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Designing REDD+ to be Just: Considerations for a Legally Binding Instrument

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Abstract

The international climate regime is in the process of negotiating a legally binding instrument concerning Reducing Emissions from Deforestation and Degradation (REDD+). The article starts by exploring the complex web of decisions and advices that currently regulate REDD+ initiatives within the international climate regime. This is followed by an analysis of justice issues raised by non-state actors in the REDD+ international negotiations. The article concludes by building on this analysis to identify some relevant considerations when seeking to design a just legally binding REDD+ instrument. These consideration include: the impact of market versus fund based investment channels, the importance of defining a clear objective; the inclusion and role of international principles such as sovereignty, preventative action, common but differentiated responsibility, sustainable development and Free Prior and Informed Consent; the appropriate design of REDD+ safeguards and the inclusion of grievance mechanisms within the instrument which provide guidance on resolving disputes associated with REDD+ investment.

Introduction

The role of forests as both sinks and sources of emissions has become an issue of interest to the international climate regime.¹ Interest in the sequestration capacity of forests has resulted in the development of the REDD+ initiative within the international climate regime. Activities implemented under the REDD+ banner seek to preserve or increase terrestrial carbon storage in developing countries.² There are concerns from a wide range of stakeholders that unintended consequences might arise from REDD+ investment and some of these concerns have been framed using a justice lens. Adverse impacts are anticipated as a number of REDD+ initiatives are occurring in areas with histories of land use conflicts and or insecure/disputed tenure

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¹ The term climate regime is used in this article to refer to the governance arrangements that exist to support the implementation of the United Nations Framework Convention on Climate Change.

² Gert JAN NABUURS and others, "Forestry" in Bert Metz and others, eds, *Climate Change 2007: Mitigation- Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2007).

arrangements. There are also concerns that communities who engage in REDD+ activities will not be the primary beneficiaries of REDD+ investment. Indigenous People, communities living in forests, women and the poor are groups that have been identified as being particularly vulnerable in the REDD+ context. Given that State parties are still negotiating the form, nature and substance that a legally binding REDD+ instrument should adopt, it seems appropriate to identify and discuss the justice concerns being raised by non-state actors, before suggesting key elements for a legally binding instrument.

Issues of justice associated with REDD+ investment arise at the international, national and sub-national levels.³ The focus of this article is on the use of justice language or a justice lens within the REDD+ dialogue at the international level. This article starts by providing an overview of the international climate regime decisions and advices concerning REDD+ and explaining how the initiative has incrementally emerged over a series of international climate negotiations. One of the underdeveloped aspects of the initiative is specific safeguard policies and it is likely that most of the justice issues raised in this paper will in part be addressed by safeguard policy once developed.

The next section of the article explores the linkages between the language and frame of justice within international environmental regulation. It shows that there is little consistency of consensus upon both the definition and or theories of justice that operate in this space as well as to the precise nature of the justice issues raised by REDD+. The article suggests that a range of justice theories, right-based paradigms and social movement perspectives, are useful in identifying areas of injustice in respect of REDD+. This article explores how non-state actor movements such as the Climate Justice Movement, the Third World Network and the Indigenous Network have framed their submissions on REDD+ and how the language of justice has been embodied within these submissions. Issues raised by these non-state actors include considerations such as to the appropriate financial mechanism to transfer REDD+ funds (market versus fund approach); the appropriate manner in which to share benefits arising from REDD+ investment (existing channels or carbon rights), the potential impact of REDD+ investment on Indigenous and local forest communities and the failure of existing safeguard policies to include the principle of Free, Prior and Informed Consent (a fundamental international human rights principle).

The article concludes by looking at the ingredients required for a just and legally binding REDD+ instrument. Such analysis looks at the nature and form options for a future agreement, the need for a clear objective, existing international environmental principles that should be included and the need for the establishment of dispute resolution machinery within the agreement.

³ Thomas SIKOR, "REDD-Plus, Forest People's Rights and Nested Climate Governance" (2010) 20 *Global Environmental Change* 423 and Thomas SIKOR, "Forest Justice: Towards a New Agenda for Research and Practice" (2010) 7 *Journal of Integrative Environmental Sciences* 245.

I. REDD+ POLICY AND PRACTICE

A. *REDD+ Policy Development within the UNFCCC*

The aim of the REDD+ initiative is to reduce emissions from deforestation and land degradation in developing countries. The initiative has provided and will continue to provide financial incentives to states that alter existing forest practices. REDD+ has generated unprecedented levels of finance at the international level for improved forest governance and management and has thus far surpassed previous international funds for forest related governance.⁴ The activities encouraged by the initiative are avoiding deforestation and degradation; conservation, sustainable management of forests; and the enhancement of forest carbon stock in developing countries.⁵ As the REDD+ initiative is occurring under the auspice of the international climate change regime, a key focus of the policy is to protect carbon values associated with forest areas. The + in the acronym represents the additional activities beyond the avoidance of deforestation and degradation. In addition, the REDD+ initiative seeks to ensure that environmental and social considerations are part of all REDD+ activities. As such, REDD+ initiatives are tasked with ensuring that they deliver on carbon, ecological and social objectives. Questions have arisen over the ability of a single mechanism to deliver triple win scenarios, as carbon sequestration activities do not necessarily align with the promotion of other co-benefits such as livelihood or ecological improvements. Despite such reservations, there is general support for the mechanism as it seeks to create financial incentives for people in developing countries to conserve or improve forest and land management. The initiative is based on the premise that unsustainable forest and land management activities can be altered, if sufficient financial, technical and regulatory support is provided.

The REDD+ policy has evolved from a number of Conference of the Parties (COP) decisions by parties to the United Nations Convention on Climate Change (UNFCCC). Article 7.2 of the UNFCCC gives the COP general authority to examine the obligations of the parties in light of the objective of the Convention and to make decisions necessary to promote the effective implementation of the Convention. The powers in article 7.2 stop short of providing the COP with authority to establish new legal commitments.⁶ Bodansky suggests that new and additional commitments require the development of new legal instruments, which could occur by way of example as an amendment of the UNFCCC, or the creation of a new protocol. The Legal Response Unit agrees with Bodansky and concludes generally that COP decisions

⁴ Collaborative Partnership on Forests, “2012 Study on Forest Financing” (2012), online: <http://www.un.org/esa/forests/pdf/AGF_Study_July_2012.pdf>.

⁵ Decision 1/CP.13 Bali Action Plan FCCC/CP/2007/6/Add.1, 14 March 2008, para. graph 1 (b) (iii).

⁶ Daniel BODANSKY, “Legal Form of a New Climate Agreement: Avenues and Options” *PEW Center on Global Climate Change* (2009), online: Center for Climate and Energy Solutions <<http://www.c2es.org/docUploads/legal-form-of-new-climate-agreement-paper.pdf>> and Legal Response Unit, “COP Decisions: Substance and Mandates” (4 October 2010), online: Legal Response Initiative <<http://www.legalresponseinitiative.org/download/BP25E%20-%20Briefing%20Paper%20-%20COP%20Decisions%20-%20Substance%20and%20Mandates.pdf>>.

“on issues of substance, to the extent they introduce new obligations or change existing obligations, would not be legally-binding unless there is a treaty provision which grants the COP the authority to make decisions in respect of those issues. In the absence of such grants of authority, the COP decisions will remain as political statements of intent until such time as the provisions of the decisions are incorporated into a new or existing treaty.”⁷

The REDD+ obligations specified within the various COP decisions are therefore non-legally binding in nature. REDD+ is referred to as a mechanism within the COP decisions, in other words a work in progress.⁸ In addition to uncertainty surrounding the future of a legally binding REDD+ instrument, there is a large degree of uncertainty surrounding a range of other issues connected with REDD+. Such issues include: benefit sharing, monitoring of carbon reductions and scaling up finance and investment. The COP decisions reached thus far on REDD+ have served a practical purpose in informing the work of institutions implementing REDD+ pilot projects. Such bodies have sought to comply with the obligations specified in COP decisions on the basis that the COP language will inform the development of future REDD+ instruments. These REDD+ implementing bodies are seeking to ensure pre compliance with the future legally binding REDD+ instrument.

The REDD+ concept was first discussed in 2005 COP negotiations in Montreal. Costa Rica and Papua New Guinea, along with support from seven other countries: Bolivia, Central African Republic, Chile, Congo, Democratic Republic of Congo, Dominican Republic and Nicaragua submitted a proposal entitled “*Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action*”.⁹ The submission made a compelling case as to why emissions from deforestation should be included within the international carbon framework. It highlighted that land use emissions accounted for 10-25% of all global human induced emissions and that developing nations currently had no way of engaging with the Kyoto Protocol for emission reductions generated from reduced deforestation rates. The submission argued that the ultimate goal of the UNFCCC found in article 2, requiring “*stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*” will be made more difficult and expensive unless both industrial and developing countries actively contribute to emission reductions from all sources. The submission received broad support and the COP decision directed the Subsidiary Body of Scientific and Technical Advice (SBSTA) to prepare a report considering the methodological issues preventing the development of REDD+ policy.

⁷ Legal Response Unit, “COP Decisions: Substance and Mandates” (4 October 2010), online: Legal Response Initiative <<http://www.legalresponseinitiative.org/download/BP25E%20-%20Briefing%20Paper%20-%20COP%20Decisions%20-%20Substance%20and%20Mandates.pdf>>.

⁸ Annalisa SAVARESI, “The Human Rights Dimension of REDD” (2012) 21 *Review of European Community and International Environmental Law* 102 at 103.

⁹ *Reducing Emissions from Deforestation and Degradation in Developing Countries: Approaches to Stimulate Action*, FCCC/CP/2005/MISC.1, 11 November 2005.

Article 9 of the UNFCCC creates the SBSTA, which is required to provide the COP with guidance on: scientific assessments, scientific advice, innovative and efficient technologies and relevant technological and methodological guidance. The SBSTA group has had REDD+ on its agenda from 2005 and has been making incremental progress in defining the requirements and terms of the mechanism. The first workshop held by the SBSTA on REDD+ was convened to discuss the following three issues:

1. Scientific, socio-economic, technical and methodological issues including the role of forests in the global carbon cycles, definitional issues (deforestation, degradation), data availability and quality, scale, rates and drivers of deforestation, estimate of changes in carbon stocks and forest cover and related uncertainties.
2. Policy approaches and positive incentives to reduce emissions from deforestation in developing countries, including causes short and long term effectiveness with respect to emission reductions, the displacement of emissions, bilateral and multilateral cooperation, activities of other relevant international bodies, enhancing sustainable forest management, capacity-building, financial mechanisms and other alternatives.
3. Identification of possible links between relevant scientific, socio-economic technical and methodological issues and policy approaches and positive incentives that may arise from the consideration of the topics above.¹⁰

Some progress has been made in addressing these three broad categories, but neither the SBSTA nor COP decisions have addressed all of these issues conclusively. Early REDD+ negotiations proceeded rapidly, as a result of rare convergence of opinion concerning REDD+ among state parties to the UNFCCC. The COP negotiations in 2012 at Doha however slowed the trend of rapid REDD+ development with issues such as verification, payment method, inclusion of non-carbon benefits and implementation of safeguards proving to be sticking points for the parties.¹¹ Table 1 below lists the main contributions of the SBSTA group to the development of REDD+ policy.

Table 1: REDD OUTCOMES: SBSTA Sessions 24-35

Session	Location/Year	Outcome/Contribution
24	18-26 May 2006 Bonn	Background paper on REDD+ developed—released in preparation for First REDD+ Workshop.

¹⁰ UNFCCC Workshop on Reducing Emissions from Deforestation in Developing Countries, 30 August—1 September 2006, hosted by FAO, Rome, Italy.

¹¹ Catriona MOSS and Michelle KOVACEVIC, “The Honeymoon for REDD+ is Over: consensus not yet reached in Doha on MRV, finance” *Center for International Forestry Research* (4 December 2012), online: Centre for International Forestry Research <<http://blog.cifor.org/12941/the-honeymoon-for-redd-is-over-consensus-not-yet-reached-in-doha-on-mrv-finance/#.UOrtke0rxFJ>>.

25	6 - 14 Nov 2006 Nairobi	Background paper developed for Second REDD+ Workshop. Issues considered included: policy approaches, incentives, technical and methodological requirements, assessment of results and reliability. Consideration of CBD, UNCCD, Ramsar instruments and work of UNFF, ITTO and WTO in dealing with forest issues.
26	7-18 May 2007 Bonn	Started preparing draft text on REDD+ for COP negotiations.
27	3-11 Dec 2007 Bali	Completed draft text on REDD+ ¹² Policy Approaches and positive incentives not dealt with in draft text.
28	4-13 June 2008 Bonn	Consideration of outstanding methodological issues: assessment of forest cover & associated carbon stocks; reference emission levels; implications of national and sub national approaches; assessing effectiveness; demonstration activities; mobilisation of resources.
29	1-10 Dec 2008 Poznan	Recommended the use of the Revised 1996 IPCC Guidelines for National Greenhouse Inventories and use of Good Practice Guidance for Land Use, Land-Use Change and Forestry Guidelines for estimating emission sink and source calculations.
30	1-10 June 2009 Bonn	Consideration on Draft Text on Methodological Guidance.
31	8-12 Dec 2009 Copenhagen	Draft Text on Methodological Guidance adopted by COP ¹³
32	31 May—10 June 2010 Bonn	Secretariat requested to increase number of experts trained on use of IPCC guidelines and to enhance sharing of information, experience and lessons learned on use of IPCC guidance by establishment of interactive discussion forum on UNFCCC web platform.
34, 35	6-16 June 2011 Bonn	Consideration of Safeguard Policy and Implementation.

The work of the SBSTA group has resulted in following key COP decisions REDD+:

¹² SBSTA, Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action, FCCC/SBSTA/2007/L.23/ADD.1/REV.1

¹³ Decision 4/CP.15, Methodological Guidance for Reducing Emissions from Deforestation and Degradation and Role of the Conservation of the Sustainable Management of Forests and Enhancement of Forest Stocks in Developing Countries. FCCC/CP/2009/11/Add.1

- Bali COP decision: *Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action*.¹⁴ The Bali COP decision encouraged parties to undertake REDD+ demonstration activities and contained multiple requests for the mobilisation of finance to support efforts to address deforestation.¹⁵
- Copenhagen COP decision: *Methodological Guidance for Activities Relating to Reducing Emissions from Deforestation and Forest Degradation and the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks in Developing Countries*.¹⁶ The Copenhagen COP decision requested developing country parties to: prepare reports identifying the drivers of deforestation, potential activities within their respective country that would result in reduced emissions and to develop transparent national forest monitoring systems.
- Cancun COP decision: *Policy Approaches and Positive Incentives on Issues Relating to Reduced Emissions from Deforestation and Degradation in Developing Countries, and the Role of Conservation, Sustainable Management of Forest and Enhancement of Forest Carbon Stocks in Developing Countries*.¹⁷ The Cancun COP report provides the types of REDD+ activities encouraged in paragraph 70¹⁸,

¹⁴ Decision 2/CP.13 Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action, FCCC/CP/2007/6/Add.1

¹⁵ Guidance on REDD+ activities from decision 2/CP13 1) Demonstration activities to occur with the approval of the host Party; 2) Estimates of reductions or increases in emissions should be founded on results-based, demonstrable, transparent and verifiable data and estimated consistently over time; 3) Parties are encouraged to use the LULUCFG as the basis for estimating and monitoring emissions; 4) Emission reduction from national demonstration activities should be assessed on the basis of national emissions from deforestation and forest degradation; 5) Sub-national demonstration activities should be assessed within the boundary used for demonstration and for associated displacement of emissions; 6) Reductions in emissions or increases resulting from the demonstration activity should be based on historical emissions, taking into account national circumstances; 7) Subnational approaches, where applied, should constitute a step towards the development of national approaches, reference levels and estimates; 8) Demonstration activities should be consistent with sustainable forest management, noting *inter alia*, the relevant provisions of the UNFF, the UNCCD and the CBD; 9) Experiences in implementing activities should be reported and made available via the Web platform; 10) Reporting on demonstration activities should include a description of the activities and their effectiveness, and may include other information and 11) Independent expert review is encouraged.

¹⁶ Decision 4/CP.15 is entitled “Methodological Guidance for Activities Relating to Reducing Emissions from Deforestation and Forest Degradation and the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks in Developing Countries”, FCCC/CP/2009/11/Add.1

¹⁷ Policy Approaches and Positive Incentives on Issues Relating to Reduced Emissions from Deforestation and Degradation in Developing Countries, and the Role of Conservation, Sustainable Management of Forest and Enhancement of Forest Carbon Stocks in Developing Countries, FCCC/CP/2010/07/Add.1.

¹⁸ The REDD+ activities encouraged under para. graph 70 are: reducing emissions from deforestation; reducing emission from forest degradation; conservation of carbon stocks; sustainable management of forests; and enhancement of forest carbon stocks.

the capacities necessary to implement REDD+ in paragraph 71¹⁹ and sets out a number of REDD+ safeguards in Annex I of the agreement.

- Durban COP decision: *Guidance on Systems for Providing Information on how Safeguards are Addressed and Respected and Modalities Relating to Forest Reference Emission Levels and Forest Reference Levels Related to Decision 1/CP.16.*²⁰ This decision reinforces that safeguards must be respected taking into account: national circumstances, respective capabilities, national sovereignty and legislation, international obligations and gender considerations. A step approach to setting national forest reference emission level is recommended and the Annex provides Guidelines for submitting information on national reference levels.

B. REDD+ Safeguard Policy Development

REDD+ safeguards are policies that address the direct and indirect impacts of REDD+ investment on communities and ecosystems.²¹ An underlying goal of REDD+ safeguard policy is to ensure that REDD+ initiatives “do no harm”. Safeguard policy is therefore a mechanism that can assist in ensuring that some of the justice issues associated with REDD+ are addressed. At the international level there are a range of competing REDD+ safeguard standards. Within the UNFCCC framework the Cancun COP Agreement created a number of safeguard principles for REDD+ projects including: transparent governance; respect and full participation rights for indigenous people and local communities; actions that reduce the risk of biodiversity loss, reversals (permanence considerations) and displacement of emissions (leakage considerations). Outside of the UNFCCC process the following safeguards have been created:

- UN-REDD Programme has developed a set of Social and Environmental Principles and Criteria (SEPC).²²

¹⁹ Para. graph 71 requests developing country parties to establish (in accordance with national circumstances) the following systems and capacities: national strategy plan; a national forest emission level or forest reference level; a robust and transparent national forest monitoring system and a system on how safeguards are to be addressed while respecting sovereignty.

²⁰ Decision 12/CP.17 Guidance on Systems for Providing Information on How Safeguards are Addressed and Respected and Modalities Relating to Forest Reference Emission Levels and Forest Reference Levels Related to Decision 1/CP.16. FCCC/CP/2011/9/Add.2.

²¹ Pamela JAGYER et al, “REDD+ Safeguards in National Policy Discourse and Pilot Projects” in Arild Angelson, eds., *Analysing REDD+ Challenges and Choices*, (Centre for International Forestry Research, 2012), 301 and Nicholas MOSS and Ruth NUSSBAUM, “A Review of Three REDD+ Safeguard Initiatives” (Forest Carbon Partnership Facility and the UN-REDD Programme 2011) 2 at para. 2.

²² UN-REDD Programme, “Social and Environmental Principles and Criteria” (UN-REDD Programme Eight Policy Board Meeting 2012)

<http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=6985&Itemid=53> accessed 9 January 2013; principles include (1) Apply norms of democratic governance, as reflected in national commitments and Multilateral Agreements; (2) Respect and protect stakeholder rights in accordance with international obligations; (3) Promote sustainable livelihoods and poverty reduction;

- The Forest Carbon Partnership Facility has developed a Common Approach to Environmental and Social Safeguards for Multiple Delivery Partners and relies on Strategic Environmental and Social Assessment.²³
- CARE International and the Climate, Community and Biodiversity Alliance have created the REDD+ Social and Environmental Standards for use within the voluntary carbon market.²⁴

There are concerns that safeguard policy will result in a race to the bottom with REDD+ verifying bodies using the safeguard policy with the lowest thresholds, so as to reduce transaction costs. No one safeguard standard addresses all concerns associated with REDD+, though the CARE International Social and Environmental safeguards have received praise for addressing tenure related issues.²⁵ Any future legally binding safeguard REDD+ instrument is advised to borrow from all the above the standards, pulling the land tenure considerations from the CARE International standards and the social justice criteria from the UN REDD Program principles in order to ensure that the concerns raised by REDD+ investment are adequately addressed by international policy.

C. *REDD+ Practice*

Despite the lack of a legally binding REDD+ instrument, a range of REDD+ activities are taking place. There is concern by some developing States and NGO groups that REDD+ activities are taking place without global consensus on a number of key REDD+ issues. These stakeholders are concerned that existing REDD+ pilot studies and their associated policy frameworks will influence the development of a legally binding REDD+ instrument as opposed to the development of a legally binding instrument based on international negotiation and acceptance. The UN REDD platform identifies two institutions as playing a large role in the implementation of demonstration REDD+ activities. These two bodies are the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD Programme) and the Forest Carbon Partnership Facility (FCPF), operating under the World Bank umbrella. In addition to

(4) Contribute to low-carbon, climate-resilient sustainable development policy, consistent with national development strategies, national forest programmes, and commitments under international conventions and agreements; (5) Protect natural forest from degradation and/or conversion; (6) Maintain and enhance multiple functions of forests including conservation of biodiversity and provision of ecosystem services; (7) Avoid or minimise adverse impacts on non-forest ecosystem services and biodiversity.

²³ Forest Carbon Partnership Facility, "Common Approach to Environmental and Social Safeguards for Multiple Delivery Partners" (2012), online: Forest Carbon Partnership <<http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/Aug2012/FCPF%20Readiness%20Fund%20Common%20Approach%208-9-12.pdf>>.

²⁴ See <<http://www.redd-standards.org/>>.

²⁵ Eduard MERGER, Micheal DUTSCHKE, and Louise VERCHOT, "Options for REDD+ Voluntary Certification to Ensure Net GHG Benefits, Poverty Alleviation, Sustainable Management of Forests and Biodiversity Conservation" (2011) 2 Forests 550.

these sources of REDD+ finance and support, the voluntary carbon market is also selling carbon credits generated from REDD+ activities.

The UN-REDD Programme was established in 2008 to assist developing countries to build capacity to participate in a future REDD+ mechanism. As of January 2013, the UN-REDD Programme has partnered with 46 countries across Africa, the Asia-Pacific region, Latin America, and the Caribbean.²⁶ The UN-REDD Programme's Policy Board has approved a total of US \$67.3 million for REDD National Programmes in 16 countries.²⁷ Of the 16 National Programmes, 13 are in the (third and final) inception and implementation phase as of October 2012.²⁸

In 2006 the World Bank created the Forest Carbon Partnership Facility (FCPF) with the purpose of building capacity for REDD+ activities in developing countries and to test some pilot programs on performance-based incentive payments schemes.²⁹ The World Bank's FCPF supports REDD demonstration activities through two separate mechanisms: the Readiness Mechanism Fund and the Carbon Finance Mechanism Fund.³⁰ At the end of the 2011 fiscal year, 24 countries had submitted Readiness Preparation Proposals or draft Readiness Preparation Proposals, and close to US \$65 million had been allocated in Readiness Preparation grants to 18 countries.³¹ In 2011 the Carbon Finance Mechanism became operational. Countries that have made significant progress under the Readiness Mechanism are eligible to apply, or authorise an entity within their country to apply for funds under the Carbon Finance Mechanism by submitting an emission reductions idea note. A small number of countries with approved emission reduction notes will then be in a position to enter

²⁶ UN-REDD Programme, "UN-REDD Programme Partner Countries" (2012), online: UN-REDD Programme <http://www.un-redd.org/Partner_Countries/tabid/102663/Default.aspx>.

²⁷ *Ibid.*; Countries with national programmes include (in alphabetical order) Bolivia, Cambodia, Democratic Republic of the Congo (DRC), Ecuador, Indonesia, Nigeria, Panama, Papua New Guinea, Paraguay, the Philippines, Republic of Congo, Solomon Islands, Sri Lanka, Tanzania, Viet Nam and Zambia.

²⁸ *Ibid.*; countries in the inception and implementation phase include: Bolivia, Cambodia, DRC, Ecuador, Indonesia, Panama, PNG, Paraguay, the Philippines, Solomon Islands, Tanzania, Viet Nam and Zambia.

²⁹ Forest Carbon Partnership Facility, "Information Memorandum" (2008) 1 para. 5-2 para. 1 online: FCPF <http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/FCPF_Info_Memo_06-13-08.pdf>.

³⁰ *Ibid.* 2 para. 3; "Under the [readiness] mechanism, [FCPF] intends to assist developing tropical and sub-tropical countries prepare themselves to participate in a future, large-scale system of positive incentives for REDD. This will include, but is not limited to: (i) determining a national reference scenario based on historical emissions from deforestation and degradation and, where needed and feasible, an assessment of how these emissions would evolve in the future; (ii) preparing a national REDD strategy; and (iii) establishing a monitoring system for emissions from deforestation and forest degradation"; Under the Carbon Finance Mechanism, FCPF "will support a few countries that will have successfully participated in the Readiness Mechanism to join, on a voluntary basis, a second mechanism through which [FCPF] will test and evaluate incentive payments for REDD programmes... The Carbon Fund will remunerate the selected countries in accordance with negotiated contracts for verifiably reducing emissions beyond the reference scenario".

³¹ Forest Carbon Partnership Facility, "2011 Annual Report" (2011), online: FCPF <http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/Oct2011/FCPF_Carbon_AR_FINAL_10_3.pdf>.

into emission reductions payment agreements.³² As of October 2012, Costa Rica, the Democratic Republic of Congo and Vietnam have presented well-developed emission reduction programmes and Ghana, Indonesia, Mexico and Nepal and started work on creating emission reduction programmes.

The Kyoto carbon market, also known as the compliance market, does not currently allow for REDD+ generated carbon credits to be traded. As such, REDD+ credits are currently traded within voluntary carbon markets.³³ Participants are motivated to engage with voluntary carbon markets due to a range of non-regulatory factors such as corporate GHG reduction targets, resale or investment potential, pre-compliance with predicted regulations, public relations or branding efforts, or direct concerns for climate change.³⁴ For the past three years, a Forest Trends initiative, Ecosystem Marketplace, has produced a report that summarizes the state of the voluntary forest carbon market based on responses from forest project developers and secondary market suppliers.³⁵ The 2012 report reveals that the value for forestry offsets in the global marketplace totalled \$237 million in 2011, an increase from the previous year.³⁶ At the global level, successfully contracted credits in 2011 were situated on 5 million forested hectares of forest land, of which 4.2 million hectares could be attributed to REDD+ projects.³⁷

II. THE LANGUAGE OF JUSTICE AND INTERNATIONAL ENVIRONMENTAL REGULATION

The definition of justice, like many grand concepts, is elusive. As Wenz states

“Justice is a contested concept. Some people claim, as does libertarian Robert Nozick, that justice requires for example absolute respect for property rights, even if this results in greater inequality between rich and poor. Others such as the liberal contractarian John Rawls believe, to the contrary that justice requires maximum equality compatible with individual incentives to promote economic growth. Still others, including the communitarian Amitai Etzioni, think that justice rests on community solidarity or traditional moral values”.³⁸

The values underlying the different definitions of justice vary significantly. This article does not attempt to define justice, but instead examines the use of the language of “justice” within international REDD+ negotiations. The basic dictionary definition

³² Payments will be given to countries in exchange for the verified emission reductions that are generated. *Ibid.*

³³ See generally Rowena MAGUIRE, “Opportunities for Forest Finance: Compliance and Voluntary Markets” (2012) 1 Carbon and Climate Law Review 100.

³⁴ Molly PETERS-STANLEY, Katherine HAMILTON & Daphne YIN, *Leveraging the Landscape: State of the Forest Carbon Markets 2012*, Ecosystem Marketplace/Forest Trends, at vi, fig. 6 (2012), online: <http://www.forest-trends.org/documents/files/doc_3242.pdf>.

³⁵ *Ibid.*

³⁶ *Ibid.*, at i.

³⁷ *Ibid.*, at iii.

³⁸ Peter WENZ, “Does Environmentalism Promote Injustice for the Poor?” in Ronald SANDLER and Phaedra PEZULLO, eds., *Environmental Justice and Environmentalism: The Social Justice Challenge to the Environmental Movement* (Massachusetts Institute of Technology, 2007), 57 at 57-58.

of justice corresponds with ideas of fairness, equity and just behaviour and treatment,³⁹ and it these ideals that underlie the dictionary definition of justice that have presented within REDD+ negotiations. The language of justice is not overtly present within the text of international environmental instruments. However, on closer examination, it is clear that values associated with justice have influenced the development of international environmental law. Many international environmental principles such as: the principle of common but differentiated responsibility, inter-generational equity, intra-generational equity and the polluter pays principle all have notions of fairness at their core.

The language of justice is more commonly used and accepted within international criminal law and human rights settings. Ideas concerning the rule of law; an impartial judiciary; adequate legal representation; and protection of basic rights and liberties align more easily with common understandings of the concept of justice. Linking the environment to justice is more of an abstract connection. Justice issues that arise in connection with the environment or rather with decisions concerning the environment are often discussed using theories of procedural justice. Procedural justice is associated with “access to justice” type considerations including: meaningful involvement and participation of relevant stakeholders in decision making processes, access to information, access to affordable and quality legal advice, legal rights associated with due process including the rights of judicial and merit review, rights of standing and consideration of the potential liabilities associated with bringing court actions (costs and time). Therefore, considerations of justice and the environment in this sense focus on the impacts for humans arising as a result of environmental decisions and governance processes.

This link between environmental decisions and injustice was first made at the domestic level, as opposed to the international level. The placement of toxic chemicals and other hazardous facilities in low socio-economic and coloured communities in the United States (US) gave rise to discussions about the justice implications of environmental management decisions.⁴⁰ These issues were framed as environmental justice concerns. The definition of environmental justice in this context comes from US Environmental Protection Agency who defines environmental justice as “*the fair treatment and meaningful involvement of all people regardless of race, colour, sex, national origin or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies*”.⁴¹

More recently, the domestic frame of environmental justice has been applied at the international level. Roberts suggests that this has occurred to expose transnational and

³⁹Cambridge Online Dictionary.

⁴⁰Detailed examination of the US environmental justice movement is beyond the scope of this article. On this topic see Luke W COLE and Sheila R FOSTER, *From the ground up: environmental racism and the rise of the environmental justice movement*, (New York: New York University Press 2001) and Ronald SANDLER and Phaedra PEZZULLO (eds) *Environmental Justice and Environmentalism: The Social Justice Challenge to the Environmental Movement*, (Massachusetts Institute of Technology, 2007).

⁴¹ United States Environmental Protection Agency, “Environmental Justice Program and Civil Rights” (September, 2013), online: EPA <<http://www.epa.gov/region1/ej/>>.

global inequalities.⁴² Transnational inequality concerns the impacts of multinational corporations on communities in developing countries while global inequality is the term used to refer to the global patterns of inequality arising as a result of exposure and vulnerability to detrimental environmental conditions. A theory of climate justice is starting to emerge which can be distinguished by its focus on the climate related perspectives of the global inequality frame. The climate justice frame has been employed to argue that poor nations are unable to cope and respond to climate disasters such as spreading drought and agricultural instability in Sub-Saharan Africa, sea level rise in Pacific Island Atolls and Bangladesh, and increased cyclone risk. This is perceived as a justice issue due to low emission profiles of these nations and the fact that those least responsible for climate change are the ones who will suffer the most as a result of climate change. Some developing nations and many NGO groups use the climate justice frame within their advocacy and campaign strategies at UNFCCC COP negotiations.⁴³ The language of climate justice is yet to be officially endorsed by the climate regime and no UNFCCC legally binding instrument or COP decision at present has adopted the climate justice terminology. The climate regime instead uses the language of vulnerability and resilience to describe exposure to environmental inequalities.⁴⁴

Despite lack of formal UNFCCC endorsement of the language of justice, there is some limited evidence of the justice frame being used in connection with the environment regulation. The Rio+20 negotiations hosted in Brazil in 2012 saw the development of soft law instrument entitled *The Future We Want*. This instrument uses the language of justice in three instances: calling for access to justice in environmental matters⁴⁵, stressing the need to provide social protection to all members of society and foster growth, resilience, social justice and cohesion⁴⁶ and a call for equal access to justice and legal support for women⁴⁷. The inclusion of the language of justice in the Rio+20 instrument could be viewed in two ways. Firstly, the language of justice here could be seen to be fairly insignificant development. Such a view could be justified on the soft law nature of the text and wide breath of subject matter and obligations raised by the text. Alternatively, inclusion of the language of justice could be seen as a reflection of the increasing use of the language of justice in the context of environmental regulation. Regardless of whether or not the term is or is

⁴² J Timmons ROBERTS, “Globalising Environmental Justice” in Ronald SANDLER and Phaedra PEZZULLO, eds., *Environmental Justice and Environmentalism: The Social Justice Challenge to the Environmental Movement*, (Massachusetts Institute of Technology 2007).

⁴³ Bolivia is a country which has endorsed this frame and which has held a conference in 2020 on the World People’s Conference on Climate Change and the Rights of Mother Earth. See <http://www.climate-justice-action.org/mobilization/cochabamba/>.

⁴⁴ Further information on this: Rowena MAGUIRE and Bridget LEWIS, “The Influence of Justice Theories on International Climate Policies and Measures” (2012) 8 *Macquarie Journal of International and Comparative Environmental Law* 16.

⁴⁵ Rio+20 United Nations Conference on Sustainable Development, “The Future We Want: Outcome Document Developed at Rio+20”, article 99, online: UNCSD <http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm.pdf>.

⁴⁶ *Ibid.*, article 156.

⁴⁷ *Ibid.*, article 238.

not used within the text of Multilateral Environmental Agreements, non-state actors seem to see benefits in framing their arguments through a justice lens. It is not exactly clear as to why these groups use the frame of justice, but it is suggested that the language of justice is employed to draw attention to the issue and to communicate that urgent action is required.

III. FRAMING REDD+ AS A JUSTICE ISSUE AT THE INTERNATIONAL LEVEL

There is little consensus within the literature as well as within negotiations as to what justice requires in the context of REDD+.⁴⁸ Despite the lack of clarity surrounding the concept and requirements of justice in respect of REDD+, there is consensus that REDD+ raises significant justice issues. The language of justice has entered into the REDD+ sphere. Okereke and Dooley identify six broad conceptions of justice within the REDD+ negotiations:

1. Justice as utilitarianism: impact of policy on human welfare - Norway;
2. Justice as liberal egalitarianism: social and economic inequalities to be arranged for the greatest benefit to the least advantaged members; corresponding with historical responsibility—Central African Forests Commission (COMIFAC);
3. Market Justice: aligned with neoliberal governance - CfrN, Latin American;
4. Justice as mutual advantage: agreements that have positive net benefit for all; securing relative economic gains as main objective—India, Brazil;
5. Communitarianism as justice: justice can only be determined on the basis of cultural context and values associated with the good in question - Tuvalu;
6. Justice as meeting needs: moral equality of humans irrespective of race or nationality—Bolivia.⁴⁹

This article does not advocate for one branch of justice to be considered, as it is believed that all theories of justice are useful in explaining and identifying different issues of injustice associated with REDD+. As this article looks at the ingredients required for an equitable legally binding REDD+ instrument, it is suggested that the theory of procedural justice is particularly useful as this theory of justice has previously been used to create legal rights and obligations in other spheres. A number of non-state actors are active participants within the REDD+ negotiations and these networks do not define or align their campaigns to particular justice theories, instead they tend to focus on the broader notions of fairness and equality associated

⁴⁸ Melissa FARRIS, “The Sound of Falling Trees: Integrating Environmental Justice Principles into the Climate Change Framework for Reducing Emissions from Deforestation and Degradation (REDD)” (2010) 20 *Fordham Environmental Law Review* 515.

⁴⁹ Chukwumerije OKEREKE and Kate DOOLEY, “Principles in Justice in Proposals and Policy Approaches to Avoided Deforestation: Towards a post-Kyoto Climate Change” (2010) 20 *Global Environmental Change* 82.

with the dictionary definition of justice. Generally speaking, these groups identify the following issues of justice associated with REDD+ investment:

- Potential for indigenous and local forest dwellers rights to be overlooked during REDD+ investments;
- Concern that a market based REDD+ mechanism will not deliver benefits to local forest stakeholders nor ensure solid emission reductions; and
- These groups also advocate for the use of safeguard policy that ensures that social and environmental criteria are satisfied, so as to prevent any unintended consequences from REDD+ investment.

This article explores three non-state actors networks that are active in REDD+ negotiation space the: Climate Justice Network, the Third World Network and the Indigenous Environment Network with the purpose of exploring the debate around justice and REDD+ at the international level. While each of these networks share common positions in respect of their REDD+, these networks each hold different underlying ideologies concerning justice and environmental regulation and views on the action required to redress injustice.

A. *Climate Justice Network and REDD+*

The climate justice movement is based upon the recognition that the adverse impacts of climate change are related to industrialisation and the associated emissions of these developments. It is argued that the benefits of industrialisation are not spread equally across the globe and the onset of climate change highlights global discrepancies in power and access to resources.⁵⁰ The climate justice movement rejects “false solutions to climate change” such as market-based mechanisms including cap and trade carbon trading scheme; and technology fixes such as geo-sequestration, carbon capture and storage, agrofuels, nuclear power, biochar, large hydroelectricity projects, biomass, construction of sea walls and the spraying of sulphates into the atmosphere to block the sun’s rays instead calling for a systems change to address climate change.⁵¹

Climate justice networks are fluid organisations that tend to gather momentum during UNFCCC COP negotiations. During these peak periods a range of existing international environmental, indigenous and other networks converge to take action on climate justice. Outside of the UNFCCC arena the movement has organised non-state functions such as The World People’s Conference on Climate Change and the Rights of Mother Nature.⁵² The climate justice movement is not based on one

⁵⁰ Stephanie LONG, Ellen ROBERTS and Julia DEHM, “Climate Justice inside and outside of the UNFCCC: The example of REDD” (2012) 66 *Journal of Australian Political Economy* 222 at 224.

⁵¹ *Systems Change not Climate Change: A People’s Declaration from Klimaforum* (2009)

⁵² The Bolivian President Morales announced that his country would host an alternative COP meeting following the Copenhagen COP negotiations. The conference hosted in April of 2010 saw 35,000 climate justice activists from 142 countries attend the conference. The conference produced *The Cochabamba Protocol: People’s Agreement on Climate Change and the Rights of Mother Earth*.

particular branch of justice, but instead borrows from a range of justice theories. The movement uses a variety of ethical frames and theories including: environmental justice, social justice, human rights, collective rights and historical responsibility for climate change.

The two key objectives of the climate justice movement in respect of REDD+ are to: advocate against the use of market based approaches for REDD+ credits; and to create a bigger role for non-state players such as Indigenous groups and civil society groups in the REDD+ negotiations.⁵³ The climate justice movement feels that

the dominance of market mechanisms with the UNFCCC is evidence that international climate policy is controlled by an elite alliance of big business, commodities traders, financial firms, neoclassical economic theories and middle class environmentalists. The UNFCCC has become a forum characterised by inequalities in representation, power imbalances, corporate influence, meetings behind closed doors, [and] dismissals of proposals which are not market orientated⁵⁴

As such, the climate justice movement advocates for the creation of REDD+ benefit sharing mechanisms that are disconnected from market investment. The climate justice movement is concerned that market based payment mechanism will yield lower and unstable returns for communities. This argument is supported by a range of state parties to the UNFCCC who advocate for the use of a fund-based approach for REDD+ payments.⁵⁵ Arguments made in opposition of market-based REDD+ mechanism include:

- Carbon markets do not reduce emissions but merely shift the burden of emission reduction from developed countries to developing countries. This type of commodification of forests allows wealthy corporations to continue polluting, which further exacerbates the risks posed to forests from a warming climate.
- Existing market based emission reduction schemes have not resulted in the expected emission reduction rate. It is estimated that between 20-65% of Clean Development Mechanism (CDM) projects did not result in real emission reductions. Furthermore, deforestation was not included in the CDM or in the European Union Emissions Trading Scheme because of insurmountable challenges associated with measuring forest carbon storage and sequestration.
- The impermanence of forest carbon sequestration means that forest carbon stocks will increase carbon in the atmosphere now and in the future.
- Carbon trading will not finance the types of forest protection activities that are most needed. The current emphasis on generating carbon credits from REDD+ will lock developing countries into expensive and futile exercise to accurately measure forest carbon. Efforts should instead be focused on addressing the

⁵³ LONG, *supra* note 50 at 222.

⁵⁴ *Ibid.*, p229.

⁵⁵ “Differing views on market based approaches for REDD+ finance” *Third World Network* (22 May 2010), online: Third World Network <http://www.twinside.org.sg/title2/climate/news/Bonn09/TWN_bonn09_up14.pdf>.

drivers of deforestation and involve activities like institutional reform, law enforcement and developing alternative livelihood income and sources.⁵⁶

The role of the climate justice movement in shaping the UNFCCC global debate is a reflection of the wider trend of non-state institutions participating in and influencing international norm setting processes.⁵⁷ The contributions of non-state actors to the UNFCCC are increasingly recognised as valuable⁵⁸ and non-state actors within the UNFCCC process wish to improve their standing.

B. Third World Network and REDD+

Third world approaches to international law challenge the content of the international law, by highlighting the inequitable nature of the rules transferred from the past. The impacts of colonisation on both past and present populations are used to show that a system of western superiority within international institutions and processes exists.⁵⁹ In the environmental context, attention is directed towards the impacts of industrialisation and the accompanying undesirable environmental effects such as air, land and water degradation. Under this frame, developing countries perceive themselves as being asked to manage their resources for the benefit of western interests. A statement from the Prime Minister of Malaysia at the 1992 Earth Summit negotiations states the third world position regarding international forest regulation eloquently:

“The poor are not asking for charity. When the rich chopped down their own forests, built their own poison-belching factories and scoured the world for cheap resources, the poor said nothing. Indeed they paid for the development of the rich. Now the rich regulate the development of the poor countries. And yet any suggestion that the rich compensate the poor adequately is regarded as outrageous. As colonies we were exploited. Now as independent nations are we to be equally exploited?”⁶⁰

While REDD+ seeks to provide compensation to developing countries for forest conservation, controversy exists over the nature of this compensation. Compensation from market-based sources is not acceptable to Third World Network advocates. Such compensation is unacceptable, as it reinforces existing patterns of power, wealth and resource distribution. These networks instead want

⁵⁶ “Climate Justice Brief, Forests and REDD” *Third World Network* (November 2010), online: Third World Network <http://twinside.org.sg/title2/climate/pdf/climate_justice_briefs/09.Forests.pdf>.

⁵⁷ Some background on this trend: Daniel BODANSKY, “The Legitimacy of International Governance: A Coming Challenge for International Environmental Law” (1999) 93 *American Journal of International Law* 596.

⁵⁸ Kal RAUSTIALA, “Non-state Actors in the Global Climate Regime”, UCLA School of Law, Research Paper 07-29, (date)

⁵⁹ Karen MICKELSON, “Rhetoric and Rage: Third World Voices in International Legal Discourse” (1998) 16 *Wisconsin International Law Journal* 353 at 354.

⁶⁰ UN Conf Report A/Conf.151/26 Rev.1 (Vol III), p 23.

funding that provides adequate, predicable and sustained financing for voluntary and rights-based avoided deforestation strategies.⁶¹

C. *Indigenous Networks and REDD+*

Many Indigenous groups have actively participated in REDD+ negotiations as a result of the significant social risks that REDD+ carries for Indigenous People.⁶² REDD+ policy is evolving against a backdrop of historical dispossession, political exclusion and cultural marginalisation of Indigenous Peoples.⁶³ Existing forest management has dispossessed, excluded and marginalised forest people. While there is potential for REDD+ projects to benefit Indigenous People, there are very valid concerns that the development and subsistence rights of Indigenous People will conflict with the carbon objectives of REDD+. The substantive and procedural human rights of Indigenous forest communities are not as present coherently protected within REDD+ policies.⁶⁴

The “UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People” considered the plight of forest-dwelling indigenous communities.⁶⁵ Of particular concern to the special rapporteur, was the lack of formal tenure recognition of customary ownership rights over forest areas; and the granting of timber concession rights to large forestry corporations on areas of indigenous/customary land. The Special Rapporteur found that forests of Indigenous People have been systematically affected by the activities of large forestry corporations resulting in the progressive destruction of their traditional means of subsistence. Such experiences have affected the living conditions of indigenous communities in the equatorial forests of Central Africa, the Amazon basin, the boreal forests of Siberia and America, the Andean range and South-East Asia, as well as the Pacific islands.

Some indigenous networks such as the *Indigenous Environment Network* have flatly refused to accept any form of forest carbon scheme or regulation on their land, referring to the REDD+ initiative as CO2lonialism of forests. Most groups, however, including the *International Indigenous People’s Forum on Climate Change* accept the idea of forest carbon schemes on the condition that the right to “free, prior and informed consent” is a core foundation of REDD+ policies.⁶⁶ The main campaign slogan used by these networks being “No Rights, no REDD” or “Rights before REDD”.

⁶¹ Submission b of the Plurinational State of Bolivia to the Ad-hoc Working Group on Long-Term Co-operation Action, BONN, 2010.

⁶² Tom GRIFFITH “Seeing REDD? Forests, Climate Change Mitigation and the Rights of Indigenous People”, Forest People Program, 2009.

⁶³ Thomas SIKOR, “REDD-Plus, Forest People’s Rights and Nested Climate Governance” (2010) 20 Global Environmental Change 423.

⁶⁴ Annalisa SAVARESI, “The Human Rights Dimension of REDD” (2012) 21(2) *RECIEL* 102.

⁶⁵ UN—Human Rights Council—Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo STAVENTHAGEN, UN Doc. A/HRC/4/32, 27 February 2007, para. s 25 and 26.

⁶⁶ LONG, *supra* note 50 at 231

While there is consensus among indigenous groups that a “rights-based approach” to REDD is critical, there are a number of views on the form that such rights should take. These views range from: redistribution of forest tenure; rights for Indigenous People in forest areas; or recognition of the role of human rights in forestry management.⁶⁷ REDD+ policy as currently designed is unlikely to result in a redistribution of forest tenure rights. Lessons from the pilot REDD+ projects suggest that future REDD+ investments will be made in areas free of tenure conflict.⁶⁸ As such, it is unlikely that REDD+ will provide the impetuses required for fundamental changes to tenure systems allowing for recognition of indigenous land rights. It is suggested that REDD+ should instead aim to ensure: 1) recognition of indigenous right to environmental self-determination; 2) the entitlement to redress for environmental injustices; and 3) direct consultation.⁶⁹

The United Nations Declaration on the Rights of Indigenous People (UNDRIP) contains a number of provisions relevant to forest dwelling indigenous communities.⁷⁰ Rights enshrined in the document include: right not be forcefully removed from lands⁷¹; rights to maintain and strengthen relation with lands and waters⁷²; rights to ensure that the environment is protected⁷³ and rights to compensation when land is taken, used or damaged⁷⁴. Article 26 is the key provision from a land rights perspective, providing for: a right to land; rights to use and control resources on the land; and obligations for states to give legal recognition to such rights. UNDRIP emphasizes the importance of obtaining “*free, prior and informed consent*” (FPIC) of indigenous groups before dealing with land under their control. The current REDD+ COP safeguards⁷⁵ only require “*full and effective participation*” of Indigenous People. This wording provides a much lower threshold to satisfy and will not ensure that consent of Indigenous People is obtained prior to REDD+ investment. As such,

⁶⁷ Thomas SIKOR, “REDD-Plus, Forest People’s Rights and Nested Climate Governance” (2010) 20 *Global Environmental Change* 423.

⁶⁸ Erik OLBREI and Stephen HOWES, “A Very Real and Practical Contribution? - Lessons from the Kalimantan Forests and Climate Partnership”, Australian National University Discussion Paper No. 16, March 1, 2012. This report suggests that the original scale of the KFCP had to be significantly scaled back, due to lack of local landholder consensus with the program Kalimantan REDD+ project.

⁶⁹ These three requirements come from the work of Melissa FARRIS, “The Sound of Falling Trees: Integrating Environmental Justice Principles into the Climate Change Framework for Reducing Emissions from Deforestation and Degradation (REDD)” (2010) 20 *Fordham Environmental Law Review* 515.

⁷⁰ See generally: Sophie LEMAITRE, “Indigenous Peoples’ Land Rights and REDD: A Case Study” 2011 20 *Review of Environmental Comparative and International Environmental Law* 150, and Rosemary LYSTER, “REDD+, Transparency, Participation and Resource Rights: The Role of Law” (2011) 14 *Environmental Science and Policy* 118.

⁷¹ United Nations Declaration on the Rights of Indigenous People (2008) Resolution adopted by the General Assembly A/61/L.67, Add 1, article 10.

⁷² *Ibid.*, article 25.

⁷³ *Ibid.*, article 29.

⁷⁴ *Ibid.*, article 28.

⁷⁵ Policy Approaches and Positive Incentives on Issues Relating to Reduced Emissions from Deforestation and Degradation in Developing Countries, and the Role of Conservation, Sustainable Management of Forest and Enhancement of Forest Carbon Stocks in Developing Countries FCCC/CP/2010/07/Add.1. Annex I.

REDD+ safeguard policy contravenes existing international law concerning the rights of Indigenous People, thus presenting a major justice issue.⁷⁶

IV. CONSIDERATIONS FOR THE DESIGN OF A JUST LEGALLY BINDING REDD+ INSTRUMENT

The above analysis has shown that there are a range of justice considerations relevant to REDD+ instrument design. The following section provides a broad overview of the types of issues, requirements and principles that should feature within negotiations concerning a legally binding REDD+ instrument based on this analysis. The requirements listed are by no means exhaustive, but instead provide examples of issues and principles that are important to REDD+ when viewed from a justice lens.

A. *Form and Nature of a REDD+ Agreement:*

Development of a legally binding REDD+ instrument is currently being explored within the UNFCCC. The current favoured form approach for REDD+ is a separate and additional mechanism to the existing Kyoto Protocol market mechanisms. This is the approach envisaged by the Costa Rica and Papua New Guinea REDD+ original proposal.⁷⁷ This approach would only work if the UNFCCC is maintained as the founding and principle instrument of the regime, thus allowing a REDD+ instrument to sit beneath this infrastructure. Another alternative option would be the creation of a new comprehensive climate treaty, which creates REDD+ machinery within its text. Slow progress on resolving many other issues on the UNFCCC agenda such as mitigation commitments and adaptation funding suggests that it may be easier and quicker to negotiate a separate REDD+ instrument that sits below the UNFCCC.

The nature that a REDD+ instrument should take is currently controversial.⁷⁸ Options include:

- Market-based approach: where carbon credits are created via a regulatory process, and then sold within a market structure to either public or private bodies (for a specified price); or a
- Fund-based approach: where payments for the “result” generated by REDD+ activities are disbursed through a fund structure, which acts as an intermediary institution between the donor and host country. This intermediary institution would manage the allocation funds according to pre-determined rules and procedures.

⁷⁶ There is some debate as to whether UNDRIP is legally binding or non-legally binding. Detailed analysis of this point is beyond the scope of the present article.

⁷⁷ Reducing Emissions from Deforestation and Degradation in Developing Countries: Approaches to Stimulate Action, FCCC/CP/2005/MISC.1, 11 November 2005.

⁷⁸ Sean STEPHENSON, “Does ODA Grow On Trees? A Legal Analysis of REDD ODA” (2011) 4 European Journal of Legal Studies.

It is possible that a combination of both market and fund-based approaches could be included as financing mechanisms within the REDD+ instrument. Part of the current debate regarding REDD+ focuses on which financing model is more “just” in terms of the outcomes it would facilitate for stakeholders, particularly more vulnerable groups. As discussed, opponents to market-based approaches fear that the imbalance of power between carbon investors and forest dependent-communities will result in the rights of the latter being ignored or abused. A fund model that operates under specified rules and procedures would play the role of intermediary between the body paying REDD+ finance and those receiving funds according to pre-determined criteria.

The concept of benefit sharing is used within REDD+ to refer to process that distributes REDD+ investments to stakeholders in emission reduction activities. There is at present no international law concerning benefit sharing in the REDD+ context. Benefits may be distributed at the national, subnational or project level and or may also be based upon performance indicators being satisfied. An international legally binding REDD+ instrument will need to provide some guidance on benefit sharing mechanism and governance. A just and equitable benefit sharing mechanism will be designed to ensure that payments reach those involved at the local level as well as ensuring that any opportunity cost or risks associated with the REDD+ activity are compensated through the mechanism. Guidance for this mechanism can be drawn from benefit sharing mechanisms developed for the Convention for Biological Diversity⁷⁹ under the Nagoya Protocol.⁸⁰

Fund distribution could be linked to carbon ownership rights, but this is not essential. The distribution of income under a fund model would be based on the policy choice most appropriate for the country or state where the REDD+ investment is occurring. For example, the State may decide to distribute REDD+ investment in accordance with domestic forestry policies or along existing community forestry association networks. It is essential that benefits channelled under a fund approach are transferred in a transparent and accountable manner. Under this approach, funds may be distributed along existing government structures in which case issues such as case corruption or elite capture may arise. If untested distribution networks are used, stringent transparency procedures would need to be in place to ensure that payments were disbursed appropriately. The debate regarding the most appropriate funding model is live within the negotiations and is likely to remain so.

B. Objective of Regime

During the Bali COP negotiations, REDD+ generated excitement as a mechanism to achieve substantial emissions reductions via avoided deforestation and enhanced

⁷⁹ *Convention on Biological Diversity*, 1992, 1760 UNTS 79, 31 ILM 818 (opened for signature 5 June 1992, entered into force 29 December 1993).

⁸⁰ *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, adopted 29 October 2010 at the Conference of the Parties to the Convention on Biological Diversity (2010: Nagoya, Japan).

carbon sequestration. During subsequent negotiations, REDD+ has evolved to acknowledge the “multiple benefits” of forests and the capacity of the mechanism to provide increased livelihoods for forest-dependent communities. Carbon has become a “co-benefit” of REDD+ alongside its other benefits. There is at present no agreement on the relative priority of carbon values versus non-carbon values or any guidance on how to determine which value should take priority.⁸¹ As such, it is crucial that any future legally binding REDD+ instrument has a clear objective that can be implemented, without confusion as to which forest service or value takes precedence. If REDD+ policy is able to create a methodology for determining conflict between the promotion of various forest services, this will make a significant contribution to the law and governance of sustainable forest management worldwide.⁸² This mechanism will need to balance the goals of climate change mitigation of the UNFCCC against the promotion of the multiple benefits of forests in terms of their capacity to deliver ecosystem services (as a public good) and better lifestyles for local communities. An instrument founded on considerations of justice will seek to ensure that carbon forest values do not overshadow other forest values.

C. Guiding Principles of the Regime

Principles are used within regulatory frameworks to guide the interpretation and implementation of the obligations specified in the instrument. Existing international environmental law principles should lay the foundations of a REDD+ legally binding instrument. The basis for including existing international principles is threefold:

1. Many of these principles have a basis in equity and as such will assist in resolving justice concerns and issues associated with REDD+;
2. International law should evolve consistently aligned with existing agreements, principles and rules; and
3. It is common practice to include existing international principles within founding international instruments.

A number of international environmental principles are already part of the UNFCCC architecture. Article 3 of the UNFCCC provides for the application of: common but differentiated responsibility, inter-generational and intra-generational equity, the precautionary principle, sustainable development and the principles of cooperation. Inclusion of these principles within the UNFCCC instrument was controversial. The United States of America, along with other developed countries,

⁸¹ Constance McDERMOTT et al, “Operationalizing Social Safeguards in REDD+: actors, interests and ideas” (2012) 21 *Environmental Science and Policy* 63 at 64, and on the issue of environmental effectiveness and cost efficiency see Andrea CATTANEO et al, “On International Equity in Reducing Emissions from Deforestation” (2010) 13 *Environmental Science and Policy* 742.

⁸² See generally on this issue: Constance MCDERMOTT, “REDDuced: From Sustainability to legality to units of carbon –The search for common interests in international forest governance” (2012) *Environmental Science and Policy* (article in press).

did not want to include open-ended principles within the agreement due to concerns that their inclusion would lead to the creation of additional commitments beyond those clearly articulated within the Convention. Developing countries felt that it was essential to include a statement on principles within the articles of the agreement to guide the implementation of the text.⁸³ The final text of the agreement adopts the developing country perspective, thus creating within Article 3 a normative framework to support the implementation of the UNFCCC.⁸⁴ The principles contained within Article 3 are therefore not directly enforceable, but can be used to inform policy development and implementation modalities within the broader climate change regime. There are a number of international environmental principles that should feature in a legally binding REDD+ instrument. These include: sovereignty; preventive action; common but differentiated responsibility; and sustainable development (encompassing inter-generational equity, intra-generational equity and integration). In addition, the principle of Free, Prior and Informed Consent (FPIC) must be included within a binding REDD+ instrument.

1. Sovereignty

International forest negotiations have had issues of fairness and equity at the centre of the debate since the Earth Summit negotiations in 1992. The most controversial issue facing international forest regulation has been issues connected with State Sovereignty.⁸⁵ States view fairness in connection with forest regulation as involving freedom to legislate and manage forest areas according to national, not international priorities. Those States with high levels of forest cover have fiercely guarded sovereign rights to regulate forest use and management, due to the contribution that forest products make to these countries' economies. The unwillingness of States to create legally binding international standards concerning forest use and management has been associated with the lack of global progress in implementing sustainable forest management globally.⁸⁶ While States have previously been unwilling to cede sovereignty over forest areas, REDD+ policy shows a shift in States attitudes to accepting some degree of infringement upon their forest rights, on the basis that adequate compensation is provided for this infringement.⁸⁷ There are three reasons which explain why REDD+ has not been perceived as a threat upon State sovereignty:

⁸³ Daniel BODANSKY, "The United Nations Framework Convention on Climate Change: A Commentary", (1993) 18 *Yale Journal of International Law* 451 at 501.

⁸⁴ Yamin and Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge: Cambridge University Press, 2004) at 66.

⁸⁵ David HUMPHREYS, *Logjam: Deforestation and Crisis of Global Governance* (Earthscan 2006) at chapter 5.

⁸⁶ See generally Catherine MCKENZIE, "Lessons from Forestry for International Environmental Law" (2012) 21 *Review of European Community and International Environmental Law* 114.

⁸⁷ Rowena MAGUIRE, *Global Forest Governance: Legal Concepts and Policy Trends*, (Cheltenham: Edward Elgar, 2013) at chapter 10 and Thomas SIKOR, "Forest Justice: Towards a New Agenda for Research and Practice" (2010) 7 *Journal of Integrative Environmental Sciences* 245.

1. Engagement in the REDD+ process in on a voluntary basis. Under current COP rules, demonstration activities must occur with the approval of the host country;⁸⁸
2. REDD+ policy does not cover all forest areas within the State's territory, rather it only applies to particular project or demonstration sites;
3. While REDD+ is an infringement upon sovereign rights, this infringement has been accepted on the basis that compensation is provided by the initiative.

REDD+ therefore only restricts States sovereign rights in limited circumstances. Principle 2(a) of the non-legally binding forest principles drafted in 1992⁸⁹ provides an example of wording that could be adjusted for a REDD+ sovereignty statement. The amendments to the text for REDD+ purposes made in italics:

“States have the sovereign and inalienable right to utilize, manage and develop their forests in accordance with their development needs and level of socio-economic development on the basis of national policies consistent with sustainable development and legislation” [*States may voluntarily consent to host REDD+ projects within their territory. Such projects only limit sovereign rights over the particular REDD+ project site. Such limitation is only accepted on the basis the appropriate compensation is received by the state or individuals of the State*].

2. *Preventative Action*

The principle of preventative action requires states to prevent damage to the environment and to reduce, limit, or control activities which might cause or risk such damage.⁹⁰ Reducing deforestation and improving land use management are both examples of REDD+ type activities that prevent damage to the environment. Unsustainable forest and land management are associated with a host of environmental harms such as soil degradation; biodiversity loss; changes in rainfall patterns and the loss of climatic regulating services. A REDD+ legally binding instrument should recognise that REDD+ activities apply the principle of preventative action. The principle of prevention is useful in providing a basis upon which REDD+ action should be taken.

⁸⁸ Decision 2/CP.13 Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action. FCCC/CP/2007/6/Add.1

⁸⁹ United Nations Conference on Environment and Development, *Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all types of Forests*, UN Doc a/conf 15/126 (1992).

⁹⁰ Philippe SANDS, *Principles of International Environmental Law*, 2nd Ed. (Cambridge: Cambridge University Press, 2003) at 246.

3. *Common but Differentiated Responsibility*

The principle of common but differentiated responsibility (CBDR) adopts a substantive approach to justice by recognising that different groups before the law require different rights and responsibilities. As such, the principle recognises:

- The common responsibility of countries to protect the environment;
- The differing contributions of countries to environmental degradation; and
- The differing inabilities of countries to prevent, reduce and control environmental degradation.⁹¹

CBDR in the context of REDD+ should recognise the common responsibility of states to manage forest land sustainably, while recognising that there are different capacities among states to implement REDD+ or sustainable forest management initiatives. Developing countries with high levels of forest cover such as Indonesia, Congo, Brazil and Papua New Guinea should be adequately supported, so that REDD+ does not operate as a burden on nations with high forest cover and appropriate international technical and financial support provided to assist in managing these forests which are in essence being managed for global as oppose to national interests.

4. *Sustainable Development*

The concept of sustainable development originates from the 1987 Brundtland Report where the concept was described as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.⁹² The concept of sustainable development has become the one of the key goals of international environmental and developmental regimes, though implementation of the concept remains elusive.⁹³ Sands identifies four principles of the concept of sustainable development:

1. The need to preserve natural resources for the benefit of future generations (the principle of inter-generational equity);

⁹¹ Angela WILLIAMS, “Promoting Justice within the International Legal System: Prospects for Climate Refugees”, in Benjamin RICHARDSON, Heather MCLEOD-KILMURRAY and Stephan WOOD, eds., *Climate Law and Developing Countries Legal and Policy Challenges for the World Economy* (Cheltenham: Edward Elgar, 2009) 84 at 90.

⁹² World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987), at 43.

⁹³ For instance, a major summit—the United Nations Conference on Sustainable Development (Rio+20)—will take place in June 2012 in Rio de Janeiro, Brazil. This event marks the 20th anniversary of the Rio Declaration 1992, signed at the Earth Summit in Rio. The objective of the Conference is to secure renewed political commitment for sustainable development, assess the progress to date and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development, and address new and emerging challenges. The Conference will focus on two themes: (a) a green economy in the context of sustainable development and poverty eradication; and (b) the institutional framework for sustainable development. For the complete agenda and further background information, see <<http://www.uncsd2012.org>>.

2. The aim of exploiting natural resources in a manner which is sustainable or prudent or rational or wise or appropriate (the principles of sustainable use);
3. The equitable use of natural resources, which implies that use by one state must take account of the needs of other states (the principle of equitable use or intra-generational equity);
4. The need to ensure that environmental considerations are integrated into economic and other development plans, programmes and projects, and that development needs are taken into account in applying environmental objectives (the principle of integration).⁹⁴

All four components of the sustainable development principle are of relevance for REDD+ policy. REDD+ seeks to ensure that forest resources are preserved for the benefit of future generations. In addition, as REDD+ is a form of a mitigation activity, the initiative also seeks to ensure that dangerous interference with the climate system is also avoided. While it is difficult to create specific rights for future generations, a REDD+ instrument should recognise that future generations have interests associated with forest areas.

The principle of sustainable use in respect of forest areas should borrow from existing sustainable forest management frameworks. Such frameworks include the criteria and indicator processes associated with sustainable forest management, sustainable management standards from forest certifying bodies and forest management methodologies used in payment for ecosystem service market mechanisms.⁹⁵

Intra-generational considerations are particularly pertinent for REDD+ investments. Intra-generational equity can examine equity issues between nations and equity issues within nations. When considering equity issues among nations in respect of REDD+, consideration must be directed towards—the opportunity cost forgone by host REDD+ governments. When considering equity within nations—vulnerable groups such as indigenous groups, women, youth and groups without formal tenure rights should be recognised as groups requiring protection during REDD+ investment.

The principle of integration requires for environmental considerations to be taken into account in economic and development activities. Sustainable forest management needs to be incorporated into broader economic and development policies. There is also a real need for integration of REDD+ governance at the international level. The lack of a legally binding process means that there are a range of bodies creating REDD+ rules and processes. Such bodies include the UN REDD, FCPF of the World Bank and Voluntary Carbon Market verifying bodies. The development of a legally binding REDD+ instrument will assist in providing clarity on the scope and role of REDD+ initiatives and this process could be used to integrate existing institutional approaches to REDD+.

⁹⁴ Sands, *supra* note 34, at 253.

⁹⁵ For further information on these definitional processes see: Rowena MAGUIRE, *Global Forest Governance: Legal Concepts and Policy Trends*, (Cheltenham: Edward Elgar, 2013) at chapter four.

5. *Free, Prior and Informed Consent*

A legally binding REDD+ instrument must uphold existing rights protected by UNDRIP and in particular the requirements of FPIC (full, prior and informed consent).⁹⁶ The wording within the current REDD+ COP safeguards requiring “full and effective participation” is a lower standard to fulfill than FPIC. Full and effective participation, does not ensure that prior approval is given by indigenous groups before REDD+ activities commence, nor does it ensure that the indigenous group has provided consent at any stage for the REDD+ activity to occur. It is suggested that there are three types of consent relevant to REDD+ projects: consent to discuss the idea for a REDD+ project that will affect community forests; consent to participate in developing a detailed plan for a project and consent to the implementation of the project.⁹⁷ As Anderson notes:

“FPIC is a right. It is not a linear process that ends with the signing of an agreement by the community. By recognizing the right of indigenous peoples and local communities to be treated as the owners and managers of their customary territory, FPIC guarantees them a decisive voice at every stage of development planning and implementation for projects that affect them.”⁹⁸

D. *Safeguards*

A just and equitable legally binding REDD+ instrument will include solid safeguard protections for indigenous and local forest communities. Safeguards will need to address issues of land tenure and or customary land rights and provide some guidance as to how REDD+ is to be implemented within different tenure/land holdings. Insecure and or conflicting land rights claims over project sites have the potential to undermine REDD+ investments. It is therefore of crucial significance that future safeguard policy directly deal with land tenure issues so as to ensure that REDD+ investment does not cause any unintended consequences (for example displacement of people or severe livelihood implications).

As discussed within the policy and practice of REDD+ component of this article, there are a range of existing safeguard policies. These existing safeguard policies provide a useful basis for the development of future legally binding safeguard policy.

Some existing safeguard policies employ the language of justice. For example, the UN REDD Social and Environmental Safeguards require the promotion and support for the rule of law and access to justice.⁹⁹ Access to justice is defined largely as procedural justice considerations including: legal protection, legal awareness, legal aid and counsel, adjudication, enforcement and oversight (parliaments, national

⁹⁶ In support of this point see Jing ZHEN, “Environmental Justice Law and REDD meet International Legal Framework Construction” (2012) 3 Special Zone Economy.

⁹⁷ Patrick ANDERSON, *Free, Prior, and Informed Consent: Principles and Approaches for Policy and Project Development*, (2011) RECOFTC and GIZ p 19.

⁹⁸ *Ibid.*, at 11.

⁹⁹ UN REDD Program Social and Environmental Principles and Criteria—Principle 1, criteria 6.

human rights commissions). The same safeguards also require the application of the principles of democratic governance defined as equity, fairness, consensus, coordination, efficiency, transparency, accountability, effectiveness, responsiveness, participation and rule of law.

E. Remedial Justice—Grievance Mechanisms

Theories of remedial justice attempt to construct just outcomes by seeking to ensure that a remedy is provided when a wrong has been suffered.¹⁰⁰ While it is important to minimise REDD-related risks and avoid adverse impacts from the outset, a legally binding REDD+ instrument must define a process for resolving disputes or grievances that may arise during or as a result of REDD+ investment. The FCPF defines a grievances mechanism as

“a process for receiving and facilitating resolution of queries and grievances from affected communities or stakeholders related to REDD-plus activities, policies or programs at the level of the community or country. Typically, these mechanisms focus on flexible problem solving approaches to dispute resolution through options such as fact finding, dialogue, facilitation or mediation, but ‘are not substitutes for legal or administrative systems or other public or civic mechanisms’, and ‘do not remove the right of complainants to take their grievances to other more formal recourse options’”.¹⁰¹

Disputes and grievances in the REDD+ context may take place between a number of different stakeholders. These include (1) conflict between neighbors, (2) conflict within families, (3) conflict with creditors, (4) conflict between villagers and local authorities, (5) conflict between local jurisdictions, (6) conflict involving state institutions, and (7) conflict between villagers and private individuals and companies.¹⁰² According to the Center for International Environmental Law, existing protections in international obligations are not sufficient to ensure that rights of forest dependent people are protected during REDD+ investments.¹⁰³ As such, it is essential that a legally binding REDD+ instrument create a grievance mechanism specifically designed to deal with the types of conflict likely to arise in REDD+ processes.

¹⁰⁰ Some commentators have referred to this form of justice as corrective justice. Adler suggests that corrective justice imposes a duty on the agent (who has acted wrongfully and thereby caused loss to some individual) to repair the loss. Matthew D. ADLER, “Corrective Justice and Liability for Global Warming” (2007) 155 University of Pennsylvania Law Review 1859.

¹⁰¹ Forest Carbon Partnership Facility, “Guidelines for Establishing Grievance and Redress Mechanism at the Country Level” (2012) 1 para. 2-3, online: FCPF <<http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org>>.

¹⁰² S SOVANNARITH and others, “Social Assessment of Land in Cambodia”, Working Paper No. 20, 2001, at 33-6.

¹⁰³ Centre for International Environmental Law (CIEL), “A Complaint Mechanism for REDD+” (2011) 3 para. 4.

V. CONCLUSION

The future of the REDD+ initiative is uncertain, and there is no certainty that a legally binding instrument will emerge in the short term. Despite this, REDD+ has played a positive role in raising awareness and interest in the sustainable management of forests. The level of finance that the REDD+ initiative has generated is unparalleled in terms of international funds for sustainable forest management. This increase in funding and interest in enhancing and preserving global forest stocks has however not been without controversy. This article has shown that the language of justice has entered the international REDD+ process. REDD+ is being perceived as an issue of justice due to the link between a human action (investment in carbon) and harm as a result of that action (forest communities facing land restriction, displacement or minimal financial or other gain as a result of REDD+ investment). This article has shown that there are a range of different justice theories, rights based paradigms and social movements that construe REDD+ justice in different ways. There will never be consensus on the most appropriate theory to define justice and REDD+. This article instead took a practical focus and identified some key ingredients that should be considered when drafting a just and equitable legally binding REDD+ instrument. These include examining the nature and form (market versus fund-based) of the agreement, articulating a clear objective for the agreement, ensuring that a future agreement includes relevant international environmental principles and providing machinery for the resolution of grievances that may arise during REDD+ investment. The success of the REDD+ initiative will be judged upon its ability to engage forest stakeholders at the international, national and sub-national levels and through this engagement to change forest management practices. It is suggested that seeking engagement with these stakeholders will be more successful when they perceive the initiative to be just and equitable and in both design and implementation.