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International Climate Finance Mechanisms and Extraterritorial Human Rights Obligations: Status Quo and Future Prospects

by

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List of Acronyms

ACHPR	African Commission on Human and Peoples' Rights
ADB	Asian Development Bank
AE	Accredited Entity
BeRT	Benefits and Risks Tool
BMUB	Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety
CAO	Compliance Advisor/Ombudsman for the IFC
CBD	Convention on Biological Diversity
CDM	Clean Development Mechanism
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CER	Certified Emission Reductions
CERD	International Convention on the Elimination of all Forms of Racial Discrimination
CESCR	UN Committee on Economic Social and Cultural Rights
CIF	Climate Investment Funds
CMP	Meeting of the Parties to the Kyoto Protocol
COICA	Coordinator of Indigenous Organizations of the Amazon River Basin
CONPAH	Indigenous Peoples Confederation of Honduras
COP	Conference of the Parties (UNFCCC)
CTF	Clean Technology Fund
DNA	Designated National Authority
DOE	Designated Operational Entity
EIA	environmental impact assessment
ESC	environmental, social and cultural rights
ESMF	Environmental and Social Management Framework
ESMS	Environmental and Social Assessment and Management System
ETO	Extraterritorial obligation
ETS	emissions trading system
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FCPF	Forest Carbon Partnership Facility
FIP	Forest Investment Program
FPIC	Free, prior, and informed consent
FPP	Forest Peoples Programme
GC	General Comment (CESCR)
GCF	Green Climate Fund
GEF	Global Environment Facility
GHG	Greenhouse Gas
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
GRM	Grievance Redress Mechanisms

HRIA	Human Rights Impact Assessment
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Economic, Social and Cultural Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICP	Informed Consultation and Participation Process
IFC	International Finance Corporation
IISD	International Institute for Sustainable Development
ILO	International Labour Organisation
INGO	international non-governmental organization
IO	International Organization
JI	Joint Implementation
LDCF	Least Developed Country Fund
MA	Marrakesh Accords
MDB	multilateral development bank
MfDR	Management for Developing Results
MRV	measurement, reporting and verification systems
NGO	non-governmental organization
NLBI	Non-legally Binding Instrument on all Types of Forest
NMT	non-motorized transport
OAS	Organization of American States
OAU	Organization of African Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
OP	World Bank Operational Policies and Procedures
PDD	Project Design Document
PPCR	Pilot Programme for Climate Resilience
PS	IFC Performance Standards
REDD+	Reducing Emissions from Deforestation and forest Degradation, and enhancing forest carbon stocks in developing countries
RRI	Rights and Resources Initiative
SBI	Subsidiary Body for Implementation
SBSTA	Scientific Body for Technical Advice
SCCF	Special Climate Change Fund
SCF	Strategic Climate Fund
SD	sustainable development
SEPC	Social and Environmental Principles and Criteria of the UN-REDD
SESA	Strategic Environmental and Social Assessment
SIS	Safeguard information systems
SREP	Programme for Scaling-up Renewable Energy in Low Income Countries
SRSG	Special Representative of the Secretary-General
TG	Tenure Guidelines
ToR	Terms of Reference
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAC	UN Convention Against Corruption

UNCERD	UN Convention on the Elimination of All Forms of Racial Discrimination
UNDP	United Nations Development Programme
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environmental Programme
UNFCCC	UN Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Committee
UNIDO	United Nations Industrial Development Organization
UN-REDD	United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries
WB	World Bank
WRI	World Resources Institute

1 Introduction

Mitigation of climate change requires the fundamental restructuring of economies. This shift needs large-scale investments in the near future, which – as all large-scale projects – have a high potential to infringe human rights. A 2009 report of the Office of the UN High Commissioner for Human Rights (OHCHR) highlighted human rights implications of climate change response measures and states’ respective human rights duties (UNHRC, 2009). The link between human rights and climate policy was also acknowledged under the United Nations Framework Convention on Climate Change (UNFCCC) in 2010, when the 16th Conference of the Parties to the UNFCCC (COP 16) emphasised “that Parties should, in all climate change related actions, fully respect human rights” (UNFCCC, 2011). Moreover, the preamble of the 2015 Paris Agreement acknowledges that “Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity” (UNFCCC, 2016a). However, as discussed in this paper, in practice emission reduction initiatives have so far often given little attention to potential human rights implications.

Human rights implications of international climate policy are not only a matter for the countries where the concrete actions take place. In particular climate-related actions in developing countries usually involve inter- and transnational actors, raising the question of extraterritorial re-

sponsibilities. Industrialised countries finance investments such as hydropower stations or agro-fuel plantations that often severely infringe on the livelihoods of the local population. In addition, many of these activities take place in the framework of international organisations or mechanisms, such as the World Bank, its dedicated Climate Investment Funds (CIF), the Clean Development Mechanism (CDM) or the Global Environment Facility (GEF). Further international mechanisms are currently being developed, for example the Green Climate Fund (GCF) and programmes to reduce emissions from deforestation and forest degradation (REDD+). Thus, in addition to the responsibilities of those who are directly involved there is also the question of the responsibilities of government’s representatives in the regulatory bodies of these mechanisms.

This paper will undertake a cross-section analysis of the extent to which human rights considerations have so far been integrated into the mechanisms of international climate policy. The article first outlines relevant human rights norms and explores the relationship between development, the environment, and human rights. Next, the article analyses the central rules and procedures of GEF, CIF, GCF, CDM, and REDD+ to determine whether human rights standards play any role and if yes, how they are designed. The status quo is contrasted with the human rights requirements that have emerged from the discussions on extraterritorial obligations (ETOs) in the human rights regime.

The paper will thus provide an overview of human rights considerations in climate finance mechanisms, but it cannot provide a definitive assessment. Such a definitive assessment would

require that for each human right the relevant safeguards are compared with the interpretations of and guidance on the respective right that have been produced by case law and the human rights treaty bodies. Such an in-depth assessment is beyond the scope of this paper.

The paper will furthermore not discuss

whether the mechanisms as such actually serve their purpose, to foster climate-friendly development. Some groups have criticised market-based instruments such as the CDM and some approaches within REDD+ as fundamentally counterproductive. This discussion is beyond the scope of this paper.



“Geothermal power station Olkaria I (Kenya)” (© Jeanette Schade)

2 Climate Policy and Human Rights Obligations¹

2.1 *Large-scale Investment, Human Rights Norms and State Duties*

According to a recent report by the High Commissioner for Human Rights, “between 280 million and 300 million people worldwide have been affected by development-related displacement over the past 20 years; in other words, every year 15 million people are forced to leave their homes and land to make way for large development and business projects, such as the construction of hydroelectric dams, mines and oil and gas installations, or luxury resorts for tourism” (OHCHR, 2014). Climate policies today face the same challenges as large-scale projects of the past. They can potentially threaten the enjoyment of basic substantive rights such as the right to life, property, food, housing and so on, laid down in international human rights treaties. Moreover, procedural rights such as the right to information and participation are frequently impaired (Schade et al., 2015; Schade & Obergassel, 2014).

In contrast to other international law, which focuses on horizontal rights and duties between states, human rights law mainly defines vertical duties of the state towards individuals and certain groups, usually under its jurisdiction. Generally, states have a duty to respect (not

to breach human rights), to protect (from human rights breaches) and to fulfil (using active measures to realize) human rights.² Their performance/compliance is monitored by treaty bodies, which at the international level consist of commissions only. There are also regional human rights treaties in Africa, Europe, and Latin America, implementation of which is supervised by commissions and courts.

2.1.1 Substantive Human Rights Norms of Relevance

One of the most important substantive rights is the **right to life**, as laid down in the International Covenant on Civil and Political Rights (ICCPR), Art. 2(1), as well as in all regional civil and political rights treaties (CP treaties) (Council of Europe, 1950; IACHR, 1948; OAS, 1969; OAU, 1981; UNGA, 1966). Treaties on economic, social and cultural rights (ESC treaties) emphasise the **right to an adequate standard of living**, ‘including adequate food, clothing and housing, and to the continuous improvement of living conditions’ and the **right to health** both originally enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR) Art. 11, and Art. 12. Moreover, from these two articles the UN Committee on Economic Social and Cultural Rights (CESCR) derives the right

¹The section is largely based on Schade & Obergassel (2014) and Schade (2016).

²The wording ‘respect, protect, fulfil’ is the wording used by the ICESCR and its Committee on Economic, Social and Cultural Rights (CESCR) and can slightly differ in other treaties. However, there is consensus that the human rights duties of states have this threefold character (Knox, 2009). While respect constitutes a negative duty, the duty to protect and the duty to fulfil (alias promote / facilitate) constitute positive duties.

to water by recognizing that water is ‘fundamental for life and health’ and a ‘prerequisite for the realization of other human rights’ (CESCR, 2003). All those rights are frequently impaired by the impacts of large-scale investments.

Crucial in the context of development-based evictions is the right to property, which provides protection from expropriation without legal basis or public interest, or at least from expropriation without adequate compensation (Golay & Cismas, 2010). The **right to property** is laid down in the Universal Declaration of Human Rights (UDHR) Art. 17 and in all regional CP treaties (Council of Europe, 1950, Protocol 1, Art. 1; IACHR, 1948, Art. 23; OAS, 1969, Art. 21; OAU, 1981, Art. 14, 21).³ Most treaties try to strike a balance between the right to private property of non-state actors on the one hand and the legitimacy of public property and of acts of expropriation by states in cases of public interest on the other hand. Of particular interest is the question of land rights. Already CESCR General Comment (GC) No. 7 points to this underlying cause of ‘conflict over land rights’ produced by development projects (para 7) (CESCR, 1997). The right to housing addresses this problem by defining ‘**legal security of tenure**’ to be part of it (CESCR GC no. 4, para. 8) (CESCR, 1991). Finally, the right to food highlights “access to land” for “feeding oneself directly from productive land”, as well as engaging in hunting and gathering and selling products from the land at markets (CESCR, 1999, paras. 12, 13).

Indeed, land tenure systems can be very complex in countries with mixed statutory and customary land rights. At various occasions regional human rights treaty bodies endorsed the right

of indigenous peoples to their ancestral lands and its natural resources which form the basis of their existence and culture.⁴ The ACHPR does so in reference to Art 21(1) of the African Charter, which it interprets to ‘freely dispose of their wealth and natural resources’ as a right of indigenous people and not only as a right to self-determination of the people of a state. Such an approach resembles the meaning of **collective property of natural resources** under the binding Convention 169 of the International Labour Organisation (ILO) on Indigenous and Tribal Peoples in Independent Countries and the non-binding UN Declaration on the Rights of Indigenous Peoples (UNDRIP). ILO Convention 169 states that “the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized” (ILO, 1989, Art. 14[1]). Consequently, latest initiatives at the Human Rights Council try to combine individual and collective rights to land, where collective rights are crucial in many parts of the world to secure the individual enjoyment of multiple human rights (UNHRC, 2015).

Another key norm-setting instrument for land and natural resources and their relation to human rights are the UN Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (in short Tenure Guidelines, TGs). While being labelled ‘voluntary’, the TGs are strongly rooted in existing human rights law and obligations, have been negotiated and unanimously adopted by the Committee on World Food Security and are giving states detailed guidance on how to govern land and natural resources

³It is not included in the two international covenants (ICCPR and ICESCR).

⁴(Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, 2001; Maya indigenous community of the Toledo District v. Belize, 2004; Saramaka People v. Suriname, 2007; Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, 2009) (Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, 2009, Mayagna (Sumo) Awas Tingni Cmty v. Nicaragua, 2001, Maya indigenous community of the Toledo District v. Belize, 2004, Saramaka People v. Suriname, 2007)

based on their human rights obligations.

Of outstanding relevance is Objective 1 of the TGs that highlights (a) the goal of the progressive **realization of the right to adequate food** and (b) the need that governance of tenure of land and natural resources must **especially benefit vulnerable and marginalised** people (CFS & FAO, 2012, p. 1). Thus, international climate policies that interfere in/affect land governance should constantly check against this objective. In other words, climate change policies should especially reflect on how they affect land tenure aspects of vulnerable and marginalised people (e.g. landless, small-scale food producers, indigenous peoples) and should ultimately support positive land tenure outcomes for them.

The TGs are also of special relevance as they stipulate the respect for all “legitimate tenure rights”, including rights “that are not currently protected by law” (Guideline 7.1 on Safeguards). They also demand safeguards that should in particular “protect women and the vulnerable who hold subsidiary tenure rights, such as gathering rights” (ibid.).

2.1.2 Procedural Human Rights Norms of Relevance

Procedural norms are of high relevance. While the provisions of human rights treaties are at a more general level and thus not directly applicable to participation at project level, there exists a consolidated consensus about the nature of adequate consultation. The CESCR highlights: “The international human rights normative framework includes the right of those affected by key decisions to participate in the relevant decision-making processes (...) Although free and fair elections are a crucial component of the right to participate, they are not enough to ensure that those living in poverty enjoy the right to

participate in key decisions affecting their lives” (CESCR, 2001, para 12).

The right to information and participation is closely linked with the due diligence requirement in environmental law to conduct environmental impact assessments prior to major interventions. Conducting participatory environmental impact assessments has thereby gained the status of international customary law. Human rights bodies have repeatedly made use of it (Schade 2016). For instance, the Inter-American Commission on Human Rights (IACHR) in its 1997 report on human rights in Ecuador regards access to information, participation in decision-making processes, and access to legal remedies as crucial measures ‘to support and enhance the ability of individuals to safeguard and vindicate [their] rights’ (IACHR, 1997, fn 34). Similar judgements have been produced by other treaty bodies (Knox, 2009, p. 198ff).

To protect indigenous people from large-scale development that may jeopardize their survival, the Inter-American Court of Human Rights (IACtHR) extended the duty to *consult* to a duty to obtain *free, prior, and informed consent* (FPIC) (*Saramaka People v. Suriname*, 2007). The FPIC is the most important procedural requirement with regard to indigenous peoples, which requires a free and prior consultation process, leading to consent, that is defined as a “collective decision made by the rights-holders and reached through the customary decision-making processes of the affected peoples” (UN-REDD, 2013b). It is enshrined in the UNDRIP and is an amplification of the consultation and participation requirements under ILO Convention 169.⁵ The FPIC is soft law, but has been endorsed by the treaty supervising bodies of the ICESCR and the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) (Ward,

⁵The meaning of FPIC has been deliberated among experts at the UN Permanent Forum on Indigenous Issues and is summarised in (UNPFII, 2005).

2011, p. 65).

There is some debate on whether FPIC constitutes veto power. Former Special Rapporteur James Anaya points out that FPIC “should not be regarded as according indigenous peoples a general ‘veto power’” but that it requires a negotiation process ‘towards mutually acceptable arrangements’” (HRC 2009, para. 46, A/HRC/12/34). He contrasts this to mere consultation obligations which often constitute “mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process.” (HRC, 2009b, para. 46, A/HRC/12/34.) Pursuant to Hofbauer (2015, p. 231ff), “this corresponds to widespread practice and scholarly opinion, even if the adopted text tempts some bodies to go further”.

A further limitation is that the FPIC standard only applies to indigenous peoples. Hence, it does not cover other marginalized people who for their livelihood may depend on similar degrees of access to land such as small-scale peasants. The above mentioned Tenure Guidelines therefore fill an important gap in empowering the voices of marginalized groups in decisions about land-use changes. Guideline 23 on Climate Change highlights that “States should facilitate the participation, consistent with the principles of consultation and participation of these Guidelines, of all individuals, communities or peoples, with an emphasis on farmers, small-scale food producers, and vulnerable and marginalized people, who hold legitimate tenure rights, in the negotiations and implementation of mitigation and adaptation programmes.”

The principles on participation referred to above are laid down in para 3B.6 of the TGs:

“Consultation and participation: engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being

taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.” (Guideline 3)

2.2 Extraterritorial Obligations

The financing instruments discussed in this paper all involve engagement of foreign actors such as other states, international organisations, and foreign companies. Thus the question arises whether those can be held accountable if human rights are violated in the context of a project.

Deriving extraterritorial obligations (ETOs) of states from the two international human rights covenants is - at least partly - contested. **ICCPR** article (2)(1) sets out that the duty of a state to respect and ensure the rights recognized by the covenant is confined to “all individuals within its territory and subject to its jurisdiction”. The **ICESCR** contains no such paragraph limiting its jurisdiction, and although conservative interpretations tend to read it along the lines of ICCPR article 2(1), it offers the legal entry point for diagonal duties towards the population of another state. Thus, ICESCR Art. 2(1) states that each party to the Covenant undertakes steps “individually and through international assistance and co-operation [...] with the view to achieving progressively the full realization of the rights recognized by the covenant [...] including *particularly the adoption of legislative measures*” (own emphasis).

Contemplating the legal meaning of Art. 2(1), scholars, moreover, deduct an extraterritorial duty of states to *respect* by requiring “to ensure that [a state] does not undermine the enjoyment of rights of those in foreign territory” (Craven, 2007, p. 253) and not to “interfere with other

states' ability to meet their obligations" (Knox 2009: 206). The extraterritorial duty to *respect* has been confirmed by the CESCR on several occasions through their concluding observations, such as in relation to the right to adequate food (CESCR, 1999). In addition, in General Comment 15 the CESCR laid down that interference comprises direct actions as well as policies that (foreseeably) negatively affect the right to water (CESCR, 2003). In General Comment 14 on the right to health, the CESCR additionally derives an extraterritorial duty from Art. 2(1) to *protect* people outside the own territory from human rights violations by third parties, "if they are able to influence these third parties by way of legal or political means [...]" (CESCR, 2000).

The most detailed interpretation of existing legal texts with regard to ETOs concerning ESC rights has been elaborated in the Maastricht Principles, which were issued by 40 international law experts at a meeting organised by Maastricht University and the International Commission of Jurists (ICJ, 2011). The ICJ is a non-governmental organisation of legal experts, and its legal interpretations have no official character, but they are based on existing human rights law. Here, states' obligations are held to comprise, *inter alia*, the obligation to avoid causing harm; to conduct impact assessments and prevention measures; to elaborate, to interpret and apply international agreements in accordance with human rights obligations; and responsibility for obligations of international organisations (IOs).

The commentary on the Maastricht Principles clarifies that a state, as a member of IOs, has to use its decision-making power to ensure that an IO "acts in accordance with the pre-existing human rights obligations of the State".⁶ States must conclude international agreements and standards consistently with their human

rights obligations. More so, States have to refrain from indirect interference that can impair other States from complying with international economic, social and cultural rights. Overall they must create an international enabling environment that supports the fulfilment of economic, social and cultural rights (principle 29). This can be achieved through, *inter alia*, the "elaboration, interpretation, application and regular review of multilateral and bilateral agreements as well as international standards" and "measures and policies by each State [...], including actions within international organisations, and its domestic measures and policies that can contribute to the fulfilment of economic, social and cultural rights extraterritorially" (ETO Consortium, 2013).

In addition, the Maastricht Principles highlight the opinions of various human rights treaty bodies such as the CESCR that states have an ETO to protect people from human rights abuses by non-state actors domiciled within their territory – including abuses related to foreign operations of corporations – by adopting appropriate administrative, legislative, investigative, adjudicative and/or other measures (principle 24: obligation to regulate).

However, this view received only attenuated support from the Guiding Principles on Business and Human Rights endorsed by the Human Rights Council in June 2011 ("Ruggie Guidelines"), which state that:

"At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within

⁶This is derived from the prohibition to enter into treaties that are incompatible with pre-existing treaty obligations, which is based on the Vienna Convention on the Law of Treaties, articles 26 and 30(4)(b). (de Schutter et al., 2012, p. 24).

these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.” (OHCHR, 2011, p. 7)

The Ruggie Guidelines do, however, put forward “strong policy reasons” to do so,⁷ particularly if the State is involved or supports corporations operating abroad, e.g. through lending policies (OHCHR, 2011). The Guidelines find that States should still clearly set out the expectation that all business enterprises domiciled in their jurisdiction or territory respect human rights (principle 2). Principle 9 declares that States should also maintain adequate domestic

policy space in order to meet their human rights obligations when dealing with business-related policy objectives. In any case, in terms of international obligations, the Ruggie Guidelines also confirm that states “retain their international human rights law obligations when they participate in [multilateral] institutions” (OHCHR, 2011, p. 12). The Guidelines find that States should seek to ensure that multilateral organisations do not restrain their members from respecting human rights, encourage them to promote the business respect for human rights and help other States to meet their duty to respect human rights. Allowing multilateral organisations to adopt safeguards that impair other member States from respecting human rights is, thus, prohibited.



“Focus group discussion at the vacated Cultural Centre, Olkaria (Kenya)” (© Jane A. Hofbauer)

⁷“The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State’s own reputation.”

3 Human Rights Safeguards in Selected Climate Finance Mechanisms

This chapter will survey to what extent human rights considerations have been integrated in climate finance mechanisms. The discussion of each mechanism is structured as follows. Each sub-chapter starts with a brief introduction of the core objectives and operating frameworks of each instrument. Each sub-chapter then introduces the governance mechanisms of each instrument, i.e. how decisions are taken and who is taking them, in order to serve as basis for later discussion of who are the respective human rights duty bearers in each mechanism. The discussion of governance arrangements also highlights the extent to which stakeholders are involved, in line with the Tenure Guidelines principle that states should facilitate the participation of all who hold legitimate tenure rights in the negotiations and implementation of mitigation and adaptation programmes. Next, each sub-chapter discusses the current status of safeguards: whether any safeguards exists, and if so, which ones. The discussion of safeguards is sub-divided into issues of substantive rights (project criteria), procedural rights (stakeholder consultation procedures, including monitoring), and access to justice (complaint and redress mechanisms).

The aim of the analysis is to determine whether core human rights are covered by the safeguards. In the area of substantive rights this includes the the right to an adequate standard of living, including adequate food, clothing and housing, the right to health and derived from that the right to a healthy environment, the right to water as derived from the rights to food and health, the right to property and adequate compensation

and the right legal security of tenure, as derived from the right to housing.

In the area of procedural rights this includes issues of stakeholder access to adequate information about the planned projects, participation in decision-making processes, and access to grievance and redress mechanisms for cases where problems become visible only during implementation. The discussion also includes the question of whether free, prior, and informed consent of indigenous peoples is required in cases where such peoples are affected by a project.

Finally, for each mechanism an assessment synthesizes the findings, concludes on the substance of safeguards and identifies weaknesses and needs for improvement.

3.1 *The Global Environment Facility*



“Wind power plants in Xinjiang, China” by Chris Lim is licensed under CC BY-SA

3.1.1 Objectives and Basic Framework of the Mechanism

The Global Environmental Facility (GEF) has been operational since 1991 and is the designated financial operator for a number of multilateral environmental agreements, namely on climate change, biodiversity, and persistent organic pollutants. It was assigned as an operating entity entrusted with the financial mechanism of the UNFCCC at the second Conference of the Parties (COP) held at Geneva in 1996 (UNFCCC, 1996, 1997). In 2001, at their seventh meeting in Marrakesh, UNFCCC Parties further established two special funds, which were to prioritize climate change adaptation: the Special Climate Change Fund (SCCF) and the Least Developed Country Fund (LDCF). Both funds are managed by the GEF (UNFCCC, 2001a, 2001b).

GEF-funded projects can be developed by governments, non-governmental organisations (NGOs), communities, the private sector, or other civil society organisations and must be communicated through one of the ten GEF Agencies. These include several international development banks (such as ADB, EBRD and World Bank) and UN programmes and organisations (such as UNEP, UNIDO, FAO) (GEF Website, 2016a).

Since its establishment, the GEF has funded over 800 mitigation projects in developing countries and economies in transition, amounting to a funding volume of more than \$5.2 billion. The majority of these projects were funded from the GEF Trust Fund. According to the GEF, the funding leveraged over \$32.5 billion from several other sources, including *inter alia* GEF agencies, national and local governments and the private sector (GEF, 2015d). With a total volume of about \$1.2 billion, financing of adaptation projects has been considerably lower (GEF, 2015c).

3.1.2 Governance Framework

The GEF's main governing body is the GEF Council. It consists of 32 members, 16 from developing countries, 14 from developed countries and two from countries with transition economies. Decisions shall be taken by consensus. If consensus is not achieved, a formal vote can be required by any member of the council. A formal vote needs a double weighted majority to pass, meaning an affirmative vote representing 60% of the participants and 60% of the total contributions (GEF 2007). Non-governmental and civil society organisations have the possibility to participate in the meeting as observers (GEF Website, 2016c).

A project must be consistent with national priorities and programmes and be endorsed by the GEF Operational Focal Point(s) of the country or countries where it is to be implemented. The Operational Focal Points are responsible for GEF activities in the respective country and for ensuring that they are aligned with its needs and priorities (GEF Website, 2016a).

3.1.3 Nature of Safeguards and Scope of Application

Despite its early installation and the large sums of funding transferred through projects and programmes, the GEF did not have specific and clear policies to prevent adverse environmental and social impacts until November 2011 (Johl & Lador, 2012), when the GEF Council adopted the GEF Agency Minimum Standards on Environmental and Social Safeguards (GEF Safeguards). The GEF has also published a set of guidelines for its safeguards – Application of Policy on Agency Minimum Standards on Environmental and Social Safeguards. Both the Minimum Standards and their guidelines were last revised in February 2015.

The GEF's Environmental and Social Safeguard policy is based on the approach and criteria of the World Bank's Operational Policy

4.0. It is comprised of eight so-called Minimum Standards: 1. Environmental and Social Assessment, 2. Natural Habitats, 3. Involuntary Resettlement, 4. Indigenous Peoples, 5. Pest Management, 6. Physical Cultural Resources, 7. Safety on Dams, and 8. Accountability and Grievance System (GEF, 2015a). Standards 3 to 7 do not have to be met by all GEF Agencies. If an Agency is able to demonstrate that these standards do not apply to their activities, then it does not have to meet these standards (GEF, 2015b).

The GEF also uses the World Bank's method of environmental and social assessment, which aims to identify, prevent, minimize, mitigate and manage the potential adverse impacts before and throughout project implementation. The assessment will define the project as category A, B or C, based on its level of risk to people and the environment. A project classified as category A is likely to have significant and/or irreversible adverse environmental and/or social impacts that are sensitive, diverse, or unprecedented, or which affect an area that is larger than pertaining to the physical works of the project. Category B includes projects with similar impacts but on a smaller scale and in this case impacts can be readily minimized with mitigation measures. Category C projects likely have no or minimal environmental and social effects, or environmental and social review recommendations have already sufficiently been incorporated into the project.

The GEF Safeguards apply a "principles-based" approach by defining minimum standards that the GEF Partner Agencies are to meet: "whether [Agencies] have adopted relevant policies and have sufficient systems in place to ensure that the safeguard standards are applied to the design, implementation, and evaluation of GEF projects" (GEF, 2015a). With this approach, Agencies (current GEF Agencies as well as future "Project Agencies") are not required to have installed a safeguard and policy system that follows the exact design and structure of the GEF Safeguards.

Instead, Agencies will have to demonstrate that they have procedures in place to meet the criteria and minimum requirements outlined in the standards. Each GEF Partner Agency must apply its own system of safeguards to projects and the GEF does not conduct monitoring during project implementation. The GEF's Agency Minimum Standards on Environmental and Social Safeguards are not built around human rights treaties and except for ILO Convention 169 do not explicitly reference human rights, (GEF, 2015a).

3.1.4 Substantive Safeguards

Minimum Standard 1 has an overarching character and is important for the identification of potential adverse effects. The Standard determines that Agencies are to screen projects "as early as possible" in order to establish the appropriate extent and type of the environmental and social impact assessment. The minimum requirements outline that potential impacts of the proposed project to "physical, biological, socioeconomic, cultural, and physical cultural resources, including transboundary concerns, and potential impacts on human health and safety" need to be assessed and that alternatives to the proposed project need to be taken into account. The standard further requires Agencies to "assess the adequacy of the applicable legal and institutional framework".

The **right to adequate standard of living, the right to property and the right to adequate housing** are not mentioned explicitly. Relevant provisions are included especially in Minimum Standard 3 on involuntary resettlement. The standard requires Agencies to provide people to be resettled with resettlement alternatives and assistance. For example, in the case of relocation, residential housing, agricultural sites or housing sites have to be provided. In addition, displaced persons have to be assisted in improving or at least restoring their livelihoods and standards of living in real terms.

The **rights to health and to a healthy environment** are also not mentioned explicitly. Minimum Standard 2 on the protection of natural habitats, *inter alia*, requires Agencies to apply a precautionary approach and to give preference to investments on lands where natural habitats have already been converted to other land uses. The Agency must screen for potential impacts on health and quality of important ecosystems that could harm the welfare of the local people. Projects with adverse impacts on non-critical habitats should proceed only if there are no viable alternatives and if appropriate conservation and mitigation measures are implemented.

The **land rights of indigenous and tribal peoples** are referred to in Minimum Standard 4, which requires Agencies to ensure that projects foster “full respect for Indigenous Peoples, and their members’ dignity, human rights, and cultural uniqueness”. If a project entails adverse effects on indigenous peoples, projects are to develop an indigenous peoples plan or framework which specifies measures that lead to culturally appropriate benefits and identifies measures to avoid, minimize mitigate or compensate for any adverse effects. Minimum Standard 4, nevertheless, does not refer to any specific human rights norms.

Table 1: Substantive Rights in the GEF Minimum Standards

Substantive Rights	GEF Minimum Standards
Right to an adequate standard of living, including adequate food, clothing and housing	No explicit reference to human rights norms In the case of involuntary resettlement, displaced persons must be assisted in order to improve or restore their livelihoods and standards of living relative to pre-displacement.
Rights to property and compensation and to legal security of tenure	No explicit reference to human rights norms One of the key principles for GEF operations states that GEF projects shall seek to avoid involuntary resettlement. When that is not feasible, all efforts will be made to minimize it and viable alternatives are explored. Moreover, GEF will not finance the displacement of people. Minimum Standard 4 on Indigenous Peoples states that involuntary resettlement is to be avoided or minimized.
Right to health, including the right to a healthy environment	GEF refers to the right to a healthy environment. Reference to international environmental agreements. Agency must screen for potential impacts on health and quality of important ecosystems that could harm welfare of the local people. Avoid significant conversion or degradation of critical natural habitats. Projects with adverse impacts on non-critical habitats should proceed only if there are no viable alternatives and if appropriate conservation and mitigation measures are implemented.
Right to water	No explicit reference to human rights norms

3.1.5 Procedural Safeguards and Access to Justice

While the GEF’s safeguards are not explicitly based on human rights norms, they recognize ILO

Convention 169 – a legally binding norm that requires the application of FPIC (GEF, 2015a). According to the safeguards, if the relevant state has ratified the convention, then partner agencies⁸ must make sure project executors document

⁸GEF Partner Agency: One of the agencies eligible to request and receive GEF resources directly for the design, implementation, and supervision of GEF Projects (GEF, 2015a).

the mutually accepted consultation process between the project proponent and affected communities; and report the evidence of agreement between the parties as the outcome of the consultations. In all other respects the safeguards do not refer to procedural human rights norms.

The GEF's Minimum Standards refer to **environmental and social impact assessment** (due diligence) as part of Minimum Standard 1. The minimum requirements of the standard requires the Agency for each project to use a screening process in order to determine the extent and type of environmental and social impact assessment that the project needs. Documentation of the environmental and social impact assessments must be disclosed in a timely fashion and the required Indigenous peoples plan or framework has to be disclosed before appraisal formally begins. The plan or framework shall be made accessible to stakeholders in adequate form and language.

The issue of **participation in decision-making** is contained in various Minimum Standards but without reference to human rights norms. Minimum Standard 1, for instance, requires the involvement of stakeholders as early as possible in the preparation process of the Environmental and Social Impact Assessment. Their views have to be taken into account and consultations are to continue throughout project implementation if it is considered necessary and when they are affected by the impacts of the project. Similar provisions are contained in the other Minimum Standards, where stakeholders are to be involved in the process of drafting mitigation measures and resettlement plans. Persons to be resettled have to be given the opportunity

to participate in the planning, implementation and monitoring of the settlement plan. Draft resettlement plans have to be disclosed before appraisal begins and made accessible to stakeholders in a form and language understandable to them. Furthermore, Agencies have to consult appropriate experts and key stakeholders and involve them in the design, implementation, monitoring, and evaluation of projects, including mitigation planning.

Minimum Standard 8 requires the **access to adequate grievance or redress mechanisms**. The mechanisms must be independent, transparent, effective, accessible to project-affected-people, and keep complainants aware of the status of their grievances. Implementing Agencies are further required to install a grievance mechanism that meets specific design requirements: Agencies must designate an individual or office for dealing with grievances and project stakeholders must be informed about the existence of the grievance mechanism and how they can access it (GEF, 2011). In addition, the GEF has established an independent Conflict Resolution Commissioner to help resolve disputes. Concerns about projects may be raised with national systems, a GEF Agency, or the commissioner (GEF Website, 2016b).

The specific requirements of **free, prior and informed consent**, are related to ILO Convention 169 in Minimum Standard 4. The adoption of FPIC is only required for those activities that are being implemented in countries that have ratified ILO Convention 169. In cases where the host country has not ratified this convention, the less stringent concept of free, prior and informed *consultation* is to be applied (GEF Council, 2012a).

Table 2: Procedural Rights in the GEF Minimum Standards

Procedural Rights	GEF Minimum Standards
Environmental and social impact assessment prior to project start (due diligence)	No explicit reference to human rights norms Agencies are to conduct Environmental and Social Impact Assessments of each proposed project and involve stakeholders in the preparation process and ensure that their views are taken into account.
Access to adequate information during all phases	No explicit reference to human rights norms The documentation of the consultation process, the required indigenous peoples plan or framework draft environmental and social impact assessments have to be disclosed before appraisal of project begins and made accessible to stakeholders in an adequate form and language. Consultations are to continue throughout project implementation if considered necessary.
Participation in decision-making	No explicit reference to human rights norms Agencies have to consult appropriate experts and key stakeholders and involve them in the design, implementation, monitoring, and evaluation of projects, including mitigation planning. Persons to be resettled have to be given the opportunity to participate in the planning, implementation and monitoring of the settlement plan.
Access to adequate grievance and redress mechanism	No explicit reference to human rights norms Grievance mechanisms are required, must be independent, transparent, effective, accessible to project-affected-people, and keep complainants aware of the status of their grievances
In case indigenous people are affected, requirement for free, prior and informed consent	Reference to ILO Convention 169 if host state has ratified it. Otherwise agencies are to undertake free, prior and informed <i>consultations</i> with affected indigenous peoples, in order to ensure a positive engagement with the project, avoid or mitigate/compensate/minimize adverse impacts and provide any benefits in a culturally appropriate way.

3.1.6 Discussion

While the Minimum Standards contain many provisions that cover aspects of both substantive and procedural human rights, they have not been developed with human rights as starting point. Tellingly, Minimum Standard 1 contains a reference to international environmental agreements, but there is no mention of other agreements and obligations, such as human right obligations. The Minimum Standard on indigenous peoples is the only standard which makes a direct reference to human rights. However, the standard comes short with regard to procedural rights as GEF applies FPIC in those host countries that have ratified ILO convention 169. This has raised considerable criticism. As the number of developing countries that have actually ratified this

convention is very low, this limits the application of FPIC to very few countries, mainly in Latin America. Another important issue is the rating of projects before safeguard implementation. For example, the project “Protected Areas Management and Sustainable Use”, which funded the management of wildlife and cultural resources in Uganda, was originally classified in the low-impact category C, which did not invoke the use of safeguards. However, since the project included the construction of infrastructure in a national park, it should have actually been rated as category B, a category that requires the implementation of safeguards. This was acknowledged in the project completion report of the World Bank. Nevertheless, the project managed to avert excessive social impacts. Ultimately the

government of Uganda decided to re-draw the borders of the national parks in way that local communities remained outside of the park area,

making re-settlement unnecessary (World Bank, 2011).

3.2 The Climate Investment Funds



“Shams 1 Parabolic Trough in Abu Dhabi” by Masdar Official is licensed under CC BY-SA

3.2.1 Objectives and Basic Framework of the Mechanism

The Climate Investment Funds (CIF) were agreed in 2008 to pilot low-carbon and climate resilient development. The CIF are housed by the World Bank and consist of two trust funds: the Clean Technology Fund (CTF) and the Strategic Climate Fund (SCF).

With a funding volume of \$5.6 billion, the Clean Technology Fund is the largest CIF fund. It provides middle-income countries with funding to explore possibilities for scaling-up the demonstration, deployment and transfer of clean, low-carbon technologies, focusing on renewable energy, sustainable transport and energy efficiency activities. A total of \$3.5 billion, over 60% of CTF funding, is approved and under implementation (CIF Website, 2015a).

The CIFs’ second fund, the Strategic Climate Fund (SCF) serves as an overarching framework for three programmes: the Pilot Programme for Climate Resilience (PPCR), the Forest Investment Programme (FIP) and the Programme for Scaling-up Renewable Energy in Low Income Countries (SREP). With \$1.2 billion pledged the PPCR is the largest of the three programmes (CIF Website, 2015c). However, since PPCR

is a programme particularly targeting adaptation to climate change it will not be further assessed in this paper, which is exclusively focusing financing of mitigation activities. The \$771 million FIP is the second-largest of the three programmes and is specifically supporting REDD+ activities (CIF Website, 2015b). SREP is the third programme specifically targeting the world’s poorest countries and has a total funding volume of \$798 million. Around 25% (\$194 million) of SREP funding is approved and under implementation for projects that scale-up the deployment of renewables to increase energy access and economic opportunities (CIF Website, 2015d).

3.2.2 Governance Framework

The CIF’s main governing bodies are the Trust Fund Committees. Each fund, the CTF and the SCF, has its own Trust Fund Committee. In addition, the SCF has Sub-Committees for each of its programmes. Each Committee has equal representation of donor and recipient countries, which are the decision-making members. The Trust Fund Committees comprise eight decision-making members of donor countries and eight of recipient countries. Other members include representatives from the World Bank and the other MDBs. In the CTF Trust Fund Committee a representative of an additional recipient country may assist the meeting in cases where an investment plan, programme or project for that country is being considered. Decisions of the Committees are taken by consensus of the decision-making members. The Trust Fund Committees meet at least once a year. Stakeholders, including *inter alia* representatives of the GEF, UNFCCC, UNEP and UNDP as well as representatives of civil society, indigenous peoples or private sector organisations, can participate in the meetings as “active” observers, meaning they can participate in strategic discussions (CIF Website, 2016).

3.2.3 Nature of Safeguards and Scope of Application

CIF funding is channelled through six multilateral development banks (MDBs): World Bank, Asian Development Bank, European Bank for Reconstruction and Development, Inter American Development Bank, African Development Bank and the International Finance Corporation. For the monitoring and future evaluation of projects, the CIF approved a results framework for CTF, PPCR and SREP. The revision of the May 2011 results framework of the Forest Investment Programme (FIP) is still ongoing (FIP, 2015). All the MDBs have their own procedures for monitoring and reporting.

Each results framework contains a small number of core indicators. The frameworks rely on the national monitoring and reporting systems and on the MDB's own management of development results (MfDR) approaches while the "development of parallel structures or processes for (...) monitoring and reporting will be avoided" (CIF 2012a:11). MDBs and implementing countries are to report on a limited number of indicators on an annual basis.

The Clean Technology Fund results framework (CIF, 2013), for instance, provides five core indicators:

- tonnes of GHG emissions reduced or avoided,
- volume of direct finance leveraged,
- installed capacity (MW) from renewable energy,
- number of additional passengers using low carbon public transport, and
- annual energy savings (GWh) as a result of CTF interventions.

The first two indicators are to be used by all projects, while the remaining indicators will be applied in the respective project types (energy provision, transport and energy efficiency). Hence, the indication of the climate change mit-

igation effect and the funding leveraged lies at the core of the system.

In addition to the reporting on these core indicators it is "recommended" that projects and programmes explain how they will contribute and document to achieving co-benefits at the impact and outcome level. At the outcome level, the results framework outlines three types of co-benefits: access to energy, health and employment. At least one of the indicators proposed has to be identified and integrated into the CIF-financed project or programme (CIF, 2013).

A similar structure has been developed for the Programme for Scaling-up Renewable Energy in Low Income Countries, where project or programme documentation is to demonstrate how they contributed to the two outcomes "increased supply of renewable energy" and "increased access to modern energy services", using indicators. In addition and similar to the CTF framework, projects and programmes are expected to outline how their activities will contribute to achieving co-benefits at the impact and at the outcome level. At the impact level, the three types of co-benefits are reduction of greenhouse gas emissions, health and employment. At the outcome level, the co-benefits are reliability and economic viability of the energy system (CIF 2012b). In contrast to the CTF framework, however, no indicators for measuring co-benefits are proposed.

3.2.4 Substantive Safeguards

The CTF results framework contains no provisions requiring projects and programmes to adhere to environmental and social safeguards and to monitor and report on these. Instead, as outlined in the private sector operational guidelines of the Clean Technology Fund, "each MDB will adhere to its own social and environmental safeguard policies" (CIF, 2012, para 12(j)). Similarly, in the SREP "processes will follow the MDB policies and procedures, including the relevant MDB's environmental and social safeguards, fidu-

ciary and disclosure policies”. (CIF, 2010, para 50).

3.2.5 Procedural Safeguards and Access to Justice

According to the CIF website, the CIF’s stakeholder base is a “critical element of CIF effectiveness” (CIF Website, 2015e). At the programme level, observers can participate in the process as or via observers to the Trust Fund Committee and Sub-Committee meetings. At the investment plan level, the CIF policies and framework documents do not provide specific guidance on how a broad-based stakeholder engagement should be implemented. However, the documentation of the individual funds contains some guidance on the involvement of stakeholders during the preparation of investment plans, with some notable differences between the funds. While the programmes under the Strategic Climate Fund contain requirements regarding the involvement of stakeholders, the CTF documents do not explicitly mention consultation processes with affected people (ADB, 2013). The CTF states that country-led joint missions should take place in collaboration with the MDBs and focused on government officials, civil society, private industry and other stakeholders (CIF, 2015c). By contrast, the the Strategic Climate Fund, as part of a process to develop a strategic program that collects views on important elements of the project, requires consultations with key stakeholders (CIF, 2009c). The key stakeholders can include development partners, non-governmental organisations, indigenous peoples, the private sector and local communities (CIF, 2009b). According to the FIP Criteria for FIP Investment Strategies, Programs and Projects programs and projects consultations should especially focus on marginalized stakeholders such as indigenous peoples, local communities and women (CIF, 2009a).

In May 2015, the CTF and SCF Trust Fund Committees agreed on underlying principles and

measures for strengthening national-level stakeholder engagement. The joint Trust Fund Committees agreed to address inconsistencies in the principles and requirements of CIF programs on stakeholder engagement. The underlying principles of the proposed decision envisage universal standards for stakeholder engagement, while strategies themselves are tailored to fit specific program and country contexts. Rules, strategies and policies for stakeholder engagement are meant to be derived from already existing country systems or from MDBs, international organizations, donors and NGOs (CIF, 2015a).

During project implementation, the CIF rely exclusively on the policies and procedures of the MDBs and there is no grievance mechanism in place that would allow project-affected groups to raise their concerns directly to the CIF. Individuals or groups that feel adversely affected by CIF projects or programmes can file a complaint only by using the structure of the respective MDB.

3.2.6 Discussion

The CIF’s current monitoring and reporting frameworks rely on national systems as well as on the approaches of the MDBs. The frameworks do not contain any provisions for the monitoring and reporting of safeguards but only require programmes and projects to report on additional benefits (CIF, 2015b). Similar observations can be made with regard to the participation of stakeholders. Procedures remain rather general and are mainly based on the structures of the MDBs. The documents, in particular in case of the CTF, do not contain clear and detailed minimum requirements for stakeholder participation. Detailed guidance on how stakeholders must be engaged during the planning, implementation and evaluation of CIF-financed activities is lacking.

In a number of cases the lack of strict requirements on stakeholder engagement have led indigenous groups to protest against CIF programmes, such as the FIP (part of the SCF). In 2013 Peru-

vian civil rights groups claimed that there had not been enough consultation and openness with the local indigenous peoples during the drafting of an FIP investment plan (Bretton Woods Project, 2013). This led to further joint missions by the IDB, World Bank and IFC in Peru and further drafting of investment plans. However, according to another statement by the indigenous organizations, last minute changes were added to the draft that had not been discussed with the groups (AIDSESEP, CONAP, & COICA, 2013). Civil rights groups made similar complaints against FIP in Indonesia. On 30 September 2013, 50 Indonesian and international groups published a letter criticizing FIP for not ensuring effective consultations and the implementation of FPIC. According to the Indonesian groups, the FIP did not publish information in a transparent manner and participation remained non-inclusive to indigenous peoples (Bretton Woods Project, 2014). Similar concerns have also been brought up about the SREP investment plan in the Maldives. In 2013, Transparency International argued that civil engagement was inadequate and access to information limited (Transparency In-

ternational, 2013).

The approach applied by CIF to rely on the MDB's own social and environmental safeguard systems does not only impede a proper reporting on adverse impacts of CIF-funded activities at an aggregate level. In addition, this architecture may also cause projects funded by different MDBs to be subject to very different requirements. Despite some MDBs having very advanced procedures to reduce adverse environmental and social impacts, the institutional capacities and the necessary procedures to adequately address these impacts are not equally established throughout all MDBs. For example, while the World Bank and the IFC refer to free, prior and informed *consultation* (as opposed to *consent*) in indigenous community engagement, the Asian Development Bank does not integrate the UNDRIP concept at all. Important differences are not only highlighted by the literature available (see for instance: Bernstorff and Dann, 2013), but the differences also led to mixed results in GEF reviews of its Partner Agencies (GEF Council, 2013).

3.3 The Green Climate Fund



“Barro Blanco Hydroelectric Power Plant Project” (© Jane A. Hofbauer)

3.3.1 Objectives and Basic Framework of the Mechanism

Establishment of the GCF was decided at COP 16 in Cancún in 2010, which established the GCF as an operating entity of the financial mechanism of the UNFCCC under its Art. 11. The Cancún decision also established the possibility for developing countries to get direct access to funding, instead of having to go through intermediary implementing institutions like the World Bank or United Nations agencies as has so far usually been the case (UNFCCC, 2011).

In 2011, COP 17 adopted the GCF’s Governing Instrument. According to the instrument, the purpose of the GCF is to make “a significant and ambitious contribution” to the global effort to combat climate change (UNFCCC, 2012, p. 58). The instrument contributes to the UNFCCC’s ultimate objectives: to prevent dangerous anthropogenic climate change and “to promote the paradigm shift towards low-emission and climate-resilient development pathways by providing support to developing countries to limit or reduce their greenhouse gas emissions and to adapt to the impacts of climate change” (UNFCCC, 2012, para. 2). The GCF is meant to pursue “a country-driven approach and promote and strengthen engagement at the country level

through effective involvement of relevant institutions and stakeholders” (UNFCCC, 2012, para. 3).

Access to the Fund takes place through accredited entities (AEs) – national, regional, international public and private entities accredited by the GCF Board. Funding is possible through two modes of access: direct access and international access. The direct access track works through subnational, national and regional entities. The international access track works through international entities, such as the UN, multilateral development banks, international financial institutions and regional institutions. Recipient countries can choose the mode of access or use both modalities at the same time (GCF, 2011, 2014b).

The initial capitalisation of the GCF is 10 billion USD (UN Website, 2014). A first round of 8 projects was approved in November 2015 (GCF, 2015a).

3.3.2 Governance Framework

The GCF is accountable to and functions under the guidance of the COP. It is governed by a Board of 24 members with half each coming from developing and industrialised countries respectively. The members represent the UNFCCC’s regional groups and are selected by them. The Board has two co-chairs, one each from industrialised and developing countries. Decisions are to be taken by consensus (UNFCCC, 2012).

The Board has been discussing procedures for situations where consensus cannot be reached. Since consensus remains the preferred and driving principle of GCF decision-making, future rules will apply only if co-chairs have established that all efforts at reaching consensus have been exhausted. The Board has not yet decided on a one-country-one vote or a weighted voting system.

Observers may participate in the GCF board’s meetings and two civil society representatives

and two representatives from the private sector may participate as “active observers” (UNFCCC, 2012). The active observers may intervene in Board meetings upon invitation of the co-chairs and are to represent the views of their constituencies (GCF, 2013, Annex II).

3.3.3 Nature of Safeguards and Scope of Application

The GCF’s governing instrument mandates the Board to adopt “best practice environmental and social safeguards” to be applied to all programs and projects financed with resources of the Fund (UNFCCC, 2012, para. 65). At its seventh meeting in May 2014, the Board adopted the Performance Standards of the International Finance Corporation (IFC) as interim environmental and social safeguards of the GCF. Use and implementation are to be guided by the IFC Guidance Notes. The Guidance Notes include definitions of the relevant terms and guidance on the requirements of the Performance Standards in order to assess a project proposal’s impact on environmental and social issues. The current Guidance Notes and Overview were last updated on January 1, 2012 (IFC, 2012b). Ultimately the Board aims to develop its own safeguards on the basis of experience gained (GCF, 2014a).

The IFC Standards, first introduced to the IFC in 2006, are a package of eight standards. Performance Standard 1, Assessment and Management of Environmental and Social Risks, is to apply to all funding proposals. It covers identifying a proposal’s environmental and social risks and impacts, improving performance through an environmental and social management system, and engagement with affected communities or other stakeholders throughout the funding proposal cycle, including communications and grievance mechanisms.

Standards 2-8 are to be applied in a modular way as needed (IFC, 2012a). They cover:

- PS2: Labour and Working Conditions

- PS3: Resource Efficiency and Pollution Prevention
- PS4: Community Health, Safety and Security
- PS5: Land Acquisition and Involuntary Resettlement
- PS6: Biodiversity Conservation and Sustainable Management of Living Natural Resources
- PS7: Indigenous Peoples
- PS8: Cultural Heritage

Implementation of the safeguards is to be done in a scaled risk-based approach with three categories differentiated according to the level of risk of the proposed activities. Firstly, the approach will fit funding proposals into three categories, based on the likely adverse effects and risk that they entail. Category A includes activities with potential for significant adverse environmental and/or social risks that could be irreversible, while category B includes activities with mild adverse effects that are few, largely reversible and localized. Category C includes activities with minimal or no adverse risks and impacts (GCF, 2014a). Monitoring and review of mitigation and performance improvement measures are obligatory for all categories of projects but with differing levels of stringency. (GCF, 2016).

The GCF’s Initial Monitoring and Accountability Framework for Accredited Entities states that the framework shall ensure that accredited entities maintain compliance with the GCF’s environmental and social safeguards and gender policy. The framework includes a feedback system that allows for corrective measures in case compliance issues arise during accreditation. The framework also points out the significance of local monitoring through participatory and multi-stakeholder approaches. The monitoring of entities during implementation will take place through the Fund’s Evaluation Unit, the Integrity Unit and an independent redress mechanism. The independent redress mechanism, how-

ever, is not meant to be a court of appeals or a legal mechanism. In the future the GCF plans to develop a new framework that would include the suspension and cancellation of accreditation in case of compliance issues (GCF, 2015b).

3.3.4 Substantive Safeguards

The IFC Performance Standards refer to a number of substantive human rights norms but mostly in general terms. For example, while the overview of the Performance Standards states that the Standards are guided in part by UN and ILO conventions, the conventions themselves are only listed in the footnotes and are not referred to in the text. The IFC Guidance Notes on the Performance Standards, however, go beyond this. The Guidance Notes affirm the importance of the business responsibility framework “Protect, Respect and Remedy” by the Special Representative of the Secretary-General on Business and Human Rights. Of the framework’s three pillars “protect”, “respect” and “remedy”, the Guidance Notes reflect on two: corporate responsibility to “respect” human rights but also the greater access of victims to judicial and non-judicial “remedy”. Nonetheless, the Guidance Notes are only meant to offer extra information on the requirements of the Performance Standards and are not intended to establish policy. Their guidance is, hence, not obligatory for the clients (IFC, 2012b).

Performance Standard 1, which applies to all project proposals, establishes the importance of the assessment and management of social risks and impacts, as well as effective community engagement. The client shall establish and maintain a process in order to identify the environmental and social risks and impacts of the project. Performance Standards 2-8 describe potential social and environmental impacts and establish requirements to avoid, reduce, mitigate or compensate for impacts on people and the environment, and to improve conditions, using the project’s social and environmental management

system.

The **right to an adequate standard of living** (including adequate food, clothing and housing) is not explicitly protected by the Performance Standards. However, PS5 requires that the client improves or restores the livelihoods and standards of living of displaced persons. Moreover, in the case of displacements, the client should provide transitional support to the affected people, in order to restore their income-earning capacity and standards of living.

The **right to property and adequate compensation** are not referred to explicitly. Performance Standard 5 addresses project-related land acquisitions, land restrictions and negative effects on people using the land. According to PS5, the client should aim to avoid, or if not possible, minimize the displacement of the affected people. Moreover, forced evictions or any adverse effects on land use should be avoided. If this is not possible, then the client must provide compensation for lost assets, improve or restore the livelihoods and standards of living of displaced persons through legally occupied adequate housing. The possession of the land and assets may only take place after the client has provided compensation for the affected (IFC, 2012a).

The **right to health, including the right to a healthy environment** are not referred to explicitly. The PSs refer to a number of health-related hazards and how to counter them but not all of them relate to specific human rights norms. The Guidance Note to PS2 states that clients are expected to comply with international laws that regulate occupation health and safety, such as ILO Convention 155 on Occupational Safety and Health, Protocol 155 of 2002 to Convention 155, Convention 162 on Asbestos, and ILO Convention 174 on Prevention of Major Industrial Accidents. Moreover, the client shall not employ children in a manner that is harmful to their “physical, mental, spiritual, moral or social development” (IFC, 2012a, p. 20). Moreover, Perfor-

mance Standard 4 “Community Health, Safety, and Security” addresses the client’s responsibility to avoid or minimize hazards (particularly life-threatening) to the local community: “the client will exercise special care to avoid or minimize their exposure by modifying, substituting, or eliminating the condition or material causing the potential hazards” (IFC, 2012a, p. 28).

IFC Performance Standard 2 and 3 reference water use and consumption but not explicitly the **right to water**. First of all, PS2 states under “Working Conditions and Management of Worker Relationship” that workers have to be provided with, *inter alia*, basic services such as water, adequate sewage and garbage disposal. Performance Standard 3 under “Water Consumption” requires the client to “adopt measures that avoid or reduce water usage so that the project’s water consumption does not have significant adverse impacts on others” (IFC, 2012a, p. 24).

Where a project has adverse impacts on lands that have been traditionally owned by **indigenous peoples**, the client has to take the follow-

ing steps in order to minimize or avoid possible negative effects:

- Document efforts to avoid and minimize the area of land and the impacts on the natural resources or natural areas of importance (priority ecosystem services) to indigenous peoples that are proposed for the project;
- Identify and review property interests and traditional resources uses prior to purchasing or leasing land;
- Assess and document the affected communities of indigenous peoples’ resource use without prejudicing their land claims in a gender-inclusive manner;
- Ensure that the affected communities are informed of their land rights under national law;
- In case land and resources have been developed, the client shall offer affected communities of indigenous peoples compensation and due process. Management of Living Natural Resources

Table 3: Substantive Rights in the GCF Interim Environmental and Social Safeguards

Substantive Rights	GCF interim environmental and social safeguards /IFC Performance Standards
Right to an adequate standard of living, including adequate food, clothing and housing	<p>No explicit reference to human rights norms</p> <p>PS5 objectives: “To improve, or restore the, the livelihoods and standards of living of displaced persons”</p> <p>PS5 “Economic Displacement”: “Transitional support should be provided as necessary to all economically displaced persons, based on a reasonable estimate of the time required to restore their income-earning capacity, production levels, and standards of living”</p>
Rights to property and compensation and to legal security of tenure	<p>No explicit reference to human rights norms</p> <p>PS5 objectives: “To avoid, and when avoidance is not possible, minimize displacement” “To avoid forced eviction” “To improve living conditions among physically displaced persons through the provision of adequate housing with security of tenure (legal and protected tenure) at resettlement sites”</p> <p>PS5 “Physical Displacement”: “In the case of physically displaced persons under paragraph 17 (i) or (ii), the client will offer the choice of replacement property of equal or higher value, security of tenure, equivalent or better characteristics, and advantages of location or cash compensation where appropriate”</p>
Right to health, including the right to a healthy environment	<p>No explicit reference to human rights norms</p> <p>PS2 objectives: “To promote safe and healthy working conditions, and the health of workers”</p> <p>PS2 “Protecting the Work Force”: “the client will not employ children in a manner that is harmful to the child’s health or physical, mental, spiritual, moral, or social development”</p> <p>PS4 objectives: “To anticipate and avoid adverse impacts on the health and safety of the Affected Community during the project life from routine and non-routine circumstances”</p>
Right to water	<p>No explicit reference to human rights norms</p> <p>PS2 under “Working Conditions and Management of Worker Relationship”: where workers are provided accommodation services, the client has to ensure, <i>inter alia</i>, basic services such as minimum space, water, adequate sewage and garbage disposal.</p> <p>PS3 “Water Consumption”: “the client shall adopt measures that avoid or reduce water usage so that the project’s water consumption does not have significant adverse impacts on others”</p>

3.3.5 Procedural Safeguards and Access to Justice

Several IFC Performance Standards also emphasize procedural norms.

The first Performance Standard (PS1), “Assessment and Management of Environmental and Social Risks”, requires **due diligence** and an environmental and social impact assessment before

the project starts. The social and environmental assessment and management system (ESMS) is to involve the client, its workers, local communities affected by the project and where appropriate, other stakeholders such as national/local authorities and NGOs. According to the IFC Guidance Notes, ESMS also entails disclosure of project-related information and consultation with local communities that are affected by the

project (IFC, 2012b).

Access to adequate information during all phases is also not referred to in terms of human rights but features in a number of PS1 objectives and requirements. Adequate engagement shall involve stakeholder analysis and planning, disclosure, dissemination of information and the notification of Affected Communities. These activities, however, shall be proportionate to the level of expected adverse effects. The client shall inform the Affected Communities of the relevant issues concerning the project. This information will include material on the purpose, nature and scale of the project, duration of proposed project activities, any risks to and potential impacts on such communities and relevant mitigation measures, the stakeholder engagement process and the grievance mechanism. The Informed Consultation and Participation (ICP) process will be based on relevant, understandable (when necessary translated), timely and accessible information (IFC, 2012a).

Participation in consultations, according to PS1, shall be proportionate to the level of expected adverse effects. In case the project is expected to have significant adverse effects and the exact location of the project is known by the client, stakeholder analysis and planning shall include a Stakeholder Engagement Plan that is scaled to project risks and impacts, while taking into account the attributes of the Affected Communities. However, if the exact location of the project is not known, the client will prepare a Stakeholder Engagement Framework, which will identify and plan an engagement process with the Affected Communities and other relevant stakeholders.

The client shall give the Affected Communities opportunities for meaningful communication to express their views. The communication has to be meaningful in the sense that it has to take place in the language and with the methods preferred by the Affected Communities. The views will be considered and responded to by the client.

Consultation shall begin early, based on prior disclosure and dissemination of legitimate information and focused primarily on those directly affected. The process will be free of any kind of manipulation and be conducted in a meaningful and properly documented manner (IFC, 2012a).

Moreover, the Guidance Notes on the Performance Standards contain many specific procedural safeguards on involuntary resettlement. In case eviction is unavoidable, Guidance Note 55 refers to the procedural norms of the Office of the UN High Commissioner for Human Rights, which require consultation with those affected, reasonable and adequate notice and information of the eviction, presence of government representatives and identification of persons carrying out the eviction (IFC, 2012b).

In relation to **the right to adequate grievance and redress mechanism**, clients will establish a grievance mechanism with the Affected Communities. The mechanism shall be understandable, transparent and readily accessible to the Affected Communities, who will not bear any of its costs. The Affected Communities are to be able to voice their concerns without fear of retaliation. The Affected Communities also will be informed of the project Action Plans on issues related to potential or real risks to them. The reports shall be published not less frequently than annually (IFC, 2012a).

Furthermore, PS2 supports the provision of a clearly defined grievance mechanism for workers and workers' organizations to raise workplace concerns. The mechanism shall also allow anonymous complaints and prohibits any retribution (IFC, 2012a).

In the case of PS5 "Land Acquisition and Involuntary Resettlement", the client shall develop a grievance mechanism in the beginning of the project development phase, which allows affected communities to voice concerns about possible issues related to relocations and compensation. This should include a recourse mechanism in order for disputes to be resolved in an impartial

manner (IFC, 2012a).

Specific requirements on **the rights of indigenous peoples** are emphasized in Performance Standard 7. This Standard requires the client to establish and maintain the Free, Prior, and Informed Consent (FPIC) of the affected indigenous peoples, which should be in relation to potential resource and land use, relocation or the preservation of critical cultural heritage (also subject to PS8). Moreover, the client has to maintain an Informed Consultation and Participation (ICP) process with the indigenous peoples

that has a time-bound plan and is not influenced by outside pressure (IFC, 2012a, 2012b). The client shall also inform the indigenous peoples of any steps that taken to minimize the adverse effects. FPIC also requires the client to ensure that the indigenous peoples know about their land rights under national law (IFC, 2012a).

Finally, the GCF is currently deliberating the structure and functioning of its internal complaint mechanism to come (Bretton Woods Project, 2016).

Table 4: Procedural Rights in the GCF Interim Environmental and Social Safeguards

Substantive Rights	GCF interim environmental and social safeguards /IFC Performance Standards
Environmental and social impact assessment prior to project start (due diligence)	<p>No explicit reference to human rights norms</p> <p>PS1 “Environmental and Social Assessment and Management System”: “The client, in coordination with other responsible government agencies and third parties as appropriate, will conduct a process of environmental and social assessment, and establish and maintain an ESMS appropriate to the nature and scale of the project and commensurate with the level of its environmental and social risks and impacts”</p>
Access to adequate information during all phases	<p>No explicit reference to human rights norms</p> <p>PS1 objectives: “ensure that relevant environmental and social information is disclosed and disseminated”</p> <p>PS1 “Stakeholder engagement”: The client will engage stakeholders by “[...] disclosure and dissemination of information [...] and ongoing reporting to Affected Communities”</p> <p>PS1 “Disclosure of Information”: “The client will provide Affected Communities with access to relevant information on: (i) the purpose, nature, and scale of the project; (ii) the duration of proposed project activities; (iii) any risks to and potential impacts on such communities and relevant mitigation measures; (iv) the envisaged stakeholder engagement process; and (v) the grievance mechanism”</p> <p>PS5 “Community Engagement”: “Disclosure of relevant information and participation of Affected Communities and persons will continue during the planning, implementation, monitoring, and evaluation of compensation payments, livelihood restoration activities, and resettlement [...]”</p>
Participation in decision-making	<p>No explicit reference to human rights norms</p> <p>PS1 “Stakeholder Engagement”: “Stakeholder engagement is an ongoing process that may involve, [...] consultation and participation [...]”</p> <p>PS1 “Indigenous Peoples”: “For projects with adverse impacts to Indigenous Peoples, the client is required to engage them in a process of ICP.”</p>

↓

Substantive Rights	GCF interim environmental and social safeguards /IFC Performance Standards
<p>Access to adequate grievance and redress mechanism</p>	<p>No explicit reference to human rights norms</p> <p>PS1 “Grievance Mechanism for Affected Communities”: “Where there are Affected Communities, the client will establish a grievance mechanism to receive and facilitate resolution of Affected Communities’ concerns and grievances about the client’s environmental and social performance”</p> <p>PS2 “Grievance Mechanism”: “The client will provide a grievance mechanism for workers (and their organizations, where they exist) to raise workplace concerns”</p>
<p>In case indigenous peoples are affected, requirement for free, prior and informed consent</p>	<p>Guidance Note 7 does not refer to the rights in relation to human rights norms but states: “IFC recognizes that key United Nations (UN) Human Rights Conventions form the core of international instruments that provide the rights framework for members of the world’s Indigenous Peoples. In addition, some countries have passed legislation or ratified other international or regional conventions for the protection of indigenous Peoples, such as the International Labour Organization (ILO) Convention 169, ratified by 17 countries. In addition, various declarations and resolutions address rights of indigenous peoples, including the UN Declaration on the Rights of Indigenous Peoples (2007). While such instruments address the responsibilities of states, it is increasingly expected that private sector companies conduct their affairs in a way that would uphold these rights and not interfere with states’ obligations under these instruments. It is in recognition of this emerging business environment that private sector projects are increasingly expected to foster full respect for the human rights, dignity, aspirations, cultures, and customary livelihoods of Indigenous Peoples”</p>

3.3.6 Discussion

The GCF has not yet developed its own set of safeguards, the Board instead decided to adopt the IFC Performance Standards as its interim environmental and social safeguards. However, the IFC standards have not been accepted universally and been under heavy criticism from various environmental NGOs and civil society observers. For the use of this assessment, the critique is broadly divided into four main arguments.

First, many NGOs reject the basis on which the PS were selected as interim safeguards. The IFC’s Performance Standards are described in the GCF Decision B.07/02 GCF’s, which outlines the interim environmental and social safeguards, as international best practice to lead the future development of GCF’s safeguards (GCF, 2014a). NGOs, on the contrary, claim that the IFC performance standards are not representa-

tive of international best practices, while many organizations consider the Standards as only “aspirational” (Schalatek, 2014).

Second, critics find that the PSs fall short in terms of substantive rights. Even though PS1 states that clients should “respect international human rights obligations”, the Performance Standards overall are not explicitly based on human rights standards (Heinrich Böll Stiftung, 2014). Environmental NGOs find that GCF safeguards do not include in detail “international conventions, treaties, codes, action plans, soft law instruments, and sectorial best practice standards” (Accountability Counsel et al., 2014). Simons and Macklin find that, even though the Standards are meant to protect human rights, they rarely refer to human rights and many rights, such as the right to health or the right to water, are not mentioned in the Standards at all. While the Guidance Notes do refer to many hu-

man rights issues and international human rights conventions, they are not part of policy and do not require companies to follow their instructions. In 2014, 49 environmental NGOs sent a letter to the Green Climate Fund's Accreditation and Safeguards Committee, which pointed out that IFC PSs do not elaborate what is expected of clients in terms of respect for human rights (Accountability Counsel et al., 2014).

The Standards are not consistent with the UN Guiding Principles on Business and Human Rights. While the Guidance Notes do refer to the Ruggie Guidelines, they state that PS1 only reflects the “respect” and “remedy” aspects of the SRSG Framework, leaving “protect” out of its aims (Simons & Macklin, 2014).

Third, critics find that the Standards lack pro-

cedural oversight. In terms of community engagement, the IFC Performance Standards leave too much freedom in the hands of the clients. According to the review of the Compliance Advisor/Ombudsman for the IFC, the Standards depend heavily on the information from the client in assessing project impacts. Monitoring reports are constantly inconsistent in quality as there is a clear gap between Standards' input and the feedback of the clients. This in turn can cause ineffective community engagement and lack of transparency. While the Performance Standards require the implementation of grievance mechanisms in PS1, PS2, PS4 and PS5, they do not require minimum levels of due process (Herbertson, 2009; Office of the Compliance Advisor/Ombudsman (CAO), 2010).

3.4 The Clean Development Mechanism⁹



“Jatropha curcas - important source of biodiesel” by Ton Rulkensis licensed under CC BY-SA

3.4.1 Objectives and Basic Framework of the Mechanism

Under the Kyoto Protocol adopted in 1997, industrialised countries assumed legally binding commitments to reduce their greenhouse gas emissions. The CDM is a project-based mechanism based on Article 12 of the Kyoto Protocol. Article 12.2 sets out two equally weighted objectives for the mechanism: to assist developing countries in achieving sustainable development and to assist industrialised countries in achieving compliance with their Kyoto Protocol commitments. Once a CDM project has completed a pre-determined project cycle, the project participants receive emission reduction credits, so-called Certified Emission Reductions (CERs), which industrialised countries can purchase and count towards their Kyoto commitments. CDM projects need to be ‘additional’ to what would have happened in the absence of the CDM. Industrialised country governments may be directly involved in projects, but the usual model is the purchase of CERs from projects operated by pri-

vate businesses. Some jurisdictions such as the EU have also established domestic emission trading systems (ETS) where companies may also use CERs to comply with domestic obligations (Sterk & Arens, 2010).

So far, 7708 projects have been registered but only 2930 have been issued CERs (UNEP DTU, 2016).

3.4.2 Governance Framework

The CDM ‘modalities and procedures’, adopted as part of the Marrakesh Accords (MA)¹⁰ in 2001, set out the detailed rules for the implementation of projects (UNFCCC, 2006). The CDM operates under the authority of the annual meeting of the Kyoto Protocol’s Parties (the Conference of the Parties to the UNFCCC serving as Meeting of the Parties to the Kyoto Protocol, CMP). The day-to-day governance lies with the CDM Executive Board (‘Board’). The Board is composed of ten members and ten alternate members that are elected by the CMP and represent the UNFCCC’s regional groups of countries. The Board each year submits a report to the CMP, which on this basis provides further guidance to the Board. UNFCCC-accredited observer organisations can attend the Board meetings, however, instead of being provided space in the Board’s meeting room they have to take seats in an adjoining room where they are provided a broadcast of the meeting. Direct interaction is limited to a question and answer session at the end of the meeting and informal meetings during breaks.

Project proponents need to prepare a Project Design Document (PDD) according to a prescribed format developed by the Board. The PDD needs to be validated, i.e. examined as to whether it meets all CDM requirements, by an independent certification company accredited with

⁹This chapter is to a large extent based on Schade & Obergassel (2014).

¹⁰The Marrakesh Accords contain detailed implementation rules for the Kyoto Protocol, particularly regarding emissions accounting and the functioning of the Protocol’s flexible mechanisms.

the Board, called Designated Operational Entity (DOE). The project needs to be approved by the countries involved, that is, the host country and the buyer country or countries. If all requirements are met, the project is formally registered by the Board and may subsequently be issued CERs, subject to adequate monitoring of the achieved reductions by the project participants and verification by another DOE.

3.4.3 Substantive Safeguards

The CDM modalities and procedures deal almost exclusively with questions of how to make sure that projects are ‘additional’ and how to quantify emission reductions. There is no mention of human rights. The only hook for addressing substantive human rights norms is the requirement that projects contribute to sustainable development, which is addressed as part of the PDD (Schade & Obergassel, 2014).

However, there are no internationally agreed criteria or procedures for assessing contributions to sustainable development. While the EU suggested including such standards when the MA were negotiated, developing countries rejected these proposals as being incompatible with their national sovereignty. The MA therefore do not go beyond requiring confirmation by the host country that the project assists it in achieving sustainable development, without giving further specification (UNFCCC, 2006, para. 40a).

It is therefore up to host countries to define detailed sustainable development criteria. Research (e.g. Olsen, 2007; Schneider, 2007; Sterk et al., 2009) has concluded that most host countries have rather general lists of non-binding guidelines instead of clear criteria. This makes it easy to comply with the requirements: PDD sections on sustainable development as well as validation reports tend to have vague wording avoiding concrete and verifiable statements. A further problem is that DOEs have no mandate to validate compliance with host countries’ sustainable de-

velopment criteria and most host countries themselves also do not thoroughly investigate projects. There also is no monitoring of sustainable development impacts during project implementation. This leads to claims of sustainable development benefits being achieved that are never evaluated.

Due to public criticism, there have recently been new discussions on how to strengthen sustainable development assessments. Based on a mandate from the Kyoto parties, the UNFCCC Secretariat in early 2012 developed a comprehensive draft for a tool to assess sustainable development impacts, including a human rights-based ‘do no harm’ assessment. However, as in Marrakesh, most developing country representatives on the Board rejected these suggestions as incompatible with host countries’ sovereignty. The Board therefore cut down the sustainable development tool substantially. The remaining parts of the tool allow indicating only positive but not negative impacts. In addition, use of the tool is voluntary for project participants (Sterk, 2012).

3.4.4 Procedural Safeguards and Access to Justice

The Marrakesh Accords require consultation of stakeholders, but as with the issue of sustainable development there have until very recently been no internationally agreed procedures or guidelines. The MA merely state that comments shall be invited. The project participants only need to provide a summary of the comments received and a report of how any comments received were duly taken into account (UNFCCC, 2006, para. 37b). There has been no specification of who exactly to consult and how to consult them.

Research (e.g. Schneider, 2007; Sterk et al., 2009) has found that in practice stakeholder consultations have often been rudimentary, unregulated and badly documented. Furthermore, all these processes take place before project implementation. The CDM rules so far contained no

mechanisms for addressing problems that may not have been visible in the project design and approval phase.

In November 2015, after much discussion the Board approved a concept note on improving stakeholder consultation processes. The new concepts are yet to be integrated into the CDM's procedures. According to the concept note, the scope of local stakeholder consultations shall cover potential direct positive and negative impacts. As a minimum, representatives of local stakeholders directly impacted by the project and representatives of local authorities relevant to the project shall be invited and the project participants need to provide evidence that the respective invitations were sent. Information should be disseminated "in ways that are appropriate for the community that is directly affected" and include a non-technical summary of the project and positive and negative impacts, and means to provide comments. Project participants will need to report on how they have taken the comments into account and provide a justification if any comments were not incorporated (UNFCCC, 2015b).

The concept note also envisages to open a 14-day commenting period after publication of the first monitoring report to allow for comments on impacts triggered by project implementation. If comments relate to CDM requirements – which as noted do not cover human rights issues – these need to be resolved before credits can be issued. Otherwise, the Board will forward the comments to the host country authorities (UNFCCC, 2015b).

The Board also decided that if stakeholders submitted comments on human rights concerns in projects, such information should be forwarded to the respective national authorities and "relevant bodies within the United Nations system" (UNFCCC, 2015c, para 52).

So far, there is no possibility to appeal Board decisions. Discussions on establishing an appeals procedure are ongoing, but so far consensus has

not been possible. Controversial issues include who would be allowed to appeal Board decisions and whether only project rejections or also approvals could be appealed, and if so, on what grounds (UNFCCC, 2013).

3.4.5 Discussion

In summary, the term "human rights" does not appear anywhere in the CDM rules, the only hook to address human rights is the requirement to contribute to sustainable development and to consult stakeholders. However, rules and procedures for assessing the sustainability of projects have been left to the discretion of the host countries. Research has concluded that in most countries the respective rules are vague and hardly enforced. Developing countries have so far rejected suggestions to develop international standards as incompatible with their national sovereignty. They have also rejected the development of voluntary guidelines as amounting to the imposition of standards through the backdoor.

Until very recently, the same applied to rules for stakeholder consultations. Here as well host countries long rejected any suggestions to define international rules as violation of national sovereignty. In late 2015, the Board agreed to introduce minimum rules, but these still leave much room for interpretation. There is no specification how to identify impacted communities, how to invite them, and how to ensure that information is provided in an "appropriate" way.

A number of CDM projects have allegedly been involved in human rights violations due to the lack of safeguards. In many cases projects were approved even when the abuses came to light. For example, the Bajo Aguán palm oil project in Honduras is at the centre of a violent land conflict, where reportedly more than 50 people have been killed. However, despite the human rights abuses, this did not prevent the CDM Executive Board from registering the project. Board members argued that they did not have

the mandate to take the human rights situation into account as issues related to sustainable development were the sovereign province of the host country (Schade & Obergassel, 2014). Other examples relate to various hydropower projects, such as the Barro Blanco project in Panama and the Xiaoxi hydroelectric dam project in China, which caused the forcible eviction of the local population (Yan, 2011).

In addition to a lack of guidance on local stakeholder consultation and an overt reliance on national standards, CDM rules also do not require the monitoring of commitments made in the Project Design Document (PDD). This is further complicated by the fact that PDDs are

generally not translated to the languages of the host countries and comments are only accepted in English. The CDM rules have so far had no procedures to address stakeholder concerns raised after registration and do not require any action from the DNA (UNFCCC, 2015a).

The new rules agreed in November 2015 introduce a 14-day commenting period after publication of a project's first monitoring report to allow commenting on impacts caused by project implementation. While this is a step forward, 14 days provide only little time for local communities who often lack access to electronic means of communication.

3.5 Reducing Emissions from Deforestation and Forest Degradation (REDD+)



“Secretary Kerry Listens to Norwegian Environment Minister Helgesen During a Reducing Emissions From Deforestation and Forest Degradation (REDD) Conference in Oslo” by U.S. Department of State

3.5.1 Objectives and Basic Framework of the Instrument

The discussions to establish a forest protection programme under the UNFCCC began in 2005, when Papua New Guinea and Costa Rica proposed a “mechanism for Reducing Emissions from Deforestation in Developing Countries” (RED), aimed to counter the release of carbon dioxide through deforestation. After two years of discussions, Parties agreed at the 13th Conference of the Parties in Bali to expand the scope of the concept to also include forest degradation and the role of conservation, sustainable management of forests and the enhancement of forest carbon stocks (UNFCCC, 2008a, 2008b, 2010). The concept has subsequently been termed REDD+. In 2013, COP 19 adopted a series of decisions which established the Warsaw Framework for REDD+ (Sterk et al., 2013). The 2015 Paris Agreement also contains an article dedicated to REDD+ and thus underscores the relevance of the concept, but in operational terms this article mainly refers to the Warsaw Framework (UNFCCC, 2016b).

There is not one unified REDD+ mechanism.

Instead, there is a variety of bilateral and multilateral activities. This chapter therefore focuses on key multilateral organizations designed to fund REDD+ activities: the Forest Carbon Partnership Facility (FCPF) of the World Bank and the UN-REDD Program, led by the Food and Agriculture Organisation (FAO), the UN Environment Programme (UNEP) and the UN Development Programme (UNDP).

The FCPF is composed of two separate but complementary funds. The first fund is the FCPF Readiness Fund, which supports countries in developing necessary policies and systems in preparation for their future participation in REDD+. The policies and systems include the preparation of national REDD+ strategies or the enhancement of already existing national strategies, the development of measurement, reporting and verification (MRV) systems and the setting up of national environmental and social safeguards for REDD+. The second funding mechanism is the FCPF Carbon Fund, which is designed to provide performance-based payments for verified emission reductions in FCPF countries (FCPF, 2013). Donors have committed about 1 billion USD to the FCPF, 365 million USD for the Readiness Fund and 692 million for the Carbon Fund (FCPF Website, 2016)

UN-REDD similarly aims to support national REDD+ processes. UN-REDD supports the design and implementation of national REDD+ programmes, provides complementary tailored support to national REDD+ actions, and provides technical capacity building (UN-REDD Website, n.d.).

By 2015, the total amount of contributions to UN-REDD has been significantly smaller than for the FCPF – approximately 270 million USD (UN-REDD Programme, 2016).

3.5.2 Governance Frameworks

Both the FCPF and UN-REDD are governed by independent bodies. The FCPF’s main decision-

making body is the Participants Committee, which is made up of an equal number (14 each) of forest (REDD+) countries and financial contributors. The Participants Committee, *inter alia*, reviews country submissions, decides on grant resource allocation and approves budgets. The FCPF also grants observer status to NGOs that represent indigenous peoples, civil society groups, and international organisations. The Committee meets twice a year. Observers may express their views on issues under discussion but have no voting rights (IBRD, 2014).

The UN-REDD Executive Board includes representatives from partner countries, donors, civil society groups, indigenous groups and the three participating organizations (FAO, UNDP and UNEP). The Board is in charge of approving financial allocations and gives strategic directions to the UN-REDD Programme (UN-REDD Programme Website, 2016). Donor and recipient countries are each represented by three members, while the participating UN agencies (FAO, UNDP and UNEP) each have one member. Indigenous peoples and civil society organisations are each represented by one permanent observer (UN REDD Programme 2013).

3.5.3 Nature of Safeguards and Scope of Application

At the 2010 climate conference in Cancún Parties agreed to the so-called Cancún Safeguards, which “should be promoted and supported” when undertaking any of the REDD+ activities. These are in detail (UNFCCC, 2011, p. 26):

- “a) That actions complement or are consistent with the objectives of national forest programmes and relevant international conventions and agreements;*
- b) Transparent and effective national forest governance structures, taking into account national legislation and sovereignty;*
- c) Respect for the knowledge and rights of Indigenous Peoples and members of local*

communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the United Nations General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples;

- d) The full and effective participation of relevant stakeholders, in particular Indigenous Peoples and local communities; in the [REDD+ actions];*
- e) That actions are consistent with the conservation of natural forests and biological diversity, ensuring that the [REDD+ actions] are not used for the conversion of natural forests but instead used to incentivize the protection and conservation of natural forests and their ecosystem services, and to enhance other social and environmental benefits;*
- f) Actions to address the risks of reversals;*
- g) Actions to reduce displacement of emissions.”*

The Cancún conference also adopted a work plan for one of its subsidiary bodies (Scientific Body for Technical Advice - SBSTA) to develop guidance on safeguard information systems (SIS). SIS must be established in each country willing to undertake REDD+ activities in order to provide information on how safeguards will be addressed and respected at the national level (Mackenzie, 2012; UNFCCC, 2011).

The Parties at the 2013 climate conference in Warsaw decided that before developing countries can access REDD+ results-based payments (phase 3), they have to provide a summary on their adherence to the Cancún standards (UNFCCC, 2014). At COP 21 in 2015, Parties agreed that governments should provide summaries periodically but without clarifying the exact interval of submission (UNFCCC, 2016b).

Beyond the Cancún Safeguards there are no overarching safeguards that apply for all REDD+ related initiatives. There are, however, a few

non-binding guidelines for consultations and redress that are in use by both the FCPF and UN-REDD. The first is the FCPF/UN-REDD jointly produced “Guidelines on Stakeholder Engagement” and the second is the “Guidance Note for REDD+ Countries: Establishing and Strengthening Grievance Redress Mechanisms” (UN-REDD & FCPF, 2012, p. 5).

The safeguards in use by the FCPF and UN-REDD are both meant to be consistent with the Cancún safeguards adopted in 2010 while including more specific safeguards, which aim to provide a higher level of protection.

The FCPF safeguards rely to a large extent on the current World Bank Operational Policies and Procedures (OPs). The FCPF safeguards process includes a number of steps. First of all, the FCPF requires REDD+ country participants to undertake a Strategic Environmental and Social Assessment (SESA) and to develop an Environmental and Social Management Framework (ESMF). In contrast to a project-level EIA that assesses the environmental and social impact of a specific project, a SESA aims not only to assess but also to “improve capacities and mechanisms for planning, institutional governance, accountability, and effectiveness of country systems that will influence the formulation and implementation of policies, plans, programs and projects” (BIC, 2014, pp. 3–4).

In cases where the World Bank is not the implementing agency, the FCPF will apply the Common Approach to Environmental and Social Safeguards for Multiple Delivery Partners, requiring the adherence to the World Bank’s OPs and safeguard policies. In addition, the Common Approach also requires the application of FCPF/UN-REDD guidelines on stakeholder engagement, FCPF guidelines on the establishment of a grievance mechanism and a separate guideline on the disclosure of information (Roe, Streck, Pritchard, & Costenbader, 2013).

UN-REDD, along with other UN-led programmes and agencies, refers to “The Human

Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies” that was adopted by the UN Development Group in 2003. The Approach supports the common understanding that the aim of UN organisations is to realize human rights as they have been laid down in the Universal Declaration of Human Rights and international human rights treaties (HRBA Portal, 2011). UN-REDD’s tools and guidelines on safeguards comprise several elements. In 2012, the 8th UN-REDD Programme Policy Board Meeting adopted Social and Environmental Principles and Criteria (SEPC), which draws from the 2010 Cancún safeguards. UN-REDD has also developed a number of directions for the use of its safeguards, such as the UN-REDD guidelines for FPIC (UN-REDD, 2013b) and jointly with the FCPF, the aforementioned guidelines on stakeholder engagement (UN-REDD & FCPF, 2012).

In addition, UN-REDD has developed a benefits and risks tool (BeRT), which is in accordance with the SEPC and aims to facilitate its application. The BeRT consists of three modules. The objective of the first module is to document REDD+ actions that are anticipated in the country (UNFCCC, 2011). The second module identifies the potential benefits and risks of the REDD+ activities and the third module identifies the policies, laws and regulations that address the benefits and risks. The third module also aims to identify any policies, laws and regulations that conflict with the safeguards (UN-REDD, 2015).

The goal of the SEPC and BeRT is not to assess safeguards ex-ante or during implementation but to provide guidance for countries in order to develop national approaches to REDD+ safeguards in line with the UNFCCC (UN-REDD, 2012, p. 3).

3.5.4 Substantive Safeguards

While UN-REDD's SEPC refer to the UNFCCC, the Convention on Biological Diversity (CBD), the Non-legally Binding Instrument on all Types of Forest (NLBI), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ILO's Convention 169, the UN Convention Against Corruption (UNCAC), UNDRIP, the UN Convention on the Elimination of All Forms of Racial Discrimination (UNCERD) and the Millennium Development Goals in its introductory chapter, they do not explicitly tie together specific substantive rights with corresponding safeguards. The FCPF safeguards do not refer to any human rights norms.

The right to an adequate standard of living, including adequate food, clothing and housing is not mentioned explicitly. Relevant provisions are contained in UN-REDD's SEPC Principle 3, which stipulates the promotion of sustainable livelihoods and poverty reduction. The Principle consists of Criteria 12 and 13 that seek to ensure both the equal distribution of benefits between stakeholders and the protection and enhancement of the economic and social well-being of relevant stakeholders. This must take place with due regard to the most vulnerable and marginalized groups (UN-REDD, 2012).

The right to property and adequate compensation are also not mentioned explicitly. Of relevance is Cancún Safeguard 2c, which calls for respect of the rights of the indigenous peoples. The Safeguard also makes a reference to the States' obligation under UNDRIP (UNFCCC, 2011). Indigenous peoples are also the focus of the World Bank's Operational Policy 4.10, which stipulates the full legal recognition of existing customary land when the project is contingent on establishing legally recognized rights to traditionally owned land or if it involves the acquisition of these lands. Resettlements are described in the World Bank OP 4.12 on involuntary resettlements. Even though the OP states

that resettlements need to be avoided, it contends that when that is not feasible, resettlements can be executed as a sustainable development program. This would include the improvement or at least the restoration of the displaced communities' pre-displacement living standards (World Bank, 2013). Criterion 7 of the UN-REDD SEPC requires the respect and promotion of the local communities' and indigenous peoples' rights to land, territories and resources. The SEPC Criterion 10 prohibits any resettlement to take place as part of REDD+ (UN-REDD, 2012).

Legal security of tenure is mentioned only in general terms by UN-REDD and FCPF safeguards. World Bank Operational Policy 4.12 requires in the case of displacement due to a project that preference should be given to land-for-land compensation schemes which are supported by the restoration or improvement of livelihoods (World Bank, 2013). However, while the operational policies (OPs) of the World Bank imply the recognition of the right to tenure security, they do not refer to it directly. The same applies in the case of the UN-REDD safeguards – the SEPC. They require the respect and promotion of the indigenous peoples' right to land, territories and resources but do not demand explicitly the security of tenure (Criteria 7) (UN-REDD, 2012).

The right to health including the right to a healthy environment are also not mentioned explicitly. World Bank OP 4.10 prescribes that an environmental assessment must evaluate potential risks to the environment and take into account human health and safety. OP 4.09 aims at the minimization and management of the environmental and health risks associated with pesticide use by promoting environmentally safe pest management (World Bank, 2013). UN-REDD, on the other hand, includes in SEPC Criterion 13 the requirement to protect and enhance economic and social well-being of relevant stakeholders. The glossary of key terms defines "economic well-being" as, among others, the opportunity

of employment that meets internationally recognized health and safety obligations. Annex 3, which lists the sources consulted for the SEPC, includes the ILO Convention 161 on occupational health requirements (UN-REDD, 2012).

The right to water is not referenced explicitly by the safeguards. World Bank’s OP 4.01 requires an environmental assessment to take into account the whole natural environment, including air, water and land but it does not give any further recommendations nor does it reference human rights norms. UN-REDD’s SEPC criterion 13 includes an obligation to protect and enhance the economic and social well-being of

relevant stakeholders. The glossary of the key terms used in the SEPC defines “economic well-being” as access to resources, *inter alia*, such as water but does not explain what a “provision of water access” exactly entails.

The following Table 6 assesses the substantive rights as part of the FCPF and UN-REDD. The table is based on the safeguard policies of both multilateral REDD+ organizations, while bringing out references to overlapping safeguards: Cancún Safeguards and the FCPF/UN-REDD Guidelines on Stakeholder Engagement (UN-FCCC, 2011; UN-REDD & FCPF, 2012).

Table 5: Substantive Rights in the FCPF and UN-REDD Safeguards

Substantive Rights	FCPF (Readiness Fund and Carbon Fund) (FCPF, 2012; UN-REDD & FCPF, 2012)	UN-REDD (UNDP & WB, 2014; UN-REDD, 2012, 2013a, 2013b)	Overlapping Safeguards (UNFCCC, 2011; UN-REDD & FCPF, 2012)
Right to an adequate standard of living, including adequate food, clothing and housing	No explicit reference to human rights norms OP 4.10 requires that project-design allows indigenous peoples to receive “culturally compatible social and economic benefits”.	No explicit reference to human rights norms SEPC criterion 13 requires the protection and enhancement of economic and social well-being of relevant stakeholders, with special attention to the most vulnerable and marginalized groups.	No explicit reference to human rights norms Cancún Safeguard 2e states that REDD+ activities have to be “consistent with the conservation of natural forests and biological diversity, ensuring that the [REDD+ actions] [...] enhance other social and environmental benefits”.

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Substantive Rights	FCPF (Readiness Fund and Carbon Fund) (FCPF, 2012; UN-REDD & FCPF, 2012)	UN-REDD (UNDP & WB, 2014; UN-REDD, 2012, 2013a, 2013b)	Overlapping Safeguards (UNFCCC, 2011; UN-REDD & FCPF, 2012)
Rights to property and compensation and to legal security of tenure	<p>No explicit reference to human rights norms</p> <p>OP 4.10 requires that in the case of projects that involve the development of natural or cultural resources, indigenous peoples must receive adequate compensation.</p> <p>OP 4.12 declares that involuntary settlement must be avoided or, when not possible, the affected parties have to be given assistance to restore their pre-displacement livelihoods.</p> <p>World Bank OP 4.10 foresees the “full legal recognition of existing customary land tenure systems of indigenous peoples; or conversion of customary usage rights to communal and/or individual ownership rights”.</p>	<p>No explicit reference to human rights norms</p> <p>SEPC criterion 10 states that no involuntary resettlement can take place as a result of REDD+.</p> <p>SEPC 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”.</p>	<p>No explicit reference to human rights norms</p> <p>FCPF/UN-REDD Guidelines on Stakeholder Engagement: “Special emphasis should be given to the issues of land tenure, the rights of resource use and property rights because in many tropical forest countries these are unclear”.</p>
Right to health, including the right to a healthy environment	<p>No explicit reference to human rights norms</p> <p>According to OP 4.01, an environmental assessment has to take into account human health and safety.</p> <p>OP 4.00 “Environmental and Social Safeguard Policies” foresees that the borrower of financing must assess potential effects on human health and safety.</p>	<p>No explicit reference to human rights norms</p> <p>SEPC criterion 13 includes the requirement to protect economic and social well-being. The glossary of key terms includes the opportunity of employment that meets internationally recognized health and safety obligations as part of “economic well-being”. Annex 3 which lists the sources consulted for the SEPC, includes the ILO Convention 161 on occupational health requirements.</p>	
Right to water	<p>No explicit reference to human rights norms</p> <p>According to OP 4.01, an environmental assessment has to take into account the natural environment, including air, water and land.</p>	<p>No explicit reference to human rights norms</p> <p>SEPC criterion 13 includes an obligation to provide access to water.</p>	

3.5.5 Procedural Safeguards and Access to Justice

Both UN-REDD and the FCPF allow the promotion and recognition of stakeholders' right to participate in the decision-making processes (Rey et al., 2013). The joint FCPF/UN-REDD Guidelines on Stakeholder Engagement expect countries to adhere to the UNDRIP, the UN Common Understanding on the Human Rights Based Approach to Development Cooperation, UN General Assembly UN General Assembly Programme of Action for the Second International Decade of the World's Indigenous People (Resolution 60/142); General Recommendation XXIII on the Rights of Indigenous Peoples, the UN Committee on the Elimination of Racial Discrimination; UN Development Group's Guidelines on Indigenous Peoples' Issues; the ILO Convention 169, the UNFCCC and the CBD.

The safeguards of UN-REDD and the FCPF leave implementation of an **environmental and social impact assessment** prior to the project to a large degree to the discretion of the project developers. According to the Common Approach to Environmental and Social Safeguards for Multiple Delivery Partners, countries engaged with the FCPF must prepare an assessment of the country's environmental situation, and of the key social and environmental risks. As countries formulate their strategies and policies for REDD+ investments, they are meant to, as part of a SESA, identify and assess a number of issues. This covers the assessment of land tenure, sharing of benefits, access to resources and likely social and environmental impacts (FCPF, 2011).

The UN-REDD Programme and the FCPF safeguards promote **the right of access to adequate information** but not in explicit relation to human rights norms. The FCPF's Guidance on Disclosure of Information summarizes the guidelines for the disclosure of FCPF-related documents, describing the documents and their timeline of disclosure. The FCPF's and the UN-

REDD's jointly produced Guidelines on Stakeholder Engagement require that information dissemination has to be timely, happen at all levels and be culturally appropriate (UN-REDD & FCPF, 2012). UN-REDD's SEPC criterion 3 advises that information related to REDD+ must be transparent, accessible and actively disseminated to relevant stakeholders. Accessible information is described by the glossary as clear, consistent, accurate and delivered in appropriate language, format and in due time (UNDP, 2009; UN-REDD, 2012).

Regarding **the right to participation in decision-making**, Cancún safeguard 2d requires the full and effective participation of relevant stakeholders such as, *inter alia*, indigenous peoples and local communities (UNFCCC, 2011). The Guidelines on Stakeholder Engagement developed jointly by UN-REDD and FCPF state that a good consultation and participation process has to be carefully planned, needs a clear mandate, transparent conduct and shall be based on the equal opportunity of all participants (UN-REDD & FCPF, 2012). The SEPC criterion 4 promotes "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" (UN-REDD, 2012, p. 5). Full and effective participation is defined by the SEPC as the meaningful influence of all interested and relevant stakeholders in consultations and FPIC (UN-REDD, 2012).

Both the FCPF and UN-REDD provide safeguards that aim to protect **access to grievance and redress mechanisms**, by establishing grievance mechanisms at the national level, but do not reference human rights norms. First of all, the FCPF/UN-REDD Guidelines on Stakeholder Engagement require an "impartial, accessible and fair mechanisms for grievance, conflict resolution and redress", which "must be established and accessible during the consultation process

and throughout the implementation of REDD+ policies, measures and activities” (UN-REDD & FCPF, 2012, p. 5). The non-binding “Joint UN-REDD/FCPF Guidance Note for REDD+ Countries: Establishing and Strengthening Grievance Redress Mechanisms” proposes Grievance Redress Mechanisms (GRMs) for both the Readiness and Implementation phases of REDD+, in order to promote accountability in REDD+ countries, improve outcomes and address problems before and after implementation. According to the Guidance Note, the GRM should comply with internationally recognized rights (UNDP & WB, 2014).

Exclusively for the the FCPF, the Guidelines for Establishing Grievance and Redress Mechanisms at the Country Level give instructions on a feedback and grievance redress mechanism, on how to assess the results and how to develop a framework for the mechanism (FCPF, 2012).

UN-REDD safeguards also propose the use of grievance mechanisms through SEPC criterion 2, which foresees the establishment of responsive feedback and grievance mechanisms to serve the relevant stakeholders. Relevant stakeholders are defined as either the groups who have a stake or interest in the forest (such as government agencies, private sector entities, and civil society) or those that are going to be affected by the REDD+ activities (such as indigenous peoples, formal and informal forest users). Grievance mechanisms are also supported by criterion 6 that requires the promotion and support of the rule of law, access to justice and effective remedies. Effective remedies are defined to include complaints and redress mechanisms for vulnerable and marginalised groups (UN-REDD, 2012).

In addition, in case of non-compliance with World Bank Operational Policies during FCPF-supported activities, the affected parties can send

a complaint to the World Bank Inspection Panel. In case of UN-REDD there is an opportunity for affected communities to request support from the chair of the UN permanent forum on indigenous issues or NGOs that are members of the policy board of UN-REDD.

Regarding the application of **free, prior and informed consent** (FPIC) of indigenous peoples, UN-REDD requires the application of FPIC under the SEPC Criterion 9, adding that the decision of the indigenous peoples must be respected and upheld. The FPIC process is further assisted by the UN-REDD FPIC Guidelines that outline a normative policy and operational framework. UN-REDD partner countries are obligated to apply FPIC when indigenous peoples or other forest-dependent community are directly affected by REDD+ activities, and when UN-REDD is either the sole funder or the Delivery Partner under the FCPF in a country (UN-REDD, 2012, 2013b). The Guidelines affirm that States need to recognize “the right of forest-dependent communities to effectively participate in the governance of their nations” and “at a minimum States are required to consult forest-dependent communities in good faith regarding matters that affect them with a view to agreement” (UN-REDD, 2013b, p. 11).

The FCPF, which applies the World Bank Operational Policies, in contrast, requires free, prior and informed *consultation*. Hence, instead of seeking the communities’ consent, the FCPC, while referring to OP 4.10, requires the more loose “broad community support” (World Bank, 2013). Moreover, while the UN-REDD’s FPIC principles explicitly include the right of local communities to reject displacement, the FCPF only necessitates a consulting process (UN-REDD, 2013b; World Bank, 2013).

Table 6: Procedural Rights in the FCPF and UN-REDD Safeguards

Substantive Rights	Overlapping Safeguards (UNFCCC, 2011; UN-REDD & FCPF, 2012)	FCPF (Readiness Fund and Carbon Fund) (FCPF, 2012; UN-REDD & FCPF, 2012)	UN-REDD (UNDP & WB, 2014; UN-REDD, 2012, 2013a, 2013b)
Environmental and social impact assessment prior to project start (due diligence)		<p>No explicit reference to human rights norms</p> <p>According to the Common Approach to Environmental and Social Safeguards for Multiple Delivery Partners, countries must prepare an assessment of the country’s environmental situation, and of key social and environmental risks.</p> <p>Countries, as part of a SESA, need to identify and assess land tenure, sharing of benefits, access to resources and likely social and environmental impacts.</p> <p>World Bank OP 4.01 “Environmental Assessment” aims to identify, avoid and if adverse impacts have taken place, mitigate potential negative environmental impacts.</p>	<p>SEPC are consistent with UNCAC, ILO Convention 169 on Indigenous Peoples and UNDRIP.</p> <p>The Benefit and Risk Tool (BeRT) aims to assess risks in national programs that are seeking UN-REDD support.</p> <p>A Safeguard Information System (SIS) is still under development.</p>
Access to adequate information during all phases	<p>No explicit reference to human rights norms</p> <p>FCPF/UN-REDD Guidelines on Engagement state the dissemination of information has to be timely, on all levels and culturally appropriate.</p>	<p>No explicit reference to human rights norms</p> <p>The Guidance on Disclosure of Information give requirements on how to disclose information to relevant stakeholders.</p>	<p>No explicit reference to human rights norms</p> <p>SEPC criterion 3 advises that information related to REDD+ must be transparent, accessible and actively disseminated to relevant stakeholders.</p>
Participation in decision-making	<p>No explicit reference to human rights norms</p> <p>Cancún safeguard 2d: ensure “the full and effective participation of relevant stakeholders, in particular, indigenous peoples and local communities.”</p> <p>FCPF/UN-REDD Guidelines on Stakeholder Engagement</p>	<p>None separately for FCPF.</p>	<p>No explicit reference to human rights norms</p> <p>SEPC criterion 4 promotes “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”.</p>

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Substantive Rights	Overlapping Safeguards (UNFCCC, 2011; UN-REDD & FCPF, 2012)	FCPF (Readiness Fund and Carbon Fund) (FCPF, 2012; UN-REDD & FCPF, 2012)	UN-REDD (UNDP & WB, 2014; UN-REDD, 2012, 2013a, 2013b)
Access to adequate grievance and redress mechanism	<p>The FCPF/UN-REDD Guidelines on Stakeholder Engagement: “Impartial, accessible and fair mechanisms for grievance, conflict resolution and redress must be established and accessible during the consultation process and throughout the implementation of REDD+ policies, measures and activities”.</p> <p>The FCPF/UN-REDD Guidance Note for Establishing and Strengthening Grievance Redress Mechanisms</p>	Guidelines for Establishing Grievance and Redress Mechanism at the Country Level	<p>The second criterion of the SEPC references the establishment of responsible feedback and grievance mechanisms in order to ensure legitimacy and accountability.</p> <p>SEPC criterion 6 advises the promotion and support of rule of law, access to justice and effective remedy, including for vulnerable and marginalised groups.</p>
In case indigenous people are affected, requirement for free, prior and informed consent	<p>FCPF/UN-REDD Guidelines on FCPF:</p> <p>“Although OP 4.10 does not expressly mandate FPIC, if the country has ratified ILO Convention No.169 or adopted national legislation on FPIC, or if the Bank is working on a project with a development partner that expressly applies the principle of FPIC, the Bank will in turn support adherence to that principle.”</p> <p>UN-REDD countries are expected to ensure FPIC.</p>	No explicit reference to human rights norms	<p>SEPC are consistent with ILO Convention 169 on Indigenous Peoples and UNDRIP.</p> <p>UN-REDD requires FPIC</p>

3.5.6 Discussion

REDD+ initiatives have met criticism from a wide range of actors, such as environmental NGOs and human rights groups. Most of their assessments have focused on the way the safeguards of REDD+ initiatives address substantive and procedural norms but many also on their operationalisation and implementation.

First of all, an important distinction between the REDD+ safeguards and the safeguards of international finance institutions must be pointed out. The Cancún safeguards differ from the safe-

guards of other emission reduction funds as they do not make a clear distinction between what is acceptable and unacceptable behavior (Daviet & Larsen, 2012). The Cancún safeguards specify goals that the initiatives have to achieve but do not lay down rules for what is forbidden. This gives those who are implementing REDD+ initiatives the possibility to choose the means how to achieve the goals. This applies, for example, in the case of the UN-REDD’s Social and Environmental Principles and Criteria (SEPC). Most of the SEPC criteria require rules to be respected,

promoted and supported, no matter how it is achieved. Only four criteria out of 24 (Criteria 19, 20, 23 and 24) demand the avoidance and minimising of adverse impacts (UN-REDD, 2012).

Second, a large part of the criticism of REDD+ initiatives has been about the primarily voluntary nature of the various safeguards. For example, the UN-REDD Programme's safeguards have no binding grievance mechanisms – its policies are voluntary for states to implement. They are strongly encouraged to adopt the safeguards. However, the UN-REDD's safeguards are framed in non-mandatory language that only “promotes and supports” substantive and procedural rights.

The FCPF safeguards, on the contrary, include the binding safeguards of the World Bank's Operational Policies (FCPF, 2012). It is not exactly clear, however, if all specific FCPF safeguard measures, including the guidelines, are mandatory or optional. Dooley, Griffiths, Martone, Francesco, & Ozinga (2011, p. 7) find that “rather than strengthening and implementing the Bank's safeguards, the FCPF has created a dense set of guidelines that appear to water down existing policies and obfuscate minimum standards”. While the OPs are mandatory, the guidelines seem to prescribe more relaxed rules.

Third, critics find shortcomings in regard to FCPF's procedural norms. UN-REDD recognises the application of free, prior and informed consent (FPIC) [Cancun Safeguard 2c and 2d in (UNFCCC, 2011)], which is linked to the UN-DRIP and ILO Convention 169. This gives indigenous peoples and communities the right to reject proposed activities. The FCPF, however, applies “free, prior and informed *consultation*” as opposed to *consent*, which does not allow the local communities to explicitly reject proposed REDD+ activities (World Bank, 2013).

The FCPF's practice of free, prior and informed *consultations* has not been without controversy. In 2012 FCPF was accused of having violated World Bank standards in Honduras. Ac-

ording to the civil society group Indigenous Peoples Confederation of Honduras (CONPAH), the indigenous peoples affected by REDD+ were not properly consulted and free, prior and informed consent had not been followed through (REDD-Monitor, 2012). While FCPF, as has been stated before (in section 3.5.5), relies on free, prior and informed *consultation*, the Common Approach demands the application of FPIC if the national laws mandate it. Since the Republic of Honduras has supported UNDRIP, FPIC would have needed to be applied. (FCPF, 2011).

FPIC has also come up as an issue for UN-REDD. This has for example been the case in Vietnam and in the programme's pilot REDD+ project in Central Sulawesi in Indonesia, where locals have complained that the FPIC process has not been properly implemented (FPP, 2013). Most Indonesia-based REDD+ activities have suffered from the lack of clarity in land and resource rights, an undeveloped FPIC procedure, lack of transparency and consultations that have been dominated by governmental, NGO and private sector representatives (FPP, 2011).

However, currently the World Bank is reforming its approaches towards community consultation: At the 12th session of the United Nations Permanent Forum on Indigenous Issues (UNPFII) in May 2013, the World Bank announced to conduct a comprehensive dialogue with indigenous peoples. The dialogue will inform the review process for updating the Bank's safeguard policies that includes the Indigenous Peoples policy OP 4.10 as revised already in April 2013, where consultation procedures were required to take place at each important step in project implementation (World Bank Website 2013a, c). More generally, the main social and environmental criteria of the World Bank are currently undergoing a reform process, which can also be expected to have considerable repercussions on REDD+ activities under the FCPF (FPP 2013).

4 Summary and Conclusions

All state parties to the international human rights treaties have the obligation to respect, protect, and progressively fulfil the human rights of the population over which they exert effective control. The UNFCCC acknowledged in 2010 and confirmed in 2015 that all climate-related actions should fully respect human rights.

The involvement of international donors and financial institutions in international climate finance raises the question of their extraterritorial human rights responsibilities. Based on interpretation of the ICESCR mainly, states can be deemed to have an obligation not to undermine the enjoyment of human rights on foreign territory; to prevent third parties by political and legal means from abusing human rights; and to support through individual and international cooperation the fulfilment of those rights. Deduced from that, states have the responsibility to ensure that international agreements do not impact negatively on human rights. To ensure human rights compatibility from the start, the UN Tenure Guidelines demand stakeholder participation in the very design and implementation of the programmes themselves, not only in individual projects.

This paper has examined the main financing mechanisms of international climate policy to determine if and if yes, to what extent they ensure stakeholder participation and incorporate human rights safeguards.

The analysis finds that stakeholder involvement in the mechanisms' governance is weak, they may in all cases only participate as observers. In the GEF and in the CDM, observers may not even be present in the meeting room but only watch a screencast in a viewing room. In the

CIF and in the FCPF, observers may participate in discussions but have no voting rights. The GCF Board includes two "active observers" who may intervene in Board meetings upon invitation of the co-chairs but also have no voting rights. The UN-REDD Board similarly has two "permanent observers", one to represent indigenous peoples and one for civil society organisations.

The analysis furthermore finds that safeguards vary strongly and could in all cases be improved. Some of the instruments like the CDM do not provide any safeguards against negative impacts, others, such as the GCF and FCPF have safeguards but for the most part do not refer to specific human rights norms.

The Global Environment Facility has so far funded more than 600 mitigation projects. Safeguards to prevent adverse environmental and social impacts were nonetheless only introduced in November 2011. While this is a step forward, from a human rights perspective the new safeguards contain a number of weaknesses. Most fundamentally, they make reference to other international agreements but mostly not to human rights obligations. Involuntary resettlement is only to be avoided "where feasible". The standard on indigenous peoples is the only one making explicit reference to human rights. But even here, the principle of free, prior and informed consent is only to be applied where the project host country has ratified ILO Convention 169, which applies only to a few developing countries. Implementing Agencies are required to install a grievance mechanism that meets specific design requirements. In addition, the GEF has established an independent Conflict Resolution Commissioner to help resolve disputes.

The Climate Investment Funds housed by the World Bank fully rely on the substantive and procedural safeguards of the multilateral development banks that are in charge of channelling the funding. The funds' results frameworks only relate to climate mitigation impacts and funding leverage (in the case of CTF), and to supply of renewable energy and access to energy services (in the case of SREP). Projects and programmes are "encouraged" to report on additional co-benefits they help to achieve but there is no requirement to report on negative impacts. The guidance on how to conduct stakeholder consultations is very general and there is no grievance mechanism at CIF level.

The Green Climate Fund has adopted the Performance Standards of the International Finance Corporation (IFC) as interim environmental and social safeguards, with a view to developing own safeguards later on the basis of experience gained. While the Performance Standards state that clients should "respect international human rights obligations", the Performance Standards themselves are not explicitly based on human rights standards. IFC Guidance Notes that provide further information on how to implement the standards do refer to many human rights issues and international human rights conventions, but they are not part of policy and do not require companies to follow their instructions. Critics also allege that the IFC Performance Standards leave too much freedom in the hands of the clients. Clients are required to establish a grievance mechanism with the affected communities as well as a grievance mechanism for workers and workers' organizations to raise workplace concerns.

The Clean Development Mechanism is by far the largest of the international mitigation mechanisms, with so far more than 7,000 registered projects – and the weakest in terms of safeguards. Human rights are so far not mentioned anywhere in the CDM's rules and procedures. The only hooks for bringing in human rights are the re-

quirements that CDM projects contribute to sustainable development and that they consult local stakeholders. However, rules and procedures for assessing the sustainability of projects have been left to the discretion of the host countries. Research has concluded that in most countries the respective rules are vague and hardly enforced. Until very recently, the same applied to rules for stakeholder consultations. In late 2015, the Board agreed to introduce minimum rules, but these still leave much room for interpretation.

The REDD+ mechanism is still under development. The COP has agreed some broad outlines of safeguards which inter alia refer to indigenous peoples' rights and full and effective participation of stakeholders, as well as a set of guidelines how to implement these safeguards in national safeguard information systems (SIS). The details are still to be worked out. The mechanism as such is only now becoming fully operational while there are pilot activities, in particular the Forest Carbon Partnership Facility (FCPF) of the World Bank and the UN-REDD facility led by FAO, UNEP and UNDP. While both have safeguard lists that inter alia refer to indigenous peoples' rights, there have been cases where indigenous organisations complained about not having been consulted appropriately in projects. Joint FCPF/UN-REDD guidelines require the establishment of national grievance and redress mechanisms. In addition, in case of non-compliance with World Bank Operational Policies during FCPF-supported activities, the affected parties can send a complaint to the World Bank Inspection Panel. In case of UN-REDD there is an opportunity for affected communities to request support from the chair of the UN permanent forum on indigenous issues or NGOs that are members of the policy board of UN-REDD.

In summary, the GEF, the GCF, the FCPF and UN-REDD have established safeguard systems while the CIF and the CDM have none. In addition, the safeguard systems hardly refer to human rights norms, especially not in their

core standards. Of those mechanisms which have established safeguard systems, the GEF and the FCPF strongly rely on the World Bank operational policies (OPs). During the drafting of this report the World Bank, however, reformed its OPs. According to a joint statement of NGOs who participated in the respective World Bank consultations, the outcome means a considerable deterioration of the protection of project affected persons and people (urgewald, 2016a). Amongst others the World Bank is now allowed to finance projects in areas core to environmental protection and indigenous peoples. Projects that require involuntary resettlement can now be approved without knowing details about the number of people affected or plans how to restore their livelihoods elsewhere (urgewald, 2016b). Accordingly, future GEF projects and REDD+ activities under the FCPF will suffer from weakened safeguards.

All these mechanisms, as well as the World Bank, operate under the authority of national governments, with governing bodies composed of government representatives. These governments and their representatives have the responsibility to ensure that international agreements they participate in are compatible with the human rights obligations arising from the human rights treaties which their countries are Parties to. The

apparent failure to establish adequate human rights safeguards in international climate policy mechanisms can therefore be considered as a breach of their extraterritorial obligations.

It seems recommendable to develop mandatory human rights safeguards for all multilateral climate policy instruments at the UNFCCC level. The UNFCCC could require that all activities that are to receive international climate finance need to undergo a human rights impact assessment (HRIA) with clear procedural requirements for stakeholder consultations, making projects with negative impacts ineligible for funding. There should also be a procedure to de-fund projects in cases where human rights violations become apparent only during implementation. Procedural requirements should also include access to redress, i.e. a complaints mechanism, both nationally and internationally. Host countries could, for example, entrust their national human rights commissions as official contact points. Internationally, a CDM appeals procedure is being negotiated and the GCF Board also has the issue on its agenda. However, given that there is nearly half a dozen mechanism under the UNFCCC, such an appeals mechanism might also be introduced more generally with applicability to all mechanisms.

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