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THE CASE FOR SOCIAL SAFEGUARDS IN A POST-2012 AGREEMENT ON REDD

David J. Kelly

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1

INTRODUCTION

How forest dwelling communities' interests should be included within a future agreement on reduced emissions from deforestation and forest degradation (REDD)¹ is an area which has to date received insufficient political and legal attention.² In contrast, the Bali Road Map³ and the Copenhagen Accord⁴ have accelerated the international resolve to reach a comprehensive agreement on REDD. Recently developed REDD proposals have been broadly criticised,⁵ with one serious charge laid against 'market-based' approaches to REDD in particular being that it may lead to the dispossession of the forest dwelling poor.⁶

Forest dwelling communities have relied on the underlying forests subject to REDD for generations but generally lack formal recognition of their customary property and use rights afforded to them in international human rights law.⁷ This paper analyses the legal mechanisms that could be incorporated into a future REDD agreement to protect their interests.

The first part of this paper reviews current REDD proposals, the notion of customary tenure and the threats which current proposals are said to cause forest dwelling communities. The analysis shows that REDD activities do potentially pose serious threats to forest dwelling communities customary tenure regardless of whether a market, international fund or hybrid-based approach to REDD is adopted by parties to the UNFCCC. On the contrary, this paper argues the underlying cause of forest dwelling communities' vulnerability is not REDD itself but the potential for REDD to operate in the absence of minimum social safeguards.

The second part of this paper shows that a socially inclusive agreement on REDD may actually benefit forest dwelling communities. The objectives of REDD and protecting forest dwelling communities' rights are not competing but indeed complementary. Moreover, given the quantum of finance required to reduce rates of global deforestation, a REDD market which instils minimum international levels of social protection is likely to benefit the forest dwelling poor. For REDD to benefit the forest dwelling poor, social impacts need to be assessed and customary tenure respected. Rather than ignore the social aspects to REDD, a future agreement on REDD represents an opportunity to encourage the implementation of reforms that safeguard the interests of forest dwelling communities.

The third part of this paper illustrates what social safeguards should be included within a future agreement on REDD. Using a hypothetical agreement, this paper finds a policy need and legal case for the adoption of the following four mutually

1 This paper uses the term REDD synonymously: (i) as a verb to describe the act of reducing emissions from deforestation and forest degradation and (ii) as a noun to describe activities (policies or project activities) that reduce emissions from deforestation and forest degradations and which may qualify for REDD finance under a post-2012 agreement on REDD.

2 Tom Griffiths, *Seeing RED: Avoided Deforestation and the Rights of Indigenous Peoples and Local Communities 10* (UK: Forest Peoples Program, 2007).

3 *Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action*, Decision 2/CP.3, in Report of the Conference of the Parties, Thirteenth Session, Bali, 3-15 December 2007, Doc. No. FCCC/CP/2007/6/Add.1 (2008).

4 Copenhagen Accord, Draft Decision -/CP.15, Conference of the Parties to the UNFCCC, Fifteenth Session, Copenhagen, 7-18 December 2009, Doc. No. FCCC/CP/2009/L.7 (2009).

5 See, e.g., Simone Lovera, *The Hottest REDD Issues: Rights, Equity, Development, Deforestation and Governance by Indigenous Peoples and Local Communities* (Amsterdam: The Global Forest Coalition, 2008). For list of human rights concerns, see Frances Seymour, *Forests, Climate Change and Human Rights 15* (Bogor: Centre for International Forestry Research, 2008). Environmental concerns include issues of permanence, market dilution and carbon accounting accuracy, see Robert O'Sullivan, 'Reducing Emissions in Developing Countries', in Charlotte Streck et al. eds, *Climate Change and Forests: Emerging Policy and Market Opportunities 179, 182* (London: Chatham House, 2008).

6 See Simon Rawles, *REDD Myths: A Critical Review of the Proposed Mechanisms to Reduce Emissions from Deforestation and Degradation in Developing Countries* (Amsterdam: Friends of the Earth International, 2008), available at <http://www.foei.org/en/resources/publications/climate-justice-and-energy/2008/redd-myths>.

7 William D. Sunderlin, Jeffrey Hatcher and Megan Liddle, *From Exclusion to Ownership? Challenges and Opportunities in Advancing Forest Tenure Reform 3* (Washington DC: Rights and Resources Initiative, 2008).

reinforcing social safeguards. The first safeguard is the insertion of participation rights for forest dwelling communities. The second safeguard is making the recognition of 'customary tenure' a precondition for developing country participation in the REDD market. The third safeguard is adopting an international standard which includes social development criteria for assessing sub-national REDD project activities. The fourth social safeguard is the creation of a REDD Compliance Committee to ensure ongoing compliance with the agreement. The inclusion of all four minimum social safeguards within the post-2012- agreement on REDD is argued to benefit developing country governments, state and non-state REDD credit investors, and forest dwelling communities alike.

2 REDD, FOREST DWELLING COMMUNITIES AND CUSTOMARY TENURE

2.1 REDD

Approximately 13 million hectares (half the size of England) of tropical forest is deforested each year causing approximately 17-19 per cent of total global greenhouse gas emissions - this is roughly the same amount of CO₂ generated by the USA or China.⁸ Reducing emissions from deforestation and forest degradation (REDD) is the term used to describe national policies and project activities that preserve existing forests and prevent the release of emissions which result from deforestation and forest degradation.⁹ At its core, REDD involves creating a value for existing forests through the payment of financial or non-financial incentives to national government or (sub-national) project participants;

8 Johan Eliasch, *Climate Change: Financing Global Forests - The Eliasch Review 3* (London: Earthscan, 2008).

9 Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action, UNFCCC Conference of the Parties, Eleventh Session, Montreal, 28 November - 9 December 2005, Doc. No. FCCC/2005/CP/L.2 (2005).

the aim is to make it more worthwhile to conserve forests than deforest them.

REDD was excluded from the Kyoto Protocol and its carbon trading mechanisms, the Clean Development Mechanism (CDM) and Joint Implementation (JI) Programs.¹⁰ One of the major reasons why REDD was excluded from the Kyoto Protocol was because of difficulties associated with measurement, verification, leakage and ensuring permanence.¹¹ Unfortunately, due to the lack of investment in the sector, rates of deforestation globally have continued to increase¹² with as much as half of the original Brazilian rainforest estimated to be deforested by 2020.¹³

The ultimate objective of the UNFCCC is to stabilise greenhouse gas concentrations whilst not threatening sustainable economic development.¹⁴ Many view the inclusion of REDD as a vital element of a post-2012 legal agreement to stabilise global greenhouse gas emissions and an essential means of engaging the developing world in global mitigation efforts.¹⁵ The inclusion of REDD and other forest-related activities in a post-2012 international agreement is estimated to reduce global mitigation costs by 20-25 per cent.¹⁶ The 13th Conference of the Parties to the UNFCCC¹⁷ recognised that REDD 'can promote co-benefits' and that 'the needs of local and indigenous communities should be

10 See O'Sullivan, in Streck et al. eds, note 5 above at 181. See also EcoSecurities, REDD Policy Scenarios and Carbon Markets (London: EcoSecurities, Policy Brief 2007, available at [http://www.ecosecurities.com/Assets/23864/pubs%20%20redd%20policy%20brief%20ecosecurities%20\(background%20version\)_je%20v1.pdf](http://www.ecosecurities.com/Assets/23864/pubs%20%20redd%20policy%20brief%20ecosecurities%20(background%20version)_je%20v1.pdf)).

11 *Id.*

12 *Id.*

13 Claudia Azevedo-Ramos, *Sustainable Development and Challenging Deforestation in the Brazilian Amazon: The Good, The Bad and The Ugly 2* (Rome: FAO, 2007).

14 Article 2, United Nations Framework Convention on Climate Change, Rio de Janeiro, 9 May 1992, 31 *Int'l Leg. Mat.* 849 (1992).

15 See Eliasch, note 8 above.

16 Brian Dawson and Matt Spannagle, *The Complete Guide to Climate Change* 46 (New York: Routledge, 2008).

17 Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action, Decision 2/CP.3, in Report of the Conference of the Parties, Thirteenth Session, Bali, 3-15 December 2007, Doc. No. FCCC/CP/2007/6/Add.1 (2008).

addressed when action is taken' to implement REDD.¹⁸ On at least one view, REDD needs to be pro-poor in order to be both legitimate and effective.¹⁹ The difficult question which remains is how REDD should be included in the post-2012 legal architecture so as to ensure REDD benefits forest dwelling communities rather than harms them.

2.2 Forest Dwelling Communities

Although the UNFCCC itself does not mention indigenous people, other international legal instruments use varying terminology to address these and other sub-national groups.²⁰ For example, 'indigenous people', 'indigenous communities', 'indigenous populations', 'tribal peoples', 'minorities', 'forest dwellers', and 'local communities' are all used with different legal effects.²¹ This paper critically analyses current REDD proposals from the perspective of this diverse group of indigenous peoples and local communities who depend on the underlying forests available to REDD activities. One of the first legal issues the post 2012 REDD agreement will need to overcome is how to define these divergent groups. In this regard, an inclusive definition which encompasses all groups that may be affected by the introduction to REDD would be preferable.²² In the draft decision of the Ad Hoc Working Group on Long Term Cooperative Action on REDD the term 'indigenous peoples and members of local communities' was used and this term be broad enough to include the vulnerable divergent groups although the term has not yet been defined.²³

18 *Id.*

19 Leo Peskett et al., *Making REDD Work for the Poor 5* (London: Poverty Environment Partnership, 2008).

20 Marcus Orellana, *REDD Legal Issues: Indigenous Peoples and Local Communities 1* (Geneva: Centre for International Environmental Law, Draft Report, 2009).

21 *Id.*

22 See Orellana, note 20 above at 5.

23 See *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*, Draft Decision-/CP.15, in *Report of the Ad Hoc Working Group on Long Term Cooperative Action under the Convention, UNFCCC Conference of the Parties, Fifteenth Session, Copenhagen, 7 December – 15 December 2009*, Doc. No. FCCC/AWGLCA/2009/17 (2010).

This paper uses 'forest dwelling communities'²⁴ to encompass that same broad group of stakeholders.

Forest dwelling communities have raised concerns about REDD and have felt excluded from the UNFCCC negotiations concerning REDD.²⁵ At the 14th Conference of the Parties to the UNFCCC there was an expectation that the draft conclusions of the agenda item on REDD would include a reference to recognising the rights to indigenous peoples.²⁶ Although the draft conclusions did recognise the 'value of encouraging' participation by indigenous peoples, all references to 'rights of indigenous peoples' were removed.²⁷ Some progress appears to have been made at the 15th Conference of the Parties to the UNFCCC with the inclusion of a reference to indigenous peoples and members of local communities' rights remaining in the draft decision of the Ad Hoc Working Group on REDD.²⁸

2.3 Customary Tenure

Many forest dwelling communities lack formal recognition of their customary tenure and ownership rights.²⁹ Customary land tenure systems

24 The term 'forest dwellers' could be found in various other international instruments. See, e.g. *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, in *Report of the United Nations Conference on the Environment and Development, Rio De Janeiro, 3-14 June 1992*, UN Doc. A/CONF.151/26 (Vol. III), Annex III (1992).

25 See *The Global Forest Coalition*, note 5 above at 5.

26 See Orellana, note 20 above at 13.

27 *Id.*

28 See *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*, note 23 above at 35. Note that this decision has not been agreed upon and is the subject of ongoing negotiations. Also note that in the *Methodological Guidance for Activities Related to REDD and the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks in Developing Countries*, there was no reference made to rights of indigenous peoples or local communities.

29 See *Sunderlin*, note 7 above at 4.

enshrine usage rights³⁰, control rights³¹ and transfer rights³² and have served forest dwelling communities in localised and unique ways for thousands of years.³³ This paper describes these customary ownership systems and distinctive customary rights collectively as 'customary tenure'. Customary tenure is being subjected to a range of new and rapidly changing forces such that many forest dwelling communities no longer enjoy secure land tenure.³⁴ As a result, most forest dwelling communities (apart from the most isolated) now seek formalisation of their customary tenure to increase security and overcome risks of exclusion.³⁵ National governments formalise customary tenure arrangements by recognising the rights in their formal laws, indeed the requirement to do so is a recognised principle of international human rights law.³⁶

Although recognising customary tenure has been successfully achieved in many parts of the world,³⁷ customary tenure remains unrecognised in many

national statutory property laws.³⁸ In 2002, only 7 per cent of the world's remaining forests were formally 'owned' by local communities and indigenous people³⁹ therefore most of the remaining forests available for REDD finance is defined as 'state-land'.⁴⁰ Clarifying the legal ownership of forests and their resources presents risks for forest dwelling communities who struggle for recognition and lack legal capacity to have their tenure claims heard or human rights enforced by domestic courts. Formalisation of customary tenure arrangements can also exclude poorer groups within a community, leading them further into marginality and widening inequality.⁴¹ Any national law or international agreement which affects forest ownership rights must respect the customary tenure of forest dwelling communities in order to be pro-poor.⁴²

2.4 A Future REDD Agreement

Although there is currently no comprehensive international agreement on REDD, a series of proposals and options papers have been submitted to the parties of the UNFCCC.⁴³ The Copenhagen Accord includes a commitment to establish a 'REDD-plus'⁴⁴ mechanism although the nature of

30 For e.g., the right to use forests for traditional purposes including collecting fruit, growing crops or grazing animals. See Australian Agency for International Development, *Making Land Work: Reconciling Customary Land and Development in the Pacific 6* (Canberra: AusAID, 2008).

31 For e.g., the right to make decisions about the land including how to sell or dispose of products from the land; see AusAID, note 30 above at xi.

32 For e.g., the right to transfer land to other people including outsiders; see AusAID, note 30 above at xi.

33 *Id.*

34 The pressures include technological change, new income opportunities, rapid population growth, mobile populations and rapid social change; see AusAID, note 30 above at xi.

35 See Sunderlin, note 7 above at 1.

36 Examples include: Article 1 of The International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, 6 *Int'l Leg. Mat.* 368 (1967), which asserts that 'in no case may a people be deprived of its own means of subsistence' and Articles 25-27 of The United Nations Declaration on the Rights of Indigenous People, New York, 13 September 2007, UN Doc. A/RES/61/295 (2007), which asserts that States shall give 'due recognition to Indigenous Peoples laws, traditions, customs and land tenure systems' and 'recognize and adjudicate the rights of Indigenous peoples pertaining to their lands'.

37 See Sunderlin, note 7 above at 4 and note, for example, Papua New Guinea where 97 per cent of the remaining forests have community tenure associated with them.

38 *Id.*

39 *Id.*

40 In 2002, only 7 per cent of land was owned by local communities and indigenous people and 12 per cent was owned by individuals and corporations. Most of the forests in countries likely to participate in a global REDD regime is 'state owned' land with only 7 per cent of the world's forests owned by forest dwelling communities, see Sunderlin, note 7 above at 1.

41 Celestine N. Musembi, 'De Soto and Land Relations in Rural Africa: Breathing Life into Dead Theories About Property Rights', 28 *Third World Quarterly*, 1457, 1470 (2007).

42 See Peskett et al., note 19 above at 6 and Joseph Blocher, *Building on Custom: Land Tenure Policy and Economic Development in Ghana*, 9 *Yale Human Rights and Development Law Journal* 166, 167 (2006).

43 For a list of REDD proposals, see The Global Canopy Programme, *The Little REDD Book: A Guide to Governmental and Non-Governmental Proposals for Reducing Emissions from Deforestation and Degradation*, (Oxford: Global Canopy Programme, 2008).

44 For a definition of 'REDD-plus', see 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, note 23 above.

that mechanism remains completely uncertain.⁴⁵ The question of whether REDD should operate at both the national and sub-national scale is an important issue currently being debated in theory and negotiated in practice.⁴⁶ Although a purely sub-national scope is unlikely due to the inevitable problem of carbon leakage, recent proposals envisage REDD operating at both scales. Under that approach, financial or non-financial incentives will be paid to both national governments for implementing national programmes⁴⁷ and project implementers⁴⁸ for activities that reduce rates of deforestation or forest degradation within a defined area.⁴⁹ The quantum of the financial or non-financial incentive provided is likely to be based on the magnitude of the emission reductions generated⁵⁰ (on a modified *ex post* basis⁵¹) by comparing actual deforestation and degradation rates against a

reference scenario⁵² based on historic levels and/or projections of future deforestation.⁵³ It appears that a consensus is emerging for a national level approach that supports sub-national approaches (nested approach) allowing both national governments and project implementers to access REDD finance after satisfying certain pre-conditions, including capacity to verify permanent emission reductions from reduced rates of deforestation.⁵⁴

The legal and financial mechanism used to deliver the finance (or non-financial incentive) for REDD activities is also highly contentious and uncertain. There are broadly two ways of delivering REDD finance: (i) through an international trust fund; and/or (ii) through a market mechanism.⁵⁵ An international trust fund would pool official development assistance (ODA) (and possibly other innovative forms of finance)⁵⁶ and disburse those funds to compensate efforts to reduce emissions from deforestation and forest degradation in accordance with their legal mandate.⁵⁷ A REDD market mechanism allows overseas countries or non-state actors to offset their carbon liabilities through purchasing REDD credits from developing country governments or REDD project implementers. Even with prudent regulations, the REDD market is likely to involve significant financial risk for credit purchasers due to the long timeframes involved.⁵⁸ It is likely the REDD finance mechanism will

45 See The Copenhagen Accord, note 4 above at clause 6.

46 See, e.g., Arild Angelsen et al., *Reducing Emissions from Deforestation and Forest Degradation: An Options Assessment Report 2* (Washington DC: Meridian Institute, 2009); Arild Angelsen ed., *Moving Ahead with REDD: Issues, Options and Implications* (Bogor: CIFOR, 2008). See also Australian Submission on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries, in *Ideas and Proposals on the Elements Contained in Paragraph 1 of the Bali Action Plan*, Ad Hoc Working Group on Long Term Cooperative Action under UNFCCC, Fifth Session, Bonn, 29 March-8 April 2009, Doc. No. FCCC/AWGLCA/2009/MISC.1/Add.2 (2009).

47 At the national level some of the measures which may attract REDD finance include strengthened law enforcement, fire management and sustainable forest management; see Griffiths, note 2 above at 5.

48 Project implementers may be non-state actors, including private companies, local government or community groups, including forest dwelling communities.

49 The following reports and UNFCCC submissions discuss this option: See Angelsen et al, note 46 above, Angelsen ed, note 46 above and Australian Submission on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries, note 46 above.

50 See Peskett et al., note 19 above at 6.

51 Daniel Nepstad, Stephan Schwartzman and Paulo Mountinho, *Getting RED Right: Reducing Emissions from Deforestation and Forest Degradation (REDD) in the United Nations Framework Convention on Climate Change (UNFCCC)* (Woods Hole: Woods Hole Research Centre, 2007) argues at 9 the mechanism is unlikely to be completely *ex post* (after the emission reduction is generated); See also Dawson and Spannagle note 16 above at 49.

52 A REDD baseline can be calculated at either the national or project level.

53 See Peskett et al., note 19 above at 7.

54 The following reports and UNFCCC submissions discuss this option: see Angelsen et al., note 46 above; see Angelsen ed, note 46 above and see Australian Submission on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries, note 46 above.

55 See Peskett et al., note 19 above at 6.

56 For example, small percentage of earmarked contributions from the sale of international carbon credits, eg. Assigned Allocation Units, Certified Emission Reductions or their equivalent in the post-2012 architecture.

57 The Brazilian Proposal prefers an international trust fund based approach to compensate efforts to reduce emissions from deforestation and forest degradation drawing upon voluntary contribution from developed countries official development assistance.

58 See Seymour, note 5 above and note risks of non-permanent emission reductions caused by fires, pest, illegal activity and conflict.

involve a hybrid approach with public funds used in the first instance to build institutional capacity in technical assistance, verification and monitoring; and market-based approaches channelling the bulk of the funds for subsequent reduction compensation payments.⁵⁹ This is the pilot model adopted by the UN-REDD programme⁶⁰ which has developed the term 'REDD market readiness' and the model most recently recommended to the UNFCCC by the Governments of Norway and Australia.⁶¹

This paper assumes, in accordance with the above considerations, that a separate REDD agreement which operates at the national level but supported at the sub-national level; and which includes an international fund to deliver finance for capacity building and a market mechanism to deliver the bulk of future compensation payments, will be adopted (hereafter 'the Future REDD Agreement').

2.5 Threats to Forest Dwelling Communities

REDD, in particular market-based REDD mechanisms, have been strongly criticised.⁶² Aside from the moral arguments against using REDD as a convenient and cost effective way to offset developed countries' pollution - or the environmental concerns relating to additionality, permanence, dilution, leakage, and inaccurate forest carbon measurement - REDD has also been criticised because of the possible negative affects it may have on forest dwelling communities' rights.⁶³ On one view, linking REDD to carbon markets may lead to

dispossession of the forest dwelling poor.⁶⁴ The arguments can be summarised as follows.

2.5.1 Increased Prices and Loss of Rights

By placing a new value on forest resources, REDD is likely to increase the price of the underlying forests making them inaccessible to forest dwelling communities.⁶⁵ As many nomadic forest dwelling communities rely on forests for agricultural land and food, pricing out forest dwellers also increases their vulnerability to food insecurity. REDD requires certainty on the ownership of the underlying forests and the carbon they sequester.⁶⁶ Unfortunately formalising tenure arrangements to provide adequate certainty can be harmful to communities that rely on forests for survival but aren't engaged in, or recognised through, that process.⁶⁷ Forest dwelling communities that lack formal recognition of their customary tenure are therefore particularly vulnerable to land price increases resulting from the formalisation and/or privatisation of forest resources. Without adequate social safeguards forest dwelling communities risk losing their customary tenure claims which in turn makes their livelihoods more vulnerable.

2.5.2 Disincentives for Recognising Customary Tenure and Passing on REDD Incentives

Compounding the threats described above, the increase in value of the forest resources may also act

⁵⁹ See Griffiths, note 2 above at 5.

⁶⁰ UN-REDD, UN-REDD Programme Rules of Procedure and Operational Guidance, 2009, available at: http://www.unredd.net/index.php?option=com_docman&task=doc_details&gid=360&Itemid=53 and UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries: National Programme Document, 2009, available at: http://www.unredd.net/index.php?option=com_docman&task=doc_details&gid=206&Itemid=53.

⁶¹ See Angelson et al., note 46 above; see Angelson et al., note 46 above and Australian Submission on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries, note 46 above..

⁶² See Rawles, note 6 above. See also Griffiths note 2 above and Seymour note 5 above.

⁶³ *Id.*

⁶⁴ See Seymour, note 5 above and Rawles note 6 above.

⁶⁵ See Griffiths, note 2 above.

⁶⁶ Rosimeiry Portela, Kelly J. Wetland and Laura L. Pennypacker, 'The Idea of Market-Based Mechanisms for Forest Conservation and Climate Change', in Streck et al. eds, note 5 above at 25.

⁶⁷ India's Scheduled Tribes (Recognition of Forest Rights) Act is a case in point. The Act (which formalised customary tenure arrangements for forest dwelling communities) was criticised by tribal activists for excluding certain groups, for example, communities who depend on forests for survival, but who were not forest dwellers or Scheduled Tribes. The revised the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 has also been criticised for leaving certain forest communities without rights or resettlement plans. For more information see Lovleen Bhullar, 'The Indian Forests Rights Act: A Critical Appraisal', 4/1 *Law, Environment and Development Journal* 20 (2008), available at <http://www.lead-journal.org/content/08020.pdf>.

as a disincentive for national governments to recognise forest dwelling communities' existing customary rights.⁶⁸ As rights to forests are formalised to accommodate REDD, national governments may delay customary ownership to the underlying forests or separate the ownership of the forest from the rights of the resources contained within, including rights to forest carbon.⁶⁹ Some jurisdictions have already passed laws which deem the state to be the owner of the carbon rights rather than the customary owners⁷⁰ or private owners of the forest.⁷¹ In the absence of international standards, domestic governments have an incentive to coup higher short term REDD rents from deferring, limiting or not recognising community tenure within the underlying forests subject to REDD.

As it is likely the REDD payment schemes discussed above would be in part determined by land tenure and ownership rights,⁷² without any legal recognition of their rights to the forests in which they live, forest dwelling communities have no guarantees of receiving financial incentives under a Future REDD Agreement.⁷³

68 See Angelson ed, note 46 above at 113.

69 For example, New South Wales. See Karen Gould, Monique Miller and Martin Wilder, 'Legislative Approaches to Forest Sinks in Australia and New Zealand: Working Models for Other Jurisdictions', in Streck et al eds., note 5 above at 262.

70 Indonesia has now passed at least three pieces of legislation relating to REDD: Ministerial Regulation No. 68, 2008 on REDD pilot projects, the main REDD Regulation, No. 30, 1 May 2009 and Regulation 36, 29 May 2009, on revenue sharing rules for REDD. Regulation 30 was passed despite a request from the United Nations Committee on the Elimination of Racial Discrimination (CERD) to make changes to accommodate indigenous peoples' rights to own and control their traditional areas: Drawn from REDD Concerns Deepen, No 82, Down to Earth, September 2009, available at <http://dte.gn.apc.org/82acl.htm>.

71 For example under New Zealand's Permanent Forest Sink Initiative the government retained forest sink credits and associated deforestation liabilities. Under PFSI forests generate removal units (RMUs) which the Crown retained. It should be noted that under the New Zealand system the crown then devolved the removal units to the landowners however the position on carbon sequestration rights has been reversed with the introduction of the NZ Emissions Trading Scheme.

72 See Peskett et al., note 19 above at 7.

73 See Rawles, note 6 above at 23.

2.5.3 Harmful Enforcement Techniques

Another concern is that REDD may lead to national governments adopting overzealous enforcement techniques and forest protection laws to the detriment of forest dwelling communities.⁷⁴ There is a threat that without appropriate legal safeguards, national governments could finance the provision of guns, helicopters and armed guards to protect forest resources through REDD.⁷⁵ The high risk nature of REDD credits and the potentially high contingent liability in repaying money received from REDD credits in the event of subsequent forest loss, increases this risk that inappropriate enforcement provisions may be adopted to the detriment of forest dwelling communities.

2.5.4 Increased Risk of Conflict

Forest dwelling communities are highly vulnerable to external influences and particularly prone to conflict especially in the absence of secure legal tenure.⁷⁶ Again, without clarifying the forest dwelling communities' rights prior to the introduction of a future REDD agreement, a high risk of future conflict remains between forest dwelling communities and the state and between forest dwelling communities themselves. A REDD agreement that is implemented without consideration of customary tenure arrangements is likely to lead to conflict and ongoing costs for forest dwelling communities and developing country governments.

2.5.5 Lack of Participation

As discussed, REDD has also been criticised for the lack of participation by forest dwelling communities in the ongoing international negotiations.⁷⁷ Continuing apathetic attitudes towards forest

74 See Peskett et al., note 19 above at 7.

75 *Id.*

76 See AusAID, note 30 above at xi.

77 Issues Relating to Indigenous Peoples and Local Communities for the Development and Application of Methodologies: Submissions from Parties, UNFCCC Subsidiary Body Scientific and Technological Advice, Thirtieth Session, 1-10 June 2009, Doc. No. FCCC/SBSTA/2009/MISC.1 (2009).

dwelling communities' interests represents a threat in and of itself especially if REDD projects are approved without forest dwelling communities knowledge or participation. As the UNFCCC is a state based Convention, forest dwelling communities are non-state actors and are not directly represented at the UNFCCC. Forest dwelling communities face financial constraints and lack technical capacity to access the negotiations or legal advice. Ironically the engagement of forest dwelling communities is critical for REDD activities to be sustainable.

The above list of threats to forest dwelling communities exist regardless of whether the REDD finance is provided through an international fund or a market mechanism. The root cause of forest dwelling communities' vulnerability is not REDD itself, or the financial mechanisms used to deliver the incentives, but the potential for REDD to operate in the absence of minimum international social safeguards.

3

HOW REDD CAN FAVOUR FOREST DWELLING COMMUNITIES?

Contrary to the threats and arguments described above, the introduction of REDD, in particular market-based REDD, could actually benefit forest dwelling communities if appropriate social safeguards are implemented.⁷⁸ In contrast to the discussion above, one of the main stated benefits of REDD is that it may act as an incentive for governments to recognise customary tenure.⁷⁹ In fact, secure property rights are essential for both a functioning REDD market mechanism⁸⁰ and for achieving social, economic and environmental development.⁸¹ Forest dwelling communities may

⁷⁸ See Nepstad, note 51 above at 10.

⁷⁹ See Angelson ed, note 46 above. Note that biodiversity is another stated co-benefit.

⁸⁰ See Portela, note 66 above at 25.

⁸¹ Hernando De Soto, *The Mystery of Capital* (New York: Basic Books, 2000) and UNDP, *Making the Law Work for Everyone* (New York: UNDP, 2008).

benefit from appropriately regulated market-based approaches to REDD for the following reasons.

3.1 Incentives for Recognising Customary Tenure

Empirical evidence shows that recognising customary tenure over forests leads to decreased deforestation.⁸² Some evidence supports the conclusion that it is also not only the most effective way of reducing deforestation⁸³ but also is one of the lowest cost forms of carbon abatement.⁸⁴ On the other hand, insecure tenure is a known driver of deforestation.⁸⁵ Accordingly, land tenure reform in the form of recognising customary tenure in line with recognised principles of international law is likely to attract a significant ongoing income stream for the national government, from the REDD market mechanism in particular, because such reforms are likely to reduce deforestation.

To reduce the risks associated with REDD investments, the REDD market may also encourage stronger governance structures. Tenure is perceived to be a prerequisite for capital investment in the forest carbon sector while conversely conflicts over land discourage investment.⁸⁶ REDD is likely to carry significant risk for the REDD credit purchaser, therefore carbon investments are more likely to flow to countries and regions with strong governance structures and systems where legal tenure is not contentious.⁸⁷ In this way broader governance factors, including the clarity and security of customary tenure as well as transparent judicial

⁸² See Nepstad, note 46 above.

⁸³ See Lovera, note 5 above at 5 illustrates that 'Satellite images of Amazonian deforestation clearly show how deforestation rates are low to virtually non-existent in most of the recognized Indigenous territories, while the average deforestation rate in the Brazilian Amazon in general has gone up by 69 per cent between August 2007 and August 2008'.

⁸⁴ Jeffrey Hatcher, *Securing Rights as a Mitigation Measure: The Costs of Securing Rights and Carbon Benefits*, (Paper presented at the conference entitled Rights, Forests and Climate Change organised by Rights and Resources Initiative, Oslo, 15-17 October 2008), available at <http://www.rightsandresources.org/events.php?id=80>.

⁸⁵ See Eliasch, note 8 above.

⁸⁶ See Sunderlin, note 7 above.

⁸⁷ See Angelson ed, note 46 above at 45.

processes may become important in determining risk profiles of REDD credit investment.⁸⁸ In theory, market-based approaches to REDD may have positive benefits in encouraging the resolution of customary tenure disputes. National governments have incentives to put in place systems which promote capital investment so more carbon finance becomes accessible, however, the danger still exists that 'resolutions' of land tenure issues are detrimental to forest dwelling communities' interests unless appropriate social safeguards are incorporated into the agreement.

3.2 Improvements in forest conservation

Reducing deforestation itself would directly benefit many forest dwelling communities around the world.⁸⁹ Forest dwelling communities are not major contributors to deforestation.⁹⁰ Slash and burn agriculture represents only a very small proportion of global rates of deforestation in comparison to large scale oil palm and soy production, cattle ranching and industrial and illegal logging for commercial activities.⁹¹ These industries provide few benefits to forest dwelling communities and often result in the loss of land and livelihood of the forest dwelling poor.⁹² Moreover, creating a market for activities that reduce deforestation also benefits forest dwelling communities who possess natural comparative advantages in providing those eco-services.⁹³

3.3 Additional finance

Market-based approaches to REDD also provide important opportunities to reduce poverty and enhance equity by delivering significant additional financial flows to rural areas and forest dwelling communities, which are among the most depressed and under-funded parts of most developing countries.⁹⁴ REDD requires funding at

unprecedented levels with estimates for halving deforestation varying between \$18-\$26 billion per year in 2020.⁹⁵ Therefore, without an unprecedented increase in ODA, some form of carbon finance will be required to mobilise the funding required to have an impact on global rates of deforestation. Some estimates suggest markets could deliver as much as \$7 billion per year by 2020.⁹⁶ The World Bank recognises that to reduce the annual rate of deforestation in developing countries by 20 per cent, some form of market finance will be required.⁹⁷ Given the quantum finance required to reduce rates of deforestation, some form of market-based finance will be required.

Although the potential threats to forest dwelling communities are serious, if appropriately regulated, market-based approaches to REDD could potentially deliver unprecedented benefits to forest dwelling communities who tend to protect the forests in which they live. In particular, legal reforms that support the participation of forest dwelling communities and safeguard informal claims to customary tenure are likely to deliver significant global mitigation benefits, financial incentives for developing country governments and development benefits for the forest dwelling poor. The difficult legal challenge is how to mitigate the threats and harness the potential benefits. The question is what legal safeguards are required and whether their implementation is left to national governments or prescribed at the international level.⁹⁸ This paper recommends four social safeguards prescribed at the international level in line with international law, the principle of national sovereignty and REDD best practice.

⁸⁸ See EcoSecurities, note 10 above.

⁸⁹ See Nepstad, note 51 above.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See Angelson ed, note 46 above at 110.

⁹⁵ See Eliasch, note 8 above.

⁹⁶ *Id.*

⁹⁷ As quoted in Griffiths, note 2 above at 7.

⁹⁸ Rights and Resources Initiative, Foundations for Effectiveness: A Framework for Ensuring Effective Climate Change Mitigation and Adaptation in Forest Areas Without Undermining Human Rights and Development (Washington DC: Rights and Resources Initiative, 2008), available at http://www.rightsandresources.org/documents/files/doc_898.pdf.

4 SOCIAL SAFEGUARDS REQUIRED TO TURN REDD THREATS INTO OPPORTUNITIES

There has not been strong support at the international level for including legal text in the Future REDD Agreement which protects forest dwelling communities' rights,⁹⁹ although this position is changing.¹⁰⁰ In a REDD proposal submitted to the UNFCCC in March 2009, Australia, for example, submitted that 'it is not necessary and thus not appropriate for the post-2012 outcome to mandate specific institutional frameworks for individual parties'¹⁰¹ and on that basis submitted there should not be social prerequisites for REDD market participation because of reasons of national sovereignty. Although the issue of national sovereignty is paramount, it is widely accepted that at least some minimum *environmental* standards in the form of REDD market prerequisites are required in order for the REDD market operate effectively:

*the development of independently verifiable technical, methodological and institutional performance specifications... must be met for host parties to participate in the forest carbon market mechanism... These should include national carbon monitoring and assessment systems, national sustainable forest management frameworks and institutions to administer crediting arrangements and should be consistent with national sustainable development strategies.*¹⁰²

This position requires international standards to ensure environmental safeguards to protect market integrity, however, defers to national governments on the substance of requisite social standards of protection. The legal effect of the position is to defer to national governments on whether the social impacts of a REDD project activity are acceptable. The position allows REDD market participation regardless of institutional capacity to recognise customary tenure, which as we have seen may not be in the best interests of the market, forest dwelling communities or developing country governments themselves.

As discussed above, there are many arguments in favour of including at least some minimum standards of social protection at the international level. Firstly, forest dwelling communities' legal rights are vulnerable in the absence of institutional capacity and willingness to recognise customary tenure in the face of REDD. Secondly, the track record of national governments in upholding the rights of forest dwelling communities varies widely.¹⁰³ Thirdly, what is stated in domestic national laws is often quite different to what is applied in practice.¹⁰⁴ Fundamentally, in the absence of any minimum international standards the opportunity exists for national governments to exclude forest dwelling communities and secure short term rents by delaying, ignoring and limiting land tenure reform in the form of granting customary tenure.

In the 15th Conference of the Parties to the UNFCCC some progress has been made on social

99 See The Global Canopy Programme, note 43 above, and Thiago Chagas, Non-State Actors and REDD: Issues Surrounding the Participation of Indigenous People and Local Communities (Climate Focus, March 2009), available at <http://www.redd-oar.org/links/Legal%20Issues%20REDD.pdf>.

100 See joint submission of the European Community, Panama, Ecuador, Guatemala, Costa Rica also supported by Bosnia, Croatia, Montenegro and Serbia, 'Issues Relating to Indigenous People and Local Communities for the Development and Application of Methodologies: Submissions from Parties, UNFCCC Subsidiary Body Scientific and Technological Advice, Thirtieth Session, 1-10 June 2009, Doc. No. FCCC/SBSTA/2009/MISC.1 (2009) and 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, note 23 above, Clauses 2(c) and (d).

101 See Australian Submission on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries, note 46 above at 9.

102 *Id.* at 2.

103 Lorenzo Cotula and James Mayers, Tenure and REDD: Start Point or Afterthought 15 (London: IIED, 2009).

104 *Id.*

safeguards with the inclusion of a set of safeguards, including two draft social safeguards, in the draft decision of the Ad Hoc Working Group on REDD.¹⁰⁵ The Draft decision currently states that when undertaking REDD activities developing country Parties should '[promote and support]': 'the knowledge and rights';¹⁰⁶ and 'the full and effective participation of indigenous peoples and local communities'.¹⁰⁷

Although the draft decision of the Ad Hoc Working Group on REDD has not been finalised the social safeguards as they are currently drafted are not mandatory and therefore difficult to enforce. Although the principle of national sovereignty needs to be upheld, a precedent for providing mandatory minimum rights to non-state actors in international mitigation agreements exists.¹⁰⁸ Affording rights to non-state actors in the form of minimum standards of protection is not 'inconsistent' with the principle of national sovereignty indeed certain minimum social and environmental safeguards are required in order for the REDD mechanism to effectively operate. The following four mutually reinforcing social safeguards are presented below in the hope that social safeguards in the form of legally binding obligations aligned with the principle of national sovereignty are adopted into the Future REDD Agreement.

4.1 Safeguard 1: Procedural Rights of Participation

The insertion of mandatory participatory rights for forest dwelling communities affected by REDD

activities in the Future REDD Agreement would be a strong step to ensure the agreement could, in practical terms, reflect their interests.¹⁰⁹ The recognition of the principle of indigenous participation in international environmental law has been reflected in a number of international treaties.¹¹⁰ Procedural rights could be included in the Future REDD Agreement either indirectly or directly.¹¹¹

The indirect approach involves importing either guiding or specific principles from one or other international agreements.¹¹² However, due to the 'soft' legal nature of legal principles, the participation of forest dwelling communities rights cannot be guaranteed; national governments may not comply with them or implement national policies which limit their effectiveness.

A preferable legal option would be to directly include procedural rights in the Future REDD Agreement to safeguard the interests of forest dwelling communities at the international level. Although the current draft decision of the Ad Hoc Working Group on REDD does not provide legally enforceable participation rights to forest dwelling

105 See 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, note 23 above clause 2.

106 *Id.* Clause 2 (c).

107 *Id.* Clause 2 (d).

108 See, e.g., Modalities and Procedures for a Clean Development Mechanism as Defined in Article 12 of the Kyoto Protocol, Decision 3/CMP.1, in Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, First Session, Montreal, 28 November - 10 December 2005, Doc. No. FCCC/KP/CMP/2005/8/Add.1 (2006).

109 See Chagas, note 99 above.

110 See, e.g., the Convention on Biological Diversity, *Rio De Janeiro*, 5 June 1992, 31 ILM 818 (1992); Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Ramsar, 2 February 1971, 11 *Int'l Leg. Mat.* 963 (1972). and the Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters, Aarhus, 28 June 1998, 38 *Int'l Leg. Mat.* 517 (1999).

111 See Chagas, note 99 above.

112 For example Principle 22 of the *Earth Summit* could be imported. It asserts: 'Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development'. See Rio Declaration on Environment and Development, in Report of the United Nations Conference on Environment and Development, Rio de Janeiro, UN Doc. A/CONF.151/26 (Vol. I), Annex I (1992).

communities,¹¹³ the CDM provides a legal precedent for establishing direct non-state actor participation in international climate change mitigation agreements.¹¹⁴ The CDM framework affords non-state actors a suite of rights, for example, stakeholders¹¹⁵ *must* be consulted during the planning of a CDM project activity,¹¹⁶ and accredited independent designated operational entities must verify that local stakeholders' concerns have been considered and properly addressed by project developers wishing to have their project validated.¹¹⁷ Also under the CDM, project participants¹¹⁸ are afforded even greater procedural rights, including rights to communicate with the Executive Board directly on matters related to a project, its registration and the issuance of certified

credits.¹¹⁹ It would be preferable for a similar suite of rights could be adopted under the Future REDD Agreement for stakeholders affected by REDD, including forest dwelling communities.

Under the CDM model, however, in order to access the above listed rights of participation, local community groups need to be first authorised by the host country before they may become project participants.¹²⁰ Given the vulnerability of forest dwelling communities, this is one area where the CDM model could be improved by the inclusion of a deeming provision within the operating provisions of the Future REDD Agreement which operates to grant a similar suite of participation rights to forest dwelling communities affected by a REDD project activity.

The direct inclusion of procedural rights in the Future REDD Agreement could facilitate and improve the quality and degree of participation of non-state actors in *project based* REDD initiatives and, to some extent, secure that their interests and rights are brought to the attention of the relevant international body supervising the implementation of the REDD mechanism, discussed below.¹²¹ For example, the effective implementation of such procedural rules could become a requirement for a REDD project participant to obtain and maintain the approval of its reference scenario (baseline) for project based activities.¹²²

To mitigate the potential inability of forest dwelling communities to participate as a result of a lack of capacity to demonstrate violation of rights,¹²³

113 As at 5 February 2010, the Draft Decision of the Ad Hoc Working Group on REDD only goes so far as to say that developing countries *should* promote and support 'full and effective participation of relevant stakeholders, including in particular indigenous peoples and local communities' (clause 2 (d)) however the legal text is still being negotiated. See 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, note 23 above.

114 Modalities and Procedures for Afforestation and Reforestation Project Activities under the Clean Development Mechanism in the First Commitment Period of the Kyoto Protocol, Decision 5/CMP.1, *in* Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, First Session, Montreal, 28 November - 10 December 2005, Doc. No. FCCC/KP/CMP/2005/8/Add.1 (2006).

115 See Modalities and Procedures for a Clean Development Mechanism as Defined in Article 12 of the Kyoto Protocol, note 108 above, Para. 1(e).

116 See Para. 37 of Modalities and Procedures for a Clean Development Mechanism, Annex, *in* Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, note 114 above. .

117 *Id.* Paras. 37(b) and 62(b).

118 Project participants are those entities that have a direct connection to a CDM project, including investors, project developers, carbon credit sellers or purchasers, as consultants or intermediaries. In the case of the Future REDD Agreement they may include forest dwelling communities, local NGOs and local community groups.

119 See Para 66 of Modalities and Procedures for a Clean Development Mechanism, Annex, *in* Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, note 114 above, as Defined in Article 12 of the Kyoto Protocol, note 108 above.

120 The Clean Development Mechanism defines 'project participants' as a party or a private and/or public entity authorized by a Kyoto Party involved to participate in a CDM project activity. See Modalities and Procedures for a Clean Development Mechanism as Defined in Article 12 of the Kyoto Protocol, note 108 above.

121 See Angelsen et al, note 46 above at 93.

122 *Id.*

123 Jade Saunders, Johannes Ebeling and Ruth Nussbaum, *Reduced Emissions from Deforestation and Forest Degradation (REDD) Lessons from a Forest Governance Perspective* (Oxford: EcoSecurities, 2008).

formal advisory groups composed of indigenous people and civil society representatives could be established to advise forest dwelling communities as well as various bodies of the UNFCCC (or national REDD project offices) on REDD design and implementation.¹²⁴ Forest dwelling communities' interests are likely to be better protected under a model which bestows procedural rights that are protected directly at the international level and which are supported by advisory groups.

Although procedural requirements are preferable for REDD project activities (sub-national level), they are unlikely to be helpful at the national level where states are likely to be unwilling to accept interference with their national laws.¹²⁵ It is also more difficult to define stakeholders at the national level. Although the direct inclusion of procedural rights for forest dwelling communities in the Future REDD Agreement is an important first step, such rights alone do not adequately secure forest dwelling communities' rights.

4.2 Safeguard 2: Customary Tenure as a Prerequisite for REDD Market-readiness

Recognising the customary rights of indigenous peoples to their native and ancestral lands, including the natural resources contained within those lands, is an established international legal norm.¹²⁶ Several international legal instruments confer rights directly to indigenous peoples, indigenous communities, local communities and other sub-national groups, including direct rights to property¹²⁷ and the natural

resources contained within those lands.¹²⁸ For example, Article 26 of the *UN Declaration on the Rights of Indigenous People (UNDRIP)*, which has been endorsed by 145 States, asserts:

*Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired...*¹²⁹

Although the UNDRIP is not prima facie legally binding, its principles represent the development of international norms and reflect the commitment of states to abide by certain principles and move in certain directions.¹³⁰ UNDRIP has been almost universally endorsed and UN bodies and others have asserted that 'UNDRIP restates existing rules of international law and is the appropriate normative framework for conceiving and implementing measures that may affect indigenous peoples',¹³¹ so at least on one view, the principles laid out in the UNDRIP represent customary international law.¹³² Since its endorsement many tropical forest countries have passed legislation to give forest dwelling communities stronger rights to forests, including Bolivia who adopted UNDRIP as national law in 2007.¹³³ Unfortunately, a small proportion of

¹²⁴ See Angelsen ed., note 46 above.

¹²⁵ See Chagas, note 99 above at 35.

¹²⁶ See Orellana, note 20 above.

¹²⁷ Other additional examples of international agreements that provide rights to land and territories to indigenous people is Article 13 of Convention concerning Indigenous and Tribal Peoples in Independent Countries, Geneva, 27 June 1989, 28 *Int'l Leg. Mat.* 1382 (1989) and Article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination, New York, 21 December 1965, U.N. Doc. A/6014 (1966).

¹²⁸ See, e.g., Orellana note 20 above highlights Article 26 of United Nations Declaration on the Rights of Indigenous People, note 36 above; Article 16-19 of Convention concerning Indigenous and Tribal Peoples in Independent Countries, note 127 above and Article 8(j) of the Convention on Biological Diversity, note 110 above.

¹²⁹ Article 26 of United Nations Declaration on the Rights of Indigenous People, note 36 above.

¹³⁰ See United Nations Permanent Forum on Indigenous Issues: UNDRIP FAQs: http://www.un.org/esa/socdev/unpfii/documents/faq_drips_en.pdf.

¹³¹ Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, UN Doc. A/HRC/9/9, 11 August 2008, as cited in Rights and Resources Initiative, note 98 above.

¹³² It is notable that only four States voted against the Declaration, including Australia which endorsed the Declaration on 3 April 2009 and New Zealand which is reconsidering its position. Furthermore, all of the major tropical forest countries have endorsed the Declaration.

¹³³ International Tropical Timber Organisation, *Tropical Forest Tenure Assessment: Trends, Challenges and Opportunities* 30 (Washington DC: International Tropical Timber Organisation, 2009).

countries have resisted transferring any forest areas to forest dwelling communities.¹³⁴ Indigenous peoples have collectively called for all climate change mitigation measures to be firmly grounded in the rights framework set forth in the UNDRIP.¹³⁵

Significant progress was made on the need to recognise customary rights of forest dwelling communities in the Ad Hoc Working Group on REDD at the 15th Conference of the Parties at Copenhagen.¹³⁶ The draft decision of the Ad Hoc Working Group affirms that when States undertake REDD activities they should:

Respect the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the General Assembly has adopted the United Nations Declaration on the rights of Indigenous Peoples.¹³⁷

Although a positive first step, the ultimate legal impact of a future cross reference to the UNDRIP will be determined by where in the Future REDD Agreement it is placed and how the cross reference is drafted.¹³⁸ In order for the cross reference to be legally binding the cross referencing needs to be made within the operating clauses of the agreement and contain legally enforceable obligations. Merely noting the General Assembly's adoption of the UNDRIP may not go far enough to safeguard forest dwelling communities' rights.

One alternative the Ad Hoc Working Group could consider is bolstering the language of the current safeguard by importing specific legal obligations of

the UNDRIP into the Future REDD Agreement. This approach may be more preferable because it could provide more certain obligations on national governments and more tangible social protection for forest dwelling communities. The determination, however, of which particular legal obligations ought to be imported into a Future REDD Agreement requires careful consideration.¹³⁹ In order to safeguard customary tenure (including rights to land and natural resources), a legally binding importation of Article 26 of the UNDRIP could be effectively inserted:

[When States undertake REDD activities they must respect]:

Indigenous peoples... right[s] to lands, territories and natural resources which they have traditionally owned, occupied or otherwise used or acquired...

States shall give legal recognition and protection to these lands, territories and resources.

Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the Indigenous people concerned.

Even the direct inclusion of these rights alone does not, however, necessarily ensure they will benefit forest dwelling communities. Without corresponding incentives (or disincentives), the importation of such rights does not necessarily mean domestic governments will comply with their treaty obligations through the introduction and subsequent enforcement of domestic legislation.¹⁴⁰ The legal effectiveness of the clause on forest dwelling communities' rights depends on how it is drafted into the Future REDD Agreement and the associated incentives put in place to encourage and ensure compliance.

Accordingly, rather than merely stating the legal principles including the rights stated above in the Future REDD Agreement, a potentially more effective approach may be for the Future REDD Agreement to make the recognition of customary tenure a pre-requisite for REDD market

¹³⁴ *Id.* at 36.

¹³⁵ Report of the Conference on Indigenous Peoples and Climate Change', UN Doc. E/C.19/2008/CRP. 3, 10 March 2008, as cited in Rights and Resources Initiative, note 99 above.

¹³⁶ See 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, note 23 above at 35.

¹³⁷ *Id.* at clause 2(b) although note the draft decision, including the language around the safeguards is currently being negotiated.

¹³⁸ See Orellana, note 20 above at 14.

¹³⁹ *Id.*

¹⁴⁰ See Cotula, note 103 above at 15.

participation. Additional certainty and security may be garnered by tying REDD market participation to the implementation of domestic laws which recognise customary tenure. The significant financial capital that developing countries could access through implementing laws consistent with the UNDRIP represent strong incentives to comply.

Drafted this way, the following sort of cross reference could be included in the Future REDD Agreement:

Before a Member State, or REDD project participants from the State can register REDD credits that State must demonstrate their capacity to:

Recognise customary tenure in accordance with Article 26 of the UNDRIP.

The legal effect of a Future REDD Agreement drafted in this way would be to include one additional *social* prerequisite requiring national governments to introduce national laws which recognise customary tenure in line with international law before they can access REDD market finance.

4.2.1 Is the Pre-condition Preferable?

The threats to forest dwelling communities' rights are likely to be more effectively protected by making the recognition of customary tenure a prerequisite for REDD market participation as incentives are better aligned. The pre-condition is also preferable for the following reasons.

Consistent with international environmental law, the principle of national sovereignty and REDD best practice

The requirement to implement domestic laws that recognise customary tenure is a well established legal norm recognised (and implemented to varying degrees) by most States.¹⁴¹ Coupling the relevant Article of UNDRIP to the REDD market-readiness criteria allows national governments to maintain autonomy with respect to domestic law-making

subject to widely recognised minimum international social standards. As discussed, legal precedent for assessing social impacts before forestry (or other) mitigation activities may generate transferable carbon credits exists in the other international climate change mitigation agreements, namely the CDM.¹⁴²

Requiring an additional *social* prerequisite does not offend the principle of national sovereignty. As discussed other *environmental* REDD market readiness prerequisites are being proposed to ensure the integrity of the REDD market. Moreover, recent evidence suggests capacity to recognise customary tenure is necessary in order for the REDD market mechanism itself to operate effectively.¹⁴³ Grounds of national sovereignty alone cannot justify limiting market-readiness criteria to environmental considerations alone.

The additional inclusion of social considerations is also consistent with best practice in the sector, as evidenced by the REDD readiness criteria developed by UN REDD Programme (UN-REDD),¹⁴⁴ The World Bank's Forest Carbon Partnership Facility Safeguard Policy¹⁴⁵ and the strong emphasis on local community consultation in existing large scale REDD demonstration activities, including the Kalimantan Forest Carbon Demonstration Activity in Central Kalimantan.¹⁴⁶

¹⁴² See Section G, Paragraph 15(c) of Modalities and Procedures for Afforestation and Reforestation Project Activities under the Clean Development Mechanism in the First Commitment Period of the Kyoto Protocol, Decision 5/CMP.1, Annex, note 114 above.

¹⁴³ See Portela, note 66 above at 25.

¹⁴⁴ See UN-REDD, note 60 above at 8.

¹⁴⁵ The key World Bank safeguards for REDD are OP4.10 on Indigenous Peoples, OP4.36 on Forests and OP4.12 on Involuntary Resettlement. More information on the Forest Carbon Partnership Facility Social Safeguard Policy is available at <http://www.redd-monitor.org/wordpress/wp-content/uploads/2009/07/Safeguarding-rights-in-the-FCPF.pdf>.

¹⁴⁶ Australian Department of Climate Change Kalimantan Forests and Carbon Partnership Fact Sheet, available at <http://www.climatechange.gov.au/government/initiatives/international-forest-carbon-initiative/action.aspx>.

¹⁴¹ *Id.*

More REDD rents to national government more evenly shared and reduced costs

Although requiring the domestic recognition of customary tenure may at first appear to go against the interest of developing country governments, in fact the opposite is more likely to be true. As discussed, the granting of customary tenure to forest dwelling communities is likely to decrease the rate of deforestation and forest degradation. The introduction of domestic laws which recognise customary tenure is likely to generate additional finance initially through the international fund and subsequently via the market through the additional emission reductions generated by the policy. Coupling the institutional capacity to grant customary tenure with REDD market finance aligns the financial incentives so that the granting of additional customary tenure would lead to additional REDD market finance.

The requirement to develop institutional capacity to grant customary tenure is not only likely to generate additional REDD finance but also likely to lead to that finance being more evenly shared between developing country governments. Evidence from the voluntary and CDM markets shows that market-based finance is unlikely to flow to projects or countries' where there is an actual or perceived risk of conflict or social harm.¹⁴⁷ The adoption of the social prerequisite is likely to lead to more finance attracted to poorer governments by improving their investment risk profile and eliminates the potential free rider problem if such a safeguard is not put in place.

Furthermore, if the REDD market harms or is perceived to harm forest dwelling communities it is likely that less finance will flow to the sector as a whole.¹⁴⁸ Although the import of minimum levels of social protection may delay a limited number of developing countries short term ability to access REDD market-finance, it is likely to lead to less criticism of REDD and more overall funding. The

¹⁴⁷ See Rights and Resources Initiative, note 98 above.

¹⁴⁸ UNDP, *The Clean Development Mechanism: An Assessment of Progress 127* (Geneva: UNDP Environment and Energy Group, 2006) highlights increased carbon finance flows to projects and countries with higher levels of social regulation.

pre-requisite is in the long term best interest of both national governments and the REDD market mechanism as a whole.

Finally, the social readiness prerequisite is likely to reduce national governments' costs in at least two ways. Firstly, it is likely to be far cheaper to provide customary tenure over forests than armed guards protecting vast quantities of forest. Secondly, clarifying customary tenure will reduce future conflict which could otherwise be aggravated in the absence of the safeguard.

Even with recognised customary tenure, however, forest dwelling communities may still be unacceptably vulnerable in the face of sub-national REDD activities, for example, if they are not adequately informed or consulted in such REDD project designs or if domestic governments fail to comply with the Future REDD Agreement hence two more social safeguards are necessary.

4.3 Safeguard 3: An International Standard for REDD Projects that Includes Social Criteria

Assuming the Future REDD Agreement supports sub-national REDD project activities, additional social safeguards may need to be put in place to effectively protect the interest of forest dwelling communities affected by REDD projects undertaken by non-state actors at the sub-national level.

The CDM, another project based mitigation mechanism based in developing countries, is a useful model which highlights the need to develop social standards for REDD projects. CDM projects are required to contribute to sustainable development in order to be approved.¹⁴⁹ Similar to the CDM and in order to ensure the REDD mechanism delivers on the social development benefits discussed above, it is recommended that a condition be drafted into the REDD mechanism which requires the REDD project activity satisfy certain international standards before the project may be approved.

¹⁴⁹ Article 12 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, 37 *Int'l Leg. Mat.* 22 (1998).

Under the CDM, the determination of sustainable development rests with the developing country government.¹⁵⁰ Unfortunately, the performance of the CDM legal architecture in promoting sustainable development has been mixed with only some countries developing sustainable development criteria¹⁵¹ to screen projects. Fewer countries still have developed social criteria as part of the project screening criteria.¹⁵² All developing countries have faced difficulties in implementing sustainable development programmes arising from the project approval process in the face of severe financial, technological and administrative constraints.¹⁵³ The vulnerability of forest dwelling communities to REDD activities and the empirical evidence from the CDM which shows the difficulty of developing countries in effectively screening and enforcing sustainable development criteria, including social criteria, highlights the need for a minimum universal standard for REDD project approvals enforced at the international level.

Lack of international regulation in the carbon forest sector has led to the development of a number of voluntary standards which more effectively assess the sustainability of project proposals, including standards which include reportable, verifiable and measurable social criteria.¹⁵⁴ The Climate, Community and Biodiversity (CCB) Project Design Standard, for example, is a highly regarded standard which includes social criteria. The standard is widely used in the voluntary carbon offset markets where it trades at a premium and which has been shown to effectively secure the rights and promote the participation of communities affected by forestry activities.¹⁵⁵ The

Future REDD Agreement could adopt the CCB Project Design Standard or an equivalent international standard (which encompasses social impacts) so as to require a social impact assessment be undertaken and that certain social standards be met before registration of the REDD project can occur. The legal effect will be to ensure a consistent minimum international standard of social protection is afforded to forest dwelling communities affected by future REDD project activities before they can be registered as tradable REDD credits.

4.4 Safeguard 4: An International REDD Compliance Committee

In order to be effective, the Future REDD Agreement needs to have an effective compliance mechanism. Neither the Copenhagen Accord nor the Draft Decision of the Ad Hoc Working Group on REDD discuss enforcement of obligations in any detail. Even with the introduction of international standards that promote compliance, it is possible for national governments or non-state actors to breach the obligations of the Future REDD Agreement. In order to promote market certainty and protect REDD investors and forest dwelling communities alike, an effective compliance mechanism is necessary to ensure compliance with the obligations enshrined within the Future REDD Agreement. There are a number of options for making the rights and obligations on state and non-state actors in the Future REDD Agreement enforceable: national enforcement; international oversight mechanisms; and international courts and tribunals.¹⁵⁶

Enforcement of rights and obligations at the national level depends on the extent of recognition of those rights and obligations within the jurisdiction in question. This is unlikely to be the most appropriate mechanism as the threat to forest dwelling communities arises largely from domestic legislation itself. On the other hand, it is unlikely that national governments will forgo a share of their sovereignty and consent to the possibility of being brought directly before an international court or tribunal capable of issuing binding decisions by a non-state actor.¹⁵⁷ An

150 Designated National Authority approval is a requirement for project registration: see Section G, Paragraph 15(c) of Modalities and Procedures for Afforestation and Reforestation Project Activities under the Clean Development Mechanism in the First Commitment Period of the Kyoto Protocol, Decision 5/CMP.1, Annex, note 114 above.

151 See UNDP, note 148 above at 28 for a description on progress.

152 *Id.* at 127.

153 *Id.*

154 See Angelsen et al, note 46 above at 98.

155 Anonymous, CCB Alliance Enhances Carbon Standard, Carbon Offset Daily, 9 December 2008, available at <http://www.carbonoffsetsdaily.com/top-stories/ccb-alliance-enhances-carbon-standard-2875.htm>.

156 See Angelsen et al, note 46 above at 95.

157 See Orellana, note 20 above at 15.

international oversight mechanism may therefore be the most appropriate enforcement mechanism for the Future REDD Agreement.

The establishment of an international compliance mechanism to hear the objections of non-state actors and independently verify if and when a country becomes REDD market-ready, including whether they satisfy the prerequisite of recognition of customary tenure, is an option likely to bring the most protection to forest dwelling communities and other REDD stakeholders. Several treaties and international legal instruments establish compliance mechanisms, which include for example, enforcement rights to non-state actors and independent committees that continuously monitor compliance and implementation of those treaties.¹⁵⁸ This model may be the most preferable option for the future REDD Agreement.

Under such an enforcement framework, non-state actors could be granted standing to inform a Future REDD Compliance Committee ('Committee') that the national laws of a member State (or the design of a sub-national project) infringe upon the obligations enshrined within the Future REDD Agreement. The Committee's role would be to investigate the complaint and report the results to a governing body which can require the state (of the REDD project implementer) to take remedial action. Penalties could be imposed onto bodies that fail to take remedial action, for example, they could lose their baseline and therefore the corresponding ability to generate future finance from the REDD market. This hypothetical model for the Future REDD Agreement is similar to the Compliance Committee of the Kyoto Protocol.

One option available for the Future REDD Agreement is to expand the mandate of the Compliance Committee of the Kyoto Protocol to (i) include the Future REDD Agreement and (ii) hear cases brought by aggrieved non-state entities with rights under the Future REDD Agreement.¹⁵⁹ Alternatively a new Committee, with those same oversight capabilities, and the mandate to promote,

facilitate and enforce compliance with the commitments under the Future REDD Agreement could be formed. Under either of those enforcement options, obligations under the Future REDD Agreement would become a matter of international rather than domestic law¹⁶⁰ and independent experts could be tasked with verifying the fulfilment of the procedural rules.

Furthermore, a formal appeal mechanism could also be introduced to allow non-state actors, including forest dwelling communities to appeal decisions of the Committee to further safeguard their interests.¹⁶¹

An independent committee to verify compliance, based on an improved Kyoto Protocol Compliance Committee model, is likely to be the most effective enforcement mechanism to reinforce the right to participate and uphold the social safeguards enshrined within the Future REDD Agreement.

5 CONCLUSION

It is an unfortunate reality that in a minority of tropical forest countries, forest dwelling communities' claims to customary tenure have been systematically ignored.¹⁶² This paper has critically analysed the threats arising from the introduction of a Future REDD Agreement in those circumstances. This paper has argued that the imposition of REDD, in the absence of effective social safeguards, leaves forest dwelling communities vulnerable to dispossession. Contrastingly, the introduction of a REDD market mechanism that includes social safeguards which effectively protect forest dwelling communities' interests, represents an opportunity for, and is in the best interest of, the forest dwelling poor.

¹⁵⁸ See Orellana, note 20 above at 10.

¹⁵⁹ See Chagas, note 99 above at 7.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See International Tropical Timber Organisation, note 133 above at 36.

There is a strong legal case for including effective social safeguards at the international level in the Future REDD Agreement. An initial safeguard is required to ensure forest dwelling communities are afforded rights to participate in the REDD debate and the approval process of REDD project activities going forward. A second safeguard is required to ensure the recognition of customary tenure in line with international law before a state can become REDD market-ready. This safeguard aligns the interests of multiple stakeholders and may also represent a critical step necessary for the Future REDD market to operate fairly and effectively. A third safeguard in the form of the adoption of a universal REDD standard which incorporates social criteria mitigates the risk that sub-national REDD projects disaffect forest dwelling communities' rights. Finally, the adoption of an independent international REDD compliance mechanism to enforce the legal obligations of states and non-state actors alike, with a capacity to hear cases from forest dwelling communities, may represent the most effective model to ensure the social safeguards incorporated in the Future REDD Agreement have sufficient legal weight to be effective.

The efficacy of the Future REDD Agreement as a global mitigation measure will depend on its ability to protect forest dwelling communities' rights whilst upholding the notion of national sovereignty and addressing the underlying local causes of deforestation and forest degradation. Negotiators of the Future REDD Agreement should be wary of the critical role the forest dwelling poor play in implementing activities that reduce deforestation and forest degradation and strengthen their rights in that agreement to ensure greater certainty, equity and effectiveness.

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