

BENELEX Working Paper No. 25

Constructing a norm of benefit-sharing in climate finance

Kim Bouwer

This paper is part of the project “BENELEX: Benefit-sharing for an equitable transition to the green economy - the role of law,” which is funded by the European Research Council Starting Grant (November 2013-October 2018) - Grant Number: 335592:
<http://www.strath.ac.uk/research/strathclydecentreenvironmentallawgovernance/ourwork/research/BENELEXproject/>.



Abstract

This article examines fair and equitable benefit-sharing in the context of climate finance. Benefit-sharing and climate finance are both complex, heterogeneous and fast-developing fields. Yet despite the increasing use of benefit-sharing in climate change, it lacks clear conceptualisation. After explaining the subject matter and the intersection between them, the article seeks to establish what benefit-sharing does or might mean in climate finance, and questions the content and value of universalised norms in this context.

1. Introduction

This article examines fair and equitable benefit-sharing in the context of climate finance law. It approaches this by examining benefit-sharing obligations and practices in relation to project-based finance dispensed through the ‘climate funds’ (as defined below). It takes a constructivist approach towards the concept of benefit-sharing in climate law, borrowing critically from the jurisprudence in other areas of environmental law, to inform this concept. The broad rationale for this approach is as follows: although benefit-sharing has potential to support just and equitable outcomes in climate change responses, it remains undertheorised. While not claiming to have all the answers, this article tentatively suggests that more conceptual clarity, clear norms and effective engagement structures could support better actualisation of benefit-sharing in this context.

With its most significant articulation in international biodiversity law, benefit-sharing arrangements can be and are used means to compensate, reward and involve various sets of stakeholders in climate change adaptation and mitigation activities at the national and subnational levels.¹ Benefit-sharing is deployed across the climate

** The preparation of this article was financially supported with a grant (number 335592) from the European Research Council under the Benelex Project, run out of Strathclyde Centre for Law and Environmental Governance. It has been generously reviewed by the other members of the Benelex Team, and its board of advisors. Annalisa Savaresi, Kati Kulovesi, and Maria Manguiat provided helpful comments on earlier versions. Earlier versions and parts of the paper were presented at the Society of Legal Scholars Conference at University College Dublin in September 2017, the BeneLex Final Project Meeting, Ross Priory, Scotland, in June 2018, the IUCN-AEL Symposium at

change landscape to support reallocation of advantages derived from climate change *responses*.² In theory, benefit-sharing could be employed to ‘carve out’ spaces for justice and equity in the climate regime, being used to specifically engineer more positive and equitable outcomes, where climate change responses could embed or worsen existing patterns of inequity. Benefit-sharing arrangements could contribute in ensuring that the advantages generated by the responses to climate change are allocated in a fair and just manner.³ Benefit-sharing is not explicitly mentioned in any core climate change treaties, but as shall be explored in more depth below, it could be read in as a requirement in a number of ways, most specifically through the explicit protection of human rights and protection of the vulnerable.

Simultaneously, the adoption of the Paris Agreement and the introduction of common but differentiated climate commitments to all parties, has brought the issue of climate finance into sharp focus.⁴ This makes the provision of climate finance is a developed country obligation.⁵ The introduction of common obligations for *all* member states to take (differentiated) climate action has increased the relevance and importance of climate finance in the climate change regime. For now, supply, sources and sufficiency of, and now transparency in, climate finance dominate the global conversation.⁶ Where this relates to questions of justice and equity, this tends to address broader questions around ethical responsibility and burden sharing. And although there is increasing attention on human rights impacts at the recipient end of

University of Strathclyde, Glasgow in July 2018, and the Max Weber Fellows’ Law Writers’ Group, European University Institute, Florence, in January 2019. I am grateful to all present for their interest and helpful comments.

¹ Annalisa Savaresi, ‘The Emergence of Benefit-Sharing under the Climate Regime: A Preliminary Exploration and Research Agenda’ University of Edinburgh School of Law Research Paper Series No 2014/43.

² Savaresi, ‘The Emergence of Benefit-Sharing under the Climate Regime: A Preliminary Exploration and Research Agenda’ (n 1). Although it should be recognised that these arise in relation to activities that contribute to climate change as well, such as oil and gas extraction: see generally Lila Barrera-Hernández and others (eds), *Sharing the Costs and Benefits of Energy and Resource Activity* (OUP 2016).

³ Annalisa Savaresi and Kim Bouwer, ‘Equity and Justice in Climate Change Law and Policy: A Role for Benefit-Sharing’, *Routledge Handbook on Climate Justice* (2018).

⁴ Climate finance was both determinative of, changed by and is crucial to the implementation of the Paris Agreement – see e.g. Jorge Gastelumendi and Inke Gnittke, ‘Finance (Article 9)’ in Daniel Klein and others (eds), *The Paris Agreement on Climate Change* (OUP 2017).

⁵ Paris Agreement (FCCC/CP/2015/L9/Rev1). Article 9

⁶ E.g. Yulia Yamineva and Kati Kulovesi, ‘The New Framework for Climate Finance Under the United Nations Framework Convention on Climate Change: A Breakthrough or an Empty Promise?’ in Erkki J Hollo, Kati Kulovesi and Michael Mehling (eds), *Climate Change and the Law* (Springer Netherlands 2013).

climate finance,⁷ relevant issues will have been discussed in an oblique manner elsewhere,⁸ very little attention has been paid to benefit-sharing in climate finance per se.⁹ The prospect (or hope) of a considerable upswing in climate finance means that urgent thought needs to be given to these issues, to ensure that mechanisms in climate finance support rather than undermine the achievement of justice and fairness in national implementation of the obligations enshrined in the international climate change regime.

This of course raises the broader question of this article, which is the extent to which benefit-sharing is an existing or emerging norm in international climate law and international law of climate finance; and, if it is, what the content of that norm is, and whether and to what extent universalised norms on benefit-sharing apply, whether benefit-sharing in climate finance is something distinct, or whether it should be subject to ad hoc practice. To answer these questions the article discusses the obligations adopted by the climate funds as a logical starting point for a discussion of benefit-sharing in climate finance. It considers international law and practice on benefit-sharing, taking a constructivist approach in questioning how benefit-sharing norms would look in the context.¹⁰ And the context is very specific: because the climate funds seek to employ benefit-sharing in relation to projects in (what would usually be) developing countries, which are not 'state-to-state' matters. As such, the article considers international norms largely applied through host states, intermediary bodies and their accredited entities, and as such, indirect application of relevant norms. This raises further questions about particularity and specific practice in those contexts, in addition to further questions about regime interaction flagged above. These are expanded further throughout.

⁷ See e.g. Wolfgang Obergassel and others, 'Human Rights and the Clean Development Mechanism: Lessons Learned from Three Case Studies' (2017) 8 *Journal of Human Rights and the Environment* 51.

⁸ For instance, there are many studies of benefit-sharing in renewable energy projects which focus on the energy justice aspects of the arrangements, but do not frame these as climate finance issues – see e.g. Ara Azad and Ava Azad, 'Energy Justice, Climate Justice, and Financing Innovation' in Randall Abate (ed), *Climate Justice* (Environmental Law Institute 2016).

⁹ Although see Savaresi, 'The Emergence of Benefit-Sharing under the Climate Regime: A Preliminary Exploration and Research Agenda' (n 1).

¹⁰ On constructivism see Jutta Brunnée and Stephen J Toope, 'Constructivism and International Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012), and sources cited therein.

There are several things this paper does not do and does not claim to do. First, regarding methodology, there is much to be gained by sociological evaluation of the efficacy and equity of benefit-sharing arrangements or other participatory processes in a variety of contexts, but this is a different project to the one undertaken here. A modest textual review was conducted as a scoping exercise.

Second, the focus is very narrowly on the potential to achieve equity and justice within climate responses,¹¹ and specifically in relation to benefit-sharing. The efficiency of these projects (both financially and in terms of climate goals) are and should be, of course, of importance to the relevant decision making bodies, but this is beyond the scope of the article.¹² Third, the article does not directly consider the offset mechanisms established under Kyoto Protocol, specifically the Clean Development Mechanism and emission trading schemes,¹³ the specific financing arrangements made under REDD+,¹⁴ or any arrangements being contemplated under Article 6 of the Paris Agreement. These result in financial flows that broadly could be called 'climate finance', but they are governed by specific instruments and require consideration on their own merits.¹⁵ I have used some of the critical literature about these mechanisms to inform my analysis and understanding.¹⁶

The article has five sections. The second section questions the status of the norm of benefit-sharing in international climate finance law, questioning both whether a norm exists, whether one should exist and whether it should be distinct. The third draws a

¹¹ More generally see Friedrich Soltau, *Fairness International Climate Change Law and Policy / Environmental Law* (CUP 2009).

¹² It should be possible to do both. See however e.g. Tomilola Eni-ibukun, 'Climate Justice: The Clean Development Mechanism as a Case Study' in Erkki J Hollo, Kati Kulovesi and Michael Mehling (eds), *Climate Change and the Law* (Springer Netherlands 2013). In addition, I have approached this topic as an environmental lawyer with an interest in equity and justice; a finance or corporate lawyer, a development expert or a human rights lawyer may have treated this subject very differently.

¹³ Article 12 Kyoto Protocol. Although see Savaresi, 'The Emergence of Benefit-Sharing under the Climate Regime: A Preliminary Exploration and Research Agenda' (n 1), 8-10.

¹⁴ There is extensive literature about benefit-sharing in REDD+. See Savaresi and Bouwer (n 3), Section 3(a); Cecilia Luttrell and others, 'Who Should Benefit from REDD+? Rationales and Realities' (2013) 18 *Ecology and Society* 52; Kathleen Birrell and Lee Godden, 'Benefits and Sharing: Realizing Rights in REDD+' (2018) 9 *Journal of Human Rights and the Environment* 6; Grace Yee Wong and others, 'An Assessment Framework for Benefit Sharing Mechanisms to Reduce Emissions from Deforestation and Forest Degradation within a Forest Policy Mix' (2017) 27 *Environmental Policy and Governance* 436; Sophie Chapman, Martijn Wilder and Ilona Miller, 'Defining the Legal Elements of Benefit Sharing in the Context of REDD+' (2014) 4 *Carbon and Climate Law Review* 270.

¹⁵ Eni-ibukun (n 12).

¹⁶ Most significantly Damilola Olawuyi, *The Human Rights-Based Approach to Carbon Finance* (Cambridge University Press 2016).

picture of climate finance for the purpose of this paper, and explain where benefit-sharing obligations already exist in the climate funds. The fourth section draws on the jurisprudence discussed in the first section to suggest what a developed norm of climate finance might look like, seeking to illustrate where existing practices are helpful, where distinctions need to be made, and where difficulties could be anticipated. The fifth section concludes.

2. Benefit Sharing

2.1 Benefit-sharing in international environmental and human rights law

Benefit-sharing as a concept developed in its most significant expression in international biodiversity law - where it developed as a tool for justice and equity to distribute the benefits and burdens accrued in cases of bio-prospecting (research and innovation based on genetic resources) – and the international human rights protection of indigenous peoples. Benefit-sharing was developed to ensure that indigenous peoples or local communities with a legal or moral stake in the exploitation of their land, property or traditional knowledge, have established rights to share in the benefits derived from these processes. As discussed further herein, benefit-sharing obligations are now used quite widely, but some examples include: as a mechanism to share profits in circumstances where indigenous traditional knowledge is exploited commercially,¹⁷ or to ensure local community access to employment and shareholding opportunities in mining or other extractive industries.¹⁸

Benefit-sharing obligations are becoming progressively ubiquitous in international human rights and environmental law, despite some confusion about regime integration and coherence of benefit-sharing as a concept, and despite a fairly mixed track-record in achieving the equity and justice which are the purported aim of these arrangements. In this section, I explore some questions about the status and

¹⁷ For example, discussed in Saskia Vermeylen, 'Contextualizing "Fair" and "Equitable": The San's Reflections on the Hoodia Benefit-Sharing Agreement' (2007) 12 *Local Environment* 423.

¹⁸ Hanri Mostert and others, 'Corporate Social Responsibility in the Mining Industries of Namibia, South Africa, and Zambia: Choices and Consequences' in Lila Barrera-Hernández and others (eds), *Sharing the Costs and Benefits of Energy and Resource Activity* (OUP 2016).

integration of benefit-sharing in international climate law, questioning whether this is even desirable or helpful. Space does not permit a full elaboration of how benefit-sharing across respective regimes,¹⁹ but Section Four fleshes out the possible *content* of a norm of benefit-sharing in climate finance relying heavily on the jurisprudence referenced herein.

Benefit-sharing is now a positive obligation in some areas of international environmental and human rights law. The most developed and well-accepted articulation of benefit-sharing as it reflects the rights of indigenous peoples in international law, appears in environmental law, and in particular under the Convention for Biological Diversity. The CBD specifies the rights of indigenous people to benefit-sharing in relation to the use of their traditional knowledge, innovations and practices in cases of nature conservation and biosprospecting.²⁰ The CBD formulation of benefit-sharing can be considered strongly authoritative; it is well-developed through ancillary instruments, specifically the Nagoya Protocol,²¹ and the recent Akwe:Kon Guidelines on environmental and socio-cultural assessments, and Mo'otz Kuxtal Voluntary Guidelines on consent and benefit-sharing from the use of traditional knowledge, which provide detail and support on the implementation of benefit-sharing under the Nagoya Protocol.²² The CBD has high levels of participation and ratification, entailing high levels of consensus. In this context CBD can be considered complimentary to international human rights, and *arguably* other international regimes for the protection of the environment. On the other hand, the vague and voluntary nature of the more recent Guidelines, can be seen as an active

¹⁹ See Elisa Morgera, 'Under the Radar: The Role of Fair and Equitable Benefit-Sharing in Protecting and Realising Human Rights Connected to Natural Resources' (2019) 7 The International Journal of Human Rights 1098 for a fuller description.

²⁰ Convention on Biological Diversity (CBD) 1992, 1760 UNTS 79, Article 8(j) States shall respect, preserve and maintain [...] practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, [...] and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

²¹ Specifically, 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, of October 29, 2010, the objective of which is the promotion of benefit-sharing arising from the use of natural resources.

²² Although notably the application and implementation of the Nagoya Protocol has been criticised quite heavily in the Global South. See Jorge Cabrera Medaglia, 'Access and Benefit-Sharing: North-South Challenges in Implementing the Convention on Biological Diversity and Its Nagoya Protocol' in Shawkat Alam and others (eds), *International Environmental Law and the Global South* (2015); Kanchana Kariyawasam and Matthew Tsai, 'Access to Genetic Resources and Benefit Sharing: Implications of Nagoya Protocol on Providers and Users' (2018) 21 The Journal of World Intellectual Property 289.

attempt by CBD parties to limit the international law making implications of some of these instruments.²³

Most recently benefit-sharing was included as a Framework Principle (FP) (one of the main human rights obligations in the environmental context) in the final report of the UN Special Rapporteur on Human Rights and the Environment Professor John Knox,²⁴ the culmination of a lengthy examination of the inter-relationships between the protection of the environment and respect for human rights. The inclusion of benefit-sharing in a FP reflects its unassailable status as a principle of international human rights law, as reflected particularly in treaties protecting the human rights of indigenous peoples. The treaty recognition of benefit-sharing in international human rights law, specifically under the ILO Convention 169,²⁵ and benefit-sharing has been applied directly or read in as an obligation in decisions of the Inter-American Court on Human Rights.²⁶ The FPs are not meant to create new obligations, but can be considered a strongly authoritative statement reflecting actual or emerging law. Professor Knox specified that the principles reflect 'minimum standards' of protection, should be seen as best practice, and either reflect existing law or should be formally adopted as norms expeditiously.²⁷ While it was accepted that not all states had ratified the underlying treaties, these were considered sufficiently broadly accepted by international bodies, and reflected in state practice, to constitute established norms.²⁸ FP 15 requires states to ensure the fair and equitable sharing

²³ Elisa Morgera, 'Dawn of a New Day? The Evolving Relationship between the Convention on Biological Diversity and International Human Rights Law' (2018) 53 Wake Forest Law Review 101, 119.

²⁴ John Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (UN General Assembly 2018) A/HRC/37/59 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/017/29/PDF/G1801729.pdf?OpenElement>> accessed 8 July 2019.

²⁵ International Labour Organisation Indigenous and Tribal Peoples Convention, 1989 (No. 169) Convention concerning Indigenous and Tribal Peoples in Independent Countries, Article 15 specifies as follows: 1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources. 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

²⁶ For instance, the *Case of the Kalina & Lokono Peoples v Suriname* Merits Reparations and Costs, Judgment, Inter-Am Ct. H.R. No 309 (Nov 25, 2015)

²⁷ Knox (n 27), paras 8-9.

²⁸ Knox (n 27), para 9.

of benefits with indigenous peoples or traditional communities, in relation to their lands, territories and resources.²⁹ The FPs expand further on the understanding of what benefit-sharing should entail, particularly regarding the need for early and proper consultation,³⁰ just and fair redress for harm,³¹ and free, prior and informed consent.³² and does not represent authoritative treaty interpretation.³³

It is notable that despite these strong authoritative statements supporting benefit-sharing in international human rights law, Professor Knox relied heavily on the CBD and associated guidance to flesh out the details of what is required for fair and equitable benefit-sharing. Specifically the jurisprudence of the In-Am Court favours relying on guidance adopted under the Convention on Biological Diversity to support understandings of benefit-sharing in human rights and natural resources law.³⁴ This makes sense when the obligations on benefit-sharing in human rights law are subjected to further examination – in the whole they are quite abstract, and yield little guidance in terms of implementation or practical application.³⁵ This is probably reflected in Professor Knox's careful framing of benefit-sharing as an 'emerging' principle of international law. Accordingly at best much of the more developed guidance on the *implementation* of benefit-sharing arrangements reflects best practice.

Benefit-sharing arrangements also appear in connection with the exploitation and measures for the conservation of natural resources such as water,³⁶ in agriculture,³⁷

²⁹ Knox (n 27), Principle 15, para (d). FP 15 protects the rights of indigenous people and traditional communities, and further emphasises the need to respect their rights and interests, the importance of free, prior and informed consent being obtained through consultation when their rights are affected, and emphasising the importance of respecting their traditional knowledge and practices.

³⁰ Knox (n 27), FP 9.

³¹ Knox (n 27), para 51 - 53.

³² Knox (n 27), FP 15(b).

³³ Morgera, 'Dawn of a New Day? The Evolving Relationship between the Convention on Biological Diversity and International Human Rights Law' (n 26).

³⁴ *ibid*, 193. Also see Morgera, 'Under the Radar: The Role of Fair and Equitable Benefit-Sharing in Protecting and Realising Human Rights Connected to Natural Resources' (n 19).

³⁵ Morgera, 'Under the Radar: The Role of Fair and Equitable Benefit-Sharing in Protecting and Realising Human Rights Connected to Natural Resources' (n 19).

³⁶ Ramsar Convention on Wetlands of International Importance, Resolution X.19: Wetlands and River Basin Management: Consolidated Scientific and Technical Guidance (2008), Annex, para. 25.

³⁷ Food and Agriculture Organization (FAO), Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT), UN Doc. CL 144/9 (C 2013/20) (2012), Appendix D, Art. 8.6

as well all kinds of energy projects and in connection with extractive activities.³⁸ While these frameworks do reflect fairly bald benefit-sharing requirements, in practice these obligations are deployed in a variety of contexts and circumstances, which may be different to the approach taken under the CBD. For instance, these may in some cases be determined by requirements embedded in national or international law, or by voluntary guidelines adopted by national and subnational governments, contracts, or corporate standards or practice. As such, a fairly messy picture emerges, it can be difficult to establish with certainty what benefit-sharing is taken to mean in all the contexts where it is used, or indeed if there is any sectoral consistency at all.

2.2. Benefit sharing in the climate regime

Regarding climate change, benefit-sharing arrangements have been deployed in both climate change adaptation and mitigation *responses* over the years,³⁹ most significantly to support the provision of social safeguards in relation to the sustainable use and preservation of forests, under REDD+.⁴⁰ However on the whole the approach to benefit-sharing in climate change law more closely resembles human rights protection, most likely because it has most commonly been used to counter the impacts of climate responses, rather than empowering participation.⁴¹ However, actualising a human rights based approach in this context would require significant improvements both substantively and procedurally.⁴² Certainly express provision for benefit-sharing is made in relation to climate finance, as discussed in more detail in Section Three, and appear on an *ad hoc* basis in various private or domestic instruments in relation to various climate response measures. The conceptualisation and formulation of benefit-sharing arrangements in each instance remains be fairly context-specific.

³⁸ See Barrera-Hernández and others (n 2).

³⁹ Savaresi and Bouwer (n 3). Also see discussion below.

⁴⁰ Decision 1/CP.16, Cancún Agreements, UN Doc FCCC/CP/2010/7/Add.1, Appendix I, para. 2. These are not expressly required but routinely used, see Wong and others (n 14).

⁴¹ Savaresi, 'The Emergence of Benefit-Sharing under the Climate Regime: A Preliminary Exploration and Research Agenda' (n 1), 15.

⁴² Olawuyi, for instance, motivates strongly to increase the efficacy of human rights protections in funded carbon projects - (n 16). A central tenet of this monograph is that additional human rights protection is *required* in relation to carbon projects, and that additional protections and mechanisms are required in order to actualise these. See in particular Chapter 6.

There are no express provisions on benefit-sharing in the climate treaties. However, it is possible tentatively to read in benefit-sharing as required due to the other treaty protections, and in particular references to human rights, outlined below. The absence of a conflict clause in the UNFCCC can be understood to mandate harmonious interpretations of the human rights and climate regimes. 'As there is no intrinsic priority of one set of obligations over the other, when faced with implementation conflicts, obligations under the UNFCCC should be interpreted in such a way as to support, rather than conflict with, human rights.'⁴³

The inclusion of human rights is celebrated as a triumph of the Paris Agreement,⁴⁴ but even prior to this, the Framework Agreement does 'echo concerns closely aligned with human rights obligations – from a recognition of the central role of the principle of equity, to need to acknowledge the vulnerability of specific groups, or to references to ... public participation.'⁴⁵ The Cancun Agreements require respect for human rights in relation to all climate change responses,⁴⁶ which supported the introduction of social and environmental safeguards under REDD+.⁴⁷ There is also emphasis on human rights and protection of the vulnerable in the Paris Agreement (PA),⁴⁸ both in the express inclusions of human rights references, but also arguably in an understanding of human rights issues and the 'relevance of human rights norms' in the climate regime.⁴⁹ Specifically, the preambular paragraphs to the PA require parties to, '...when taking action to address climate change, respect, promote and consider their respective obligations on human rights', specifying specific situations including the rights of indigenous peoples, local communities, 'people in vulnerable situations' and in relation to the right to development. Both the fairly watery wording, and the position of these provisions in the treaty, suggest that the

⁴³ Savaresi, 'The Emergence of Benefit-Sharing under the Climate Regime: A Preliminary Exploration and Research Agenda' (n 1), 16.

⁴⁴ Daniel Klein and others (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press 2017), 114 - 117.

⁴⁵ Sébastien Duyck, 'Delivering on the Paris Promises? Review of the Paris Agreement's Implementing Guidelines from a Human Rights Perspective' (2019) 9 *Climate Law* 202, 204. Also see the discussion in Section 2.1.

⁴⁶ Decision 1/CP.16 The Cancun Agreements 2011 (FCCC/CP/2010/7/Add1), para 8.

⁴⁷ Savaresi and Bouwer (n 3), Section 3(a).

⁴⁸ Paris Agreement.

⁴⁹ Duyck (n 48), 207.

usefulness and authority of these provisions may be somewhat circumscribed.⁵⁰ Article 12 of the PA emphasises the importance of procedural rights, requiring co-operation in relation to various measures including ‘...public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under this Agreement.’⁵¹ Thus the PA does not itself create human rights obligations, and these references could be seen as asserting the importance of the protection of human rights even in the face of the climate challenge.⁵²

At the time of writing, Parties to the PA have just concluded the negotiation of the Paris ‘Rulebook’, which specifies modalities, procedures and guidelines, the mechanisms for increased transparency and accountability, as well as implementation and compliance, under the PA.⁵³ The purpose of the enhanced transparency processes under the PA is the maintenance of trust and openness between member states, vital for the maintenance of ambition and continued co-operation of all parties.⁵⁴ The Rulebook did not fulfil the hopes of some that a strongly ‘rights-based’ implementation package would follow.⁵⁵ This does not mean that the door is closed in this regard; of course the provisions in the PA carry weight, and the implementation package is worded in a strongly procedural way, without reference to rights, justice, or equity.

Despite this, there are some provisions in the Rulebook that could be seen as supportive of the inclusion of human-rights based protections, including benefit-sharing. The Rulebook reiterates the recognition that the implementation of climate responses (which would include projects funded with climate finance) can have an impact, noting that ‘...Parties may be affected not only by climate change but also by

⁵⁰ Alan Boyle, ‘CLIMATE CHANGE, THE PARIS AGREEMENT AND HUMAN RIGHTS’ (2018) 67 *International & Comparative Law Quarterly* 759, 769 - 770.

⁵¹ Paris Agreement, Article 12.

⁵² Annalisa Savaresi and Joanne Scott, ‘Implementing the Paris Agreement: Lessons from the Global Human Rights Regime’ (2019) 9 *Climate Law* 159 and the SI generally.

⁵³ FCCC/PA/CMA/2018/3/Add.2 (2018)

⁵⁴ See for example Feja Lesniewska and Linda Siegele, ‘The Talanoa Dialogue: A Crucible to Spur Ambitious Global Climate Action to Stay Within the 1.5°C Limit’ (2018) 12 *Carbon & Climate Law Review* 41.

⁵⁵ Duyck (n 48).

the impacts of the measures taken in response to it...'.⁵⁶ It also establishes a forum on the impact of climate responses,⁵⁷ This reflects the recognition that climate change responses must not exacerbate existing inequalities, or arguably be contrary to existing human rights protections. The modalities and procedures of the said forum include the promotion of '...action to minimize the adverse impacts and maximize the positive impacts of the implementation of response measures....'⁵⁸ This could be interpreted to include proactive safeguards to ensure fair distribution of the advantages and disadvantages of climate action.

Finally, although not specific to the Rulebook, there is improved recognition for the role of indigenous people and local communities (IPLC). An Indigenous People's and Local Communities Platform was created to strengthen the knowledge, practices and efforts of IPLC in responding to climate change, which emphasises the sharing and strengthening of knowledge and the enhancement of engagement in the overall UNFCCC process.⁵⁹ The need to engage with and seek the contribution of IPLC in the formulation and implementation as well as national adaptation plans, and to actively seek their participation in relation to adaptation planning, is also expressly recognised.⁶⁰ While this inclusion emphasises the importance of the broader contribution IPLC can make in relation to climate change, the strengthening of their status and specific emphasis on their involvement to be 'in accordance with international law' reflects the importance of indigenous people's rights and interests to be reflected in the climate regime.

2.3 Questions of fragmentation or universalisation

This resonates with broader questions about fragmentation and universalisation in international environmental law. Benefit-sharing appears as a emerging norm of international law as it protects the rights of indigenous peoples and local

⁵⁶ Decision 7/CP.24, preambular paragraphs

⁵⁷ Decision 7/CMA.1.

⁵⁸ Annex to Decision 7/CMA.1, para 1(f)

⁵⁹ Decision 2/CP.23, 'Local Communities and Indigenous Peoples' Platform', FCCC/CP/2017/11/Add.1 (2017), preamble and para. 6(c)

⁶⁰ Decision 8/CP.24, Article 12; Decision 9/CP.24 Article 8.

communities in specifically defined contexts, in circumstances where high consensus supports its legal significance, and there is strong authority that supports the integration of benefit-sharing across regimes to resemble the application of benefit-sharing under the CBD (discussed above). Strong arguments can be made for defined universal norms, not least in order to establish coherence in the use of such arrangements, and to ensure that gains in some areas are not lost in others.⁶¹ It is valuable to extract (or propose) key normative concepts from specific cross-sectorial practices to provide headline guidance for the development of benefit-sharing arrangements in different contexts.⁶² This article attempts this in the fourth section.

On the other hand, similarly strong arguments can be made that some fragmentation in international environmental law might be desirable, because this allows for flexibility and responsiveness in specific and complex areas.⁶³ For instance, while the CBD regime does provide the most detailed guidance on the implementation of benefit-sharing arrangements, these are not immune to criticism in their own context,⁶⁴ but the dominance of these guidelines in other contexts may not adequately address the need for and purpose of safeguards in a distinct context. It could be argued that these intra-sectoral crossfertilisations do not raise concerns about hegemony or dominance, potentially subverting the interests of other regimes to that of the hegemon,⁶⁵ as they represent a shared resistance and protection of the vulnerable across areas of environmental law. But this is problematic if the protections are problematic or ineffective, and yet are imposed as a normative 'good' in other contexts. Specifically related to benefit-sharing, it is arguable that the very specific and localised nature of many of these arrangements, necessitate that their ad hoc development is preferable,⁶⁶ and avoids the imposition of predetermined features on vulnerable people.

⁶¹ Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (2016) 27 EJIL 353. For instance, Morgera refers to the discussions under the Convention on Biological Diversity, that have fleshed out this concept – from 365.

⁶² Chapman, Wilder and Miller (n 14).

⁶³ Louis J Kotzé, 'Fragmentation Revisited in the Context of Global Environmental Law and Governance' (2014) 13 South African Law Journal 548.

⁶⁴ Medaglia (n 24).

⁶⁵ Martti Koskenniemi, 'Hegemonic Regimes' in Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012).

⁶⁶ Chapman, Wilder and Miller (n 14).

There is however, one further argument that strongly supports the development of headline norms for these kinds of safeguards, despite the concerns above and likely difficulties in doing so. As indicated above, despite the absence of a treaty recognition of benefit-sharing in, for instance, the climate regime, there is consistent if varied practice on benefit-sharing on various levels and seemingly without consistently or clear articulation as to what benefit-sharing means, or consistency in minimum standards or best practice. But it is probably unlikely that these arrangements are developed entirely ad hoc, instead, with norms developing that are specific to national or sectorial context, or even, specific key actors in an industry or field.⁶⁷ For instance, in some cases this might be regulated through national legislation or formal guidance or codes.⁶⁸ But perhaps more broadly, standardised approaches to benefit-sharing seem to appear in formal contracts and formal and informal codes of industry practice in various contexts, sometimes in the context of national legislation.⁶⁹ As Savaresi argues: ‘The chasm in the approach to REDD+ safeguards adopted by the UN-REDD and the FCPF is ultimately down to the different institutional cultures and practices. Such discrepancy in standards is hardly conducive to the establishment of a level playing field enabling countries to carry out REDD+ activities on an equal footing. Therefore, further guidance from the UNFCCC COP on these crucial issues seems indispensable.’⁷⁰

The frequent use of private contracts raises interesting questions. On one hand, the frequent use of private, frequently confidential, arrangements can be seen as problematic in the context of a mechanism that is meant to secure equity and justice for vulnerable communities. It is quite likely that sector- or industry-specific standardisation emerges in the use of codes or private contracts. This could happen directly, through corporate standard form agreements forming the basis (or entirety) of their external agreements, or through more subtle processes through which both the idea, as well as the content and process of the agreement became replicated

⁶⁷ Savaresi and Bouwer (n 3).

⁶⁸ Savaresi and Bouwer (n 3), Section 2(a).

⁶⁹ Yinka Omorogbe, ‘Resource Control and Benefit Sharing in Nigeria’ in Lila Barrera-Hernández and others (eds), *Sharing the Costs and Benefits of Energy and Resource Activity* (OUP 2016), Sections IV - VI.

⁷⁰ Annalisa Savaresi, ‘The Legal Status and Role of Safeguards’ in Christina Voigt (ed), *Research Handbook on REDD+ and International Law* (Edward Elgar 2016) <<https://www.e-elgar.com/shop/research-handbook-on-redd-plus-and-international-law>> accessed 1 June 2018. at 151.

through exchange.⁷¹ These contracts, together with any industry codes, would create some standardisation of benefit-sharing within an industry,⁷² but this does not necessarily mean that this is empowering to the recipients. For instance, Affolder argues that the variegation of voluntary contractual arrangements used for forest conservation under REDD+, entrench private authority and define the contours in the broader field.⁷³ What is not clear, is the extent to which the subjects of the benefit-sharing arrangements – the vulnerable ‘recipients’ of benefits – are able to shape the relationships formed under these agreements in different contexts.⁷⁴ Inherent in the rationale for benefit-sharing is the appreciation of the vast power imbalance between the contracting parties.⁷⁵ This has potential to give rise to an equity deficit in negotiations both due to gaps in commercial sophistication, negotiating acumen, knowledge gaps, and political leverage.⁷⁶ In some circumstances, benefit-recipients have learned sophisticated approaches to benefit-sharing negotiations, and are able both to negotiate favourable terms and enforce their rights judiciously and judiciously.⁷⁷ But securing satisfactory arrangements should not be contingent on this, and there is clear evidence that where corporate practices are developed *ad hoc* in circumstances of poor or no institutional guidance, this can give rise to substantial shortcomings in terms of both procedural and substantive legitimacy, specifically that the value of ‘benefits’ could not be considered fair given the overall economic picture of the project.⁷⁸

Furthermore, commercial contracts are opaque and inaccessible for ‘commercial sensitivity’ reasons, meaning for the most part where these do constitute industry

⁷¹ Natasha Affolder, ‘Looking for Law in Unusual Places: Cross-Border Diffusion of Environmental Norms’ [2018] *Transnational Environmental Law* 1, Section 3.

⁷² Even if setting standards is not an overt aim of these agreements, suggests, they can constitute a form of private governance, with their use by repeat players implicitly setting industry standards. See Neil Craik, Holly Gardner and Daniel McCarthy, ‘Indigenous – Corporate Private Governance and Legitimacy: Lessons Learned from Impact and Benefit Agreements’ (2017) 52 *Resources Policy* 379.

⁷³ Natasha Affolder, ‘Transnational Carbon Contracting : Why Law’s Invisibility Matters’ in A Claire Cutler and Thomas Dietz (eds), *The Politics of Private Transnational Governance by Contract* (Routledge 2017).

⁷⁴ Omorogbe (n 72).

⁷⁵ Ken J Caine and Naomi Krogman, ‘Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada’s North’ (2010) 23 *Organization & Environment* 76.

⁷⁶ Caine and Krogman (n 78); P Velasco Herrejon and A Savaresi, ‘Wind Energy, Benefit-Sharing and Indigenous Peoples: Lessons from the Isthmus of Tehuantepec, Southern Mexico’ *Oil, Gas & Energy Law Journal (OGEL)* <<https://www.ogel.org/journal-advance-publication-article.asp?key=604>> accessed 31 July 2019, Section 3.1.

⁷⁷ Alastair Lucas, ‘Participatory Rights and Strategic Litigation’ in Lila Barrera-Hernández and others (eds), *Sharing the Costs and Benefits of Energy and Resource Activity* (OUP 2016).

⁷⁸ Craik, Gardner and McCarthy (n 75).

standards on benefit-sharing they can not be evaluated, accessed or compared with other arrangements or international norms, or the need for justice and equity. While confidentiality on some specific features can protect the interests of vulnerable benefit-recipients, standard confidentiality erodes transparency and the potential for cross-community learning, holistic discussions of benefits or the potential for sharing good and bad experiences about benefit arrangements, and as such disadvantages other groups in negotiations.⁷⁹ A standardisation approach that include requirements to introduce benefit-sharing, define it with regard to minimum international standards, and include arrangements for ongoing dialogue could also require transparency in these arrangements.⁸⁰ This could support other communities in terms of understanding the possibilities and procedures, gains made elsewhere, and ensure that rights won in other contexts were not negotiated away. Indeed, the need to regulate private actors and ensure benefit-sharing arrangements meet minimum standards was a significant motivator for Special Rapporteur Knox, in requiring the formalisation of a norm of benefit-sharing.

The purpose of this argument is to interrogate whether a norm of benefit-sharing exists in international climate law, not really to examine whether this is desirable from a normative perspective. However, it is clear that the idea of universalised norms are not universally accepted even in circumstances where equity and justice are prioritised.⁸¹ The reasons for this relate to the particularity of benefit-sharing arrangements and how these should be developed in each set of circumstances. The suggestion is that universalised norms could overwhelm the contribution to their own participation made by the supposed benefits-recipients – for instance, by limiting the scope for them to shape their own arrangements according to their values and preferences. This is dealt with in more detail below, however in brief, these considerations include the importance of the vulnerable participants' voice and priorities, in framing the nature and circumstances of the arrangements. In essence, it is accepted practice that benefits as framed should genuinely reflect net benefits to the receiving community, and that this can not be standardised, but be developed *de*

⁷⁹ Caine and Krogman (n 78), 86.

⁸⁰ See Olawuyi (n 16) from 119 on the benefits of transparency in carbon projects.

⁸¹ For instance, Chapman, Wilder and Miller (n 14) argue against 'predetermined' approaches to benefit-sharing for similar reasons, but despite this recognise some core features.

novo in each instance. But this is not an argument against the formalisation of headline norms. If anything, a clear norm would preserve *minimum standards* or *best practices* in relation to benefit-sharing, in that these would be standardised through instruments informed by human rights, rather than corporate expedience. This would not preclude the negotiation of more favourable or desirable conditions by some benefits-recipients where appropriate or possible, or indeed, for parties to agree on arrangements that represent an *improvement or progression* beyond the universalised minimum standards but ensure that gains won in other areas are not lost in others.

On the other hand, one of the emblematic features of many of these relationships are deep inequality in resources, knowledge and (sometimes) *savoir faire*, and inherent power imbalances. The case can be made that there is a limit to what can be achieved in terms of the distributive power of benefit-sharing arrangements, and that these very inequities may make the achievement of fair, or indeed entirely voluntary arrangements, impossible. For instance, it is arguable that the offered arrangements could be seen as a 'bribe' or unsavoury inducement to marginalised people with few other options.⁸² This raises all sorts of questions as to whether, despite their increasing use in practice and interest from the academy, introducing contractual or quasi-contractual arrangements in such a context could ever be entirely voluntary, and indeed whether these arrangements could ever support more fair outcomes than otherwise, let alone address underlying distributive issues. For instance, Armeni describes benefit-sharing participatory process that requires full informed engagement of both parties, but it is questionable whether this can ever be achieved in practice.⁸³

There is a further significant critical issue also can not be understated: while benefit-sharing has potential yield positive and powerful results, there are strong indications

⁸² Noel Cass, Gordon Walker and Patrick Devine-Wright, 'Good Neighbours, Public Relations and Bribes: The Politics and Perceptions of Community Benefit Provision in Renewable Energy Development in the UK' (2010) 12 Journal of Environmental Policy & Planning 255. Gardar Arnason and Doris Schroeder, 'Exploring Central Philosophical Concepts in Benefit Sharing: Vulnerability, Exploitation and Undue Inducement' in Doris Schroeder and Julie Cook (eds), *Benefit Sharing: From Biodiversity to Human Genetics* (Springer Netherlands 2013). – although the authors dispute that this is always necessarily the case.

⁸³ Chiara Armeni, 'Participation in Environmental Decision-Making: Reflecting on Planning and Community Benefits for Major Wind Farms' (2016) 28 Journal of Environmental Law 415.

that it is at best difficult to evaluate,⁸⁴ at worst, failing as a tool of engagement. Of course, this also begs the question as to what success in benefit arrangements might mean, although for instance O’Faircheallaigh argues that these can be evaluated according to how they ‘...continue to provide meaningful benefits to those signed on to them and enhance their ability to negotiate more effectively over time for those benefits that are perceived as fair and potentially necessary to tolerate the negative impacts of development.’⁸⁵ Much of the empirical evidence evaluating benefit-sharing arrangements across a variety of contexts, suggest mixed results at best. Problems range from failures in relation to engagement and participation, a failure for benefit-sharing arrangements to improve the situation of the recipients or a range of unintended consequences. For example, in some instances the arrangements reflect poor recognition of the recipients preferences and interests, resulting in useless or unhelpful arrangements in exchange for their ancient traditional knowledge or loss of property rights or community space.⁸⁶ In others, poorly designed arrangements cause or exacerbate community tensions, causing violent conflict.⁸⁷ The diversity of the circumstances in which these arrangements are employed, and often, the arrangements’ opacity (even to benefit-recipients), means that establishing precisely what went wrong and how to fix it presents tremendous challenges. It is not clear if these flaws arise due to avoidably flawed applications of the basic norms, and whether these problems could be avoided through better institutions, better enforcement and more sensitive application of core principles. An alternative view is that the arrangements are fundamentally ideologically or conceptually flawed, and can never deliver equity and justice in the way that is envisaged.⁸⁸

This presents something of a conundrum for the development of benefit-sharing both as a concept and as a practice. Idealistically, whatever one’s ideology, it may be better not to continue to use – and endeavour to extend the application of - a

⁸⁴ Caine and Krogman (n 78), 81.

⁸⁵ Cited in Caine and Krogman (n 78), 89.

⁸⁶ Vermeulen (n 17); Azad and Azad (n 8); Shalanda H Baker, ‘Project Finance and Sustainable Development in the Global South’ in Shawkat Alam and others (eds), *International Environmental Law and the Global South* (CUP 2015).

⁸⁷ JS Kemerink-Seyoum and others, ‘Sharing Benefits or Fueling Conflicts? The Elusive Quest for Organizational Blue-Prints in Climate Financed Forestry Projects in Ethiopia’ (2018) 53 *Global Environmental Change* 265.

⁸⁸ For instance, Birrell and Godden (n 14) critique benefit-sharing as the ‘commodification of a moral imperative’.

mechanism that is largely failing as a tool of engagement in most of its current manifestations. But given the broad and increasing use of these arrangements, this seems implausible, and indeed, until something better can take its place, problematic. Perhaps using best endeavours to ensure as close to fairness and voluntary engagement, while acknowledging the practice of benefit-sharing will be imperfect, is the best that can be achieved in most contexts?⁸⁹ The alternative would be to avoid using these arrangements altogether, which would mean there was no mechanism for reallocation of advantages from carbon (and other) projects.

3. Climate Finance

3.1 Climate finance – what is it

Climate finance will become an area of increasing importance over the coming years. The Parties to the Paris Agreement are committed to make ‘finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development’,⁹⁰ and the specific provisions on climate finance contain some of the PA’s few ‘hard’ obligations, as discussed below. However, there is as yet no formal agreed definition on climate finance. The working definition of the UNFCCC Standing Committee on Finance is helpful, which uses the term “climate finance” as ‘the financial resources dedicated to adapting to and mitigating climate change globally, including in the context of financial flows to developing countries.’ Global climate finance is important for making progress towards the objective of the Convention and the goals set out in the Paris Agreement, such as holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and

⁸⁹ Chiara Armeni, ‘Participation in Environmental Decision-Making: Reflecting on Planning and Community Benefits for Major Wind Farms’ (2016) 28 *Journal of Environmental Law* 415. See also Louisa Parks and Elisa Morgera, ‘The Need for an Interdisciplinary Approach to Norm Diffusion: The Case of Fair and Equitable Benefit-Sharing’ (2015) 24 *Review of European, Comparative & International Environmental Law* 353, 356.

⁹⁰ Paris Agreement, Article 2(1)(c).

impacts of climate change.’⁹¹

These definitional issues to some extent mean it is very difficult to delimit the scope of climate finance, and determine how it should be monitored. Exercises on monitoring and verification are beset with uncertain working practices, gaps and uncertainty in data, and variable accounting practices. These issues are important, not least because they determine flows and usage of climate finance.⁹² They do not present enormous problems for this article, which examines the work of the treaty climate funds. For instance, a narrow and formalistic international law approach to climate finance restricts the field to ‘treaty finance’ provided by the ‘treaty climate funds’ (the Global Environmental Facility, Adaptation Fund and Green Climate Fund, as expanded on below).⁹³ This is sufficient for the article, but leaves the question of, if benefit-sharing can be considered a norm in climate finance, when and in what circumstances it applies. The treaty climate funds are the obvious starting point for any enquiry into benefit-sharing and climate finance, because they operate within the

⁹¹ UNFCCC SCF, ‘2018 Biennial Assessment and Overview of Climate Finance Flows: Technical Report’ <<https://unfccc.int/sites/default/files/resource/2018%20BA%20Technical%20Report%20Final.pdf>> accessed 3 August 2019, para 13.

⁹² See discussion in Romain Weikmans and J Timmons Roberts, ‘The International Climate Finance Accounting Muddle: Is There Hope on the Horizon?’ (2019) 11 Climate and Development 97. For instance, the Standing Committee on Climate Finance places the following boundaries in its assessment of climate finance flows: ‘The 2018 BA provides an updated overview of climate finance flows in 2015 and 2016 from provider to beneficiary countries, available information on domestic climate finance and cooperation among Parties not included in Annex I to the Convention (non-Annex I Parties), and the other climate-related flows that constitute global total climate finance flows.’ UNFCCC SCF (n 94), para 4. In the report, the SCF acknowledges in several places that improvements in data or calculation methodology has affected estimates quite considerably, noting a revised estimate of USD 584 billion from USD 741 billion for total global climate finance in 2014 – see Executive Summary para 24. But different calculation methodologies matter – the SCF reported total global flows of climate finance of USD 584 billion in 2014 and USD 680 billion in 2015, probably increasing to USD 681 billion in 2016 – Executive Summary para 23 – still ‘considerably below what one would expect given the investment opportunities and needs that have been identified – para 49. In contrast, the Climate Policy Initiative tracks ‘domestic and international investment from both the public and private sectors in activities that address and respond to climate change, i.e. both mitigation and adaptation’ - Padraig Oliver and others, ‘Global Climate Finance: An Updated View 2018’ <<https://climatepolicyinitiative.org/publication/global-climate-finance-an-updated-view-2018/>> accessed 3 August 2019, page 1. It revised its earlier estimates (Barbara Buchner and others, ‘Global Landscape of Climate Finance 2017 - Climate Investment Analysis’ <<https://climatepolicyinitiative.org/publication/global-landscape-of-climate-finance-2017/>> accessed 9 May 2018.) based on the above referenced SCF report, with findings that global climate finance flows for 2015 amount to USD 472 billion and USD 455 billion for 2016. The stark differences in these figures reflects the importance of clarity on these key issues for the monitoring and verification of future actions taken under and in accordance with the broader goals of the Paris Agreement.

⁹³ The version preferred by Alexander Zahar, *Climate Change Finance and International Law* (Routledge 2016), Chapter 1. Broader more regulatory approaches acknowledge the role of private actors and other regulatory mechanisms and modalities that may govern their involvement in climate project finance, but it is not necessary to consider these in this article. Richard B Rudyk Stewart Bryce Mattes, Kiri, ‘Governing a Fragmented Climate Finance Regime’ in Hassane Cissé, Daniel D Bradlow and Benedict Kingsbury (eds), *The World Bank Legal Review: International Financial Institutions and Global Legal Governance* (The World Bank 2011) <https://elibrary.worldbank.org/doi/abs/10.1596/9780821388631_CH15> accessed 18 December 2018.

climate regime, and some in their constitutional documents recognise the need for benefit-sharing, as I outline in more detail below.⁹⁴

However, the climate funds are not the only *public* actors in climate finance, and are not the only institutions that operate in this way: there are a variety of climate funds established through other overarching institutions, and some climate finance is deployed through other kinds of institutions, like development banks.⁹⁵ Climate funds might also be provided by institutional investors, such as pension funds or insurance companies. Private institutions already provide a significant proportion of donor finance both domestically and on an interstate basis.⁹⁶ Private institutions include but are not limited to private banking institutions, commercial financial institutions specifically banks, private corporates but also private equity and insurance firms, pension fund providers and other project developers. The contribution of private finance and private institutions is relevant to this study insofar as they are involved with the provision of finance in conjunction with multilateral climate funds. For instance, from 2014, the Green Climate Fund has accelerated its private sector facility which was there to mobilise private sector investment and funding and encourage action in developing countries.

The above notwithstanding, explaining what climate finance does or how it can be used, probably gives the best sense of the subject matter of the article. Climate finance can cover the costs and risks of climate mitigation and adaptation actions, ensuring low carbon growth as well as improved resilience and adaptation measures.⁹⁷ It can be used to support projects that are designed to achieve mitigation outcomes, specifically in supporting the development of low carbon and renewable energy technologies on a project basis.⁹⁸ It can also be used to support

⁹⁴ While not strictly relevant for this article, it would also be an obvious starting point for work developed from this paper, as established institutions with (some) publicly accessible foundation and process documentation.

⁹⁵ There are a significant number of other institutions that are involved. These include climate funds and also Development Financial Institutions: national development banks, multilateral development banks, and bilateral financial institutions. Outside of the UNFCCC, a number of bilateral or multilateral co-operation agencies have been created that contribute significantly to the deployment of climate finance. For instance, the World Bank hosts a number of multilateral investment funds, including the Climate Investment Funds and the Clean Technology Fund.

⁹⁶ Buchner and others (n 95).

⁹⁷ Although adaptation measures continue to be underfunded: UNFCCC SCF (n 94).

⁹⁸ Søren Lütken, *Financial Engineering of Climate Investment in Developing Countries* by Søren Lütken (Anthem Press 2014), Chapter 1.

the implementation of policies that are likely to support similar aims, including incentives such as subsidies, feed-in tariffs or tax breaks or incentives.⁹⁹ Climate finance can support capacity building and technical assistance, as well as support the provision of technologies to support mitigation actions. Climate finance can also cover costs of removing barriers to technology introduction. This includes institutional and regulatory barriers, softer issues such as behavioural and educational issues, and issues to do with capacity building and readiness to receive.¹⁰⁰ Climate finance will also be required to support full participation in the Paris Agreement, for instance in compiling NDCs, and with compliance with the transparency processes that are part of the climate regime now.¹⁰¹

Understanding what climate finance does and how it does it, also requires an understanding of the processes through which climate finance is ‘delivered’, through the climate funds. A modest amount of project climate finance is provided directly, in the form of grants.¹⁰² Some (particularly) public bodies provide grants or subsidies to support climate actions, providing the ‘incremental costs’ (which I explain below) incurred due to (for instance) low carbon choices being made in financing. Grant funding could include actual cash transfers, or the provision of some other kind of ‘free’ support. In the research context, this can include direct payments made or channelled through climate funds, or direct support from climate funds.

Climate finance is more commonly provided through a range of financial instruments which enhance possibilities or make financing available, rather than a direct monetary gift. In this sense, climate finance is predominantly about facilitation, rather than donation. A variety of methods or financial instruments encourage continuing flows of private finance, which is then used to provide ‘climate finance’

⁹⁹ Lütken (n 101), 59 - 61 .

¹⁰⁰ On the barriers to technology transfer, see Kim Bouwer, ‘Insights for Climate Technology Transfer from International Environmental and Human Rights Law’ (2018) 23 *Journal of Intellectual Property Rights* 7. Indeed, Zahar (n 96) identifies technology transfer as simply a ‘species’ of climate finance, see Chapter 3, Section 4.

¹⁰¹ See for instance Art 13.14 of the Paris Agreement.

¹⁰² Buchner and others (n 95), Table 1. This table presumably includes intrastate payments to individuals or organisations. But grant payments can be made interstate as well.

(frequently) to fund projects and initiatives in receiver countries.¹⁰³ Where private finance is involved, public finance is frequently used to make the investment environment more palatable for investors. A significant portion of finance is provided in form of concessional loans.¹⁰⁴ Concessional loans usually ‘blend’ public and private finance, to provide upfront financing to support activities, in circumstances where repaying the loan at market rates of interest might otherwise make the project unworkable.¹⁰⁵ Concessional loans can be blended with other financial instruments – for instance blending climate funds’ low cost loans with commercial financing from Development Financial Institutions is common practice in climate finance.¹⁰⁶ This detail is provided to illustrate the complexity and sophistication of many of the arrangements, which is relevant for the discussion of climate finance and benefit-sharing later in the article. But this also ties back to the broader issues in climate finance flagged earlier in this section, and in particular, in the methodological and technical complications involved in tracking flows of finance. For instance, loans need to be repaid, and it is questionable whether these always result in a net flow of finance from developed to developing countries. Zhang explains: [I]f loans and other profit-driven financial instruments are considered to be climate finance, there will be cases where the flows of climate finance, as reported, is in line with the rules (i.e. it is from developed to developing countries), but in reality the net transfer is in the other direction (e.g. where developing countries have to pay back the loans with interest to developed countries).¹⁰⁷

Other climate finance instruments can also provide support for specific risk involved in climate investments. For instance, instead of subsidising a loan, an institution could provide a guarantee or surety against default by the loan recipient, thus maintaining finance flows despite what might otherwise be seen as prohibitive risk. Climate funds or private investors can also ameliorate risk to investors by supporting

¹⁰³ Murray Ward, ‘Innovative Climate Finance: Examples from the UNEP Bilateral Finance Institutions Climate Change Working Group’ (UNEP 2011).

¹⁰⁴ Susanne Olbrisch and others, ‘Estimates of Incremental Investment for, and Cost of, Mitigation Measures in Developing Countries’ in Erik Haites (ed), *International Climate Finance* (Routledge 2013).

¹⁰⁵ Lütken (n 101).

¹⁰⁶ Cassie Flynn, ‘Blending Climate Finance Through National Climate Funds’ (UNDP 2011).

¹⁰⁷ Hao Zhang, ‘Implementing Provisions on Climate Finance Under the Paris Agreement’ (2019) 9 *Climate Law* 21, 35.

project financing systems,¹⁰⁸ or can play a leveraging or aggregation function which ameliorates risk for private investors.¹⁰⁹ This can involve portfolio-based involvement rather than funding in and around specific projects, but roughly by creating portfolios for investors, development banks and climate funds can smooth out profiles and make investment packages attractive. By facilitating risk-spreading through portfolios development banks and climate funds can leverage private capital to ensure investment is provided for key projects.¹¹⁰

3.2 Climate finance in the climate regime

The early treaty references to climate finance sought to distinguish between finance with definite climate-related benefits, and for instance, development finance or other varieties of investment. The UNFCCC requires the provision of ‘new and additional’ financial resources to support other countries, by providing to developing nations the ‘full agreed incremental costs’ meeting their obligations.¹¹¹ Elsewhere climate finance is limited to ‘... this difference in cost.’¹¹² So theoretically climate finance refers to the resources provided to meet the difference in cost between a traditional pathway and ‘technologically advanced, less globally harmful’ development,¹¹³ although of course this distinction is not always easy to make. The provision of climate finance as an obligation is reiterated under the PA, forming one of few ‘hard’ obligations.¹¹⁴ The PA requires ‘... finance flows consistent with a pathway towards

¹⁰⁸ Baker (n 89).

¹⁰⁹ Lütken (n 101), Chapter Five.

¹¹⁰ Flynn (n 109).

¹¹¹ United Nations Framework Convention on Climate Change. Article 4 para 3: ‘shall provide’. The relevant article further requires adequacy and predictability in the flow of funds, and (importantly) that proper provision be made for burden sharing. Article 12 governs commitments in relation to the communication of information. In addition, paragraph 4 sets out voluntary actions that might be taken by developing nations: ‘Developing country Parties may, on a voluntary basis, propose projects for financing, including specific technologies, materials, equipment, techniques or practices 24 that would be needed to implement such projects, along with, if possible, an estimate of all incremental costs, of the reductions of emissions and increments of removals of greenhouse gases, as well as an estimate of the consequent benefits.’

¹¹² Zahar (n 96). He explains further that a program delivering only global environmental benefits but no local benefits would show no difference between total and incremental costs, because the hosting country receives no benefits. Conversely, where there is only local, but no global environmental benefits, no incremental costs are incurred and the project has no entitlement to climate finance.

¹¹³ Zahar (n 96). Chapter 1. This concept is linked to developmental pathways, and the acknowledgement that, at present, less conventional developmental pathways could be more expensive to implement than others.

¹¹⁴ Paris Agreement. Article 9.1. states that ‘Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.’ The significance of this very careful drafting should not be unrecognized – this

low greenhouse gas emissions and climate-resilient development.’¹¹⁵ This slightly under-utilised provision forms part of the core purpose of the agreement, reflecting the strong understanding in Paris that finance is an ‘enabler’ for action and that the global action on mitigation and adaptation require significant recalibration of public and private financial flows.¹¹⁶ Notions of progression are emphasised, and the provision of finance is subject to the transparency and compliance mechanisms that will seek to hold parties accountable in international climate governance.¹¹⁷

The recent Katowice Climate Package concluded in December 2018, seeks to operationalise the PA by setting out detailed guidelines for how parties could implement the commitments they have made under the PA, the Paris Rulebook. Climate finance was a core consideration in Katowice, and the need for clarity on predictability of flows, funding criteria, additionality, and the usefulness of climate finance in capacity building and supporting necessary transitions, are reflected in the operational paragraphs of the relevant decisions.¹¹⁸ The Rulebook (inter alia) clarifies the information that needs to be provided by parties for full transparency on climate finance, and the modalities, procedures and guidelines that specify in detail how this information should be presented.¹¹⁹ The Parties worked towards a treaty definition of climate finance, but this was one issue that remained defiantly unresolved.

However of course, the achievement of justice and equity is also a core goal in the international climate change regime, and indeed, progress is being attempted in relation to burden sharing. For instance, the Rulebook does encourage parties, in

represents one of very few ‘hard’ obligations in the Paris Agreement – see Lavanya Rajamani, ‘The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations’ (2016) 28 *Journal of Environmental Law* 337. Other parties are ‘encouraged’ to continue to provide support ‘voluntarily’, a provision which recognises the contribution already made by emerging market states to support other countries in their climate change response - Paris Agreement, Article 9.2.

¹¹⁵ Paris Agreement, Article 2(1)(c)

¹¹⁶ Ralph Bodle and Vicky Noens, ‘Climate Finance: Too Much on Detail, Too Little on the Big Picture?’ (2018) 12 *Carbon & Climate Law Review* 248, 250; Paris Agreement, Article 3.

¹¹⁷ Paris Agreement, Articles 9.5-9.7

¹¹⁸ Decision 12/CMA.1, Annex. Space and this article’s purpose does not permit a full discussion of all the Rulebook provisions relating to climate finance, but see Zhang (n 110).

¹¹⁹ In accordance with Article 9.5, 13.9 and 13.10 of the PA – decision 12/CMA.1 of FCCC/PA/CMA/2018/3/Add.1 and Annex I, Information to facilitate clarity, transparency and understanding of nationally determined contributions, referred to in decision 1/CP.21, paragraph 28, para 6 and Decision 18/CMA.1 Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement

the preparation of their NDCs, to justify how ‘... its nationally determined contribution is fair and ambitious, in the light of its national circumstances, and how it contributes towards achieving the objective of the Convention as set out in its Article 2...’.¹²⁰ This means there is space for questions of equity to be included from a burden-sharing perspective, when parties’ account for their contributions. But there is very little in the Rulebook that enables or supports direct evaluation of the equity and justice of climate finance provision, from an operational perspective. For instance, as has been observed, there are no provisions for human rights anywhere in the Rulebook, other than where noted above,¹²¹ and there are no equivalent transparency provisions on the climate funds directly. These omissions are odd and to many, disappointing, given the recognition of human rights in the Paris Agreement.¹²²

The implications of this are interesting. As outlined above, there is an existing or emerging norm of benefit-sharing, in terms of which states have specific obligations in international law, although the contours of this norm might be somewhat fuzzy. The climate funds themselves have adopted voluntary provisions on benefit-sharing, although as will be discussed below, their concept of benefit-sharing is somewhat sparse. In the article context, setting up benefit-sharing arrangements and ensuring their ongoing effective management, does not concern the relationships between the parties, but those between members of the climate regime and the climate funds. Of course, the PA does encourage transparency and accountability between parties, but this is intended to ensure trust and co-operation between parties to ensure continued and progressive ambition.¹²³ Given the clear and surprising deprioritising of human rights in the KCP, it seems unlikely that the implementation mechanisms of the PA would be effectively used to monitor other states’ domestic compliance with human rights, or equity considerations, in the receipt of climate finance.

3.3. Benefit sharing and climate finance

¹²⁰ Decision 4/CMA.1, para 9

¹²¹ Duyck (n 48).

¹²² Savaresi and Scott (n 55).

¹²³ Lavanya Rajamani, ‘AMBITION AND DIFFERENTIATION IN THE 2015 PARIS AGREEMENT: INTERPRETATIVE POSSIBILITIES AND UNDERLYING POLITICS’ (2016) 65 International & Comparative Law Quarterly 493, 502 - 505.

There are no direct, hard law or binding requirements for benefit-sharing in the law of climate finance. As outlined above, benefit-sharing is not a formal obligation in the international climate change regime, but has been used extensively in mechanisms that fall under or are associated with the climate regime, most notably in relation to REDD+;¹²⁴ it is also employed in climate-relevant projects in domestic and other contexts,¹²⁵ for instance in relation to renewable energy projects, in particular wind farms.¹²⁶ There is, however, oblique reference to climate or development finance in the FPs, discussed in more detail in the previous section.¹²⁷ FP 13 requires the co-operation of states ‘...to establish, maintain and enforce effective international legal frameworks in order to prevent, reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights.’ This further requires compliance with human rights obligations in accordance with international financial mechanisms. The commentary to the principle expressly states: ‘International financial institutions, as well as State agencies that provide international assistance, should adopt and implement environmental and social safeguards that are consistent with human rights obligations, including by: (a) requiring the environmental and social assessment of every proposed project and programme; (b) providing for effective public participation; (c) providing for effective procedures to enable those who may be harmed to pursue remedies; (d) requiring legal and institutional protections against environmental and social risks; and (e) including specific protections for indigenous peoples and those in vulnerable situations.’¹²⁸ While this section does not expressly require benefit-sharing, it emphasizes the importance of substantive and procedural safeguards in international financing. The reference to the specific protections for indigenous peoples could be interpreted to include all the protections specified in FP 14, which as explored above, includes benefit-sharing. More broadly, and as will be explored in more depth in the next section, the proper observation of these requirements

¹²⁴ See for instance Chapman, Wilder and Miller (n 14).

¹²⁵ Probably most markedly, in relation to renewable energy generation, see e.g. Aileen McHarg, ‘Community Benefit through Community Ownership of Renewable Generation in Scotland: Power to the People?’ in Lila Barrera-Hernández and others (eds), *Sharing the Costs and Benefits of Energy and Resource Activity* (OUP 2016).

¹²⁶ See McHarg (n 129). In relation to wind and CCS in the UK context, see Maria Lee and others, ‘Public Participation and Climate Change Infrastructure’ (2013) 23 *Journal of Environmental Law* 33.

¹²⁷ Knox (n 27).

¹²⁸ Knox (n 27), para 39.

could not only indicate the appropriateness of benefit-sharing arrangements, for instance environmental and social assessment, but also be required to ensure these were substantively fair and equitable, for instance public participation.

Some of the climate funds have incorporated 'soft' benefit-sharing obligations in their founding documents, and have taken some steps towards incorporating benefit-sharing arrangements in funded projects. In the article context, the climate funds are a small group of intermediary bodies to the climate regime, established under the UNFCCC, Kyoto Protocol and now, Paris Agreement. The Global Environmental Facility (GEF) is an independent multilateral financial institution that provides grants to developing countries for projects related to climate change and other environmental issues such as land restoration and pollution control. It is the long standing operating entity of the Financial Mechanism of the UNFCCC,¹²⁹ and operates two specific climate funds, the Special Climate Change Fund and the Least Developed Countries Fund.¹³⁰ The Adaptation Fund (AF) was established under the Kyoto Protocol to finance adaptation projects and programmes in developing countries that are particularly vulnerable to the adverse effects of climate change.¹³¹ It was included as a funding mechanism to serve the PA in Katowice.¹³² The Green Climate Fund (GCF) was formally established in Cancun in 2010, with the goal of financing projects, programmes and policies for mitigation and adaptation to climate change by channelling finance to developing countries,¹³³ and operationalised in 2014 in Lima. The GCF is also an operating entity of the Financial Mechanism under Article 11 of the FCCC.

3.4. How do benefit-sharing obligations appear in the climate funds?

All the above climate funds have developed policies and guidance to maintain standards and avoid environmental and social risks and impacts in the

¹²⁹ The Financial Mechanism was created under Article 11, and the Global Environmental Facility of the of the United Nations Development Programme, the United Nations Environment Programme and the International Bank for Reconstruction and Development was restructured and entrusted with its operation under Article 21.3 United Nations Framework Convention on Climate Change. But see Stewart (n 96), 380.

¹³⁰ The Marrakesh Accords (FCCC/CP/2001/13/Add1). Decision 7/CP.7

¹³¹ The Marrakesh Accords. Decision 10/CP.10

¹³² Decision 13/CMA.1, para 1

¹³³ Decision 1/CP.16 The Cancun Agreements, Decision 1/CP.16, para. 102.

implementation of their projects or policies. All include or could be read to include some provisions for benefit-sharing.¹³⁴ The GEF and the AF will be discussed first. Both admit to some talking points in terms of being finance providers,¹³⁵ and it is important to remember that the GEF channels funding for a variety of UN projects and so does not only provide climate finance, but they are a good place to start as their environmental and social policies (ESP) make clear and express provision for benefit-sharing. The GEF has a new ESP which applies to the GEF secretariat and all ‘project agencies’,¹³⁶ and sets out a series of minimum standards in relation to environmental and social risks and impacts in all new (and some in progress) projects and programs, specifies a tiered risk mitigation approach.¹³⁷ In the ESP, the benefit-sharing provisions are included under the minimum standards in relation to IP. Agencies are required to ensure they have the necessary ‘policies, procedures, systems and capabilities’ to ensure that when their ‘lands or natural resources’ are commercially developed, or when there is any commercial use of their ‘Cultural Heritage’, the IP should be informed of their rights under national law and enabled to share equitably in the benefits.¹³⁸ These processes should be subject to Meaningful Consultation (as defined) and opportunities for negotiation which includes the right to effectively participate in the design or provision of benefit sharing measures.¹³⁹ It is specified that ‘benefits can take many forms, including participation in a project, and may not be financial.’¹⁴⁰

¹³⁴ This discussion relates to the current and most recent iterations of these policies. For a discussion of benefit-sharing provisions under the earlier policies, see Savaresi, ‘The Emergence of Benefit-Sharing under the Climate Regime: A Preliminary Exploration and Research Agenda’ (n 1), 17-19.

¹³⁵ Space and the article’s purpose do not permit a full discussion. In short, although the GEF continues as an operating entity of the Financial Mechanism along with the GCF, there have been some talking points about the distributive choices made in the handling of climate finance – see Savaresi, ‘The Emergence of Benefit-Sharing under the Climate Regime: A Preliminary Exploration and Research Agenda’ (n 1), 11. The Adaptation Fund was previously funded by proceeds from the Clean Development Mechanism, and in the future will be funded by whatever mechanism is developed under Article 6.4 of the Paris Agreement. At present it is dependent on voluntary contributions from developed countries.

¹³⁶ Global Environment Facility, ‘Environmental and Social Safeguard Standards (Council Document GEF/C.55/07/Rev.01)’ (13 June 2019) <<https://www.thegef.org/documents/environmental-and-social-safeguard-standards>> accessed 10 August 2019, 12.

¹³⁷ Global Environment Facility, ‘Environmental and Social Safeguard Standards (Council Document GEF/C.55/07/Rev.01)’ (n 140), Minimum Standard 1, para 4(c); Minimum Standard 3, para 8(b); Minimum Standard 5, para 11(a)-(j).

¹³⁸ Global Environment Facility, ‘Environmental and Social Safeguard Standards (Council Document GEF/C.55/07/Rev.01)’ (n 140), Minimum Standard 5: Indigenous Peoples, 11(g).

¹³⁹ Global Environment Facility, ‘Environmental and Social Safeguard Standards (Council Document GEF/C.55/07/Rev.01)’ (n 140), Minimum Standard 5: Indigenous Peoples, 11(c) and (h).

¹⁴⁰ Global Environment Facility, ‘Environmental and Social Safeguard Standards (Council Document GEF/C.55/07/Rev.01)’ (n 140), Minimum Standard 5: Indigenous Peoples, 11(h). Arguably this is not much of an improvement from the previous policy which included IP’s right to ‘culturally appropriate economic and social

The GEF has enacted further Principles and Guidance for engaging with Indigenous Peoples (PGIP),¹⁴¹ and Stakeholders. In the PGIP, environmental and social protections are framed much more broadly, and linked to human rights protection and the dignity of indigenous community. For instance, a relevant provision reads as follows: ‘GEF Partner agencies are required to ensure that GEF-financed projects are designed and implemented in such a way that fosters full respect for indigenous Peoples’ and their members’ identity, dignity, human rights, and cultural uniqueness so that they 1) receive culturally appropriate social and economic benefits; and 2) do not suffer adverse effects during the development process.’¹⁴² The PGIP also links benefit-sharing to the importance of respect for IP’s traditional knowledge, innovations and practices, recognising the importance of utilisation of genetic resources related to traditional knowledge,¹⁴³ and ‘recognising and respecting’ the existing guidance on traditional knowledge and sharing of traditional resources, ‘... including Tkarihwaie: ri Code, the Akwe: Kon guidelines, the Bonn Guidelines and the Nagoya Protocol [mentioned in the previous and subsequent sections of this article, and encouraging] the use of the guidance contained in these documents in GEF-financed projects, as appropriate.’¹⁴⁴

It also establishes a series of ‘minimum standards’ in relation to the procedural safeguards, which while speaking to environmental justice more generally, are both components of and necessary to properly implement and administer benefit-sharing arrangements. These include early screening and risk and impact assessment,¹⁴⁵ and reference specific risks including the potential for vulnerability or disadvantage to

benefits’ which could go beyond the mere ‘receipt of funds’: GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards (2013 ed.) Criterion 4 – also Minimum requirements 4.6 and 4.8.

¹⁴¹ Global Environment Facility, ‘Principles and Guidelines for Engagement with Indigenous Peoples (Council Document GEF/C.42/Inf.03/Rev.1)’ (21 October 2012) <<https://www.thegef.org/documents/indigenous-peoples>> accessed 10 August 2019.

¹⁴² Global Environment Facility, ‘Principles and Guidelines for Engagement with Indigenous Peoples (Council Document GEF/C.42/Inf.03/Rev.1)’ (n 145), para 30(a).

¹⁴³ Global Environment Facility, ‘Principles and Guidelines for Engagement with Indigenous Peoples (Council Document GEF/C.42/Inf.03/Rev.1)’ (n 145), para 40(d).

¹⁴⁴ Global Environment Facility, ‘Principles and Guidelines for Engagement with Indigenous Peoples (Council Document GEF/C.42/Inf.03/Rev.1)’ (n 145), para 40(e).

¹⁴⁵ Global Environment Facility, ‘Environmental and Social Safeguard Standards (Council Document GEF/C.55/07/Rev.01)’ (n 140), 16-18.

impede access to benefits.¹⁴⁶ The need for free, prior and informed consent is required where proposed activities will cause an impact on or relocation of IP's.¹⁴⁷ These are fleshed out in the guidance documents, for instance the PGIP guidance specifies the need for early engagement on proposed projects, 'full and effective participation ... in the identification, development, implementation, monitoring and evaluation of all relevant project activities',¹⁴⁸ full dissemination of information and stakeholder involvement and participation,¹⁴⁹ and 'broad based and sustainable' public involvement in funded projects.¹⁵⁰ Stakeholders are broadly defined to include various categories of potentially affected people, including IPLC,¹⁵¹ even though the benefit-sharing provisions only relate to IPs. The guidance for dealing with Stakeholders requires engagement with much broader groups of people, including 'traditional and indigenous communities',¹⁵² but also notes that relevant groups will be context specific. For instance, engagement plans '...should involve different stakeholders and communities as relevant to the project and situation. These may include, for example, private sector engagement in introducing sustainable livelihoods and associated value chains; academia involvement in developing new technologies; and communities involved with forest protection and rehabilitation or other project-related issues.'¹⁵³ It expands further on the need for thorough and ongoing engagement throughout a project's lifecycle,¹⁵⁴ but although the purpose of

¹⁴⁶ Global Environment Facility, 'Environmental and Social Safeguard Standards (Council Document GEF/C.55/07/Rev.01)' (n 140), 18.

¹⁴⁷ Global Environment Facility, 'Environmental and Social Safeguard Standards (Council Document GEF/C.55/07/Rev.01)' (n 140), Minimum Standard 5: Indigenous Peoples 10; Also see Global Environment Facility, 'Principles and Guidelines for Engagement with Indigenous Peoples (Council Document GEF/C.42/Inf.03/Rev.1)' (n 145), para 30(e).

¹⁴⁸ Global Environment Facility, 'Principles and Guidelines for Engagement with Indigenous Peoples (Council Document GEF/C.42/Inf.03/Rev.1)' (n 145), para 30(b), developed further in 36(a).

¹⁴⁹ Global Environment Facility, 'Principles and Guidelines for Engagement with Indigenous Peoples (Council Document GEF/C.42/Inf.03/Rev.1)' (n 145), paras 17 - 19. Also Global Environmental Facility, 'Policy on Stakeholder Engagement (Council Document GEF/C.53/05/Rev.01)' (30 November 2017) <<https://www.thegef.org/documents/stakeholder-engagement>> accessed 10 August 2019, para 16.

¹⁵⁰ Global Environment Facility, 'Principles and Guidelines for Engagement with Indigenous Peoples (Council Document GEF/C.42/Inf.03/Rev.1)' (n 145), para 30(c) and (d).

¹⁵¹ Global Environment Facility, 'Guidelines on the Implementation of the Policy on Stakeholder Engagement (Council Document GEF/C.55/Inf.08)' (21 November 2018) <<https://www.thegef.org/council-meeting-documents/guidelines-implementation-policy-stakeholder-engagement>> accessed 11 August 2019, Definitions.

¹⁵² Global Environment Facility, 'Guidelines on the Implementation of the Policy on Stakeholder Engagement (Council Document GEF/C.55/Inf.08)' (n 155), para 23.

¹⁵³ Global Environment Facility, 'Guidelines on the Implementation of the Policy on Stakeholder Engagement (Council Document GEF/C.55/Inf.08)' (n 155), para 30.

¹⁵⁴ Global Environment Facility, 'Guidelines on the Implementation of the Policy on Stakeholder Engagement (Council Document GEF/C.55/Inf.08)' (n 155), Definitions, and generally.

said engagement is seen to include ‘opportunities for enhanced benefits’,¹⁵⁵ little more is said about this.

The Adaptation Fund’s revised Environmental and Social Policy establishes a risk-based screening for social and environmental risks of proposed initiatives, such as can be avoided, minimised or mitigated by the AF or its implementing entities.¹⁵⁶ It aims to bring its practices in line with the social and environmental safeguards used by ‘other leading financing institutions active in environment and development financing’, and the domestic laws of many donor and recipient countries, and the existing policies and management systems of many of their implementing entities.¹⁵⁷ But in actual fact, although quite sparsely detailed, the AF’s approach certainly to benefit-sharing is the most progressive and best developed. It requires that projects and programmes it supports ‘shall provide fair and equitable access to benefits in a manner that is inclusive and does not impede access to basic health services, clean water and sanitation, energy, education, housing, safe and decent working conditions, and land rights, [and] should not exacerbate existing inequities, particularly with respect to marginalized or vulnerable groups.’¹⁵⁸ The implementation guidelines focus on equity and fairness, specifying that ‘project/programme benefits’ must be subject to a fair process and with fair and impartial access,¹⁵⁹ and that the programme should not exacerbate gender inequality including through ‘differential allocation of benefits between men and women’.¹⁶⁰ In contrast, the guidance relating to IP does not explicitly mention benefit sharing at all, but requires that projects and programmes are consistent with international protection of IP, (although the host country’s ratification status of the ILO Convention 169 may be considered ¹⁶¹)

¹⁵⁵ Global Environment Facility, ‘Guidelines on the Implementation of the Policy on Stakeholder Engagement (Council Document GEF/C.55/Inf.08)’ (n 155), para 4.

¹⁵⁶ Adaptation Fund, ‘Environmental and Social Policy (Amended in March 2016, Approved in November 2013)’ (March 2016) <<https://www.adaptation-fund.org/document/environmental-and-social-policy-approved-in-november-2013/>> accessed 10 August 2019, D. Environmental and Social Policy Delivery Process.

¹⁵⁷ Adaptation Fund (n 160), para 2, 4, 6.

¹⁵⁸ Adaptation Fund (n 160), B. Environmental and Social Principles, 13. Access and Equity. In the Adaptation Fund, ‘Guidance Document for Implementing Entities on Compliance with the Adaptation Fund Environmental and Social Policy’ (*Adaptation Fund*) <<https://www.adaptation-fund.org/document/guidance-document-implementing-entities-compliance-adaptation-fund-environmental-social-policy/>> accessed 10 August 2019, 6, it is acknowledged that this principle might not always apply..

¹⁵⁹ Adaptation Fund (n 162), 6.

¹⁶⁰ Adaptation Fund (n 162), 10.

¹⁶¹ Adaptation Fund (n 162), 13.

including best practices as recommended by the Special Rapporteur, including the importance of FPIC throughout, and including involvement in all project stages.¹⁶² The implementing entities are to use a risk analysis to determine risks of inequity in access to benefits, and to conduct stakeholder mapping to determine all potential beneficiaries.¹⁶³ The Principle framing potentially vulnerable groups is similarly broad.¹⁶⁴ Programmes and policies are also required to respect and where applicable promote international human rights,¹⁶⁵ which is specified in the guidelines to include an awareness of and adherence to the UN Declaration on Human Rights as an overarching principle.¹⁶⁶ More specifically, it requires that human rights issues be ‘an explicit part of consultations with stakeholders during the identification and formulation of the project/programme’,¹⁶⁷ and states that compliance with the UDHR will be monitored, even when the host country is not a signatory to other core human rights treaties.¹⁶⁸ Provisions relating to procedural rights are quite sparse, stating the need for early identification of stakeholders and open public consultation,¹⁶⁹ and accountability mechanisms which include a monitoring and reporting process,¹⁷⁰ and a grievance mechanism,¹⁷¹ but with little more either in the policies or the guidance to develop these.

The Green Climate Fund also has newly revised policies for social and environmental safeguards. The stated purpose of the policies are that: ‘In carrying out its mandate of promoting a paradigm shift towards low-emission and climate-resilient development pathways in the context of sustainable development, GCF will effectively and equitably manage environmental and social risks and impacts, and

¹⁶² Adaptation Fund (n 162), 11-12.

¹⁶³ Adaptation Fund (n 162), 7.

¹⁶⁴ Adaptation Fund (n 160), B. Environmental and Social Principles, 14. Marginalized and Vulnerable Groups. ‘Projects/programmes supported by the Fund shall avoid imposing any disproportionate adverse impacts on marginalized and vulnerable groups including children, women and girls, the elderly, indigenous people, tribal groups, displaced people, refugees, people living with disabilities, and people living with HIV/AIDS. In screening any proposed project/programme, the implementing entities shall assess and consider particular impacts on marginalized and vulnerable groups.’ The guidance acknowledges that

¹⁶⁵ Adaptation Fund (n 160) B. Environmental and Social Principles, 15. Human Rights.

¹⁶⁶ Adaptation Fund (n 162), 8.

¹⁶⁷ Adaptation Fund (n 162), 8.

¹⁶⁸ Adaptation Fund (n 162), 9.

¹⁶⁹ Adaptation Fund (n 160) D. Environmental and Social Policy Delivery Process, 33. Public Disclosure and Consultation.

¹⁷⁰ Adaptation Fund (n 160), D. Environmental and Social Policy Delivery Process, 32. Monitoring, Reporting, and Evaluation.

¹⁷¹ Some brief discussion in Adaptation Fund (n 162), 21.

improve outcomes of all GCF-financed activities.’¹⁷² This is to be done in such a way that environmental and social sustainability is ‘integrated’ into fund activities.¹⁷³ The policy commits to avoid or mitigate ‘adverse impacts to people or environment’,¹⁷⁴ ‘enhance equitable access to development benefits’,¹⁷⁵ and give ‘due consideration to vulnerable and marginalised populations, groups, and individuals, local communities, indigenous peoples, and other marginalized groups of people and individuals that are affected or potentially affected by GCF-financed activities.’¹⁷⁶

Substantively the GCF policy has a broad and inclusive but also ad hoc framing. The policies apply to all sectors and entities, kinds of projects and programmes – this includes subprojects, and the GCF encourages a consistent approach in respect of jointly implemented projects¹⁷⁷ - and in respect of all financial instruments including grants and loans.¹⁷⁸ The social and environmental assessment and implementation of environmental and social management systems, is conducted by ‘accredited entities’.¹⁷⁹ These conduct the relevant screening and assign risk categories,¹⁸⁰ which, in accordance with ‘the fit-for-purpose approach, [citation omitted] will be proportional to the nature, scale, and location of the activity, its environmental and social risks and impacts, and the vulnerability of the receiving environments and communities.’¹⁸¹ This is subject to a due diligence review by the GCF.¹⁸²

Protection is extended to the broad group of potentially affected communities and individuals outlined above, with a recognised need to prevent inequality and discrimination against marginalised groups,¹⁸³ including indigenous peoples,¹⁸⁴ be

¹⁷² Green Climate Fund, ‘Environmental and Social Policy (Board Decision B.19/10)’ (2018) <<https://www.greenclimate.fund/documents/environmental-social-policy>> accessed 23 January 2019, para 3.

¹⁷³ Green Climate Fund (n 176), para 8(a).

¹⁷⁴ Green Climate Fund (n 176), 3(a).

¹⁷⁵ Green Climate Fund (n 176), para 3(b).

¹⁷⁶ Green Climate Fund (n 176), 3(c).

¹⁷⁷ Green Climate Fund (n 176), para 6.

¹⁷⁸ Green Climate Fund (n 176), para 5.

¹⁷⁹ For full definition see Green Climate Fund (n 176), para 2(a). Accredited entities can include financial intermediaries, and their role is to support delivery of GCF activities while ensuring social and environmental standards are met – see Green Climate Fund (n 176), paras 19 and 21.

¹⁸⁰ Green Climate Fund (n 176), para 23.

¹⁸¹ Green Climate Fund (n 176), para 29.

¹⁸² Green Climate Fund (n 176), para 34 - 38.

¹⁸³ Green Climate Fund (n 176), 8(e).

gender-sensitive,¹⁸⁵ and be consistent with international human rights standards.¹⁸⁶ 'Accredited entities' are required to be ongoing, transparent and consistent,¹⁸⁷ and subject to due diligence and oversight by the GCF.¹⁸⁸

The policy speaks to both the need for common standards and particularity. On the one hand, it speaks to consistency with broad international standards: environmental and social management systems are required to be aligned with 'international best practices and applicable standards',¹⁸⁹ and required to be consistent both with safeguards established under REDD+,¹⁹⁰ but also harmonised with its own decisions and practices to ensure 'a common approach'.¹⁹¹ Similarly to the GEF, it establishes a 'mitigation hierarchy' which requires risks or impacts to GCF funded activities to be dealt with through 'anticipation and avoidance', abatement, mitigation, and finally remedy, restoration and compensation.¹⁹² Simultaneously it speaks to a 'fit-for-purpose' risk-based approach, to 'require that environmental and social requirements and processes are commensurate with the level of risk and meeting the relevant ... standards'.¹⁹³ These provisions also speak to the heterogeneity of climate finance, recognising 'a wide range of entities, which can differ according to the scope and nature of the activities of the entities, and their capacity to manage environmental and social risks and impacts'.¹⁹⁴

The loosely-worded provisions that (potentially) deal with benefit-sharing are included in the principle relating to the treatment of indigenous peoples. It specifies as follows: 'All GCF-financed activities will avoid adverse impacts on indigenous peoples, and when avoidance is not possible, will minimize, mitigate and/or

¹⁸⁴ Green Climate Fund (n 176), para 8(p).

¹⁸⁵ Green Climate Fund (n 176), para 8(j).

¹⁸⁶ Green Climate Fund (n 176), para 8(q).

¹⁸⁷ Green Climate Fund (n 176), para 11(a).

¹⁸⁸ Green Climate Fund (n 176), para 11(c).

¹⁸⁹ Green Climate Fund (n 176), para 8(i).

¹⁹⁰ Green Climate Fund (n 176), para 8(n).

¹⁹¹ Green Climate Fund (n 176), para 8(l). 'GCF will promote the harmonized application of environmental and social safeguards to reduce multiple and overlapping requirements for activities through the development of common approach that considers the requirements of other co-financing institutions while providing the highest level of environmental and social protection required among the parties, with at least the level of protection by GCF being required.'

¹⁹² Green Climate Fund (n 176), para 8(f).

¹⁹³ Green Climate Fund (n 176), 8(c).

¹⁹⁴ Green Climate Fund (n 176), para 8(d).

compensate appropriately and equitably for such impacts, in a consistent way and improve outcomes over time; promote benefits and opportunities; and respect and preserve indigenous culture, including the indigenous peoples' rights to lands, territories, resources, knowledge systems, and traditional livelihoods and practices. All GCF-financed activities will support the full and effective participation of indigenous peoples and recognize their contribution to fulfilling the GCF mandate throughout the entire life cycle of the activities. The design and implementation of activities will be guided by the rights and responsibilities set forth in the United Nations Declaration on the Rights of Indigenous Peoples including, of particular importance, the right to free, prior and informed consent, which will be required by GCF in applicable circumstances...'¹⁹⁵ While this paragraph does not specifically require benefit-sharing expressly, it can be read to do so. As will be explored more fully in the next section, many of the provisions are consistent with what would be required for benefit-sharing arrangements that are consistent with international standards, including the clear distinction between compensation or mitigation and benefits, and the requirement of 'free, prior and informed consent' and ongoing engagement throughout the life of the project.¹⁹⁶ Procedurally, the paragraph speaks to the need for 'full and effective' participation.

More specific provision is made for the procedural aspects of environmental and social assessment. The GCF assumes responsibility for the full disclosure of information, including that related to the social and environmental safeguards,¹⁹⁷ and that 'stakeholders' are consulted in matters where they are affected,¹⁹⁸ with specific reference to additional requirements in relation to indigenous peoples, 'during the design and implementation of the activities',¹⁹⁹ and the formulation of environmental and social management plans.²⁰⁰ Extensive provision is made for monitoring and reporting.²⁰¹ The ESP also establishes a grievance procedure and Independent

¹⁹⁵ Green Climate Fund (n 176), para 8(p).

¹⁹⁶ Also in Green Climate Fund (n 176), para 12(b).

¹⁹⁷ Green Climate Fund (n 176), para 12(a) and 61 - 66.

¹⁹⁸ Green Climate Fund (n 176), paras 12(b), 18 and 67 - 72.

¹⁹⁹ Green Climate Fund (n 176), para 12(b).

²⁰⁰ Green Climate Fund (n 176), para 47.

²⁰¹ Green Climate Fund (n 176), para 56 - 60.

Redress Mechanism (IRM),²⁰² and requires that accredited entities both have complimentary procedures and facilitate access to the IRM.²⁰³ The GCF IRM aims to provide redress in cases of adverse impacts brought about ‘... through the failure of the project or programme funded by the Fund to implement the Fund’s operational policies and procedures, including environmental and social safeguards.’²⁰⁴

From the above, no clear picture on benefit-sharing in climate finance emerges at a policy level. Of course, the ESPs are not there just to govern benefit-sharing arrangements. For instance, the guidelines govern matters such as early stakeholder identification, ongoing participation, free and prior informed consent, all of which are consistent with the procedural elements of good benefit-sharing arrangements if used properly. But significantly, these provisions are for the governance and oversight of social and environmental safeguards more generally. While it would be expected that, if a project was one where benefit distribution was identified, the management of these processes would be flagged and managed under these processes, this is only assumed.

There is also no coherent story in terms of what benefit-sharing means in this context and to whom it should apply, and when, and in what circumstances. This is reflected in how these arrangements are interpreted by the funds; for instance, an empirical analysis of board decisions from the Adaptation Fund has found it difficult to identify coherence in the approaches taken to vulnerability and benefit (in which the term is used to determine the benefit of the project) in decisions of the AF board.

²⁰⁵ If there is no internal coherence, it is unlikely that there is coherence across funding entities, or certainly between climate financing entities and climate change benefit-sharing, or international norms more generally.

Provision is usually only made directly in relation to IP, which is of course necessary, but falls short of international standards which requires protection to extent to local

²⁰² Green Climate Fund (n 176), para 73 - 78.

²⁰³ Green Climate Fund (n 176), para 12.

²⁰⁴ Decision B.06/09, Annex V, ‘Terms of Reference of the Independent Redress Mechanism.’

²⁰⁵ Elise Remling and Åsa Persson, ‘Who Is Adaptation for? Vulnerability and Adaptation Benefits in Proposals Approved by the UNFCCC Adaptation Fund’ (2015) 7 *Climate and Development* 16.

communities, and also falls short of what seems to be more usual practice in climate change and benefit-sharing, which is that communities local to a project should also be considered for benefit-sharing under some circumstances. The AF acknowledges this implicitly, by including benefit-sharing as a general obligation that is not specific to IP. But there is also no real guidance as to when and in what circumstances benefits could be said to arise – the GEF contemplates this happening when projects are commercialised, but this too is a narrow framing compared to international standards, and does not take account of the complex potential relationship of climate benefits and community benefits, as shall be explored in the next section.

Additional to the question of whether there is consistency and coherence in the way benefit-sharing arrangements are introduced, is the question of whether benefit-sharing proposals are considered and then introduced in circumstances where they ‘should’ be. It is notable though that a comprehensive empirical review of funding proposals to the Adaptation Fund reveals that very few applications address the distribution of benefits amongst beneficiaries.²⁰⁶ A scoping review of the GCF documents suggests that these arrangements are not being proposed or sought in the vast majority of funding applications. For instance, GCF approved 11 new projects in 2017 and the 24 members of the GCF board took a number of key policy decisions to further strengthen the operations of the Fund and its support for highly quality climate finance initiatives.²⁰⁷ Very few projects sought approval for benefit-sharing arrangements either in their project requests or ESP reports. Of course, benefit-sharing will not be necessary or appropriate in all circumstances, so the small number of applications is not indicative of anything necessarily having gone wrong. But there are no clearly defined triggers for benefit-sharing in climate finance, either in the funds’ guidance document, or anywhere else. As such, a determination of whether BS arrangements were needed and appropriate must presumably be entirely discretionary and left to the accredited entity formulating the proposal.

4. What might be meant by benefit sharing in climate finance

²⁰⁶ Remling and Persson (n 209), 28.

²⁰⁷ https://www.greenclimate.fund/documents/20182/38417/release_GCF_2017_B18.pdf/

Having dealt with these key formal and definitional issues, the section seeks to distil some lessons that would be useful in refining the meaning of benefit-sharing in the context of climate finance. What hopefully emerged from the previous sections, is that benefit-sharing as a concept and practice in climate finance requires further thought. The purpose of this section is not necessarily to prescribe or construct the norm, as this process would follow practices within the intermediaries,²⁰⁸ rather to suggest that these need to be developed. In so doing, international norms and standards on benefit-sharing need to be considered and respected, but this must be done with an eye to existing practices in climate law and climate finance, and the particular nature and circumstances of the arrangements that develop in this context.

This section of the article deals with important and/or undertheorised areas in benefit-sharing in climate finance. There might be more, but these have emerged as the key issues in a period of study and reflection on both issues. The previous section examines substantive and then procedural provisions that govern benefit-sharing arrangements in the climate funds. It makes less sense to take this approach here because in many instances the substantive and procedural aspects of what is required are interwoven. For instance, the right to participation in environmental decisions is a substantive as well as procedural right,²⁰⁹ and the concept and processes of participation are both necessary to secure other rights, but also important because of their capacity to inform other, substantive elements such as consent, and the ongoing need for dialogue and recognition. Accordingly this section proceeds as follows: first it revisits some earlier discussion to make some comments about how the heterogeneity of climate finance and how this complicated approaches to benefit-sharing. Next it looks at some overarching issues relating to participation, community involvement and representation, emphasising the procedurally necessary but also substantive importance of these. Finally, it returns to the substantive question of what benefits might mean in climate finance, first making some key distinctions in a fairly muddy field, and considering what benefits might be in climate finance, and how these might be appraised.

²⁰⁸ Brunnée and Toope (n 10).

²⁰⁹ Olawuyi (n 16) from 120.

4.1 *Some basics*

The first point is that climate finance projects do not have a distinct or uniquely defining character to them. The scale and features of these funded endeavours may differ considerably and, crucially, may in their substantive character resemble other areas where benefit-sharing norms and practices exist, whether formal or informal. Despite this, there may be some persistent trends or broad project areas where benefit-sharing is more helpful than in others. For instance, small-scale renewable energy projects may frequently employ benefit-sharing arrangements which may simultaneously be subject to national laws or policy guidelines, but also subject to the choices and practices of specific sub-industries or individual developers.²¹⁰ This might look very different to, say, projects that aimed to increase crop resilience in small-scale agriculture, which would take place in an increasingly complex legal landscape of conflicting rights and policies.²¹¹ Different still might be broader international exchanges which seek to stimulate innovation and support capacity building through long term technology development initiatives.²¹² Such projects currently do not, yet may benefit from formalised inter-state benefit-sharing agreements;²¹³ this however raises other questions about how ‘benefits’ would be conceptualised in the context of such far ranging projects.²¹⁴

What is consistent about climate finance as an area of study, is the provision of finance; yet as described above even the instruments and modalities of climate finance vary enormously, and finance provided through the funds varies between project, with use being made of grants, subsidies, loans and various forms of public-private ‘blended’ finance. This compounds the heterogeneity of the field and further challenges universalisation approaches. Of course, this raises the question of why consider climate finance at all, and simply allow benefit-sharing approaches to be

²¹⁰ Annalisa Savaresi, ‘The Rise of Community Energy from Grassroots to Mainstream: The Role of Law and Policy’ (2019) (forthcoming) *Journal of Environmental Law*.

²¹¹ Outlined in Elsa Tsioumani, ‘Beyond Access and Benefit-Sharing: Lessons from the Law and Governance of Agricultural Biodiversity’ (2018) 21 *The Journal of World Intellectual Property* 106.

²¹² David Ockwell and Rob Byrne, ‘Improving Technology Transfer through National Systems of Innovation: Climate Relevant Innovation-System Builders (CRIBs)’ (2016) 16:7 *Climate Policy* 836.

²¹³ Savaresi and Bouwer (n 3), Section 3(b).

²¹⁴ But see for instance Bouwer (n 103), Section 6.

determined by the substantive regimes within which climate finance is delivered, if any. But as argued above, while it would not work either in law or in principle simply to apply the standards and rules from another regime, it also would not do to expect an easy answer in this context. A simple answer to this question, is that the climate funds do have obligations to take benefit-sharing into account when funding projects, and that a lack of consistency or coherence either across the projects of a specific entity, or throughout the climate regime as a whole, is not consistent with justice and fairness. At the very least, the adoption of clear minimum standards will ensure consistently with international obligations created elsewhere, and would not prevent the adoption of distinct, more specific or better protection if required by ad hoc practice or by an alternative international regime.

4.2. Starting early with assessment

All the funds' ESPs and associated policies underline the importance of early assessment. All the climate funds prescribe the circumstances in which proposed projects require review of impacts or possible risks before approval is granted. Much like EIA, these environmental and social risk assessments are a procedural requirement in environmental law, yet can also be seen as an '... entryway into deeper, substantive legal understandings of public participation ... and wider concepts of rights and obligations in any legal system.'²¹⁵ These requirements are relevant to but go beyond considerations about benefit-sharing in projects; these assessments identify project impacts and likely risks, and determine how these might be mitigated or controlled, or subject to compensation or other forms of reparative payments. As I discuss further below, the line between compensation and benefit-sharing is not always clear, although it seems that international standards require that these should be distinct processes. If so, then assessment stage is when these distinctions and divisions between reparatory and benefit-sharing processes should be made. But these assessments also make (or *should make*) early determinations as to whom the stakeholders are in a project.

²¹⁵ Natasha Affolder, 'Contagious Environmental Lawmaking' (2019) 31 Journal of Environmental Law 187, 190; Also see Knox (n 27), para 25.

Professor Knox has stipulated that where environmental and social assessment is done it should be done as early as possible,²¹⁶ and *in relation to indigenous peoples and local communities*, in accordance with their own customs and traditions, and the Guidelines established under the Convention for Biological Diversity.²¹⁷ The voluntary Akwé: Kon Guidelines provide detailed and far-reaching requirements combined social, environmental and cultural impact assessments to be conducted in circumstances where the rights or interests of indigenous peoples are potentially affected.²¹⁸ The guidelines cover the conduct of meetings, including establishing mechanisms for the ongoing engagement of communities and the conduct and recording of meetings.²¹⁹ They provide for indigenous communities involvement with the financial aspects of the problem, including auditing and project oversight,²²⁰ thereby ensuring transparency of the financial investment and gains made in the project. They require states to provide support (including legal, technical, financial) indigenous peoples to assist their engagement in these processes. They also require the establishment of a review and appeal process.²²¹ References to these requirement are reflected, albeit imperfectly, in the funds' ESPs, which are certainly 'front-loaded' in terms of processes of risk assessment and identification of key stakeholders.

In this way, this early procedural process is key to the 'predetermination' of the agenda, and gets to frame the boundaries of risk and impact assessments, but also whether benefit-sharing arrangements are 'triggered' or indicated, at project proposal stage.²²² If the initial assessment works well, it sets the stage for the future relationship for what could be a decades-long project, and to some extent shapes all the criteria discussed below – how the participatory processes function, who the beneficiaries are, how project benefits are understood etc. These issues become a non-decision, or are simply determinable by default, if those potentially affected

²¹⁶ Knox (n 27), para 20.

²¹⁷ Knox (n 27), paras 43, 50. This approach was endorsed by the Inter-American Court of Human Rights in relation to indigenous people's rights in relation to extractive activities taking place on their land. See discussion in Morgera, 'Under the Radar: The Role of Fair and Equitable Benefit-Sharing in Protecting and Realising Human Rights Connected to Natural Resources' (n 19).

²¹⁸ CBD Dec VII.16 UNDoc UNEP/CBD/COP/DEC/VII/16 Annex F, Section IV.

²¹⁹ *ibid* paras 14 – 17.

²²⁰ *ibid*, para 18.

²²¹ *ibid*, para 23.

²²² Caine and Krogman (n 78), 82.

simply are not brought to the table.²²³ But the issues underlying these assessments can be seen as a subcategory of benefit-sharing both as a procedural entry into proper arrangements, but also as a synecdoche for the tensions between particularity and universality, and questions about universalisation that were discussed earlier in the article. If ESPs can be seen as a category of EIA, then as much as these have or are acquiring the status of a norm in international environmental law, a transnational review of the effectiveness of EIA reveals mixed results.²²⁴ It simply is not clear that EIA works in all contexts for a variety of reasons – for instance, where national laws or standards do not support robust evaluations or measures of risk, or where failures in implementation come about due to subversive interests or contrary incentives in terms of what the process is for.²²⁵ This is particularly problematic for the current study, as most of the studies reflecting shortcomings come from the developing world and post-colonial states, that would (or should) be the targeted recipients of climate finance.²²⁶ But it is also difficult to imagine an alternative – certainly simply not bothering with assessment processes is not a solution.

4.3. The importance of participation

The right to participation in environmental decisions is a substantive as well as procedural right,²²⁷ and the concept and processes of participation in environmental law have been well developed in the academic literature.²²⁸ Participation is considered necessary to secure the public accountability and legitimacy of any environmental project or programme. Notably, the Framework Principles discussed above emphasise the importance of public participation, which must be open to everyone, occur early in any process or project, and be done with full and complete information as to the intended project, possible decisions and rights of the parties in that context.²²⁹

²²³ Caine and Krogman (n 78), 82.

²²⁴ Affolder, 'Contagious Environmental Lawmaking' (n 219).

²²⁵ Affolder, 'Contagious Environmental Lawmaking' (n 219), Section 2.

²²⁶ Affolder, 'Contagious Environmental Lawmaking' (n 219), and sources cited therein.

²²⁷ Olawuyi (n 16) from 120.

²²⁸ Lee and others (n 130).

²²⁹ Knox (n 27), Principle 15 and commentary.

Benefit-sharing is always inherently linked to participation because it requires the ongoing balancing of rights and interests in an ongoing project. The importance of participation in benefit-sharing in the climate regime is implicitly acknowledged in the Cancun safeguards that seek to avoid negative outcomes or results from the implementation of REDD+ projects, calling for ‘full and effective participation’.²³⁰ Notably, a lack of participation or loss of access to salient information about the design and process of carbon projects, has been identified as a severe shortcoming.²³¹ In essence this requirement informs all other aspects of benefit-sharing arrangements, in that participatory processes determine the quality of the relationships that underlie established arrangements. For instance, participation plays a role in shaping the engagement and external face of communities, as the engagement and dialogue within communities with governs the internal legitimacy of community protocols and embody the communities’ approach to the project and their engagement with it.²³² These are of crucial importance, for in order for the community to ‘participate’ in any benefit-sharing arrangements the representatives must fulfil their role legitimately. But participation, or elements of what defines adequate participatory processes, also underpin and inform other essential aspects of the benefit-sharing concept. Participatory processes determine the quality and effectiveness of channels of communication between project partners (which could include any range of actors such as climate funds, project developers, local or national governments) and the benefit recipients, and are relevant at all stages of the project; at initiation, identification of stakeholder, risk assessment, project management and (if relevant) any accountability and redress processes. As discussed above, all of the studied climate funds in their ESPs and associated documents, require processes that are either constitutive of, or depend on participation for their proper actualisation.

This raises all sorts of questions as to whether benefit-sharing arrangements can create the basis for the ongoing relationships required for substantive participation in

²³⁰ Decision 1/CP.16 The Cancun Agreements, Appendix 1.1(d).

²³¹ Olawuyi (n 16) from 111.

²³² Parks and Morgera (n 92), 340.

climate finance funded projects, and indeed whether benefit ‘recipients’ could have adequate participatory power through existing structures to enforce and maintain benefit-sharing arrangements. Where participatory processes are examined in other contexts, and where engagement in participation is done without proper reflection and engagement, the outcomes can be less than constructive, either reinforcing existing power imbalances,²³³ or alienating stakeholders from the initiatives in or for which their consent (or in theory involvement) is sought,²³⁴ and frustrating all parties due to the perceived futility of engaging in ‘hollow’ bureaucratic exercises with little real scope for consensus or dialogue.²³⁵ These ongoing processes should include a ‘...deliberative, consensus-based public dialogue aimed at reaching better-quality decisions through the value of individual rationalities.’²³⁶ This needs to be more than participation simply to secure consent or ‘public acceptance’, where decisions are imposed and discussion aims only to secure acceptance or compliance.²³⁷

4.4. Voice and recognition

Closely associated with these substantial concepts of participation is the concept of participant voice and recognition. Notably, this sense of inclusion accrues by virtue of recognition of preference in relation to monetary and other benefits. Recognition is both a subject but also precondition for other forms of justice,²³⁸ and indeed social recognition is included as a non-monetary benefit in the ‘menu’ of benefits annexed to the Nagoya Protocol.²³⁹ Certainly recipient voice and priorities are important when it comes to how the benefits are framed, which further underlines the importance of participation as an ongoing priority in these arrangements, if they are to continue to operate in a fair and just manner. As Schlosberg explains: ‘If you are not recognized

²³³ Maria Lee and Carolyn Abbot, ‘The Usual Suspects? Public Participation Under the Aarhus Convention’ (2003) 66 *The Modern Law Review* 80.

²³⁴ Margherita Pieraccini, ‘Rethinking Participation in Environmental Decision-Making: Epistemologies of Marine Conservation in South-East England’ (2015) 27 *Journal of Environmental Law* 45.

²³⁵ Lee and others (n 130). Also see L Natarajan and others, ‘Navigating the Participatory Processes of Renewable Energy Infrastructure Regulation: A “Local Participant Perspective” on the NSIPs Regime in England and Wales’ (2018) 114 *Energy Policy* 201.

²³⁶ Armeni (n 86) 437.

²³⁷ Armeni (n 86).

²³⁸ Saskia Vermeylen and Gordon Walker, ‘Environmental Justice, Values and Biological Diversity: The San and the Hoodia Benefit Sharing Agreement’ in JoAnn Carmin and Julian Agyeman (eds), *Environmental inequalities beyond borders: local perspectives on global injustices* (MIT Press 2011), 108.

²³⁹ Nagoya Protocol, Annex 2(p)

you do not participate; if you do not participate you are not recognized. In this respect justice must focus on the political process as a way to address both the inequitable distribution of social goods and the conditions undermining social recognition.²⁴⁰

This raises all sorts of questions about perspective, worldview and knowledge when it comes to the determination of project benefits and the framework through which these should be delivered. These need to be designed to suit recipients' particular needs and priorities. This is not an argument against systematisation and universalisation of these norms, and it certainly raises no conflict with the requirement that full information about all aspects of the proposed project and associated rights be provided. The provision of full information and preservation of minimum standards and best practices should preserve a space for recipient voice; this is not the same as the imposition of pre-determined benefits packages.

4.5. Community / benefit recipients

Benefit-sharing in climate finance raises new questions about actors and participants, and in particular who the benefit recipients are. There are broader questions about actors and their positioning within international law. But climate finance benefit-sharing does raise particular issues about who might receive the benefits. First, benefit-sharing as a norm in international human rights and biodiversity law originated particularly as a means to protect the rights and interests of indigenous peoples in specific contexts where their traditional knowledge or natural resources were to be used or exploited by corporate or other interests. Its current status as an emerging norm in international human rights and environmental law asserts the rights of indigenous peoples and local (or traditional) communities, the latter referring to traditional communities which do not define as indigenous but have close relationships with nature and depend on these relationships for material or cultural survival.²⁴¹ As such, at the very least there should be an obligation to

²⁴⁰ Cited in Vermeylen and Walker (n 242), 108.

²⁴¹ Knox (n 27), para 48. The paragraph continues: 'Examples include the descendants of Africans brought to Latin America as slaves, who escaped and formed tribal communities. To protect the human rights of the members of such

consider benefit-sharing arrangements with IP and LC where a project is funded by climate finance; at present this is not reflected by all the CFESPs. There are a reason why hard fought safeguards for IPLC is enshrined in international human rights and biodiversity law, and what follows should not be seen to detract for that, or in any way dilute the significance of what is required in terms of protecting their interests. But prescribed categories of benefit-sharing recipients extend beyond this under international law. For instance, rights of ‘farmers’ to benefit-sharing are protected in agricultural regimes,²⁴² or for instance small-scale fishermen in certain marine regimes.²⁴³

Moreover, in many instances benefit-sharing arrangements under climate finance have more in common with benefit-sharing under human rights law, or energy projects, as they relate to various aspects of the climate response. So, all the examples mentioned above – renewable energy projects, seed resilience schemes and technology innovation centres – are likely to have different effects and implications that either impact on or effect a distinct community, or generate benefits in circumstances where distributive justice requires be fairly allocated amongst involved or affected participants. This presents complex challenges of determining the scope or character of specific communities, in relation to who is included, who is excluded, who makes these decisions and how and whether the internal governance of (which could be otherwise inchoate) communities are important issues in benefit-sharing practice.²⁴⁴ Strong governance and accountability processes within the communities can ensure fair internal distribution of benefits and prevent social

traditional communities, States owe them obligations as well. While those obligations are not always identical to those owed to indigenous peoples, they should include the obligations described below (see A/HRC/34/49, paras. 52–58). Paragraph 53 makes express reference to benefit-sharing.

²⁴² Tsioumani (n 215).

²⁴³ Morgera, ‘The Need for an International Legal Concept of Fair and Equitable Benefit Sharing’ (n 64), 378.

²⁴⁴ Lila Barrera-Hernández and others, ‘Introduction: Sharing Costs and Benefits of Energy and Resource Activity’ in Lila Barrera-Hernández and others (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016). 9 and the volume generally. For instance: ‘One of the interesting trends is the extent to which developments in energy and resource activities are driving changes to the very idea of community. It reinforces the view that social scientists have always found it difficult to define community. Keller observes that most scholars define community as rooted in territorial/spatial and generational togetherness, where place, shared ideals and expectations, and a network of social ties and allegiances are important ... Community involves not only shared identity, but to varying degrees, also the sharing of resources. Distributional justice issues around ‘sharing’ may resonate within a community based in bonds of trust and personal relationships but may also imply not sharing with outsiders. Thus, the processes of definition of a community and the exercise of power within a community may play out in the distribution or sharing of costs and benefits. [citation omitted] Indeed, many energy and resource projects may prove to be highly divisive for ‘local’ communities and may lead to group conflicts.’

disruption and other conflicts.²⁴⁵ But these processes can also be intensely divisive, creating or exacerbating power hierarchies and hence internal distributive patterns within communities.²⁴⁶

The extensive literature on communities in social and political science excavates these questions into complex and dynamic conceptions of community.²⁴⁷ For benefit-sharing purposes, conceptions of community anchored around either place, or shared interests, or both, are most useful in determining how to make sense of community as determinative of rights or interests of a group.²⁴⁸ For instance, del Guayo proposes a concept of ‘energy community’ as including those that are spatially or legally constructed, or formed through the shared experience of adverse impacts of an energy project.²⁴⁹ The complex and contested notion of ‘community’ can seem like an ungovernable complexity, or an opportunity for a ‘free-for-all’ on seeking benefits which are generally unjustified. But legal or regulatory frameworks on other levels of governance have sought to define the boundaries of or conditions for community claims.²⁵⁰ For instance, the EU Renewables Directive establishes criteria for energy communities based on voluntariness, autonomy, spatial proximity to the relevant project and membership or shareholding in a relevant governing body.²⁵¹

4.7. Benefits

The final, substantive issue concerns what might be considered a ‘benefit’ in the broad and heterogenous context of climate finance. It highlights some useful principles from other regimes that could help to frame what a benefit is, before

²⁴⁵ Rachel Wynberg and Maria Hauck, ‘People, Power, and the Coast: A Conceptual Framework for Understanding and Implementing Benefit Sharing’ (2014) 19 *Ecology and Society* 27; Elisa Morgera and Elsa Tsoumani, ‘The Evolution of Benefit Sharing: Linking Biodiversity and Community Livelihoods’ (2010) 19 *RECIEL* 150, 158 and generally.

²⁴⁶ Barry Barton and Michael Goldsmith, ‘Community and Sharing’ in Lila Barrera-Hernández and others (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016).

²⁴⁷ Barton and Goldsmith (n 250).

²⁴⁸ Savaresi, ‘The Rise of Community Energy from Grassroots to Mainstream’ (n 214), 9.

²⁴⁹ Inigo del Guayo, ‘Regional and Local Energy Communities - A European Union Perspective on Community Benefits’ in Lila Barrera-Hernández and others (eds), *Sharing the Costs and Benefits of Energy and Resource Activity* (OUP 2016).

²⁵⁰ Barton and Goldsmith (n 250), from 39.

²⁵¹ Savaresi, ‘The Rise of Community Energy from Grassroots to Mainstream’ (n 214), 9.

asking some difficult questions about the relationship between benefits and financing instruments. As discussed above, climate issues make determinations of 'benefit' particularly complicated, as do financing and monetary issues.

As discussed above, climate finance is the 'additional' financing provided to support the transition to a low-carbon society. In some instances this 'additional' payment reflects what is required to make a low-carbon project viable. So in many instances the 'benefits' generated with climate finance are progress towards the amelioration of climate change, whether in terms of projected carbon reductions, or increased resilience to climate change.²⁵² In so doing, it may be important to recognise that the benefits calculable from climate finance may not align perfectly with climate goals.²⁵³ Where projects generated profits, then these are clear financial benefits to be shared on the relevant terms required. or take account of benefits that seemed to lie beyond the scope and purpose of a project.²⁵⁴ However, even if the only project benefits are carbon reductions, there is still both potential and precedent for reallocation, as is demonstrated by REDD+ and other Kyoto-based instruments. These processes, of course, have been subjected to significant criticism both in terms of their practical application, which in some instances has been disastrous, and devastating for the 'benefit recipients'.²⁵⁵

For instance, as discussed above, an empirical analysis of the project funding through the Adaptation Fund has revealed very low inclusion of 'distributable benefits' in project applications.²⁵⁶ Of course, it is conceivable that this reflects a failure or refusal to take benefit-sharing seriously; it or it be indicative of the overlap between development or resilience benefits with adaptation funding. To wit, taking the seed resilience example, if the entire purpose of the project is to support farmers' capacity in changing environmental conditions, in some circumstances there may not

²⁵² Also see McHarg (n 129).

²⁵³ See for e.g. Azad and Azad (n 8), where the recipients did not want the 'green' hydropower as a benefit, as it caused other problems.

²⁵⁴ See for e.g. Savaresi, 'The Emergence of Benefit-Sharing under the Climate Regime: A Preliminary Exploration and Research Agenda' (n 1).10 on the heated debate concerning the reporting of non-carbon benefits under REDD+.

²⁵⁵ See e.g. Leo Pekkett, 'Benefit Sharing in REDD+ : Exploring the Implications for Poor and Vulnerable People' (The World Bank 2010) 65843 <<http://documents.worldbank.org/curated/en/864211468154167055/Benefit-sharing-in-REDD-exploring-the-implications-for-poor-and-vulnerable-people>> accessed 26 March 2018.

²⁵⁶ Remling and Persson (n 209) 9, and see discussion above.

be additional benefits that require distribution. If these projects produce diffuse gains across local communities,²⁵⁷ then it seems to make little sense to seek to distribute advantages if the project aims to advantage the community. From a commercialised perspective such projects reflect an absence: an increased resilience to climate change that benefits a local community in terms of what they experience less of, specifically seed loss. But, as discussed below, there is potential for benefit-sharing in such arrangements, perhaps in shared licensing or intellectual property rights, capacity building or other educational opportunities. These are all recognised as benefits under different regimes in international law.

4.8. Benefits

Apart from particular issues to do with climate response or climate finance, there are some well-established principles that have developed under the CBD, and continue to be used in biodiversity law,²⁵⁸ or law of energy and natural resource extraction,²⁵⁹ and that are not incompatible with benefits arising in a different context. At a minimum, this should include a broad concept of ‘benefits’ which can be both monetary and non-monetary. For instance, a narrow conception of benefit may exclude indirect or non-monetary benefits (or as discussed below, conflate these with other payments or entitlements), particularly if formalised approaches devalue non-monetary benefits.²⁶⁰ The Nagoya Protocol includes a ‘menu’ of monetary and non-monetary benefits, most of which would be possible or compatible with projects funded with climate finance, that range from various kinds of financial payments including license fees, payments to trust and salaries; it lists non-monetary benefits which include a range of technology access solutions and capacity building, resource sharing, social recognition and contributions to the local economy.²⁶¹ These arrangements can also be complex, combining ownership rights or shareholdings – which can be considered as a benefit – which both guarantee control and

²⁵⁷ Sarah Colenbrander, David Dodman and Diana Mitlin, ‘Using Climate Finance to Advance Climate Justice: The Politics and Practice of Channelling Resources to the Local Level’ [2017] *Climate Policy* 1.

²⁵⁸ Elisa Morgera, ‘Justice, Equity and Benefit-Sharing under the Nagoya Protocol to the Convention on Biological Diversity’ (2015) 24 *The Italian Yearbook of International Law Online* 113.

²⁵⁹ Barrera-Hernandez and others (n 248). 8

²⁶⁰ See discussion in Armeni (n 86), from 428.

²⁶¹ Nagoya Protocol, Annex 1.

transparency, but and also generates benefits in the forms of profits and share revenue. Furthermore, shareholding arrangements are also a powerful positional tool which guarantee a degree of ongoing control in an enterprise, and that can support demands for participation in projects and the legitimate realisation of benefits. Project benefits should reflect the values and priorities of the recipients and be determined with their full participation,²⁶² and should be needed and usable by them.

It is also important that 'net' benefits are considered and calculated - whatever is received should not be eclipsed by the costs and impacts of the activities on the effected community (particularly when the benefits are financial).²⁶³ The net costs should include costs of administration and management of the benefits fund, which might require professional services, but at the very least will include interest, administration charges and may have implications for tax or other entitlements.²⁶⁴ For this recipients should have a reasonable expectation of transparency in relation to project revenue and the risks and costs anticipated under the project.²⁶⁵ A calculation of net benefits in the context of proper administration could prevent the social disruption frequently experienced by marginalised communities which receive sudden, unstructured income.²⁶⁶

As highlighted earlier, potential difficulties can arise in circumstances where the dense involvement of potential beneficiaries with the projects, gives rise to a range of entitlements all of which could be settled financially. Of course, strong arguments can be made that benefit-sharing arrangements can have a reparative or compensatory aspect to them;²⁶⁷ however, the purpose of these arrangements is not to compensate but rather to ensure that vulnerable parties are properly remunerated

²⁶² This understanding emanates from the 2002 Bonn Guidelines, see Vermeulen (n 17), 424.

²⁶³ Some models refer to this as 'sharing the burdens' as aligned with 'sharing the costs'. Burden-sharing has its own meaning in climate discourse, and I don't feel it is helpful to use that wording in a different way. In addition, this does not describe well what I mean – the costs of the project to the vulnerable benefit-recipients may not necessarily be 'burdens' of the project as a whole.

²⁶⁴ This may include entitlement to state benefits or grants, such as pensions, unemployment benefit or parental support, particularly if means tested. These issues should be managed, and the costs of management should be incorporated in the calculation of the benefit.

²⁶⁵ See Kemerink-Seyoum and others (n 90) at 266 and generally.

²⁶⁶ Vermeulen and Walker (n 242), 119.

²⁶⁷ Bram De Jonge, 'What Is Fair and Equitable Benefit-Sharing?' (2011) 24 *Journal of Agricultural and Environmental Ethics* 127.

and acknowledged for their role in making the project possible. For instance, communities or indigenous peoples resettled from their land, or who otherwise lose tenure or other rights, should be entitled to compensation or reparations for the loss of tenure rights or relocation. *In addition*, they might be entitled to benefit-sharing arrangements in relation to the use of their traditional knowledge or due to infringement on residual rights.²⁶⁸ As raised earlier, these distinctions should be made at early assessment stage, but it is difficult to see how this could be managed in such a way as to ensure that the full range of entitlements to which benefit recipients are available are not absorbed into entitlements that are distributed similarly but on a different basis.²⁶⁹

As before, it is difficult to be prescriptive about what might be involved, due to the diverse uses and possibilities for climate finance. What is clear, however, is that the areas highlighted above have not been sufficiently clearly distinguished in the existing guidance of the climate funds. For instance, restricting benefits payments to ‘commercialised’ projects does not do justice to the range of benefits available. But in terms of monetary benefits further food for thought lies in the *provision* of climate finance as much as the *receipt* of climate finance. The interface between private financial organisations and climate funds is reflected in the provision of ‘blended finance’. A variety of methods or financial instruments encourage continuing flows of private finance, which is then used to provide ‘climate finance’ (frequently) to fund projects and initiatives in receiver countries, as discussed in the previous section.

As Baker explains, in some instances the very design of the project obviates any possibilities for benefit-sharing. In the context of renewable energy projects funded with project finance, she explains: With the exception of payments to the Mexican government and development banks, all benefits flow exclusively to corporate actors. Indeed, the energy produced is sold to corporations ... Debt payments are made to private banks. Once the debt payments are made, profit flows up to the private developers who are the initial investors in the projects. The structure of the projects

²⁶⁸ For instance see Herrejon and Savaresi (n 79).

²⁶⁹ For instance, Craik, Gardner and McCarthy (n 75) discusses how natural resource agreements stipulate that impact mitigation and benefits should be dealt with separately - see 381 - 383.

themselves impedes any hope of authentic community benefits. Proponents of the projects point to one public good: a net positive reduction in greenhouse gas emissions'.²⁷⁰

But in less intensively structured arrangements, the design of financing instruments frequently raises questions both about project benefits, but also broader questions about the ultimate direction of flows of climate finance. Interest earned on supported concessional loans, and both capital and equity earned through supported investments, are clear monetary benefits generated in climate specific situations with the support of (largely publicly funded) climate funds. In this sense, public climate finance supports the creation of a viable, risk-managed market for the providers of private finance, which generates financial benefits for them. Apart from the climate benefits, in commercial terms provision of finance is only beneficial to recipients; these processes and arrangements raise all sorts of questions about mutual interest and possibility of shared benefits. If anything, financing arrangements are more inherently associated to the provision of climate finance, than the various recipient-end projects that are funded by it.

Of course, the counter-arguments is clear: that there is no appropriate 'benefit-sharing' trigger in these instances, and that benefit-sharing arrangements are appropriate (and required) in relation to the receipt of climate finance, not its provision.

4.9. Triggers

There should be clearly defined conditions which would trigger benefit-sharing obligations.²⁷¹ Establishing clear and defined 'triggers' for benefit-sharing helps to clarify why benefits generated a specific context might be seen to give rise to obligations to ensure equitable access, but not in others. For instance, Morgera explains the approach and rationale taken to benefit-sharing under biodiversity law

²⁷⁰ Baker (n 89), 350.

²⁷¹ See discussion in Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (n 64) from 372.

differs to that under human rights law, and this affects conceptions of benefit as well as triggers, but in any event the acceptance of benefit-sharing obligations in this context leaves little question that benefit-sharing is an obligation in climate finance. But in this context the determinations of benefit-sharing based on markets and resource use, impacts and human rights, or co-operation within projects, will determine to some extent when and how such projects are framed, who is considered a stakeholder, and how benefit-sharing arrangements would be constructed around them.²⁷²

5. Conclusions

Benefit-sharing has been suggested as a core procedural and substantive safeguard to the achievement of practical justice in environmental and natural resource use. Despite problems in application and implementation, benefit-sharing continues to be introduced in new areas of international environmental law, with mixed mixed conceptualisations and mixed results. This article has examined how benefit-sharing appears in climate finance. The unique and heterogeneous nature of climate finance and benefit-sharing creates complexities in terms of how benefit-sharing might be contextualised in this context. Some of the possibilities are very obvious, but approaching the field with a fresh eye raises new possibilities in terms of the kinds of activities that might be seen as benefit-generating.

This article has argued that the guidelines developed in some respects do not keep pace with international standards, and in others leave open questions in terms of how benefit-sharing would be operationalised in this context. In many ways benefit-sharing is not an easy fit for climate finance, but drawing on standards and research in other areas of international environmental law, including climate law, can help to flesh out some core requirements as to how benefit sharing can be better conceptualised in climate finance. In some respects, the matters raised, for instance the approaches to participatory practices, can not be governed by guidelines, but depend on the approaches taken by participants.

²⁷² Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (n 64), 379 - 380.