

Defining the Legal Elements of Benefit Sharing in the Context of REDD+

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How to share the benefits from REDD+ implementation is an important consideration for any country. For benefit sharing mechanisms designed to operate at the national level (often referred to as Benefit Distribution Systems), subnational level or project level, common structural elements will exist. In legal terms, this article refers to these as the legal elements of benefit sharing. From a legal perspective, the key questions to consider with respect to benefit sharing include how benefits are defined, how benefits are allocated (and to whom), how benefits are distributed, and how to ensure the accountability of benefit sharing arrangements (such as measures to ensure public participation and transparency). In order to assist stakeholders to deconstruct and organise the many different issues discussed within benefit sharing dialogues, this article offers a conceptual model of benefit sharing from a legal perspective, identifying and describing the different structural elements underpinning benefit sharing arrangements at any level of REDD+ implementation.

I. Introduction

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 (REDD+) has emerged out of the United Nations Framework Convention on Climate Change (UNFCCC)/Kyoto Protocol negotiations.¹ It is intended to be a tool to address greenhouse gas emissions from changes in land use – in particular, from deforestation and forest degradation. In parallel to the international negotiations, approaches to REDD+ have developed in the voluntary forest carbon market and also as part of national compliance schemes to address emission reductions. Most countries planning to implement REDD+ programmes are currently preparing national strategies and action plans, a key aspect of which is benefit sharing.

In the context of REDD+, benefit sharing is a mechanism to identify the outcomes (financial or non-financial) from a REDD+ intervention and then distribute those outcomes between stakeholders. Effective benefit sharing systems will create incentives for broad stakeholder participation and support for REDD+ initiatives. Although benefit sharing is a vital component of any country's REDD+ programme, the approach that should be taken is not prescribed

– in fact, there is recognition at both the multilateral and local level that a generic approach to benefit sharing is not appropriate. The UNFCCC decisions on REDD+, other frameworks and standards, and leading organisations involved in REDD+ offer general requirements and guidance about how benefit sharing arrangements should be designed and implemented, but do not impose a particular approach. This is because every country, and community within it, is likely to have unique circumstances, preferences and needs that will inform benefit sharing arrangements.

From a legal perspective, it is possible to identify different structural elements within benefit sharing arrangements. Key considerations to address include how benefits are defined, how benefits are allocated (and how beneficiaries are determined), and how benefit distribution is managed. In addition, other

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1 UNFCCC, "Background: REDD", available on the Internet at <http://unfccc.int/methods_science/redd/methodological_guidance/items/4123.php> (last accessed 126 February 2015).

important design elements include measures to support accountability of the benefit sharing arrangements, such as public participation and transparency. Although overriding policy questions will also influence the way in which incentive structures are designed and the way benefits are delivered (for example, the scale of REDD+ implementation, the type of financing model to be relied upon to deliver REDD+ finance, and the type of interventions to be made as part of REDD+ implementation), this article focuses on the conceptual basis for benefit sharing from a legal perspective.

II. Benefit Sharing for REDD+: Conceptual Basis

1. Definition and General Principles of Benefit Sharing

As noted above, benefit sharing is a mechanism to identify the outcomes from a REDD+ intervention (whether those outcomes are financial or non-financial) and then distribute those outcomes between stakeholders. Benefit sharing has also been defined as the distribution of both the monetary and the non-monetary benefits generated through the implementation of REDD+ projects² and programmes, and it has been argued that benefit sharing arrangements for REDD+ are best understood as the sum of many different mechanisms.³ Effective benefit sharing design will create incentives for different stakeholders (whether national or subnational governments, communities or businesses) to initiate and support action

to reduce emissions from deforestation and forest degradation (which is the overarching purpose of REDD+ policy). It is helpful to think of benefit sharing as the final stage of a process that seeks to generate, commoditise and allocate REDD+ benefits (both carbon and non-carbon). Further, a distinction can be drawn between benefit allocation (ie. who is entitled to receive benefits) and benefit distribution (ie. the method of distributing those benefits).

As a starting point, it is important to take note of the requirements and guidance regarding benefit sharing set out in the decisions of the Parties to the UNFCCC on REDD+ (hereinafter referred to as the UNFCCC) and in other international frameworks and standards, in addition to the guidance provided by leading international organisations with practical experience of benefit sharing issues related to both natural resource management and REDD+. Although the UNFCCC emphasises the need for REDD+ implementation to enhance social and environmental benefits,⁴ it does not prescribe a particular approach to doing this. In a similar way, the Nagoya Protocol⁵ under the Convention on Biological Diversity⁶ addresses benefit sharing, but does not define a particular benefit sharing mechanism – instead, it encourages national action by requiring parties to: take legislative, administrative and policy measures to ensure that indigenous and local communities gain fair and equitable benefits from the utilisation of genetic resources⁷; create a national focal point on access and benefit sharing⁸; and, develop and update voluntary codes of conduct, guidelines and best practices/standards in relation to access and benefit sharing.⁹ This reflects a general recognition in inter-

2 Thu T. Pham et al., *Approaches to Benefit Sharing: A Preliminary Comparative Analysis of 13 REDD+ Countries* (Bogor: CIFOR, 2013) 1, at para. 2.

3 Cecilia Luttrell et al., "Who Should Benefit from REDD+? Rationales and Realities" 18(4) *Ecology and Society* (2013), at 51-52.

4 Appendix 1 of the Cancun Agreement reads: "When undertaking the activities referred to in paragraph 70 of this decision, the following safeguards should be promoted and supported: ... (e) That actions are consistent with the conservation of natural forests and biological diversity, ensuring that the actions referred to in paragraph 70 of this decision are not used for the conversion of natural forests, but are instead used to incentivize the protection and conservation of natural forests and their ecosystem services, and to enhance other social and environmental benefits [Taking into account the need for sustainable livelihoods of indigenous peoples and local communities and their interdependence on forests in most countries, reflected in the United Nations Declaration on the Rights of Indigenous Peoples, as well as the international Mother Earth Day]" (emphasis added).

5 See Article 1 of the 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, Nagoya, 29 October 2010, in force 12 October 2014, UN Doc. UNEP/CBD/COP/DEC/X/1, which outlines the objective of the Protocol: "The objective of this Protocol is the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding thereby contributing to the conservation of biological diversity and the sustainable use of its components."

6 Convention on Biological Diversity, Nairobi, 22 May 1992, in force 29 December 1993, 31 *International Legal Materials* (1992), at 818.

7 Nagoya Protocol, *supra*, note 5, Art. 5(2).

8 *Ibid.*, Art. 13.

9 *Ibid.*, Art. 20.

national agreements and conventions that countries will implement measures in a way that is consistent with their unique national circumstances (which is reiterated for climate change mitigation and adaptation measures under the UNFCCC, including for REDD+).

The Readiness Fund¹⁰ of the Forest Carbon Partnership Facility (FCPF) requires that benefit sharing arrangements be assessed as part of national ‘readiness’ preparations, and requires countries to have a Benefit Sharing Plan under its Carbon Fund. However, the FCPF has also commented that a prescriptive approach to benefit sharing is unlikely to be effective.¹¹ The FCPF draws on experience from other project-level forest management initiatives (in addition to existing REDD+ projects) to conclude that a generic, ‘one size fits all’ approach to benefit sharing is not appropriate, reflecting the fact that the stakeholders (and their rights and interests) will vary between initiatives.

Several voluntary standards have emerged to guide the behaviour of stakeholders involved in project level activities, such as the Climate, Community and Biodiversity Standards (CCB Standards). The CCB Standards emphasise the importance of equitable benefit sharing, which is discussed in the context of Free, Prior and Informed Consent (FPIC) and grievance redress.¹² Focusing on national or subnational initiatives (in addition to the project level), the REDD+ Social and Environmental Standards (REDD+ SES) require a transparent and participato-

ry assessment of predicted and actual benefits, costs, and risks of the REDD+ programme for relevant rights holders and stakeholder groups at all levels, with special attention for women and marginalised and/or vulnerable people.¹³ It further requires that transparent, participatory, effective and efficient mechanisms should be established for equitable sharing of benefits of the REDD+ programme among (and within) relevant rights holders and stakeholder groups.¹⁴ In addition, leading organisations such as the Centre for International Forestry Research¹⁵ (CIFOR), the International Union for Conservation of Nature (IUCN)¹⁶ and the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD)¹⁷ have each discussed guiding principles regarding benefit sharing arrangements, often drawing on the experience gained in other fields of natural resource management. These commentaries help to inform the design of benefit sharing systems at any level of implementation (ie. whether the national, subnational or project level).

In the absence of explicit benefit sharing requirements within the UNFCCC or other frameworks, countries need to decide what approach to benefit sharing will be most appropriate for their REDD+ programmes and projects. Informed by the requirements and overarching principles outlined above, laws should provide clear principles and procedures for determining benefit sharing under REDD+. Such principles and procedures should guarantee oppor-

10 The Readiness Fund is intended to be a capacity-building fund with the goal of assisting tropical and sub-tropical developing countries to prepare to participate in REDD+.

11 Forest Carbon Partnership Facility (FCPF), *FCPF Carbon Fund Methodological Framework Discussion Paper #9: Benefit Sharing* (Washington, DC: World Bank, 2013), 18, at 6.

12 Climate, Community and Biodiversity Alliance (CCBA), *Climate, Community & Biodiversity Standards (Third Edition)*. Arlington, VA, USA. December, 2013. Available on the Internet at <http://www.climate-standards.org/ccb-standards/> (last accessed February 28 2015).

13 REDD+ Social & Environmental Standards, *REDD+ SES (Version 2)*, 10 September 2012, Sec. 2.1. Available on the Internet at <http://www.redd-standards.org/> (last accessed February 28 2015).

14 *Ibid.*, Sec. 2.2.

15 Arild Angelsen (ed.), *Moving Ahead with REDD: Issues, Options and Implications* (CIFOR, 2008), at 18, Sec. 2.5.

16 IUCN, *REDD-plus and Benefit sharing: Experiences in forest conservation and other resource management sectors* (IUCN: 2009), at 5: Table A.

17 UN-REDD has identified several elements that should be incorporated into an effective Benefit Distribution System (BDS).

These are: **Timeliness:** performance can be measured and reported some time after the interventions have been made. It is unrealistic to expect poor rural stakeholders to “carry” the costs of those interventions, so the BDS needs to offer incentives more regularly than the measurement intervals. **Adequacy:** Interventions will not be made or sustained if the incentives provided do not match the potential values generated through alternative uses of the forest land (the “opportunity costs”). In some cases, the BDS may need to incorporate “bundling” of benefits from several sources to make them more attractive. **Flexibility:** Diverse biophysical, cultural and socio-economic circumstances means that there is no “one-size-fits-all” BDS that will satisfy stakeholders in every locality. The design of the BDS needs to incorporate local decision-making on the form that the positive incentives should take. **Equity:** Stakeholders need assurance that other groups are not receiving disproportionate benefits. Measures to promote equity are greatly facilitated by transparency and broad-based participation. **Efficiency:** If costs incurred in managing a REDD+ programme are too high, the total benefits available for providing positive incentives is reduced, and the conditions of adequacy will be compromised. **Segregation:** The process by which benefits are allocated to stakeholders must be independent of REDD+ fund management and financial transactions, and from technical, financial and management quality assurance. Source: UN-REDD Programme, *Asia-Pacific Lessons Learned: Benefit Distribution* (2013), at 1.

tunities to reward different stakeholders (including private land owners, local and indigenous communities), and also be capable of allocating benefits to government programmes and investors.¹⁸

2. The Key Elements of Benefit Sharing

In order to assist stakeholders to deconstruct and organise the many different issues discussed within benefit sharing dialogues, this section offers a conceptual model of benefit sharing from a legal perspective. It identifies and describes the different structural elements underpinning benefit sharing arrangements at any level of REDD+ implementation, discussing each in turn.

a. Defining Benefits

Benefits from REDD+ can be carbon-based (for example, carbon sequestration) or non-carbon-based (for example, community and biodiversity benefits), noting that there have been few attempts to define the legal character of non-carbon benefits in law. The Clean Development Mechanism (CDM) provided a process for creating Certified Emission Reductions (CERs), providing one model for defining 'carbon benefits'; in the voluntary market, different methodologies can be used to create Verified Carbon Units (VCUs) under the Verified Carbon Standard (VCS), providing another example of a 'carbon benefit.' 'Biodiversity benefits' have also been defined in different biodiversity offset schemes.¹⁹ Clearly defining the benefits from REDD+ clarifies what the outcomes from REDD+ implementation will be, allowing investors (whether public or private) to make decisions about resource allocation (for example, the FCPF's Carbon Fund attempts to define the benefits to which finance will be linked).

At a conceptual level, the dialogue about both the carbon and non-carbon benefits flowing from REDD+ is ongoing. This article's discussion of benefit sharing in the context of REDD+ identifies the following important benefits from REDD+ implementation:

- Sequestered forest carbon is a **physical benefit** from REDD+ implementation. When linked to an ongoing verification process which certifies that the forest carbon has been sequestered for a given period of time (ie. the "permanence" requirement of many REDD+ schemes), an 'emission reduction' is created. An 'emission reduction' is usually referred to as a '**carbon benefit**'²⁰ by those working in the carbon market, and can be commoditised as tonnes of carbon dioxide (CO₂) avoided, abated or sequestered. If it meets specified criteria, this 'carbon benefit' resulting from REDD+ implementation can be formally recognised under an arrangement, scheme or law (for example, VCUs under the VCS);
- REDD+ payments can be made for either 'carbon benefits' (for example, a buyer paying a seller for the emission reductions achieved through REDD+ implementation) or for participation in REDD+ implementation (for example, an individual or community might directly participate in the implementation of a REDD+ programme or project, or might need to be compensated for the opportunity cost of REDD+ implementation). These payments are referred to here as the **financial benefits** from REDD+. Financial benefits can be monetary or 'in kind,' where 'in kind' payments include such things as the provision of a school, health centre, or infrastructure such as a well; and
- REDD+ can be implemented in a way that provides other benefits to local communities and the environment, such as poverty alleviation and biodiversity conservation. These are referred to as the **non-carbon benefits** from REDD+, noting the possibility that they could also be commoditised - for example, through Payments for Ecosystem Services (PES) schemes for water or biodiversity.

Given that REDD+ finance is results-based (whether in a market or non-market setting), it is important to identify how the result (or benefit) in question is defined by the law. Certification processes (such as measurement, reporting and verification procedures) can be used to assure funders that the benefit is legiti-

18 John Costenbader (ed.), *Legal Frameworks for REDD+: Design and Implementation at the National Level* (2009), at 121.

19 See generally, Becca Madsen, Nathaniel Carroll and Kelly Moore Brands, *State of Biodiversity Markets Report: Offset and Compensation Programs Worldwide* (Report by Forest Trends, Washington DC, 2010), at 22.

20 In this context it is worth noting that the term "carbon rights" is often used in a number of different ways - such as referring to the tonne of carbon dioxide equivalent (CO₂e) created, or the legal right to own the tonne of CO₂e sequestered, or a non-legal entitlement to benefit from REDD+ projects or programmes. It is important for all stakeholders involved in a given initiative to have a common understanding of the term.

mate (whether that funder is a government, private sector participant or a fund). Once the benefits flowing from REDD+ implementation are defined, the issue of how these benefits are to be divided between different stakeholders needs to be considered carefully.

b. Allocating Benefits and Determining Beneficiaries

Potential beneficiaries from REDD+ might perceive a moral claim to benefit. However, from a legal perspective, a right to benefit needs to be linked to a legal instrument (such as a contract, a statute, or a national Constitution). The law has an important role in clarifying who the beneficiaries of REDD+ are and also in establishing a formal basis for their benefit claims. Potential beneficiaries from REDD+ implementation can be:

- Those who claim the emission reductions ultimately generated from REDD+ implementation (such as a government, landowners, or a third party to which they are validly transferred);
- Governments (at either national, subnational or local level) who receive REDD+ payments, potentially as taxation revenue from private sector projects;
- Those involved in (and consequently rewarded for) their involvement in REDD+ implementation, such as communities and project developers; and
- In very general terms, the society at large that benefits from the climate, social and environmental impacts from successful REDD+ implementation.

Who is entitled to claim benefits from REDD+, and on what basis, is an important aspect of any benefit distribution system. Legal frameworks therefore have an important role to play in clarifying the status of rights linked to benefits. Some claims to an entitlement (or right) will represent strongly held beliefs in an entitlement but will not be recognised as legally valid by a court of law.²¹ The legal basis for a benefit claim can be derived from the following legal instruments:

- A national Constitution (for example, in Ghana forestry revenue must be divided according to a formula in the Constitution);
- A statute, or other legislative instrument (for example, a Community Forestry Agreement made under forestry regulations in Cambodia, or rev-

enue allocations under Indonesia's State Finance Law);

- A contract (for example, REDD+ projects in the voluntary carbon market have used negotiated benefit sharing agreements to divide benefits between participants); and
- Land and resource rights (for example, private title in Kenya is the basis for a claim to carbon ownership and, subsequently, the revenue from carbon credits generated on the land in question). Given that carbon is a newly recognised type of natural resource, in most countries the legal rights to the carbon are unclear because the concept does not exist in current law.

It can also be argued that the customary laws of a country provide a legal basis for benefit claims, although potentially only to the extent that such customary rights are recognised in the nation's Constitution. Where any disputes regarding formal and customary laws are present and unresolved, conflict could arise. The status of customary rights is therefore an important consideration in REDD+ policy and its legal implementation.

The different ways that legal instruments can influence benefit sharing arrangements are discussed further below.

(i) Constitutions and Benefit Sharing Arrangements

Given that constitutions sit at the top of national legal hierarchies, it is important that benefit sharing arrangements are consistent with their rules. Constitutions might contain general, aspirational principles about providing incentives for environmental protection and/or benefit sharing. For example, Article 69(1)(a) of Kenya's 2010 Constitution puts an obligation on the State to manage resources sustainably (including for conservation purposes), and to ensure that benefits accruing from the exploitation of natural resources are shared equitably.²² Ecuador's

21 John W. Bruce and Robin Nielsen, *Identifying and Working with Beneficiaries when Rights are Unclear* (PROFOR, World Bank: 2012), at 5, para. 5.

22 Constitution of Kenya (2010), Part 2 - Environment and Natural Resources, Obligations in respect of the environment: Art. 69(1): The State shall – (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.

2008 Constitution created explicit 'rights of nature,' placing a general obligation on the State to 'give incentives' to protect nature²³ and further stating that all stakeholders have the 'right to benefit from the environment.'²⁴ General constitutional principles must be respected when designing benefit sharing arrangements at any level of REDD+ implementation.

Constitutions can also specify how the revenue from forestry resources should be divided between different beneficiaries. Where carbon is considered to be a forest resource, the financial benefits flowing from REDD+ could be divided according existing constitutional models. For example:

- Ghana: Article 267 of Ghana's 1992 Constitution regulates the disbursement of revenue from 'stool lands' (ie. belonging to a Chief).²⁵ It provides that 10% of the revenue be given to the Office of the Administrator of Stool Lands to cover administrative expenses, 25% to the Stool, 20% to the traditional authority, and 55% to the District Assembly wherein the stool lands are situated.²⁶ How this formula applies in the context of REDD+ implementation would need to be clarified; and
- Columbia: Article 357 of Columbia's 1991 Constitution provides that municipalities (including indigenous reservations) will have a share in national revenues. It states that laws will determine the minimal percentage of revenues to be shared, and that revenues 'will be distributed by the law in ac-

cordance with the following criteria: 60% in direct proportion to the number of inhabitants below the poverty level or with unsatisfied basic needs, and the rest as a function of the total population, fiscal and administrative efficiency, and the progress demonstrated in the citizens' quality of life.²⁷ Congress may revise the percentages of distribution every five years. How this formula applies in the context of REDD+ implementation would need to be clarified.

Constitutions could state that all land and natural resources within a country are owned by the State, to be managed on behalf of the people (for example, as in Viet Nam and Cambodia), with important consequences for benefit sharing in a REDD+ context. For REDD+ projects in Cambodia, the State assumes ownership of the carbon (and carbon credits), and then specifies how carbon revenue should be shared with participating communities; it is an interesting example of how the national Constitution, land regime and forest regime interact to determine how the financial benefits from REDD+ are to be allocated between different stakeholders. In addition, a nation's Constitution can recognise customary rights which then provide a legal basis for benefit claims (to be discussed further below at *iv*).

(ii) Statutes and Benefit Sharing Arrangements

Statutes can be used to implement policy choices regarding the type of REDD+ intervention (for example, a PES model, a community forestry model for forest management, or a taxation regime²⁸). They can also be used to establish benefit distribution mechanisms, such as fund structures or the redistribution of taxation. In this way, statutes can help to decide who the beneficiaries of REDD+ are and what allocation of REDD+-related payments they are entitled to. For example:

- Costa Rica: Costa Rica's Forestry Act 7575 (1996) establishes the National Forestry Financing Fund (FONAFIFO) to administer the country's payment for environmental services programme.²⁹ The act identifies four environmental services (carbon mitigation, hydrological services, biodiversity for scientific and research purposes, and scenic beauty or bio-tourism³⁰), directs one third of a tax on fossil fuels to financially support payments for these services,³¹ and establishes a 3% tax on the

23 Republic of Ecuador Constitution (2008), Title II/Chapter Seven – Rights of Nature, Art. 71: ...The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem [etc].

24 *Ibid.*, Title II/Chapter Seven – Rights of Nature, Art. 71 - Art. 74: ... Persons, communities, peoples, and nations shall have the right to benefit from the environmental and the natural wealth enabling them to enjoy the good way of living [etc].

25 Stool land 'includes any land or interest in, or right over, any land controlled by a Stool or Skin, the head of a particular community or the captain of a company, for the benefit of the subjects of that Stool or members of that community or company.' See the Constitution of the Republic of Ghana (1992), Art. 295(1).

26 Constitution of the Republic of Ghana (1992), Art. 267(6).

27 Constitution of Colombia (1991), Art. 357.

28 See generally, John Costenbader, *REDD+ Benefit Sharing: A Comparative Assessment of Three National Policy Approaches* (UN-REDD/FCPF, 2011).

29 Costa Rica's Forestry Act 7575 (1996), Art. 46.

30 *Ibid.*, Art. 3.

31 *Ibid.*, Art. 69.

transfer value in the market for logs.³² Under FONAFIFO, the National Payment for Environmental Services Programme has been active since 2011; this program has been responsible for a range of payment schemes, including for water.³³ A new REDD+ scheme is expected to sit alongside the payment for environmental services programme, following a bilateral agreement to purchase emission reductions by the FCPF's Carbon Fund (Letter of Intent signed September 10, 2013); and

- Viet Nam: Pursuant to the Law on Forest Protection and Development 2004, Decree 05/2008/ND-CP establishes the Forest Protection and Development Fund to protect and develop forests, raise awareness and responsibility towards forest protection, and build capacity and efficiency in forest management and utilisation.³⁴ Financing is provided by the Government, in addition to voluntary donations from international organisations, local and foreign organisations and individuals.³⁵ It is possible that this structure could form the basis for future REDD+ benefit sharing arrangements in the country. UN-REDD's *Viet Nam Phase II Programme: Operationalising REDD+ in Viet Nam* indicates that field research 'has defined viable approaches for how a payment system could work,' but benefit distribution 'requires further piloting based on actually implemented REDD+ activities.'³⁶

Statutes could be used to create various ways for stakeholders to access benefits from REDD+ implementation, with the potential to enhance transparency and provide regulatory certainty. Existing statutes could be used to facilitate certain models of REDD+ interventions (such as Costa Rica's FONAFIFO Fund) or as a model for the centralised disbursement of REDD+ finance (such as Viet Nam's Forest Protection and Development Fund). Investors might have greater confidence in established vehicles, with the added advantage that they could avoid the delays associated with enacting new legislation (depending on a country's unique processes). However, existing laws might not capture all legal requirements for appropriate REDD+ benefit sharing, meaning that additional regulations or a new law would be needed to create a consolidated approach.

(iii) Contracts and Benefit Sharing Arrangements

In the absence of clear legal frameworks for benefit sharing, and also in order to reflect the unique circumstances of a particular project, contractual arrangements have been used to determine benefit sharing arrangements at the project level. For example, as part of Wildlife Works' Kasigau Corridor REDD Project (Phase I: Rukinga Sanctuary, and Phase II: The Community Ranches), the Wildlife Works Carbon Trust (WWCT) has been established to distribute funds from these projects. The WWCT works in conjunction with several community-based committees (Locational Carbon Committees) and Community Based Organizations (CBOs). The Locational Carbon Committees are elected by community members and decide where the funds are allocated to provide 'in kind' benefits. Once a decision is made, funds flow directly to CBOs who oversee implementation of the projects approved by the WWCT. These arrangements are outlined in contracts between the different stakeholders.

Hybrid arrangements using contractual models already in use under a statutory regime can be utilised for the purposes of REDD+ implementation, as demonstrated by Cambodia's case. Existing regulations permitting community forestry agreements between the State and communities were adapted in order to implement REDD+ for a large, collaborative project in Oddar Meanchey province. Sub-decree No. 79 (2003) on Community Forestry Management provides for Community Forestry Agreements, which are written agreements between a community and the Government's Forestry Administration that grant rights to the community within a specified area to 'access, use, manage, protect and benefit from forest resources in a sustainable manner.'³⁷ This is an example of how a regulation authorises a particular division of revenue (and was applied to the circumstances of the REDD+ project in question), but the vehicle for distributing those benefits was actually a

32 Ibid., Art. 42.

33 FONAFIFO, *Crédito Forestal*, available on the Internet at <<http://www.fonafifo.go.cr/>> (last accessed on 26 February 2015).

34 Decree 05/2008/ND-CP (Socialist Republic of Viet Nam), Art. 3.

35 Ibid., Art. 9.

36 UN-REDD Programme, *UN-REDD Viet Nam Phase II Programme: Operationalising REDD+ in Viet Nam* (2013), at 122: Table 6.

37 Sub-Decree No. 79/2003 (Kingdom of Cambodia), Art. 5(3).

contract authorised under the existing community forestry regime. It should be noted, however, that communities seeking to rely on community forestry agreements under a similar REDD+ scenario in neighbouring Siem Reap province were unsure whether the existing provisions (which do not explicitly contemplate REDD+) were appropriate for REDD+ purposes, creating uncertainty regarding the longevity of any benefit sharing arrangements based upon them.³⁸

Contractual agreements are a tool to clarify the arrangements between different stakeholders involved in REDD+ implementation. They can include clauses to allocate responsibilities between different parties for various aspects of REDD+ implementation, to identify the ownership of emission reductions and other carbon and non-carbon benefits, to create formulae to allocate and share benefits and, importantly, to create dispute settlement procedures that should be followed in the event of any conflict between the parties. For the large scale implementation of REDD+, guidelines may be needed for the use of contracts in order to protect vulnerable stakeholders and support equitable benefit distribution. In addition, how existing community forestry agreements could be adapted for REDD+ implementation should be assessed and clarified before they are used for this purpose.

(iv) Land Rights and Benefit Sharing Arrangements

Clear land tenure and forest tenure are prerequisites for the effective implementation of REDD+ initia-

tives.³⁹ Unclear tenure can create confusion regarding who is responsible for forest conservation and who is entitled to benefits.⁴⁰ Clear tenure helps to ensure the long-term permanence of emission reductions and other environmental benefits because unclear or insecure tenure is a driver of land use change and deforestation. Clear tenure facilitates the allocation of benefits from REDD+ because communities with clear and secure property rights are more likely to access natural resources and benefits from REDD+ than those with unrecognised or highly limited rights.⁴¹ In addition, agreed tenure arrangements lower the potential for conflicts over benefits linked to forest resources.

Various types of benefits are linked to indigenous land rights, based upon the type of recognition these rights receive. Given that the financial benefits flowing from REDD+ are often linked to land and resource tenure, indigenous land claims can have an important impact on benefit sharing arrangements. Indigenous land rights can be recognised in different ways in national legal instruments, including constitutions and legislation – for example:

- In Brazil, usufruct rights for indigenous groups are provided for in Article 231 of the Constitution;
- In South Africa, Article 211 of the Constitution obliges the courts to apply customary law where applicable (subject to the Constitution and any legislation that deals with customary law), which is relevant in the context of indigenous rights claims; and
- Australia's Native Title Act 1993 (Cth) defines the content of indigenous rights, including their character as communal, group or individual rights in relation to land or water.

Depending on the approach taken, a right to use the resources of a forest may or may not allow rights to be transferred (leased or sold). For example, Brazil's Constitution recognises that indigenous groups have a right to permanent possession of lands that they traditionally occupy, as well as the exclusive rights to the resources of the soil, lakes and rivers within those lands.⁴² This approach can be contrasted with the Canadian example, where the Federal Government has entered into Comprehensive Land Claim Agreements (CLCAs)⁴³ that have been individually negotiated with relevant groups. These negotiated agreements have broad scope, ranging from the use of wildlife, mining rights, land tenure and self-gov-

38 Interviews conducted in Siem Reap province, Cambodia, by the Cambridge Centre for Climate Change Mitigation Research (December 2012).

39 Patrick Wieland, "Building Carbon Rights Infrastructure with REDD+ incentives: A multi-scale analysis in the Peruvian Amazon" 43 *Environmental Law Reporter* (2013), at 10275.

40 Ibid.

41 Crystal Davis, Ruth Nogueron, Peter Veit and Anne-Gaelle Javelle, *Analysis of Institutional Mechanisms for Sharing REDD+ Benefits: Property Rights and Resource Governance* (USAID, 2012), at 15.

42 Constitution of the Federal Republic of Brazil, Art. 231(2).

43 G'wich'in Comprehensive Land Claim Agreement, vol 1. (2007), available on the Internet at <http://www.ainc-in-ac.gc.ca/pr/agr/gwich/gwic/index_e.html> (last accessed on 26 February 2015); and, WB Henderson and DT Ground, "Survey of Aboriginal Land Claims", 26(1) *Ottawa Law Review* (1994), at 188.

ernment. A proportion of title has been assigned to most groups,⁴⁴ as well as compensation for lands ‘ceded’ to the State. It is possible that similar negotiated arrangements could be used in situations where land rights in an area targeted for REDD+ implementation are unclear or contested (for example, where the application of new law could affect the legal ownership and administration of land and where a transition period between the current situation and implementation of the new law could involve uncertainty).

Given that forest carbon is a newly recognised form of natural resource that will sit alongside existing tenure arrangements, it would be helpful for governments to clearly define who has the rights to carbon (options include vesting rights in the State, in land owners, in forest users, or creating a separate form of property right⁴⁵). This would provide greater certainty with respect to both the rights and responsibilities of different stakeholders – including indigenous groups.

c. Defining the Benefit Distribution Model

The intended approach by many countries to benefit distribution is being set out in policy documents, often referring to benefit sharing models that already exist in other forest management policies or forest utilisation models. For example, public fund structures can be used to disburse payments to different stakeholders; in a similar way, a community trust fund can be used at the local level (for example, the structure being used to distribute non-monetary benefits to communities involved in Wildlife Works’ initiatives in Kenya). Forest management policies based on forest concessions, Participatory Forest Management (PFM) and PES schemes also provide models for sharing benefits from forestry resources. Contracts between different stakeholders (whether communities, project developers or the State) can also be used to clarify benefit sharing arrangements, including the method of distributing benefits. In practical terms, the type of financial arrangements used for cash transfers and/or the eligibility criteria for ‘in kind’ benefits need to be considered in all contexts.

From a theoretical perspective, benefit sharing is often described as either ‘horizontal’ or ‘vertical.’ ‘Vertical’ distribution occurs between different institutional levels, such as transfers between a multilater-

al fund to a national government, and/or a national government to a subnational government. A fund structure could be used for this purpose or simply for financial allocations through grants, payments or loans. ‘Horizontal distribution’ refers to how benefits are distributed between participants at the local level, for example, between communities and/or between households. Legal vehicles used to distribute money ‘horizontally’ could be community trust funds or contracts (among others). Both ‘horizontal’ and ‘vertical’ benefit sharing could occur simultaneously in a REDD+ programme⁴⁶ (for example, a national fund distributes REDD+ finance vertically between different levels of government, and at the community level a ‘horizontal’ benefit sharing arrangement divides the allocated funds between households). Legal tools such as funds or contracts could be used to structure this (combination of) horizontal and/or vertical distribution. This distinction is particularly useful when considering complex benefit sharing arrangements (for example, the multiple mechanisms and levels at which benefit sharing arrangements under a country’s national programme are likely to operate). It also supports the proposition that a benefit sharing system is likely to be the sum of many different mechanisms.

d. Other Elements of Benefit Sharing to Support Accountability

Public participation can help to ensure accountability of REDD+ implementation to affected stakeholders, and transparency is important to ensure the integrity of REDD+ financial flows. As such, both are discussed below as important elements of a benefit sharing system.

(i) Public Participation

Benefit sharing issues are linked to participation issues⁴⁷ because they help to balance rights and in-

44 Ibid.

45 Wieland, “Building Carbon Rights Infrastructure”, *supra*, note 39, at 10274-5.

46 IUCN, *REDD-plus and Benefit Sharing* (December 2009), at 4, para. 1; and, Costenbader, *REDD+ Benefit Sharing*, *supra*, note 28, at 2, para. 2.

47 John Costenbader, “Benefit Sharing” Chapter 3 in Costenbader (ed.), *Legal Frameworks for REDD+: Design and Implementation*, *supra*, note 18, at 79, para. 2.

terests of different stakeholders. Participation includes both participation in REDD+ decision-making (including access to information), and participatory approaches to undertaking REDD+ activities.⁴⁸ In the context of REDD+, different entry points for stakeholder participation are:

- participation in the development of national strategies and action plans;
- participation in the preparation of regulatory instruments; and
- participation in decision-making regarding particular activities or projects, and/or with respect to the grant of rights and interests that affect the different stakeholders.

Participation can take different forms, for example: the ability to have access to information; the ability to make submissions (and the status that is given to those submissions – ie., whether it is required or optional for such submissions to be taken into account by regulators); representation on consultative bodies; and, the ability to legally challenge decisions made with respect to plans made or decisions taken by government. There are a number of different options available for undertaking consultation and engaging participants, including the following:

- mandating public admission to relevant meetings;
- implementing legally mandated consultations;
- establishing a permanent multi-stakeholder body;
- national legislation could identify the responsibility of national and local authorities in relation to access to information and participation rights⁴⁹;
- laws could identify the types of REDD+ related information that is freely accessible, and clearly establish relevant responsibilities, rights and procedures to guarantee such access⁵⁰; and
- legislation could establish overarching principles so that consultations are representative of indigenous people, including women and young people.⁵¹

Acknowledging the importance of participation, the Cancun safeguards⁵² ask States to ensure “the full and effective participation of relevant stakeholders, in particular indigenous peoples and local communities.”⁵³ The Cancun safeguards request that States promote and support “respect for the rights of indigenous peoples and members of local communities,” asking them to take note of the United Nations Dec-

48 Elisa Morgera, “Participation, Balancing of Rights and Interests, and Prior Informed Consent” Chapter 2 in John Costenbader (ed.), *Legal Frameworks for REDD+: Design and Implementation at the National Level*, supra, note 18, at 35, para. 3.

49 Francesca Robles, *Legal analysis of cross-cutting issues for REDD+ implementation: lessons learned from Mexico, Viet Nam and Zambia*, UN-REDD Programme (2013), at 20.

50 Morgera, “Participation, Balancing of Rights and Interests, and Prior Informed Consent” Chapter 2 in John Costenbader (ed.), *Legal Frameworks for REDD+: Design and Implementation at the National Level*, supra, note 18, at 50.

51 *Ibid.*, at 52-53.

52 The “Cancun safeguards” are a set of policies and measures outlined in the Cancun decisions intended to guard against negative social or environmental impacts that REDD+ may entail. See UNFCCC, *The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention*, Decision 1/CP.16, FCCC/CP/2010/7/Add.1. Cancun Agreements, paragraph 70: Encourages developing country Parties to contribute to mitigation actions in the forest sector by undertaking the following activities, as deemed appropriate by each Party and in accordance with their respective capabilities and national circumstances: (a) Reducing emissions from deforestation; (b) Reducing emissions from forest degradation; (c) Conservation of forest carbon stocks; (d) Sustainable management of forests; (e) Enhancement of forest carbon stocks. Paragraph 69 states that the implementation of the activities referred to in paragraph 70 should be carried out in accordance with Appendix I to this decision [see below], and that the safeguards referred to in paragraph 2 of Appendix I to this

decision should be promoted and supported. *Appendix I: Paragraph 2. When undertaking the activities referred to in paragraph 70 of this decision*, the safeguards [outlined in paragraph 2] should be promoted and supported:

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

53 *Ibid.* Cancun safeguard (d) (Appendix 1, 1d).

laration on the Rights of Indigenous Peoples⁵⁴ (UNDRIP). UNDRIP references ‘free, prior and informed consent’ in several contexts,⁵⁵ including with respect to obtaining approval for projects which can affect land and resource use.⁵⁶ FPIC is considered to be an important part of stakeholder engagement, as identified by both UN-REDD and the FCPF in their guidelines on stakeholder engagement⁵⁷ and further elaborated by their specific guidelines on FPIC.⁵⁸ In addition to being emphasised in the emerging UN-FCCC framework for REDD+, principles for public participation (including for FPIC) can be found in different standards used to assess REDD+ implementation. In order to comply with both the UNFCCC requirements and other guidance, countries can choose to include and/or strengthen existing public participation regulations as part of their REDD+ legal frameworks.

(ii) Transparency

Several of the developing countries targeted by REDD+ because of high deforestation (whether actu-

al or predicted) also experience governance challenges, making them especially vulnerable to corruption.⁵⁹ The United Nations Development Programme (UNDP) defines corruption as the ‘misuse of entrusted power for private gain,’⁶⁰ recognising that it exists in a number of different forms⁶¹ and could influence the success of REDD+ implementation.⁶² A country’s existing anti-corruption framework could therefore play an important role in REDD+ implementation.

With respect to benefit sharing, anti-corruption measures are important because they can support stakeholder participation, in terms of both access to information and legitimate/inclusive decision-making processes surrounding REDD+ design and implementation. In addition, existing anti-corruption rules can play a role in creating incentives for stakeholders to participate in REDD+ due to increased confidence in the system to deliver benefits and outcomes. Many countries already have anti-corruption frameworks and these can be explored as a basis to support REDD+ implementation and benefit sharing arrangements, providing a good example of how a

54 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution adopted by the General Assembly*, 2 October 2007, A/RES/61/295. This is a resolution of the United Nations’ General Assembly; as such, it does not impose binding obligations on its signatories but rather provides guidance with respect to State relations with indigenous peoples.

55 References to free, prior and informed consent within the text of UNDRIP include: Art. 10 regarding relocation; Art. 11(2) regarding access to grievance mechanisms regarding cultural, intellectual, religious and spiritual property; Art. 19 regarding consultation with respect to law-making and administration; Art. 28(1) regarding redress with respect to dispossession of lands and resources; Art. 29(2) regarding use of land for disposal of hazardous materials; Art. 32(2) regarding the approval of projects that will affect land and resources.

56 Art. 32: 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources; 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources; 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

57 UN-REDD/FCPF, *Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities*, 20 April 2012 (revision of 25 March 2012 version).

58 UN-REDD Programme, *Guidelines on Free, Prior and Informed Consent* (January 2013).

59 Peter Bofin et al., *REDD Integrity: Addressing Governance and Corruption Challenges in Schemes for Reducing Emissions from*

Deforestation and Forest Degradation (U4 Report No. 1, U4 Anti-Corruption Resource Centre et al, 2011), see especially at 6: Table 1.

60 Estelle Fach and Anga Timilsina (eds.), *Staying on Track: Tackling Corruption Risks in Climate Change* (United Nations Development Program, Nairobi, Kenya 2011), at 27.

61 *Ibid.*, at 27. Bribery refers to the act of offering someone money, services or other inducement to persuade him or her to do something in return. Bribes can also be referred to as kickbacks, hush money or protection money. Cronyism refers to the favourable treatment of friends and associates in the distribution of resources and positions, regardless of their objective qualification. Embezzlement is the misappropriation of property of funds legally entrusted to someone in their formal position as an agent or guardian. Extortion is the unlawful demand or receipt of property, money or sensitive information to induce cooperation through the use of force or threat. Fraud refers to an intentional misrepresentation, which is done to obtain an unfair advantage by giving or receiving false or misleading information. Grand corruption involves bribery or the embezzlement of huge sums of money by those at the highest levels of government. Nepotism is a form of favouritism that involves family relationships; its most usual form is when a person exploits his or her own power and authority to procure jobs or other favours for relatives. Patronage refers to the support or sponsorship by a patron (a wealthy or influential guardian) to make appointments to government, provide jobs or to distribute contracts for work. Petty corruption, also called bureaucratic corruption, involves low-level contracts between citizens, businesses and officials and generally takes place where public policies are being implemented. Political corruption is the misuse of political power for private gain for preserving or strengthening power for personal enrichment, or both. State capture is where the State is held captive to the actions of individuals, groups or firms that influence the formation of laws, rules and regulations to serve their own private interests.

62 *Ibid.*, at 31.

country's existing law can be used for the purposes of implementing REDD+.

III. Conclusion

Irrespective of a country's REDD+ policy choices (such as the scale of implementation or the specific types of REDD+ interventions that will be permitted), certain legal considerations must be addressed in order to construct an effective benefit sharing system for REDD+. In summary, the different legal elements of REDD+ benefit sharing structures are:

- the definition of the benefits from REDD+, whether carbon or non-carbon;
- the allocation of benefits, including the identification of the beneficiaries;
- the method of distributing benefits to eligible beneficiaries; and
- measures to support the accountability of the benefit sharing system, including (i) the provision of

participation rights for different stakeholders (including the protection of vulnerable stakeholders and marginalised groups), and (ii) transparency measures, which could be linked to existing anti-corruption work.

Countries might be able to build on existing legal frameworks in order to create effective benefit sharing systems, but it is likely that issues specific to REDD+ will need to be explicitly addressed. At a minimum, the relationship between existing law and REDD+ benefit sharing arrangements will need to be clarified. The different structural elements of benefit sharing discussed in this paper provide useful entry points for identifying relevant issues, assessing the extent to which existing laws can be used to support benefit sharing arrangements under REDD+, and assessing the gaps in existing law. Careful consideration of these issues will ultimately contribute to the development of robust benefit sharing arrangements to serve a country's REDD+ strategy.