect for, the "statutory and customary rights to lands, territories and resources which Indigenous Peoples or local communities have traditionally owned, occupied or otherwise used or acquired" (criteria 1.2);

[419] REDD+ SES, "REDD+ Social and Environmental Safeguards. Version 2," *supra* note 412 at fn. 10.

- application of "free, prior and informed consent of Indigenous Peoples and local communities for any activities affecting their rights to lands, territories and resources" (criteria 1.3);
- allocation of private carbon rights (where applicable) on the basis of the "statutory and customary rights to the lands, territories and resources" that generated the emissions reductions (criteria 1.4);
- establishment of "[t]ransparent, participatory, effective and efficient mechanisms" for "equitable sharing of benefits of the REDD+ program among and within relevant rights holder and stakeholder groups" (criteria 2.2);
- generation of "additional, positive impacts the long-term livelihood security and well-being of Indigenous Peoples and local communities, with special attention to women and the most marginalized and/or vulnerable people" (criteria 3.1);
- ensuring that all "relevant rights holder and stakeholder groups that want to be involved in REDD+ program design, implementation, monitoring and evaluation are fully involved through culturally appropriate, gender sensitive and effective participation" (criteria 6.2);
- respect and support for and protection of "rights holders' and stakeholders' traditional and other knowledge, skills, institutions and management systems including those of Indigenous Peoples and local communities" (criteria 6.3);
- identification and use of "processes for effective resolution of grievances and disputes relating to the design, implementation and evaluation of the REDD+ program, including disputes over rights to lands, territories and resources relating to the program" (criteria 6.4); and
- compliance with applicable international conventions (criteria 7.1), including those relating to the "human rights of Indigenous Peoples and local communities" (indicator 7.1.2).

In addition to this set of social and environmental safeguards, the REDD+ SES provides guidelines that establish the steps that must be followed by developing countries that want to use and apply the REDD+ SES as part of their jurisdictional REDD+ readiness efforts. Under the guidance of a Standards Committee formed in each jurisdiction, governmental and non-governmental technical experts facilitate a multi-stakeholder process for the country-specific interpretation and assessment of the REDD+ SES. This process is meant to result in the creation of indicators tailored to local laws, realities, and institutions, and the establishment of a locally relevant,

accountable, and transparent assessment mechanism.[420] Because the REDD+ SES is consistent with the UNFCCC guidance on safeguards and the safeguards applied by the World Bank and the UN-REDD Programme, the information gathered through a REDD+ SES assessment may be integrated into reports and communications submitted to a variety of multilateral, bilateral, and private donors. In addition, the REDD+ SES has developed an international review mechanism whereby independent experts assess the extent to which a country has followed REDD+ SES guidance, evaluate and offer feedback on the process followed to use REDD+ SES at the country level, and identify lessons and good practices that may be useful to other jurisdictions.[421]

2.7 HETEROGENEITY IN THE RECOGNITION OF INDIGENOUS AND COMMUNITY RIGHTS IN INTERNATIONAL AND TRANSNATIONAL SITES OF LAW FOR REDD+

Opinions on how these different sites of law have performed in respecting and ensuring respect for the rights of Indigenous Peoples and local communities continue to be divided among scholars and activists. To be sure, the legal norms developed in many sites of law, especially the UNFCCC and the World Bank FCPF, fall short of fully incorporating the rights enshrined in the UNDRIP or recognized by international and regional human rights bodies. Yet, compared with the reluctance of many actors to accord any importance to human rights issues in the initial stages of the development of REDD+, the final set of Indigenous and community rights recognized across these sites of law reflects a clear evolution in the legal norms constructed for REDD+ as well as an important development more broadly, given the traditional reluctance of multilateral institutions and conservation NGOs to apply human rights norms to their activities.

Yet the processes by which legal norms relating to the rights of Indigenous Peoples and local communities surfaced within international and transnational sites of law for REDD+ have not been free from controversy, however, nor have they yielded a homogenous set of outcomes. As can be seen from Tables 2.1 and 2.2, important divergences have most notably emerged in the

[420] REDD+ SES, "Guidelines for the Use of REDD+ Social & Environmental Standards at Country Level, Version 2," available at: www.redd-standards.org/files/pdf/redd-docs/Standards/REDD_SES_Guidelines_Version_2_-_16_November_2012.pdf (accessed 30 December 2013) at 4–5.

[421] REDD+ SES, "REDD+ International Review. State of Acre, Brazil," available at: www.redd-standards.org/images/REDD_SES_International_Review_for_Acre_ENG.pdf (accessed 4 April 2016) at 1–2.

TABLE 2.1. *Variations in the recognition of the right to free, prior, and informed consent in international and transnational sites of law for REDD+*

Strong recognition of the right to free, prior, and informed consent	Weak recognition of the right to free, prior, and informed consent
The UN-REDD Social and Environmental Principles and Criteria and guidelines on Free, Prior, and Informed Consent clearly recognize the right of Indigenous Peoples to free, prior, and informed consent. REDD+ SES recognizes the right of Indigenous Peoples and local communities to free, prior, and informed consent. The third edition of the CCB Standards recognizes the right of property right holders, including Indigenous Peoples, to free, prior, and informed consent.	The UNFCCC *Cancun Agreements* do not specifically refer to the right of Indigenous Peoples to free, prior, and informed consent and provide instead that countries should ensure "the full and effective participation of relevant stakeholders, in particular, indigenous peoples and local communities." Through the application of the World Bank's Operational Policy on Indigenous Peoples, the FCPF requires a "process of free, prior, and informed consultation with the affected Indigenous Peoples' communities."

treatment of the right to FPIC as well as the distinctive status held by Indigenous Peoples across international and transnational sites of law. While the UN-REDD Programme Social and Environmental Principles and Criteria, the REDD+ SES, and the third edition of the CCB Standards offer strong support for the right to FPIC, the UNFCCC *Cancun Agreements* and the World Bank's Operational Policy on Indigenous Peoples do not. At the same time, the UNFCCC *Cancun Agreements*, the World Bank's Operational Policies, and the UN-REDD Programme Social and Environmental Principles and Criteria maintain a clear distinction between the obligations owed to Indigenous Peoples and non-indigenous local communities, whereas the REDD+ SES and the third edition of the CCB Standards appear to do away with this distinction altogether.

The recognition and operationalization of human rights norms across sites of law reflects different balances that have been struck between the effectiveness of REDD+ and its implications for justice and equity.[422] On the whole, the social safeguards for REDD+ adopted within the UNFCCC, the World Bank FCPF, and the UN-REDD Programme represent a series of compromises between actors pressing for the protection of human rights and those concerned with preserving the sovereignty of developing countries and not "over-burdening"

[422] See generally McDermott *et al.*, "Operationalizing social safeguards" *supra* note 54.

TABLE 2.2. *Variations in the recognition of the distinctive status of Indigenous Peoples in international and transnational sites of law for REDD+*

Strong recognition of the distinctive status and rights of Indigenous Peoples	Weak recognition of the distinctive status and rights of Indigenous Peoples
The UNFCCC *Cancun Agreements* maintain a clear distinction between the obligations owed to "Indigenous Peoples" those owed to "members of local communities" and notes the adoption of the "United Nations Declaration on the Rights of Indigenous Peoples" as one of the sources for defining the obligations owed to the former. The World Bank FCPF Charter distinguishes between "Forest-Dependent Indigenous Peoples" and "Forest Dwellers." It applies the World Bank Operational Policy on Indigenous Peoples to the former, and expresses principles by which it will engage with "local communities" in the context of forestry that are applicable to the latter. Although the UN-REDD Social and Environmental Principles and Criteria refer to the "rights of indigenous peoples, local communities and other vulnerable and marginalized groups," the UN-REDD Programme guidelines on Free, Prior, and Informed Consent clearly differentiate between the obligations owed to "Indigenous Peoples" and those owed to "forest-dependent communities."	REDD+ SES applies to all relevant "rights-holders" and extends rights generally defined as applying to Indigenous Peoples under international law, such as rights to lands, territories, resources, and free, prior, and informed consent, to both "Indigenous Peoples" and "local communities." The third edition of the CCB Standards applies a broad definition of "communities" which encompasses "Indigenous Peoples, mobile peoples and local communities," and extends rights generally defined as applying to Indigenous Peoples under international law, such as rights to lands, territories, resources, and free, prior, and informed consent, to all "Property Rights Holders."

their efforts to operationalize jurisdictional REDD+ initiatives at the domestic level.[423] The recognition of Indigenous and community rights even proved controversial in the context of a voluntary certification scheme like the CCBA,

[423] In relation to the UNFCCC, see Interview 33 at 6–7 and Interview 41 at 4 and 7. In relation to the FCPF, see Interview 79 at 1–2 and Interview 94 at 1. In relation to the UN-REDD Programme, see Interview 66 at 6–7 and 16–18 and Observations gathered during participation in GIZ/UN-REDD/FCPF workshop on the full and effective participation of Indigenous Peoples in REDD+ (Weilburg, Germany, September 2013). In relation to all three sites, see

which was specifically developed to ensure that carbon sequestration projects would deliver multiple and significant social benefits beyond compliance with international law.[424] In this regard, there is little doubt that the participatory, multi-stakeholder approach underlying the development of the CCB Standards (as well as the REDD+ SES) has provided unique opportunities for adopting stronger rights and protections for Indigenous Peoples and local communities than the consensus-based, state-centered multilateral processes and all of the political compromises that they required on such a sensitive issue.[425]

Finally, the recognition of human rights in the field of REDD+ has also been affected by the mediating influence of existing legal norms present in different sites of law. A comparison of the differing approaches of the World Bank FCPF and the UN-REDD Programme to the recognition of rights is illustrative of the influence of existing legal norms. Specifically, the UN-REDD has adopted a rights-based approach that is consistent with the United Nation's approach to human rights issues. It accordingly refers to the more recent definition of FPIC included in the *UNDRIP*. By contrast, the World Bank FCPF has stuck with the Bank's risk-based perspective and maintains its Operational Policy on Indigenous Peoples.[426]

As I will demonstrate in subsequent chapters, these variations in the recognition of Indigenous and community rights have created significant opportunities for the translation of rights in national and local sites of law for REDD+. Indeed, the heterogeneous manner in which these rights have been recognized have enabled government officials, activists, lawyers, project developers, and communities to develop innovative interpretations and applications of these rights across different contexts.

also NORAD, "Real-Time Evaluation of Norway's International Climate and Forest Initiative. Synthesising Report 2007–2013. Annexes 3–19. Report 3/2014" (August 2014), available at: www.norad.no/no/evaluering/publikasjoner/publikasjon/_attachment/415168?_download=true&_ts=147e976c97e (accessed 6 October 2014) at 368–369 and at 476–477.

[424] Interview 77 at 4–5 and 7. For instance, the enhanced integration of rights in the third edition of the CCB standards generated some opposition from conservation NGOs concerned with the challenges that this would create for the implementation of REDD+ projects on the ground. See, in particular, the exchange between the Conservation Fund and the CCB Standards Steering Committee in relation to the stringency of community-related requirements in the initial draft of the third edition of the CCB Standards: CCBA, "Compilation by principle of all comments on the Draft Third Edition of the CCB Standards of 31st July 2013 received during the second 60-day public comment period 1st August to 29th September 2013" (26 October 2013), available at: https://s3.amazonaws.com/CCBA/History_of_the_Standards/CCB+Standards_Second+Public+Comment+Period_Response+to+Comments.pdf (accessed 1 October 2014) at 1–2.

[425] Interview 77 at 7.

[426] See Analisa Savaresi, "The Legal Status and Role of Safeguards" in Voigt, *supra* note 17, 126.