

# University of Edinburgh

School of Law

Research Paper Series

No 2014/43

## **The Emergence of Benefit-sharing under the Climate Regime: A Preliminary Exploration and Research Agenda**

**Annalisa Savaresi**

University of Edinburgh  
annalisa.savaresi@ed.ac.uk



This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s). If cited or quoted, reference should be made to the name(s) of the author(s), the title, the number, and the working paper series

© 2014 Annalisa Savaresi

Edinburgh School of Law Research Paper Series

University of Edinburgh



## **BENELEX Working Paper N. 3**

# *The Emergence of Benefit-sharing under the Climate Regime: A Preliminary Exploration and Research Agenda*

*Annalisa Savaresi, University of Edinburgh ([annalisa.savaresi@ed.ac.uk](mailto:annalisa.savaresi@ed.ac.uk))*

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).



## **Abstract**

This paper analyzes the increasing currency of benefit-sharing in the climate regime and its potential to contribute to engendering greater equity in climate governance. The notion of benefit-sharing has been deployed in international environmental law instruments to equitably and fairly allocate advantages derived from the sustainable use and conservation of natural resources and related traditional knowledge, as well as from the regulation of uses and of conservation of such resources. Though benefit-sharing is not explicitly mentioned in the UN Framework Convention on Climate Change or in the Kyoto Protocol, the international climate regime raises a host of equity questions that have been at least in part addressed by making explicit or implicit reference to the notion of benefit-sharing. This paper maps the use of the benefit-sharing notion in the climate regime, with the objective of developing a research agenda towards ascertaining whether there is any overall coherence in the way it has been termed and interpreted, as well as its potential to better integrate human rights and environmental objectives in climate governance. In order to achieve this, the paper first introduces the main equity questions arising in the climate regime at the inter- and the intra-State levels, to then analyze them through a benefit-sharing lens. The conclusions articulate a series of research questions for further investigation, as well as a preliminary reflection on the implications of investigating equity in the climate regime from a benefit-sharing perspective.

## 1. Introduction: benefit-sharing in the climate regime

Averting or tempering the impact of future climate changes on generations to come has significant equity implications for present generations, both between and within States. At the *inter-State* level, climate change response measures may potentially slow developing countries' progress towards economic development and poverty eradication. These countries therefore need finance and technologies to continue on the path towards economic development, while contributing to addressing climate change. At the *intra-State* level, climate change response measures could potentially restrict access to resources such as energy, land and forests for the most vulnerable segments of the population in developed and developing countries alike.<sup>1</sup> It is therefore necessary to ensure that measures adopted to counter climate change avoid or compensate the negative social impacts they may produce. This paper analyzes these two sets of equity concerns by drawing on the notion of benefit-sharing.

In recent years, the notion of benefit-sharing has gained prominence in international law as a means to allocate advantages derived from the use, regulation and conservation of natural resources and related traditional knowledge, at both the inter- and intra-State levels.<sup>2</sup> While benefit-sharing is not explicitly mentioned in the UN Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol, benefit-sharing requirements have increasingly appeared in the climate regime as a means to compensate, reward and involve various sets of stakeholders in climate change adaptation and mitigation activities. Benefit-sharing is thus already being used as a tool to address the *intra-State* equity questions associated with the impact of climate change laws and policies on the most vulnerable segments of the population, especially in developing countries; and, in some instances, also as a means to build upon synergies with indigenous peoples' and other communities' traditional practices that are supportive of climate change mitigation and adaptation.

In principle benefit-sharing could also be a means to address the significant *inter-State* equity implications associated with the distribution of resources to address climate change amongst States. At this level, measures to facilitate access to finance and technologies in the climate regime may be regarded as a form of benefit-sharing.<sup>3</sup> Framing the underlying equity questions in terms of benefit-sharing draws attention to the advantages derived from environmental protection, management and regulation, and to the need to reconcile

---

<sup>1</sup> See e.g. Intergovernmental Panel on Climate Change (IPCC), *Summary for Policymakers*, Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2014), 4; Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (2009) A/HRC/10/61, 42-54; and Human Rights Council Resolution 26/L.33 (2014), 1.

<sup>2</sup> Elisa Morgera, "Conceptualizing Benefit-Sharing: An Emerging Principle of Equity in Addressing Global Environmental Challenges? BENELEX Project Working Paper" (Edinburgh Law School, 2014), 3.

<sup>3</sup> *Ibid.*, 18.

competing State interests while sharing resources to address climate change as a *common concern* of mankind.<sup>4</sup>

The notion of benefit-sharing may also function as a “bridge” between States’ obligations under the climate regime and human rights and biodiversity law.<sup>5</sup> In human rights law, benefit-sharing is mainly viewed as a means to compensate negative impacts associated with restrictions over indigenous peoples’ and other communities’ land and natural resources,<sup>6</sup> and to support their right to free prior and informed consent.<sup>7</sup> The Human Rights Council has specifically drawn attention to the need to ensure that responses to climate change are “coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty.”<sup>8</sup> These qualifications are particularly important, as the implementation of climate response measures has amply demonstrated that these measures risk creating perverse incentives to violate human rights.<sup>9</sup>

Although the UNFCCC does not mention human rights, UNFCCC Parties are expected to comply with their extant international commitments, including those concerning human rights, when they implement their obligations under the climate regime. Human rights treaties and the UNFCCC are equally binding upon Parties, which are required to fulfill their commitments under both treaties in good faith.<sup>10</sup> While the UNFCCC Conference of the Parties (COP) has recognized that Parties should fully respect human rights “in all climate change related actions,”<sup>11</sup> it has not provided guidance on how States should concretely take human rights into account when taking action to combat climate change. As not all Parties to the UNFCCC have ratified human rights treaties, the extent of the application of human rights in relation to specific climate change response measures depends on a host of national

---

<sup>4</sup> United Nations Framework Convention on Climate Change, (New York, 9 May 1992) (‘UNFCCC’), preamble.

<sup>5</sup> Elisa Morgera, “Benefit-Sharing as a Bridge between the Environmental and Human Rights Accountability of Multinational Corporations,” 2014, <http://papers.ssrn.com/abstract=2424802>.

<sup>6</sup> Report of the Special Rapporteur on the Rights of Indigenous Peoples, Extractive industries and indigenous peoples (2013) A/HRC/24/41, 88; Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, Advice No. 2, Indigenous peoples and the right to participate in decision-making, with a focus on extracting industries (2012) A/HRC/21/55, 42; IACtHR, *Saramaka People v. Suriname* (Case No. 172), Judgment of 28 September 2008, 138-140; and ACHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, (Comm. No. 276/2003), Decision of 4 February 2010, 297. See discussion in Morgera, “Conceptualizing Benefit-Sharing,” 27.

<sup>7</sup> *Ibid.*, 30.

<sup>8</sup> Human Rights Council Resolution 26/L.33 (2014), Preamble.

<sup>9</sup> See Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment. Focus report on human rights and climate change (2014).

<sup>10</sup> Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) (‘VCLT’), Article 26. Furthermore, VCLT Article 31.3(c) specifies that a treaty be interpreted in light “of any relevant rules of international law applicable between the Parties.”

<sup>11</sup> See Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (2010) FCCC/CP/2010/7/Add.1, 8.

circumstances, and most crucially, on the human rights treaties any given country has ratified.<sup>12</sup>

This layered legal landscape is further enriched by the fact that the main international law-making body dealing with the protection of biodiversity—the Conference of the Parties to the Convention on Biological Diversity (CBD COP)—has adopted some guidance concerning climate response measures.<sup>13</sup> In the CBD, benefit-sharing is not only viewed as a means to compensate negative impacts, but also as a means to empower stakeholders, by rewarding them for the provision of ecosystem services and traditional knowledge, or enhancing their participation in relevant decision-making processes.<sup>14</sup> Contrary to human rights treaties, virtually all Parties to the UNFCCC are also Parties to the CBD—with the sole exceptions of the US and Andorra. Parties to the UNFCCC should therefore consider the obligations and guidance adopted under the CBD as they implement their obligations under the climate regime, interpreting them in a mutually supportive way, rather than in a conflicting fashion. This approach is consistent with the general obligation that Parties to treaties fulfill their commitments in good faith.<sup>15</sup>

Benefit-sharing therefore presents itself as a potentially useful tool for the mutually supportive interpretation and cross-fertilization of international climate, human rights and biodiversity law.<sup>16</sup> This paper investigates this potential by providing a preliminary analysis of benefit-sharing under the climate regime, with the objective of ascertaining whether there is any overall coherence in the way it has been approached. The paper distinguishes inter- and intra-State equity demands arising under the climate regime and the role of benefit-sharing in addressing such demands. The conclusions articulate a series of research questions,

---

<sup>12</sup> While the UNFCCC has been ratified by 196 Parties, the International Covenant on Civil and Political Rights (New York, 16 December 1966) has 168 Parties; the International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) has 162 Parties; and the UN Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966) has 177 Parties. Finally, only 22 States have ratified International Labour Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (Geneva, 27 June 1989). Regional human rights treaties, which have exerted a considerable influence over the interpretation of several human rights that are crucial from a climate change perspective, only enjoy regional membership.

<sup>13</sup> CBD Decision VII/15, Biodiversity and Climate Change (2004) UNEP/CBD/COP/7/21; Decision VIII/30, Biodiversity and Climate Change (2006) UNEP/CBD/COP/8/31; Decision IX/16, Biodiversity and Climate Change (2008) UNEP/CBD/COP/9/29; CBD Decision X/33, Biodiversity and Climate Change (2010) UNEP/CBD/COP/10/27; CBD Decision XI/20, Climate-related Geoengineering (2012) UNEP/CBD/COP/11/35; CBD Decision XI/19, Biodiversity and climate change related issues (2012) UNEP/CBD/COP/11/35; and CBD Decision XI/21, Biodiversity and climate change (2012) UNEP/CBD/COP/11/35.

<sup>14</sup> CBD Decision VII/12 (2004) Annex II, Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity; CBD Decision VII/16C (2004), Annex, Akwé: Kon voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding sacred sites and lands and waters traditionally occupied or used by indigenous and local communities; CBD Decision X/42 (2010), Annex, Tkarihawaié:ri Code of Ethical Conduct. See discussion in Morgera, “Conceptualizing Benefit-Sharing,” 22-24.

<sup>15</sup> See note 10 above and International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission* (Geneva: International Law Commission, 2006), 426.

<sup>16</sup> Morgera, “Conceptualizing Benefit-Sharing,” 35-36.

as well as preliminary reflections on the implications of investigating equity in the climate regime from a benefit-sharing perspective.

## 2. Inter-State benefit-sharing

The principles guiding Parties in achieving the objective of the UNFCCC expressly mention equity as the basis for action to protect the climate system.<sup>17</sup> Three main inter-State equity considerations characterize the climate regime: States' *responsibility* for causing climate change; their *capacity* to contribute to solving the problem; and their *need* for or right to the resources at stake.<sup>18</sup> All three ultimately relate to how to distribute financial and technological resources to tackle climate change and address imbalances between States.<sup>19</sup>

The principle of common but differentiated responsibilities may be regarded as the core distributive paradigm and the main operationalization of equity in the climate regime.<sup>20</sup> Whilst the UNFCCC distinguishes between developed and developing country Parties,<sup>21</sup> singling out some groups among the latter as particularly vulnerable,<sup>22</sup> the allocation of costs and resources under the international climate regime has been dominated by the first two orders of equity considerations. In other words, while the climate regime places a heavier 'burden' upon developed country Parties in consideration of their historic *responsibility* for climate change and their better *capacity* to address it, its law and practice have only given limited consideration to the question of Parties' *needs*.<sup>23</sup>

Differentiation in the climate regime mainly concerns Parties' obligations, the modalities of implementation of obligations, and the assistance they should receive.<sup>24</sup> First, while some *obligations* are common to all Parties,<sup>25</sup> others are only incumbent upon developed country Parties—above all, the obligation to adopt national policies and measures to mitigate climate change by limiting anthropogenic emissions.<sup>26</sup> Second, developed country Parties must

---

<sup>17</sup> UNFCCC, Article 3.1.

<sup>18</sup> UNFCCC, Article 3.2. On this conceptualization of equity under the climate regime, see for example: Friedrich Soltau, *Fairness in International Climate Change Law and Policy* (Cambridge: Cambridge University Press, 2009), 164; Steffan Kallbekken, Håkon Sælen, and Arild Underdal, *Equity and Spectrum of Mitigation Commitments in the 2015 Agreement* (Copenhagen: Nordic Council of Ministers, 2014), 22; and Duncan French, "Developing States and International Environmental Law: The Importance of Differentiated Responsibilities," *International & Comparative Law Quarterly* 49, no. 01 (2000): 35–60, 52.

<sup>19</sup> According to Adelman, for example, climate change provides an opportunity for conveying "intragenerational equity through an equitable redistribution of resources from countries primarily responsible for the problem to those with inadequate resources." Sam Adelman, "Rethinking Human Rights: The Impact of Climate Change on the Dominant Discourse," in *Human Rights and Climate Change*, ed. Stephen Humphreys (Cambridge: Cambridge University Press, 2009), 159–80, 178.

<sup>20</sup> See e.g. Harald Winkler and Lavanya Rajamani, "CBDR&RC in a Regime Applicable to All," *Climate Policy* 14, no. 1 (2014): 102–21, 104.

<sup>21</sup> See UNFCCC, Annexes I and II.

<sup>22</sup> UNFCCC, Article 4.8-10.

<sup>23</sup> The issue of developed countries needs is specifically singled out in Rio Declaration on Environment and Development (1992), Principle 6.

<sup>24</sup> Compare the conceptualization in Lavanya Rajamani, *Differential Treatment in International Environmental Law* (Oxford: Oxford University Press, 2006), 191–212.

<sup>25</sup> UNFCCC, Article 4.1.

<sup>26</sup> UNFCCC, Article 4.2 and Kyoto Protocol, Annex B.

*support* developing ones in complying with their obligations under the Convention<sup>27</sup> and adapting to climate change, including through transfers of finance and technologies.<sup>28</sup> Third, developing country Parties' *implementation* of commitments under the UNFCCC is subject to developed country Parties' compliance with their obligations related to the transfer of technology and financial resources.<sup>29</sup> The UNFCCC also gives some consideration to the special circumstances of some developing country Parties, especially those particularly vulnerable to the effects of climate change.<sup>30</sup>

While differentiation is well embedded in the climate regime, its interpretation has become the source of much contention in ongoing negotiations on a new climate agreement.<sup>31</sup> The first and most acrimonious issue of contention is that the distinction between developed and developing country Parties is based on the state of affairs in 1992 and, although theoretically amendable,<sup>32</sup> it has not been revised in light of present levels of economic development and emissions. The second and more subtle but equally intractable issue of contention is the fact that lack of differentiation amongst developing countries has produced some perverse outcomes in the implementation of the climate regime, with 'better-off' developing countries, such as China, taking a large share of the resources made available to developing countries,<sup>33</sup> thus raising the question of how to better attend to the needs of the least developed countries.

Disagreement over the interpretation of differentiation between the Parties has been of great consequence for the evolution (or lack thereof) of the climate regime. While Parties agree that their future efforts should be undertaken "on the basis of equity and common but differentiated responsibilities and respective capabilities," and taking into account "the imperatives of equitable access to sustainable development,"<sup>34</sup> disagreement on the interpretation of the latter terms has been a major bottleneck preventing progress towards the adoption of a new climate agreement. This has led to calls for a reinterpretation of the principle of common but differentiated responsibilities "in a more nuanced fashion."<sup>35</sup>

---

<sup>27</sup> UNFCCC, Article 4.3.

<sup>28</sup> UNFCCC, Article 4.3-5.

<sup>29</sup> UNFCCC, Article 4.7.

<sup>30</sup> UNFCCC, Article 3.2.

<sup>31</sup> In 2011 UNFCCC Parties launched an ongoing process for the negotiation of a new climate agreement, which is expected to be adopted in Paris in December 2015. See Decision 1/CP.17. Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action (2011) FCCC/CP/2011/9/Add.1, 2.

<sup>32</sup> UNFCCC Article 4.2(g), which provides that any party not included in Annex I may, in its instrument of ratification, acceptance, approval or accession, or at any time thereafter, undertake obligations outlined in Article 4.2 (a, b) for Annex I Parties.

<sup>33</sup> Compare for example data on the geographical distribution of CDM projects at: [www.cdm.unfccc.int/Statistics/Public/CDMinsights/index.html](http://www.cdm.unfccc.int/Statistics/Public/CDMinsights/index.html); and on the distribution of fast-start climate finance: Smita Nakhooda et al., *Mobilising International Climate Finance: Lessons from the Fast-Start Finance Period* (London, Washington and Tokyo: ODI, RRI and IGES, 2013), 31.

<sup>34</sup> Decision 1/CP.18, Agreed outcome pursuant to the Bali Action Plan (2012) FCCC/CP/2012/8/Add.1, 2.

<sup>35</sup> See Winkler and Rajamani, "CBDR&RC in a Regime Applicable to All," 109. A summary of proposals concerning the revision of Parties' categorization is available in Kallbekken, Sælen, and Underdal, *Equity and Spectrum of Mitigation Commitments in the 2015 Agreement*, 39-41.



This debate ultimately boils down to the question of how to secure a transition to low-carbon and climate-resilient economies on fair and equitable terms. In this connection, thinking of how the benefits (rather than the burdens) of climate action can be shared fairly may provide a more constructive approach to climate governance.<sup>36</sup> The relevance of these questions can be better appreciated by considering specific instances where measures to stimulate climate change mitigation and provide finance to developing countries have led to a host of inter-State equity concerns.

### ***2.1 Inter-State benefit-sharing and climate change mitigation***

Although developing countries have not undertaken binding emission reduction targets under the climate regime, their participation in mitigation endeavors has been facilitated by the establishment of the Clean Development Mechanism (CDM), and, more recently, by so-called ‘policy approaches and incentives’ to reduce emissions in the forest sector in developing countries, commonly referred to with the acronym REDD+.<sup>37</sup> Both the CDM and REDD+ may be conceptualized as a means to transfer finance (and to a more limited extent, capacity) to developing countries to facilitate climate change mitigation. From an *inter-State* equity perspective, these arrangements should target developing country Parties that most *need* the technological and financial assistance to mitigate climate change provided through the CDM and REDD+. However, both of these instruments have neglected to address considerations concerning the equitable distribution of available resources. Most CDM projects have been approved in ‘better-off’ developing country Parties, thus frustrating the need to facilitate access to finance and technologies among least developed countries.<sup>38</sup> Whilst the need to give greater consideration to these inter-State equity considerations has been brought to the attention of Parties,<sup>39</sup> the related debate is presently stalled, due to overall uncertainty concerning the future of the Kyoto Protocol and of the mechanisms it created.<sup>40</sup> The matter of the equitable distribution of REDD+ funding amongst eligible developing countries has not been addressed at all in the context of negotiations on REDD+, where the major focus has rather been on targeting States with greater mitigation potential in the forest sector.

---

<sup>36</sup> For example Jennifer Morgan and David Waskow, “A New Look at Climate Equity in the UNFCCC,” *Climate Policy* 14, no. 1 (2014): 17–22, 20-1, suggest: “If access to technology and policy innovation is provided fairly and the capacity of developing countries bolstered, then a perceived burden can turn into an opportunity for many.”

<sup>37</sup> Decision 1/CP.13, Bali Action Plan (2009) FCCC/CP/2007/6/Add.1 1(b) (iii). The full name of the agenda item under which this issue was negotiated is: “policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries.” See Decision 1/CP.13, Bali Action Plan, (2009), 1(b) (iii).

<sup>37</sup> Decision 1/CP.16, 70.

<sup>38</sup> See: [www.cdm.unfccc.int/Statistics/Public/CDMinsights/index.html](http://www.cdm.unfccc.int/Statistics/Public/CDMinsights/index.html).

<sup>39</sup> See: High-Level Panel on the CDM Policy Dialogue, *Climate Change, Carbon Markets and the CDM: A Call to Action Report* (2012), 49-51.

<sup>40</sup> To date the Doha Amendment to the Kyoto Protocol, which contains commitments for some Annex I Parties for the period from 1 January 2013 to 31 December 2020, has attracted only 18 ratifications: [http://unfccc.int/kyoto\\_protocol/doha\\_amendment/items/7362.php](http://unfccc.int/kyoto_protocol/doha_amendment/items/7362.php)

Another considerable inter-State equity concern underlying the climate regime is that the market-based instruments that Parties have created to stimulate climate change mitigation in developing countries, like the CDM (and potentially REDD+), have raised the concern that these countries sell off the ‘low-hanging fruits’ of their climate change mitigation, without creating the circumstances to facilitate their own switch to a low-emissions development paths.<sup>41</sup> Increasing emphasis has therefore been placed on the need to ensure that developing countries actually *benefit* from mitigation activities beyond the mere financial revenues created by the sale of carbon offsets. In some cases these benefits may be ecosystem-based, for example in the case of forest-related activities, whereas in others they may be related to broader societal advantages, for example in connection with the wide range of activities falling within the scope of the CDM, such as the reduction of emissions from industrial and energy production.

The CDM was originally expected to engender a series of *monetary* benefits (e.g. increased foreign investment) and *non-monetary* benefits (e.g. transfer of technologies, dissemination of best practice and strengthening of local institutional, financial and technological capacity) in countries hosting projects,<sup>42</sup> as well as lessened reliance on carbon-intensive development.<sup>43</sup> Implementation of CDM projects, however, has revealed that expectations of windfall *monetary* benefits for host countries were largely misplaced. While the CDM has mobilized considerable finance, the vast majority of projects have been funded domestically, and increased foreign investment has largely failed to materialize.<sup>44</sup> Furthermore, as CDM credits are generated and sold on a project basis, the recipients of the monetary benefits are project developers (rather than States) and, only to a limited extent, domestic authorities receiving administrative fees or taxes associated with projects.<sup>45</sup> As far as *non-monetary benefits* are concerned, such as the transfer of technology and capacity building, due to the lack of indicators designed to report these benefits of CDM activities, evidence from the implementation of project activities is inconclusive.<sup>46</sup> An expert report prepared in the context of the policy dialogue on the reform of the CDM specifically underscores the necessity to give greater consideration to Parties’ *needs*,<sup>47</sup> and measures to this effect have already been unilaterally undertaken by the European Union. Furthermore, explicit requirements for positive impacts on the economy, health, welfare and environment of the local community hosting projects already feature in voluntary standards deployed by non-State actors for the

---

<sup>41</sup> See for example: Stephen Humphreys, “Conceiving Justice: Articulating Common Causes Indistinct Regimes,” in *Human Rights and Climate Change*, ed. Stephen Humphreys (Cambridge: Cambridge University Press, 2009), 299–319, 305.

<sup>42</sup> The Kyoto Protocol specifically prescribes that host countries benefit from CDM projects at Article 12.3. Mark Kenber, “The Clean Development Mechanism: A Tool for Promoting Long-Term Climate Protection and Sustainable Development,” in *Climate Change and Carbon Markets: A Handbook of Emissions Reduction Mechanisms*, ed. Farhana Yamin (London: Earthscan, 2005), 263–88., 268.

<sup>43</sup> Christina Voigt, “Is the Clean Development Mechanism Sustainable—Some Critical Aspects,” *Sustainable Development Law & Policy* 8 (2007): 15, 19.

<sup>44</sup> UNFCCC, *Benefits of the Clean Development Mechanism* (2012), 8.

<sup>45</sup> Kyoto Protocol, Article 12.9.

<sup>46</sup> High-Level Panel on the CDM Policy Dialogue, *Climate Change, Carbon Markets and the CDM: A Call to Action Report* (2012), 18.

<sup>47</sup> *Ibid.*, 49-51.

certification of CDM projects.<sup>48</sup> However, no internationally coordinated measures in this direction have been adopted under the Kyoto Protocol, and so far inter-State benefit-sharing under the CDM has remained more a theoretical possibility than a concrete reality.

REDD+ has also raised inter-State equity questions similar to those arising in the context of the CDM, drawing attention to the need to balance the global benefits of forest-based climate change mitigation with host countries' interests and priorities. More specifically, adopting a market-based approach to REDD+ finance could promote the sell-off of a significant share of developing countries' climate change mitigation potential, without increasing their capacity to deal with climate change and develop more sustainably. The question of how to ensure that concrete benefits flow to developing countries has been addressed in the context of voluntary certification standards<sup>49</sup> as well as in safeguards that UNFCCC Parties must promote and respect in the implementation of REDD+ activities. These safeguards request that REDD+ activities avoid causing harm and "enhance social and environmental benefits."<sup>50</sup> The matter has been furthermore addressed in the context of the ongoing debate on so-called "non-carbon benefits" of REDD+, which concerns the advantages produced by REDD+ activities beyond mere carbon storage, such as poverty relief and biodiversity protection.<sup>51</sup> A heated debate presently centers on whether these non-carbon benefits should be reported and monitored and, if so, how, and whether they should attract payments.<sup>52</sup> Reporting non-carbon benefits in the information system devised for REDD+ safeguards could be an important tool to provide international scrutiny of the flow of benefits to developing countries associated with REDD+. At the time of writing, it is too early to say whether and how this debate will conclude. There nevertheless seems to be a need to better ascertain the equity implications of UNFCCC Parties' decisions on these complex matters.<sup>53</sup>

## ***2.2 Inter-State benefit-sharing and climate finance***

Another area to pose significant inter-State equity questions is that of climate finance. Even though some efforts in this direction have already been made, so far climate finance

---

<sup>48</sup> See for example the Gold Standard, Version 2.2 (2012), which was developed at the initiative of the World Wildlife Foundation to certify climate change mitigation projects that "positively impact the economy, health, welfare and environment of the local community hosting the project."

<sup>49</sup> See Climate, Community and Biodiversity Alliance, *Climate, Community and Biodiversity Project Design Standards* (2013 edition); and CCBA and CARE, *REDD+ Social & Environmental Standards* (2012 edition).

<sup>50</sup> Decision 1/CP.16, Appendix, 2(e). On REDD+ safeguards, see Annalisa Savaresi, "The Legal Status and Role of Safeguards," in *Research Handbook on REDD-plus and International Law*, ed. Christina Voigt (Edward Elgar, forthcoming).

<sup>51</sup> Compare the use of the term in e.g. Views on methodological guidance for non-market-based approaches related to the implementation of the activities referred to in decision 1/CP.16, paragraph 70 (2014) FCCC/SBSTA/2014/MISC.3. The term *multiple benefits* has also sometimes been used beyond the UNFCCC context, see e.g. UN-REDD Programme, *Multiple Benefits-Issues and Options for REDD* (2009). The latter term has also been used in CBD COP decisions, see e.g. Biodiversity and climate change related issues, CBD Decision XI/19 (2012), 12.

<sup>52</sup> See Report of the Subsidiary Body for Scientific and Technological Advice on its thirty-eighth session (2013) FCCC/SBSTA/2013/3, 45-47.

<sup>53</sup> Annalisa Savaresi, "The Operationalization of Benefit-Sharing in REDD+," *BENELEX blog*, July 2014.

instruments have failed to target the developing countries most in need.<sup>54</sup> While criteria for the allocation of resources used by all climate funds established under the Global Environment Facility (GEF) give at least some consideration to the distribution of funds amongst developing country Parties,<sup>55</sup> their operation has reportedly resulted in a bias towards Asia and lower-middle income countries,<sup>56</sup> contributing to dissatisfaction with the performance of the GEF as a financial mechanism under the climate regime. At the time of writing it is too early to say whether the Green Climate Fund (GCF), established as a new financial mechanism under the climate regime, will manage to address shortcomings in the operation of the GEF.<sup>57</sup> GCF guidance makes reference to the allocation of funding based on “the urgent and immediate needs of vulnerable countries,” only with regard to adaptation.<sup>58</sup> This proviso is largely resonant with the practice of the Adaptation Fund, which was established under the Kyoto Protocol to specifically address the needs of Parties particularly vulnerable to the adverse effects of climate change.<sup>59</sup>

The matter of the distribution of resources to address climate change amongst States has attracted much attention also in human rights fora. Both the literature and reports of human rights procedures have addressed the impact of climate change<sup>60</sup> and of climate change response measures on the protection of human rights.<sup>61</sup> While the first issue is of more direct consequence for the purpose of inter-State equity, the second is more directly related to equity considerations arising at the intra-State level (see *infra*).

---

<sup>54</sup> See e.g. Tirpak Dennis, Louise Brown, and Athena Ronquillo-Ballesteros, *Monitoring Climate Finance in Developing Countries: Challenges and Next Steps* (Washington: World Resource Institute, 2014).

<sup>55</sup> See System for Transparent Allocation of Resources (2010) GEF/P.3; and SCCF Project Pre-selection Process and Criteria (2012). Equitable geographical distribution of funding was also the very rationale for the establishment of the Least Developed Countries Fund, which finances the preparation and implementation of National Adaptation Programs of Action.

<sup>56</sup> Nakhooda et al., *Mobilising International Climate Finance: Lessons from the Fast-Start Finance Period*, 26

<sup>57</sup> See 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 *Climate Change and the Law*, ed. Erkki Hollo, Kati Kulovesi, and Michael Mehling (New York: Springer, 2013), 191–224.

<sup>58</sup> GCF Board decision B.05/05 (2013) Annex I, d-e.

<sup>59</sup> See Decision 5/CMP.2, Adaptation Fund (2006) FCCC/KP/CMP/2006/10/Add.1, 2(c).

<sup>60</sup> Edward Cameron, “Human Rights and Climate Change: Moving from an Intrinsic to an Instrumental Approach,” *Georgia Journal of International and Comparative Law* 38 (2010 2009): 673; Marc Limon, “Human Rights Obligations and Accountability in the Face of Climate Change,” *Georgia Journal of International & Comparative Law* 38 (2010 2009): 543–92; John H. Knox, “Climate Change and Human Rights Law,” *Virginia Journal of International Law* 50, no. 1 (2009): 163; Lavanya Rajamani, “The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change,” *Journal of Environmental Law* 22, no. 3 (2010): 391–429. See Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights (2009), A/HRC/10/61; and the compendium in Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment. Focus report on human rights and climate change (2014).

<sup>61</sup> For a detailed analysis, see Naomi Roht-Arriaza, “First, Do No Harm: Human Rights and Efforts to Combat Climate Change,” *Georgia Journal of International and Comparative Law* 38 (2010 2009): 593–612; Svitlana Kravchenko, “Procedural Rights as a Crucial Tool to Combat Climate Change,” *Georgia Journal of International & Comparative Law* 38 (2010 2009): 613–48; Philippe Cullet, “The Kyoto Protocol and Vulnerability: Human Rights and Equity Dimensions,” in *Human Rights and Climate Change*, ed. Stephen Humphreys (Cambridge: Cambridge University Press, 2009), 183–205.

At the inter-State level, human rights bodies have drawn attention to the adverse effects of climate change for the effective enjoyment of all human rights and to the need to address these in light of States' extant obligations.<sup>62</sup> In this regard, some human procedures have singled out the availability of climate finance and its distribution amongst indicators to assess progress in meeting the right to development,<sup>63</sup> as a means to equitably share environmental burdens.<sup>64</sup> Some authors have argued that human rights may be used as benchmarks of acceptable outcomes based on widely agreed principles and legal structure and more generally, work together with the climate regime towards a defragmentation of international law.<sup>65</sup> Others have emphasized how human rights could help in identifying which climate impacts should be given priority, what kind of action should be taken and who should bear the costs of action.<sup>66</sup> The translation of these human rights discourses into inter-State obligations is, however, problematic.<sup>67</sup>

The protection awarded by human rights instruments has considerable jurisdictional limitations, which are due to the fact that human rights obligations inherently deal with the relationship between States and subjects within their jurisdiction, rather than the relationship between States.<sup>68</sup> Rules on jurisdictional scope vary quite significantly from one human rights treaty to another.<sup>69</sup> In this respect, there is a clear divide between civil and political rights on the one hand, and social, economic and cultural rights on the other.<sup>70</sup> In the first set of treaties, such as the International Covenant on Civil and Political Rights, only in very limited circumstances have human rights bodies interpreted jurisdiction clauses in a way to cover events or consequences of State actions outside the territory of the contracting States, for example in connection with situations of territorial occupation.<sup>71</sup> Thus, the Human Rights Committee, the Inter-American Commission on Human Rights and the European Court of Human Rights have generally required some control over territory, or control and authority

---

<sup>62</sup> See most recently: Open Letter from the Human Rights Council Special Procedures mandate holders to the State Parties of the UN Framework Convention on Climate Change (2014), available at: <http://newsroom.unfccc.int/media/127348/human-rights-open-letter.pdf>

<sup>63</sup> Parties' right to sustainable development is specifically mentioned in UNFCCC, Article 3.4.

<sup>64</sup> Report of the High-level Task Force on the Implementation of the Right to Development on its Sixth Session: Right to Development Criteria and Operational Sub-criteria (2010) A/HRC/15/WG.2/TF/2/Add.2, criterion 3(b)(i).

<sup>65</sup> Humphreys, "Conceiving Justice: Articulating Common Causes Indistinct Regimes," 315-318.

<sup>66</sup> Simon Caney, "Climate Change, Human Rights and Moral Thresholds," in *Human Rights and Climate Change*, ed. Stephen Humphreys (Cambridge: Cambridge University Press, 2009), 83-90.

<sup>67</sup> On the issue, see e.g. John H. Knox, "Diagonal Environmental Rights," SSRN Scholarly Paper, (2008), <http://papers.ssrn.com/abstract=1134863>.

<sup>68</sup> Human Rights Council, Analytical study on the relationship between human rights and the environment. Report of the United Nations High Commissioner for Human Rights (2011) A/HRC/19/34, 64-73; and Human Rights Council, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2012) A/HRC/22/43, 48.

<sup>69</sup> Sarah Joseph and Adam Fletcher, "Scope of Application," in *International Human Rights Law*, ed. D. Moeckli, S. Shah, and S. Sivakumaran (Oxford: Oxford University Press, 2010), 150-72, 160-169.

<sup>70</sup> Knox, "Climate Change and Human Rights Law," 202.

<sup>71</sup> See generally Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press, 2011).

over individuals, in order to apply the obligations under the relevant treaties.<sup>72</sup> Conversely, the International Covenant on Economic, Social and Cultural Rights (ICESCR) contains no jurisdictional clause<sup>73</sup> and the body charged with interpreting its provisions, the Committee on Economic, Social and Cultural Rights, has interpreted the scope of the Covenant rather liberally.<sup>74</sup>

Independent Expert John Knox has suggested that the extraterritorial application of States' obligations under the ICESCR is in accord with the fundamental obligation of States to carry out their treaty commitments in good faith, and to avoid taking actions calculated to frustrate the object and purpose of a treaty.<sup>75</sup> While this is a tenable interpretation, it scarcely supports arguments for the extraterritorial application of States' positive obligations associated with the protection of economic, social and cultural rights in the context of climate change.<sup>76</sup> It seems, in other words, difficult to argue that States have specific obligations to undertake positive action to secure the protection of human rights associated with climate change beyond their territorial boundaries.

In this regard, it has more realistically been suggested that international human rights law may "usefully inform debates on equity and fair distribution of mitigation and adaptation burdens"<sup>77</sup> and strengthen international, regional and national policymaking in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes.<sup>78</sup> In this limited sense, the general obligation of international cooperation contained in the ICESCR,<sup>79</sup>

---

<sup>72</sup> See e.g. HRC, *Lopez Burgos v. Uruguay* (Comm. No. 52/1979), Decision of 29 July 1981; HRC, *Montero v. Uruguay* (Comm. No. 106/1981), Decision of 31 March 1983; ECtHR, *Case of Loizidou v. Turkey* (Appl. No. 15318/89), Judgment of 18 December 1996; ECtHR, *Banković v Belgium et al.* (Appl. No. 52207/99), Decision of 12 December 2001; ECtHR, *Cyprus v. Turkey*, (Appl. No. 25781/94), Judgment of 10 May 2001; ECtHR, *Ilaşcu and Others v. Moldova and Russia*, (Appl. No. 48787/99), Judgment of 8 July 2004; ECtHR, *Case of Issa and other v. Turkey* (Appl. No. 31821/96), Judgment of 16 November 2004; ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom* (Appl. No. 61498/08), Judgment of 2 March 2010; ECtHR, *Al-Skeini and Others v. the United Kingdom*, (Appl. No. 55721/07), Judgment of 7 July 2011; ECtHR, *Al-Jedda v. the United Kingdom*, (Appl. No. 27021/08), Judgment of 7 July 2011; IACoMHR, *Coard et al. v. United States* (Case 10.951), Decision of 29 September 1999; IACoMHR, *Alejandro v. Cuba* (Case 11.589), Decision of 29 September 1999. Also the ICJ has confirmed the extraterritorial application of human rights treaties only in very limited circumstances. Cf. ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Decision of 9 July 2004, 109 and ICJ, *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment of 19 December 2005, 216.

<sup>73</sup> International Covenant on Economic, Social and Cultural Rights, Article 2(1).

<sup>74</sup> See the Committee on Economic, Social and Cultural Rights General Comment No. 15 (2003) E/C.12/2002/11, where the International Covenant on Economic, Social and Cultural Rights is interpreted as requiring its Parties "to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries," 31. The Committee has further stated that Parties should take steps to prevent third parties within their jurisdiction, such as their own citizens and companies, from violating the rights to water and health in other countries. See General Comment No. 15, 33; and General Comment No. 14 (2000) E/C.12/2000/4, 39. Several special rapporteurs have adopted similar interpretations of rights under ICESCR.

<sup>75</sup> Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox (2013) A/HRC/25/53, 67.

<sup>76</sup> Knox, "Climate Change and Human Rights Law," 211.

<sup>77</sup> Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (2009) A/HRC/10/61, 87-88.

<sup>78</sup> Human Rights Council Resolution 26/L.33 (2014), Preamble.

<sup>79</sup> ICESCR, Article 2, para. 1.

and in the Charter of the United Nations<sup>80</sup> constitutes a basis to require States to work together to protect subjects within their jurisdiction from the effects of climate change on their human rights.<sup>81</sup> However, States already have more clear-cut cooperation obligations in this connection under the climate regime, so human rights considerations seem to do little but add moral arguments on the need to take international action to tackle climate change.<sup>82</sup>

### 2.3 *Interim conclusions*

There seems to be some scope to use benefit-sharing as a conceptual “frame”<sup>83</sup> to analyze how the climate regime addresses inter-State equity questions and distributes resources amongst States. A study of the climate regime through a benefit-sharing lens has the potential to provide added value to negotiations on a new climate agreement, where inter-State equity considerations and calls for reflecting on the role of human rights in climate governance are being looked afresh.<sup>84</sup> While so far this use of benefit-sharing has not been investigated in the literature, support for a benefit-sharing ‘rhetoric’ has been expressed by influential epistemic actors.<sup>85</sup> Framing equity questions raised by climate law in terms of Parties’ needs, and focusing on the interplay with the protection of human rights,<sup>86</sup> has the potential to stimulate greater awareness of mutual supportiveness between States’ international law obligations and go beyond entrenched dynamics in the climate regime.

### 3. **Intra-State benefit-sharing**

At the *intra-State* level, profound equity questions concern the need to temper the impact of climate change response measures on particularly vulnerable segments of the population in developed and developing countries alike. Contrary to the inter-State level, however, the climate regime already features examples of intra-State benefit-sharing requirements specifically aimed to do just that. Depending on the type of activity, under the climate regime benefit-sharing requirements are attached to the *conservation*, *use* and *regulation* of natural resources, such as renewable energy generation, forest carbon sequestration and other forms of land-based mitigation.

Rather than being adopted by the UNFCCC COP, these requirements are included in

---

<sup>80</sup> Charter of the United Nations (San Francisco, 26 June 1945) Articles 55 and 56. For this argument, see Knox, “Climate Change and Human Rights Law,” 212-214.

<sup>81</sup> *Ibid.*, 210-212.

<sup>82</sup> See e.g. Rajamani, “The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change,” 14

<sup>83</sup> Elisa Morgera and Louisa Parks, “An Inter-Disciplinary Methodology for Researching Benefit-Sharing as a Norm Diffusing in Global Environmental Law” (Edinburgh Law School, 2014).

<sup>84</sup> See note 62. The issue was specifically raised by Uganda during the sixth part of the second session of the Ad Hoc Working Group on the Durban Platform for Enhanced Action in Bonn, Germany, (20-25 October 2014). Notes on file with the author.

<sup>85</sup> The UN Secretary General Special Climate Envoy, Mary Robinson, has long argued the need to share equitably the benefits and burdens of climate action. See: [www.mrfcj.org/about/principles.html](http://www.mrfcj.org/about/principles.html).

<sup>86</sup> The issue of the interplay between the climate regime and human rights is also underscored in International Law Association, Washington Conference (2014) Legal Principles Relating To Climate Change, draft article 10.1 and 10.3(b).

standards formulated by a heterogeneous set of actors, in some instances acting outside the international law-making fora established under the climate regime. So while some benefit-sharing requirements have been formulated by subsidiary bodies to the COP exercising delegated regulatory powers, others have been adopted by international agencies established beyond the institutional remit of the UNFCCC, and by voluntary certification initiatives of non-State actors.<sup>87</sup> For the present purposes, the array of instruments adopted through processes that do not involve, or only partially involve, States, are relevant because of the normative consequences that States and intergovernmental organizations attach to them.<sup>88</sup>

The interplay between this complex web of sources has resulted in a situation in which no one single notion of benefit-sharing has emerged but many, and some areas, such as climate finance, have witnessed more pronounced developments than others. These multifarious manifestations of benefit-sharing tend to be strongly characterized by the subject area in which they have emerged, and by the institutional culture of the actors that have formulated them. This in turn has profound implications on the interpretation and overall coherence of the notion of benefit-sharing in the climate regime.

While the notion of benefit-sharing has considerably evolved as a result of the interplay between human rights and biodiversity law,<sup>89</sup> benefit-sharing requirements emerged under the climate regime are predominantly inspired by the understanding of benefit-sharing in human rights law. The main reason for this is that benefit-sharing arrangements under the climate regime largely aim at compensating the negative impacts of climate change response measures on *individuals and communities*, rather than empowering them to participate. There is, however, a significant exception to this rule, in the context of REDD+.

The present section reviews benefit-sharing requirements as they have emerged under the climate regime with a view to tracing their origins and the way in which they have concretely evolved. For this reason, this section distinguishes instances where benefit-sharing operates as a form of compensation for the impact of climate response measures, from those where it may be regarded as a form of reward for the individuals or communities.

### ***3.1 Intra-State benefit-sharing as a form of compensation***

Climate change response measures may have a host of intra-State equity implications.<sup>90</sup> The

---

<sup>87</sup> On informal law-making, see Joust Pauwelyn, Ramses A. Wessel, and Jan Wouters, *Informal International Lawmaking* (Oxford: Oxford University Press, 2012).

<sup>88</sup> See e.g. Laurence Boisson de Chazournes, "Policy Guidance and Compliance: The World Bank Operational Standards," in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, ed. Dinah Shelton (Cambridge: Cambridge University Press, 2000), 282.

<sup>89</sup> Morgera, "Conceptualizing Benefit-Sharing," 19.

<sup>90</sup> IPCC, *Summary for Policymakers*, Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2014), at 4: "Limiting the effects of climate change is necessary to achieve sustainable development and equity, including poverty eradication. At the same time, some mitigation efforts could undermine action on the right to promote sustainable development, and on the achievement of poverty eradication and equity. Consequently, a comprehensive assessment of climate policies involves going beyond a focus on mitigation and adaptation policies alone to examine development pathways more broadly, along with their determinants."



Human Rights Council and its Special Rapporteurs and Independent Experts have frequently drawn attention to the need to take into account the human rights implications of climate change response measures.<sup>91</sup> For example, the Special Rapporteur on Adequate Housing has remarked how the development of alternative sources of energy for climate change mitigation, such as hydroelectric dams, may result in human rights violations,<sup>92</sup> underscoring the importance of participation to enable those who stand to be most directly affected to have a say in the design and implementation of such activities, and avert rights violations.<sup>93</sup> The Rapporteur has also highlighted the need to evaluate the distributional impacts of climate change projects,<sup>94</sup> and provide redress for grievances and compensation in response to inevitable damages, as well as the role of environmental impact assessments in this regard.<sup>95</sup> Equally, the Special Rapporteur on the Right to Water has drawn attention to the need to ensure that climate change response measures integrate human rights standards and principles, amongst others by ensuring participation of concerned communities and stakeholders in local and national adaptation efforts, and in connection with decision-making associated with the use of official development assistance; and by means of “accessible, affordable, timely and effective mechanisms of redress” to safeguard against violations of the rights to water and sanitation.<sup>96</sup>

So far there has been little uptake of these exhortations in international climate change law-making processes. In its sole reference to human rights to date, the UNFCCC COP has generically recognized that Parties should fully respect human rights “in all climate change related actions.”<sup>97</sup> Since the UNFCCC does not contain any conflict clause, this assertion may be regarded as a significant statement concerning the relationship between the climate and the human rights 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.

This important specification on the relationship between the climate and human rights regimes gives little guidance on how to concretely pursue synergies between the two. In this connection, the African Commission has specifically urged the Assembly of Heads of State and Government of the African Union to ensure that “human rights standards *safeguards*, such as the principle of *free, prior and informed consent*, be included into any adopted legal text on climate change as preventive measures against forced relocation, unfair dispossession

---

<sup>91</sup> In fact, the Human Rights Council has recently specifically encouraged “relevant special procedures mandate holders to give consideration to the issue of climate change and human rights within their respective mandates.” Compare Human Rights Council Resolution 26/L.33 (2014), at 8.

<sup>92</sup> Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context (2009) A/64/255, 47 and 71.

<sup>93</sup> *Ibid.*, 50.

<sup>94</sup> *Ibid.*

<sup>95</sup> See Addendum to the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, Mission to Maldives, (2010) A/HRC/13/20/Add.3, 15.

<sup>96</sup> Special Rapporteur on the Right to Water, Climate Change and the Human Rights to Water and Sanitation, Position Paper, 5 and 6.

<sup>97</sup> See Decision 1/CP.16, 8.

of properties, loss of livelihoods and similar human rights violations.”<sup>98</sup> Similar remarks have been made by the Inter-American Commission on Human Rights, which urged States to give priority to human rights in the formation and implementation of climate change response measures.<sup>99</sup>

Benefit-sharing is one of the tools that have been deployed to strike a balance between human rights protection and climate response measures. In developed countries, multiple instances of benefit-sharing arrangements exist, largely to provide individuals and communities affected by renewable energy generation activities with various forms of monetary and non-monetary advantages, like cheap access to energy.<sup>100</sup> Analogous arrangements may also emerge in relation to carbon capture and sequestration, once this technology goes to scale and starts to be widely implemented. Benefit-sharing arrangements associated with renewable energy generation activities in developed countries take various guises and forms, depending on the relevant domestic law framework and on the contractual arrangements assisting each particular project or activity.<sup>101</sup> It is interesting to note how these arrangements do not necessarily target the vulnerable, but instead any individual that happens to be affected by renewable energy generation activities. Furthermore, they do not seem to be driven by international guidance or human rights-related discourses, but rather to be the byproduct of established domestic laws and policies associated with energy generation activities, such as nuclear plants.<sup>102</sup>

The discourse on benefit-sharing associated with climate response measures is rather more complex in developing countries, where various forms of internationally coordinated guidance have been adopted to ensure the protection of indigenous and other vulnerable communities’ rights over lands, territories and natural resources.<sup>103</sup> This has been especially true in the context of climate finance. As explained earlier, climate finance may be regarded as a means to operationalize *inter-State* equity in the climate regime, and enable developing countries to adapt to climate change and participate in mitigation endeavors. The use of climate finance, however, raises specific *intra-State* equity questions concerning the social impacts of sponsored climate change mitigation or adaptation activities. Institutions handling climate finance both within and without the institutional scope of the UNFCCC have adopted safeguards to prevent, assess and compensate such negative impacts. These safeguards include intra-State benefit-sharing requirements, which ultimately concern the need to

---

<sup>98</sup> African Commission, Resolution 153 on Climate Change and Human Rights and the Need to Study its Impact in Africa (2009), 17-18.

<sup>99</sup> Annual Report of the Inter-American Commission on Human Rights (2011), Chapter 2, 16.

<sup>100</sup> See for example Gill Seyfang and Alex Haxeltine, “Growing Grassroots Innovations: Exploring the Role of Community-Based Initiatives in Governing Sustainable Energy Transitions,” *Environment and Planning C: Government and Policy* 30, no. 3 (2012): 381–400.

<sup>101</sup> Compare the database on EU renewable energy available at: [http://ec.europa.eu/energy/idae\\_site/depoy/tablas/100\\_re\\_communities\\_title.html](http://ec.europa.eu/energy/idae_site/depoy/tablas/100_re_communities_title.html). See also SPICe Briefing, *Renewable Energy: Community Benefit and Ownership* (2012), which provides an overview of such arrangements in Scotland.

<sup>102</sup> See for example, United Kingdom Sustainable Development Commission Landscape, Environment and Community Impacts of Nuclear Power, 2006.

<sup>103</sup> See discussion in Morgera, “Conceptualizing Benefit-Sharing,” 26.

balance the pursuit of global benefits associated with climate change adaptation and/or mitigation with local needs and priorities. There has, nevertheless, been a significant degree of variation amongst these benefit-sharing requirements, both in connection with the identification of beneficiaries, as well as in the extent to which they align with human rights law and practice.

In general, all climate finance standards make reference to both monetary and non-monetary benefits to be derived from funded activities - focusing on *compensation* for any adverse impacts that these activities may have. For example, GEF standards require that financed projects and operations foster full respect for indigenous peoples' human rights, so that they do not suffer "adverse effects" and receive "culturally appropriate" social and economic benefits.<sup>104</sup> Restrictions on access to land and natural resources associated with conservation activities specifically should be compensated by means of full and effective participation and equitable benefit-sharing.<sup>105</sup> The GEF standards, however, focus narrowly on indigenous peoples, thus falling short of established human rights practice, which requires that 'tribal' communities too enjoy, at least in some circumstances, some of the rights enjoyed by indigenous peoples, for example in connection with their free prior informed consent.<sup>106</sup> Similar considerations apply to the recently adopted GCF environmental and social safeguards, which aim to "identify, analyze, control and reduce the adverse environmental and social impacts" of funded activities on indigenous peoples and maximize their potential environmental and social benefits.<sup>107</sup> The GCF standards also refer to ensuring respect for indigenous peoples' human rights, knowledge and practices; and to the need for indigenous peoples to receive sustainable and culturally appropriate development benefits and opportunities from funded activities.<sup>108</sup>

The Adaptation Fund has adopted a comparatively more progressive stance on these matters. Its environmental and social policy was expressly adopted to bring the Fund's practices in line with those of "other leading financing institutions active in environment and development financing;" by enhancing the sustainable development benefits of funded activities and avoiding unnecessary harm.<sup>109</sup> The policy is nevertheless notable in that it addresses *all* affected communities (and thus, not only indigenous peoples),<sup>110</sup> with the objective to 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,

---

<sup>104</sup> See: GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards (2013 ed.), Criteria (Sic!) 4.

<sup>105</sup> *Ibid.*, Minimum requirement 4.6.

<sup>106</sup> *Saramaka People v. Suriname*, 79-86; 138-140; and *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 297.

<sup>107</sup> Green Climate Fund, Guiding Framework and Procedures for Accrediting National, Regional and International Implementing Entities and Intermediaries, Including the Fund's Fiduciary Principles and Standards and Environmental and Social Safeguards (2014), 39.

<sup>108</sup> *Ibid.*, 1.7.

<sup>109</sup> Adaptation Fund Environmental and Social Policy (2013), 2.

<sup>110</sup> *Ibid.*, 2.

education, housing, safe and decent working conditions, and land rights.”<sup>111</sup> Funded activities should avoid imposing disproportionate adverse impacts on marginalized and vulnerable groups<sup>112</sup> and respect and promote international human rights.<sup>113</sup> Applicants are required to describe economic, social and environmental benefits, with particular reference to the most vulnerable communities and vulnerable groups.<sup>114</sup> Funding requests should furthermore include information on expected beneficiaries, with particular reference to the equitable distribution of benefits to vulnerable communities, households, and individuals, giving special consideration to minority groups and indigenous peoples. Thus, at least on paper, the Adaptation Fund’s standards are more ambitious than those of the GEF and the GCF, in that they strive to encompass a wider range of beneficiaries, and include a specific list of basic guarantees, as recommended in the guidance by the human rights bodies mentioned above.

In sum, climate finance standards treat benefit-sharing as a safeguard to protect stakeholders likely to be negatively affected by the implementation of climate measures. Some of these benefit-sharing standards explicitly draw upon international human rights law and practice. Nevertheless, not all climate finance standards have adopted an equally open approach to human rights, thus raising some concerns about the coherence with which the matter of benefit-sharing is addressed by various financing bodies operating under the climate regime and, more generally, about potential frictions with obligations under human rights law.

### ***3.2 Intra-State benefit-sharing as a reward for the use of traditional knowledge and ecosystem stewardship?***

The notion of benefit-sharing as a means to reward indigenous peoples and local communities for their ecosystem stewardship and reliance on their traditional knowledge is well embedded in the CBD framework.<sup>115</sup> Thus under the CBD, benefit-sharing is not only a means to compensate negative social impacts, but also to empower stakeholders in various ways by rewarding them for the provision of ecosystem services and traditional knowledge, and enhancing their participation in relevant decision-making processes.<sup>116</sup> The CBD COP has specifically “invited” its Parties to take into account the provision of ecosystem services in the planning and implementation of climate change mitigation and adaptation activities, including through the consideration for traditional knowledge and the involvement of indigenous and local communities.<sup>117</sup> While under the CBD benefit-sharing from traditional

---

<sup>111</sup> Ibid., 13.

<sup>112</sup> Ibid., 14.

<sup>113</sup> Ibid., 15.

<sup>114</sup> Operational Policies and Guidelines for Accessing Funding (2013), Annex 4, Request for Project/Programme Funding from the Adaptation Fund, 4-5

<sup>115</sup> CBD Decision VII/12 (2004) Annex II, Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity; CBD Decision VII/16C (2004), Annex, Akwé: Kon voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding sacred sites and lands and waters traditionally occupied or used by indigenous and local communities; CBD Decision X/42 (2010), Annex, Tkarihwaié:ri Code of Ethical Conduct. See discussion in Morgera, “Conceptualizing Benefit-Sharing,” 25-26.

<sup>116</sup> Morgera, “Conceptualizing Benefit-Sharing,” 19.

<sup>117</sup> CBD Decision X/33, 8(v)(i).

knowledge is a specific legal obligation,<sup>118</sup> the UNFCCC does not address the issue in any way. The text of the Convention mentions ecosystems only generically,<sup>119</sup> and the UNFCCC COP has made little effort to draw upon CBD guidance on the issue. Clearly not all climate change mitigation and adaptation activities may be framed in terms of ecosystem services and stewardship. While the link with ecosystems is evident in virtually all land-based mitigation activities, such as reduced deforestation and enhanced carbon sequestration in land and forests, several mitigation activities in the industrial and energy sectors are not associated with ecosystem stewardship. Even in the instances where the links with ecosystems are apparent, the climate regime has so far made little use of benefit-sharing arrangements as a means to reward traditional knowledge and ecosystem stewardship. The only notable exception is the emerging legal framework on REDD+.

REDD+ may be regarded as a form of payment for ecosystem services,<sup>120</sup> and from the beginning the sharing of the monetary and non-monetary benefits derived from forest conservation and enhancement activities with affected individuals and communities was singled out as crucial to its success.<sup>121</sup> While this matter is not addressed in the UNFCCC COP guidance, the issue has enjoyed great prominence in the context of so-called REDD-readiness standards adopted to create the enabling conditions to carry out REDD+ activities. Both of the main international initiatives established to facilitate REDD-readiness – i.e. the UN-REDD Programme and the World Bank Forest Carbon Partnership Facility (FCPF) – have adopted standards concerning the sharing of benefits associated with REDD+ activities, which have largely taken the guise of revenue-sharing arrangements focused on compensating stakeholders affected by REDD+ activities.<sup>122</sup> There is, however, a significant chasm between the standards adopted by these two institutions. While the UN-REDD has embraced a human rights-based approach,<sup>123</sup> drawing upon substantive and procedural elements of established human rights law and practice,<sup>124</sup> the FCPF has not. Instead, FCPF standards subject the protection of the rights of indigenous peoples to a series of *distinguos* and leave partner countries to interpret these in light what they ambiguously define “legally binding national obligations under relevant international laws.”<sup>125</sup> This gulf in benefit-sharing

---

<sup>118</sup> CBD, Article 8(j) and see CBD Decision X/33, 8(m) and v(i). See Morgera, “Conceptualizing Benefit-Sharing,” 20-21.

<sup>119</sup> UNFCCC, Article 2.

<sup>120</sup> TEEB, *The Economics of Ecosystems and Biodiversity for National and International Policy Makers – Part Three. Chapter Five. Rewarding Benefits through Payments and Markets* (Wesseling, Germany: United Nations Environment Programme, 2009), 27.

<sup>121</sup> Johan Eliasch, *Climate Change: Financing Global Forests. The Eliasch Review* (London: Earthscan, 2008), 59.

<sup>122</sup> See e.g. Thu T. Pham et al., “Approaches to Benefit Sharing: A Preliminary Comparative Analysis of 13 REDD+ Countries,” *Center for International Forestry Research*, accessed October 10, 2014, <http://www.cifor.org/library/4102/approaches-to-benefit-sharing-a-preliminary-comparative-analysis-of-13-redd-countries/>. (2013); and Cecilia Luttrell et al., “Who Should Benefit from REDD+? Rationales and Realities,” *Ecology and Society* 18, no. 4 (2013): 52–70.

<sup>123</sup> UN-REDD, *Social and Environmental Principles and Criteria* (2012), 3.

<sup>124</sup> *Ibid.*, Principle 2, Criterion 7; and Criteria 1-6. See also UN-REDD, *Guidelines on Free, Prior and Informed Consent* (2013), 12.

<sup>125</sup> FCPF Carbon Fund Methodological Framework (2013), Criterion 33. Note, however, that these standards are to be applied to REDD+ payments, and not to REDD-readiness activities funded by the FCPF.

standards used by the UN-REDD and the FCPF has significant implications for how intra-State equity considerations are addressed in REDD-readiness processes, which require better coordinated international guidance.<sup>126</sup> Overall, this compensatory approach to benefit-sharing is largely in line with that concerning climate finance, even if benefit-sharing requirements in the REDD+ context are likely in scope, in terms of both their beneficiaries (which include all affected stakeholders, and not just indigenous peoples) and the range of benefits provided (i.e. both economic and non-economic).

In the context of REDD+, however, benefit-sharing has also been used as a means to reward communities for their ecosystem stewardship and traditional knowledge.<sup>127</sup> This issue is implicitly encompassed in REDD+ safeguards adopted by the UNFCCC COP, which specifically mention that REDD+ activities should respect the knowledge of indigenous peoples and local communities by taking into account the “relevant international obligations, national circumstances and laws.”<sup>128</sup> While the UNFCCC COP has thus left to its Parties to address the issue of the interplay between safeguards and human rights law and practice, UN-REDD Programme standards make specific reference to the need to share the benefits derived from the use of traditional knowledge.<sup>129</sup> The rationale, although not explicitly mentioned, is clearly to *reward* the holders of traditional knowledge. At the time of writing, little evidence exists on how this standard has been interpreted and implemented. It is nevertheless evident that UN-REDD Programme standards have gone beyond the UNFCCC COP safeguards by encapsulating guidance on traditional knowledge elaborated in the context of the CBD, in line with their mandate to “uphold UN conventions, treaties and declarations, and apply the UN agencies’ policies and procedures.”<sup>130</sup>

Further developments concerning benefit-sharing may also emerge in the incipient intergovernmental dialogue concerning the application of traditional knowledge and practices to climate change adaptation<sup>131</sup> and in negotiations on agriculture.<sup>132</sup> The UNFCCC COP has already underscored that adaptation measures should be guided and based on traditional and

---

<sup>126</sup> See for example, Annalisa Savaresi, “The Role of REDD in Harmonising Overlapping International Obligations,” in *Climate Change and the Law. A Global Perspective*, ed. Erkki Hollo, Kati Kulovesi, and Michael Mehling (Springer, 2013), 391–418; Annalisa Savaresi, “REDD+ and Human Rights: Addressing Synergies between International Regimes,” *Ecology and Society* 18, no. 3 (2013): 5–21.

<sup>127</sup> See e.g. K. Graham and A. Thorpe, “Community-Based Monitoring, Reporting and Verification of REDD Projects: Innovative Potentials for Benefit Sharing,” *Carbon and Climate Law Review* 3, no. 3 (2009): 303–13.

<sup>128</sup> Decision 1/CP.16, Appendix I, 2: “respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws” as well as “the full and effective participation of relevant stakeholders, in particular indigenous peoples and local communities.”

<sup>129</sup> UN-REDD, Social and Environmental Principles and Criteria, Criterion 11.

<sup>130</sup> *Ibid.*, 2.

<sup>131</sup> Best practices and available tools for the use of indigenous and traditional knowledge and practices for adaptation, and the application of gender-sensitive approaches and tools for understanding and assessing impacts, vulnerability and adaptation to climate change (2013) FCCC/TP/2013/11, 57.

<sup>132</sup> Report on the workshop on the current state of scientific knowledge on how to enhance the adaptation of agriculture to climate change impacts while promoting rural development, sustainable development and productivity of agricultural systems and food security in all countries, particularly in developing countries, taking into account the diversity of the agricultural systems and the differences in scale as well as possible adaptation co-benefits (2014) FCCC/SBSTA/2014/INF.2.

indigenous knowledge as is appropriate.<sup>133</sup> Nevertheless, UNFCCC Parties have not so far addressed the matter of benefit-sharing, focusing only generically on the global benefits to be derived from traditional knowledge for adaptation<sup>134</sup> rather than on the benefits that ought to flow to the holders of such knowledge. Only very recently has the need to ensure “predictable and tangible benefits” for, and for the empowerment of, communities, as a means to both stimulate and reward their collaboration towards adaptation been mentioned at a technical meeting convened under the auspices of the Adaptation Committee.<sup>135</sup> It is too early to tell whether these developments will lead to the adoption of specific requirements concerning benefit-sharing from traditional knowledge.<sup>136</sup> This is, however, clearly an area where large untapped potential exists for building the climate regime on the basis of the well-established body of law developed under the CBD, not only at the intra-State level, but, at least potentially, also in its transnational dimension—i.e. in relationships between traditional knowledge providers and users across jurisdictions.<sup>137</sup>

### 3.3 *Interim conclusions*

In the climate regime intra-State benefit-sharing arrangements have been predominantly deployed as a means to compensate stakeholders for the negative social impacts associated with climate change mitigation activities, rather than as a means of empowerment. There has however been some movement towards considering benefit-sharing as a means to reward indigenous peoples and other communities for ecosystem stewardship, potentially also for their traditional knowledge. As observed in connection with inter-State benefit-sharing, guidance provided in international human rights and biodiversity law could usefully complement climate law, supplementing it with internationally agreed guidance on matters upon which States have already reached painstakingly negotiated consensus. It would therefore seem obvious that climate law-makers rely on this guidance, without attempting to “reinvent the wheel” every time.<sup>138</sup> In this exercise, it is however important to underscore the fundamental difference between international biodiversity and human rights law. While Parties to the CBD and the UNFCCC are virtually the same, this is not the case with human

---

<sup>133</sup> Decision 1/CP.16, 12.

<sup>134</sup> See for example: Database of case studies on best practices and available tools for the use of indigenous and traditional knowledge and practices for adaptation, available at: [http://unfccc.int/adaptation/workstreams/nairobi\\_work\\_programme/items/7769.php](http://unfccc.int/adaptation/workstreams/nairobi_work_programme/items/7769.php). See also the submission by Japan in: Views on the current state of scientific knowledge on how to enhance the adaptation of agriculture to climate change impacts while promoting rural development, sustainable development and productivity of agricultural systems and food security in all countries, particularly in developing countries, and taking into account the diversity of the agricultural systems and the differences in scale as well as possible adaptation co-benefits (2013) FCCC/SBSTA/2013/MISC.17, 8.

<sup>135</sup> Report on the meeting on available tools for the use of indigenous and traditional knowledge and practices for adaptation, needs of local and indigenous communities and the application of gender-sensitive approaches and tools for adaptation (2014) FCCC/SBSTA/2014/INF.11, 18(d).

<sup>136</sup> The issue was also raised by Bolivia in discussions on future technical expert meetings during the sixth part of the second session of the Ad Hoc Working Group on the Durban Platform for Enhanced Action in Bonn, Germany, (20-25 October 2014). Notes on file with the author.

<sup>137</sup> See Morgera, “Conceptualizing Benefit-Sharing,” 35-38.

<sup>138</sup> This expression is used by Elisa Morgera, “No Need to Reinvent the Wheel for a Human Rights-Based Approach to Tackling Climate Change: The Contribution of International Biodiversity Law,” in *Climate Change and the Law*, ed. Erkki Hollo, Kati Kulovesi, and Michael Mehling (New York: Springer, 2013), 359–90.

rights treaties.

While a wide array of human rights may be affected by the implementation of climate response measures, these rights are embedded in a multifarious set of international, regional, as well as ‘specialized’ human rights instruments.<sup>139</sup> The UN Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>140</sup> builds on existing human rights obligations,<sup>141</sup> and while some of its provisions may be regarded as part of customary international law,<sup>142</sup> this does not apply to all. Thus UNDRIP does not in itself address the issue of the fragmented nature of States’ obligations on indigenous peoples.<sup>143</sup>

As a result of their fragmented nature, States’ obligations under human rights instruments are inherently context-specific and need to be ascertained on a case-by-case basis. And even where there is evidence of some cross-fertilization between the interpretative practice of one regional human rights instrument and another,<sup>144</sup> this does not entail an automatic translation of the approach emerged in one regime into the other.<sup>145</sup>

In this regard, national law- and decision-makers are ultimately in charge of interpreting States’ obligations under the climate regime in line with their international legal commitments on human rights. Implementation of climate response measures, however, has already provided ample evidence that there is a need to be especially vigilant over the human

---

<sup>139</sup> For an example of how the UN Convention on the Elimination of All Forms of Racial Discrimination has been applied in connection with REDD+ in Indonesia, see Annalisa Savaresi, “The Human Rights Dimension of REDD,” *Review of European Community & International Environmental Law* 21 (2012): 102–13; Naomi Johnstone, “Indonesia in the ‘REDD’: Climate Change, Indigenous Peoples and Global Legal Pluralism,” *Asian-Pacific Law & Policy Journal* 12, no. 1 (2011): 93–123.

<sup>140</sup> UN General Assembly Resolution, Declaration on the Rights of Indigenous Peoples (2007) A/RES/61/295, (‘UNDRIP’).

<sup>141</sup> Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development (2008) A/HRC/9/9, 40.

<sup>142</sup> As suggested in International Law Association, The Hague Conference Report, Rights of Indigenous Peoples (2010), at 51, with reference to free prior and informed consent.

<sup>143</sup> On the fragmented nature of States’ obligations under human rights law, see e.g. Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox (2013) A/HRC/25/53, 27; and Rajamani, “The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change,” 412.

<sup>144</sup> As seen for example in *Saramaka People v. Suriname*; and *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*.

<sup>145</sup> This chasm is evident if one considers limited progress in connection with the protection of indigenous peoples under the European Convention on Human Rights. See Riccardo Pavoni, “Environmental Jurisprudence of the European and Inter-American Courts of Human Rights: Comparative Insights,” accessed October 14, 2014, <http://papers.ssrn.com/abstract=2352829>. See also e.g. the decision to adopt a new instrument on access to information, public participation and access to justice in environmental matters in Latin America and the Caribbean region, rather than adhering to the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998). See Valeria Torres, “Access to Information, Participation and Justice in Environmental Matters and the Post-2015 Development Agenda: Recent Developments in Latin America and the Caribbean” (presented at the 3rd UNITAR-Yale Conference on Environmental Governance and Democracy, New Haven, CT, 2014).



rights violations that may be associated with these measures.<sup>146</sup> It is therefore important to consider means by which to ensure that obligations under climate and human rights law are implemented in a mutually supportive fashion.

The use of benefit-sharing requirements may serve exactly this purpose, and function as a means to incorporate human rights considerations into international processes dealing with climate change response measures, avoiding conflicts and exploiting synergies with States' human rights obligations. However so far little intergovernmental effort has been made to systematically use benefit-sharing as a means to take human rights into account when construing, developing, and operationalizing climate response measures. The little guidance that exists on the issue is the result of the autonomous initiative of institutions dealing with climate finance and REDD+. This state of affairs has engendered a situation whereby no one single approach to benefit-sharing exists under the climate regime, and various degrees of cross-fertilization between human rights and climate law have occurred. It would seem sensible to adopt a common approach to this matter, and clearly the UNFCCC COP is the institution best-equipped to undertake such an endeavor. The UNFCCC COP however has dedicated little time and effort to considering safeguards and overlaps with human rights law.<sup>147</sup> The CBD has been far more proactive and solicitous in its approach to the matter,<sup>148</sup> but its guidance has so far remained little noticed and only covers ecosystem-related climate response measures.

Thus, ultimately ensuring that benefit-sharing under the climate regime is performed in line with States' human rights obligations largely remains a matter left to the autonomous efforts of national decision-makers and single institutions, in what Sebastian Oberthür has aptly described as "autonomous" or, at best, "unilateral interplay management."<sup>149</sup> As a result, single States and/or institutions are faced with the challenge of interpreting international law on human rights and climate change in a synergistic fashion – as opposed to more systemic forms of interplay management, where such coordination endeavors are carried out by a set of institutions together, or by an overarching international institution. The risk that autonomous and unilateral interplay management endeavors end in incoherence is already palpable when we consider that the standards addressing benefit-sharing in the climate regime already differ greatly, depending on the institution that has adopted them. This state of affairs poses considerable challenges for developed countries wishing to access funding, and faced each time with different standards. While this is not a matter arising only with

---

<sup>146</sup> See the collection of information in Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment. Focus report on human rights and climate change (2014).

<sup>147</sup> Some parties have suggested the COP address this issue, in the context of negotiations on the 2015 agreement, see: Submission by Nepal on behalf of the Least Developed Countries Group on the ADP Co-Chairs' Non Paper of 7 July 2014 on Parties Views and Proposal on the Elements for a Draft Negotiating Text (2014), 3.

<sup>148</sup> Morgera, "No Need to Reinvent the Wheel for a Human Rights-Based Approach to Tackling Climate Change."

<sup>149</sup> Sebastian Oberthür, "Interplay Management: Enhancing Environmental Policy Integration Among International Institutions," *International Environmental Agreements: Politics, Law and Economics* 9, no. 4 (2009): 371–91, at 376.

regard to benefit-sharing, it is particularly concerning that such incoherence affects standards that are ultimately aimed at ensuring equity in the implementation of climate response measures, potentially engendering the risk of widespread human rights violations.

#### 4. Preliminary inferences and questions for further investigation

This paper departed from the premise that analyzing climate law and policy by focusing on benefit-sharing provides a novel angle to scrutinize equity in the climate regime both amongst and within States, by taking into account developing countries' and communities' needs, as well as ensuring mutual supportiveness with other key international objectives, such as the protection of human rights and biodiversity conservation. The preliminary investigation carried out here has shown that benefit-sharing is already being used as a tool to operationalize equity in the climate regime, and its use has accelerated considerably in recent years.

These developments are most evident at the *intra-State* level, where the climate regime already features many instances of benefit-sharing requirements. In this context, benefit-sharing has been used both as a form of *compensation* for the negative impacts stemming from the implementation of climate response measures *lato sensu*, and, in the case of ecosystem-based activities that entail some degree of stewardship and/or use of traditional knowledge, as a *reward* for the individuals and communities involved.

These intra-State benefit-sharing requirements overlap with the considerable and much more developed body of law and practice on benefit-sharing in the spheres of international human rights and biodiversity law. While some efforts have been made to bring these elements together, multiple approaches to benefit-sharing have emerged, raising questions on the *relationship* between the legal regimes relevant to the interpretation of the benefit-sharing requirements. Questions about the relationship between the climate regime, human rights law and biodiversity law have already been addressed in the literature,<sup>150</sup> without however focusing on benefit-sharing as a means to address the intra-State equity challenges raised by climate change response measures. Uncovering the extant ramifications of benefit-sharing in climate law may not only draw specific attention to the limits posed by parallel developments under the CBD and human rights law, but also highlight constructive approaches to address common challenges concerning climate change response measures in a mutually supportive fashion. Future academic reflection is therefore needed in this direction. First, it is necessary to further understand the nuances of the various forms of benefit-sharing arrangements that have emerged in international climate change law and conceptually clarify the extent to

---

<sup>150</sup> See e.g. Cinnamon P. Carlarne, "Good Climate Governance: Only a Fragmented System of International Law Away?," *Law & Policy* 30, no. 4 (2008): 450–80. W. Bradnee Chambers, *Interlinkages and the Effectiveness of Multilateral Environmental Agreements* (Tokyo: United Nations University Press, 2008); Oberthür, "Interplay Management"; Jeffrey Dunoff, "A New Approach to Regime Interaction," in *Regime Interaction in International Law: Facing Fragmentation*, ed. Margaret A. Young (Cambridge: Cambridge University Press, 2012), 136–74; Harro van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* (Cheltenham: Edward Elgar Publishing, 2014); Savaresi, "The Role of REDD in Harmonising Overlapping International Obligations."

which it is possible to theorize a common benefit-sharing approach in the context of climate response measures. Second, there is a need to explore the link between the notion of ecosystem and that of benefit-sharing in the climate regime. So far this dimension has not been addressed in climate law. There is ample scope to investigate the role of the ecosystem approach in the context of REDD+, as well as in the incipient policy debate on agriculture,<sup>151</sup> where overlaps may also arise with the notion of benefit-sharing embedded in the multilateral regime for access and benefit-sharing of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR).<sup>152</sup> Finally, the incipient debate on the use of traditional knowledge in the climate regime may engender friction with obligations under the CBD, ITPGR and human rights law. It is therefore in order to investigate how the matter of traditional knowledge is addressed in the climate context and obligations that UNFCCC Parties should take into account when they consider ways to use traditional knowledge.

As far as *inter-State* equity is concerned, the preliminary review carried out in this paper has uncovered potential benefit-sharing aspects lying behind obligations concerning finance, technology and capacity-building in the climate regime, paying specific attention to the distribution of these resources amongst developing countries and to the question of Parties' *needs*. Although the UNFCCC does not make reference to benefit-sharing, the role of this notion in addressing inter-State equity considerations within the framework of a *common concern* of mankind will be explored as a means to contribute to ongoing scholarly debate on a new climate agreement, where questions of differentiation and equity between Parties are being looked at afresh.<sup>153</sup> No academic study on the potential of addressing inter-State equity questions arising in the climate regime from a benefit-sharing perspective yet exists. A study of inter-State benefit-sharing considerations underlying climate governance is thus expected to provide international law-makers with a useful lens to focus on the mutually supportive interpretation of obligations in the climate regime as well as those under other international regimes, and to potentially bring about new and more equitable solutions to vexed climate governance questions.

---

<sup>151</sup> The Conference of the Parties (COP), by decision 2/CP.17, paragraph 75, requested the Subsidiary Body for Scientific and Technological Advice (SBSTA) to consider issues relating to agriculture. This mandate has kick-started an ongoing debate on the issue, which has so far principally focused on climate change adaptation, but may well also encompass mitigation. For an overview, see Charlie Parker et al., *The Land-Use Sector within the Post-2020 Climate Regime* (Copenhagen: Nordisk Ministerråd, 2014).

<sup>152</sup> International Treaty on Plant Genetic Resources for Food and Agriculture (Rome, 3 November 2001), Articles 10-13.

<sup>153</sup> See e.g. Morgan and Waskow, "A New Look at Climate Equity in the UNFCCC"; Kallbekken, Sælen, and Underdal, *Equity and Spectrum of Mitigation Commitments in the 2015 Agreement*; Christina Voigt, "Equity in the 2015 Climate Agreement," *Climate Law* 4, no. 1-2 (2014): 50-69.

## BIBLIOGRAPHY

- Adelman, Sam. "Rethinking Human Rights: The Impact of Climate Change on the Dominant Discourse." In *Human Rights and Climate Change*, edited by Stephen Humphreys, 159–80. Cambridge: Cambridge University Press, 2009.
- Boisson de Chazournes, Laurence. "Policy Guidance and Compliance: The World Bank Operational Standards." In *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, edited by Dinah Shelton, 281–303. Cambridge: Cambridge University Press, 2000.
- Bradnee Chambers, W. *Interlinkages and the Effectiveness of Multilateral Environmental Agreements*. Tokyo: United Nations University Press, 2008.
- Cameron, Edward. "Human Rights and Climate Change: Moving from an Intrinsic to an Instrumental Approach." *Georgia Journal of International and Comparative Law* 38 (2010 2009): 673.
- Caney, Simon. "Climate Change, Human Rights and Moral Thresholds." In *Human Rights and Climate Change*, edited by Stephen Humphreys, 69–90. Cambridge: Cambridge University Press, 2009.
- Carlarne, Cinnamon P. "Good Climate Governance: Only a Fragmented System of International Law Away?" *Law & Policy* 30, no. 4 (2008): 450–80.
- Cullet, Philippe. "The Kyoto Protocol and Vulnerability: Human Rights and Equity Dimensions." In *Human Rights and Climate Change*, edited by Stephen Humphreys, 183–205. Cambridge: Cambridge University Press, 2009.
- Dennis, Tirpak, Louise Brown, and Athena Ronquillo-Ballesteros. *Monitoring Climate Finance in Developing Countries: Challenges and Next Steps*. Washington: World Resource Institute, 2014.
- Dunoff, Jeffrey. "A New Approach to Regime Interaction." In *Regime Interaction in International Law: Facing Fragmentation*, edited by Margaret A. Young, 136–74. Cambridge: Cambridge University Press, 2012.
- Eliasch, Johan. *Climate Change: Financing Global Forests. The Eliasch Review*. London: Earthscan, 2008.
- French, Duncan. "Developing States and International Environmental Law: The Importance of Differentiated Responsibilities." *International & Comparative Law Quarterly* 49, no. 01 (2000): 35–60.
- Graham, K., and A. Thorpe. "Community-Based Monitoring, Reporting and Verification of REDD Projects: Innovative Potentials for Benefit Sharing." *Carbon and Climate Law Review* 3, no. 3 (2009): 303–13.
- Humphreys, Stephen. "Conceiving Justice: Articulating Common Causes Indistinct Regimes." In *Human Rights and Climate Change*, edited by Stephen Humphreys, 299–319. Cambridge: Cambridge University Press, 2009.
- International Law Commission. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission*. Geneva, 2006.
- Johnstone, Naomi. "Indonesia in the 'REDD': Climate Change, Indigenous Peoples and Global Legal Pluralism." *Asian-Pacific Law & Policy Journal* 12, no. 1 (2011): 93–123.
- Joseph, Sarah, and Adam Fletcher. "Scope of Application." In *International Human Rights Law*, edited by D. Moeckli, S. Shah, and S. Sivakumaran, 150–72. Oxford: Oxford University Press, 2010.
- Kallbekken, Steffan, Håkon Sælen, and Arild Underdal. *Equity and Spectrum of Mitigation Commitments in the 2015 Agreement*. Copenhagen, Denmark: Nordic Council of Ministers, 2014.

- Kenber, Mark. "The Clean Development Mechanism: A Tool for Promoting Long-Term Climate Protection and Sustainable Development." In *Climate Change and Carbon Markets: A Handbook of Emissions Reduction Mechanisms*, edited by Farhana Yamin, 263–88. London: Earthscan, 2005.
- Knox, John H. "Climate Change and Human Rights Law." *Virginia Journal of International Law* 50, no. 1 (2009): 163.
- . "Diagonal Environmental Rights." SSRN Scholarly Paper, 2008. <http://papers.ssrn.com/abstract=1134863>.
- Kravchenko, Svitlana. "Procedural Rights as a Crucial Tool to Combat Climate Change." *Georgia Journal of International & Comparative Law* 38 (2010 2009): 613–48.
- Limon, Marc. "Human Rights Obligations and Accountability in the Face of Climate Change." *Georgia Journal of International & Comparative Law* 38 (2010 2009): 543–92.
- Luttrell, Cecilia, Lasse Loft, Maria Fernanda Gebara, Demetrius Kweka, Maria Brockhaus, Arild Angelsen, and William D. Sunderlin. "Who Should Benefit from REDD+? Rationales and Realities." *Ecology and Society* 18, no. 4 (2013): 52–70.
- Milanovic, Marko. *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*. Oxford: Oxford University Press, 2011.
- Morgan, Jennifer, and David Waskow. "A New Look at Climate Equity in the UNFCCC." *Climate Policy* 14, no. 1 (2014): 17–22.
- Morgera, Elisa. "Benefit-Sharing as a Bridge between the Environmental and Human Rights Accountability of Multinational Corporations," 2014. <http://papers.ssrn.com/abstract=2424802>.
- . "Conceptualizing Benefit-Sharing: An Emerging Principle of Equity in Addressing Global Environmental Challenges? BENELEX Project Working Paper." Edinburgh Law School, 2014.
- . "No Need to Reinvent the Wheel for a Human Rights-Based Approach to Tackling Climate Change: The Contribution of International Biodiversity Law." In *Climate Change and the Law*, edited by Erkki Hollo, Kati Kulovesi, and Michael Mehling, 359–90. New York: Springer, 2013.
- Morgera, Elisa, and Louisa Parks. "An Inter-Disciplinary Methodology for Researching Benefit-Sharing as a Norm Diffusing in Global Environmental Law." Edinburgh Law School, 2014.
- Nakhoda, Smita, Taryn Fransen, Takeshi Kuramochi, Alice Caravani, Annalisa Prizzon, Noriko Shimizu, Helen Tilley, Aidy Halimanjaya, and Bryn Welham. *Mobilising International Climate Finance: Lessons from the Fast-Start Finance Period*. London, Washington and Tokyo: ODI, RRI and IGES, 2013.
- Oberthür, Sebastian. "Interplay Management: Enhancing Environmental Policy Integration Among International Institutions." *International Environmental Agreements: Politics, Law and Economics* 9, no. 4 (2009): 371–91.
- Parker, Charlie, Eduard Merger, Charlotte Streck, Darragh Conway, Timm Tennigkeit, and Andreas Wilkes. *The Land-Use Sector within the Post-2020 Climate Regime*. Copenhagen: Nordisk Ministerråd, 2014.
- Pauwelyn, Joust, Ramses A. Wessel, and Jan Wouters. *Informal International Lawmaking*. Oxford: Oxford University Press, 2012.
- Pavoni, Riccardo. "Environmental Jurisprudence of the European and Inter-American Courts of Human Rights: Comparative Insights." Accessed October 14, 2014. <http://papers.ssrn.com/abstract=2352829>.
- Pham, Thu T., Maria Brockhaus, Grace Wong, Le G. Dung, Junarti S. Tjajadi, Lasee Loft, Cecilia Luttrell, and Assembe C. Mvondo. "Approaches to Benefit Sharing: A

- Preliminary Comparative Analysis of 13 REDD+ Countries.” *Center for International Forestry Research*. Accessed October 10, 2014.  
<http://www.cifor.org/library/4102/approaches-to-benefit-sharing-a-preliminary-comparative-analysis-of-13-redd-countries/>.
- Rajamani, Lavanya. *Differential Treatment in International Environmental Law*. Oxford: Oxford University Press, 2006.
- . “The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change.” *Journal of Environmental Law* 22, no. 3 (2010): 391–429.
- Roht-Arriaza, Naomi. “First, Do No Harm: Human Rights and Efforts to Combat Climate Change.” *Georgia Journal of International and Comparative Law* 38 (2010 2009): 593–612.
- Savaresi, Annalisa. “REDD+ and Human Rights: Addressing Synergies between International Regimes.” *Ecology and Society* 18, no. 3 (2013): 5–21.
- . “The Human Rights Dimension of REDD.” *Review of European Community & International Environmental Law* 21 (2012): 102–13.
- . “The Operationalization of Benefit-Sharing in REDD+.” *BENELEX*. Accessed August 10, 2014. <http://www.benelexblog.law.ed.ac.uk/2014/07/04/the-operationalization-of-benefit-sharing-in-redd/>.
- . “The Role of REDD in Harmonising Overlapping International Obligations.” In *Climate Change and the Law. A Global Perspective*, edited by Erkki Hollo, Kati Kulovesi, and Michael Mehling, 391–418. Springer, 2013.
- Seyfang, Gill, and Alex Haxeltine. “Growing Grassroots Innovations: Exploring the Role of Community-Based Initiatives in Governing Sustainable Energy Transitions.” *Environment and Planning C: Government and Policy* 30, no. 3 (2012): 381–400.
- Soltau, Friedrich. *Fairness in International Climate Change Law and Policy*. Cambridge: Cambridge University Press, 2009.
- TEEB. *The Economics of Ecosystems and Biodiversity for National and International Policy Makers – Part Three. Chapter Five. Rewarding Benefits through Payments and Markets*. Wesseling, Germany: United Nations Environment Programme, 2009.  
<http://www.teebweb.org/LinkClick.aspx?fileticket=I4Y2nqqIiCg%3d&tabid=1019&language=en-US>.
- Torres, Valeria. “Access to Information, Participation and Justice in Environmental Matters and the Post-2015 Development Agenda: Recent Developments in Latin America and the Caribbean.” New Haven, CT, 2014.
- Van Asselt, Harro. *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions*. Cheltenham: Edward Elgar Publishing, 2014.
- Voigt, Christina. “Equity in the 2015 Climate Agreement.” *Climate Law* 4, no. 1–2 (2014): 50–69.
- . “Is the Clean Development Mechanism Sustainable-Some Critical Aspects.” *Sustainable Development Law & Policy* 8 (2007): 15–23.
- Winkler, Harald, and Lavanya Rajamani. “CBDR&RC in a Regime Applicable to All.” *Climate Policy* 14, no. 1 (2014): 102–21.
- Yamineva, Yulia, 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 *Climate Change and the Law*, edited by Erkki Hollo, Kati Kulovesi, and Michael Mehling, 191–224. New York: Springer, 2013.