

ARTICLE

Transnational REDD+ Rule Making: The Regulatory Landscape for REDD+ Implementation in Latin America

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Abstract

REDD+ – an incentive mechanism to reduce deforestation and associated greenhouse gas emissions in developing countries – was developed under the United Nations Framework Convention on Climate Change (UNFCCC) and subsequently included in the Paris Agreement. Its early implementation activities have highlighted the role of certain intergovernmental actors: REDD+ financing initiatives, including the World Bank’s Forest Carbon Partnership Facility and Forest Investment Programme, and UN-REDD, a collaborative programme involving three agencies of the United Nations. By setting conditions for the provision of support for REDD+, these initiatives have actively and influentially engaged in REDD+ rule making. This article focuses on the regulatory landscape for REDD+ and examines rules developed under the UNFCCC and elaborated by the REDD+ financing initiatives, using examples from the Latin American region. The analysis shows that informal lawmaking plays a more relevant role in REDD+ rule making than international formal law, and has demonstrated legal and practical effects. However, informality can also tilt power relations between donor and recipient countries, which could jeopardize the legitimacy of transnational rule making.

Keywords: Climate change, Forest protection, REDD+, Non-state actors, Latin America

1. INTRODUCTION

Despite decades of international efforts to address deforestation, forests in the developing world continue to disappear at an alarming rate.¹ Carbon dioxide (CO₂) emissions from deforestation, forest degradation and agriculture represent a quarter of global greenhouse

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¹ Food and Agriculture Organization of the United Nations (FAO), *Global Forest Resources Assessment 2010* (FAO, 2010), p. 10.

gas (GHG) emissions.² A significant amount of this comes from tropical forests located in developing countries.³ This has motivated parties to the United Nations Framework Convention on Climate Change (UNFCCC)⁴ to develop an international scheme for reducing emissions from deforestation and forest degradation in developing countries and the role of conservation, sustainable management of forests, and the enhancement of forest carbon stocks in developing countries. The scheme, known as REDD+,⁵ aims to protect standing forests in the developing world. The objective is to provide developing countries with financial incentives to protect natural forests and make their protection more attractive than their conversion to other uses, such as agriculture and cattle ranches.

Several developing countries have launched activities to pilot and prepare for REDD+,⁶ and unprecedented amounts of funding for forest protection were channelled worldwide.⁷ REDD+ has also become an experiment in global ‘governance’, involving ‘non-hierarchical forms of steering’ by both public and private actors.⁸ Bilateral cooperation (led by developed countries’ aid agencies)⁹ and multilateral cooperation (particularly through international and regional organizations) have played prominent roles. They have channelled almost 90% of REDD+ and forest-related financing through official development aid (ODA).¹⁰ Key actors, in this respect, are three REDD+ funding initiatives: the Forest Carbon Partnership Facility (FCPF), the Forest Investment Programme (FIP) by the World Bank, and the UN-REDD Programme by three agencies of the United Nations (UN). The central argument here is that these financing initiatives play a notable role in rule making for REDD+.¹¹ Multifaceted

² P. Smith et al., ‘Agriculture, Forestry and Other Land Use (AFOLU)’, in O. Edenhofer et al. (eds), *Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014), pp. 811–922, at 816.

³ R. Gullison et al., ‘Tropical Forests and Climate Policy’ (2007) 316(5827) *Science*, pp. 985–6.

⁴ New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

⁵ UNFCCC Secretariat, Decision 4/CP.15, ‘Methodological Guidance for Activities relating to Reducing Emissions from Deforestation and Forest Degradation and the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks in Developing Countries’, UN Doc. FCCC/CP/2009/11/Add.1, 30 Mar. 2010.

⁶ G. Simonet et al., *REDD+ Projects in 2014: An Overview based on a New Database and Typology* (Paris-Dauphine University, 2014).

⁷ Advisory Group on Finance & Collaborative Partnership on Forests, ‘2012 Study on Forest Financing’, United Nations Forum on Forests, June 2012, available at: http://www.un.org/esa/forests/pdf/AGF_Study_July_2012.pdf.

⁸ L. Andonova, M. Betsill & H. Bulkeley, ‘Transnational Climate Governance’ (2009) 9(2) *Global Environmental Politics*, pp. 52–73, at 55.

⁹ A. Angelsen, ‘REDD+ as Result-based Aid: General Lessons and Bilateral Agreements of Norway’ (2017) 21(2) *Review of Development Economics*, pp. 237–64.

¹⁰ M. Norman & S. Nakhoda, *The State of REDD+ Finance* (Center for Global Development, 2014), p. 2. ODA comprises ‘flows of official financing administered with the promotion of the economic development and welfare of developing countries as the main objective, and which are concessional in character, with a grant element of at least 25%’: P. Dann, *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany* (Cambridge University Press, 2013), p. 47.

¹¹ H. van Asselt & C. McDermott, ‘The Institutional Complex for REDD: A “Benevolent Jigsaw”?’ in C. Voigt (ed.), *Research Handbook on REDD+ and International Law* (Edward Elgar, 2016), pp. 63–88, at 82.

interactions between international instruments¹² combined with policies applied across national boundaries and jurisdictions,¹³ and the provision of financial and technical support, have built a set of common rules for REDD+ projects.¹⁴

This article compares the rule-making activities of the UNFCCC with those of the funding initiatives. It examines how traditional accounts of international formal lawmaking explain, or fail to address, such activities. Moreover, it explores the legal and practical effects of rules of the FCPF, the FIP, and UN-REDD during preparatory activities for REDD+ implementation, based on a number of examples from Latin American countries. Approximately 25% of the world's forests are located in this region.¹⁵ Two-thirds of their GHG emissions originate from agriculture and changes in land use, including deforestation.¹⁶ With many Latin American countries pioneering REDD+ projects¹⁷ and receiving considerable sums of REDD+ financial support (56% of multilateral financing in 2016 went to Latin America and the Caribbean),¹⁸ they serve as a relevant case study. In fact, the UN-REDD Programme¹⁹ and the World Bank's FCPF Readiness Fund²⁰ have provided support to at least 15 of the 19 Latin American countries, while the FIP supports activities in six countries.²¹ Cases drawn from Honduras, Panama and Peru that involved the participation of indigenous peoples in REDD+ initiatives illustrate the

¹² See, e.g., *ibid.*; A. Savaresi, 'The Legal Status and Role of REDD-Plus Safeguards', in Voigt, *ibid.*, pp. 126–56; A. Savaresi, 'A Glimpse into the Future of the Climate Regime: Lessons from the REDD+ Architecture' (2016) 25(2) *Review of European, Comparative & International Environmental Law*, pp. 186–96, at 191–4.

¹³ H. van Asselt, M. Mehling & C.K. Siebert, 'The Changing Architecture of International Climate Change Law', in G. van Calster, W. Vandenberghe & L. Reins (eds), *Research Handbook on Climate Change Mitigation Law* (Edward Elgar, 2015), pp. 1–30, at 27; G. Shaffer, 'Transnational Legal Process and State Change: Law and Society Inquiry', Minnesota Legal Studies Research Paper No. 10-28, 1 Aug. 2011, available at: <https://ssrn.com/abstract=1901952>, p. 7. Cf. K.W. Abbott, 'The Transnational Regime Complex for Climate Change' (2012) 30(4) *Environment & Planning C*, pp. 571–90; K.W. Abbott, 'Strengthening the Transnational Regime Complex for Climate Change' (2013) 3(1) *Transnational Environmental Law*, pp. 57–88.

¹⁴ Linked to the direct control of financial flows or 'fund-based authority': van Asselt & McDermott, n. 11 above, p. 78.

¹⁵ J.B. Alcorn, 'Lessons Learned from Community Forestry in Latin America and Their Relevance for REDD+', Forest Carbon, Markets and Communities Program, Jan. 2014, p. 4, available at: http://www.fcmcglobal.org/documents/CF_Latin_America.pdf.

¹⁶ W. Vergara et al., *The Climate and Development Challenge for Latin America and the Caribbean: Options for Climate-Resilient, Low-Carbon Development* (Inter-American Development Bank, Economic Commission for Latin America and the Caribbean, World Wildlife Fund, 2013), p. 42.

¹⁷ M.E. Recio, 'Current Developments in Carbon & Climate Law: Latin America and the Caribbean' (2017) 13(2) *Carbon and Climate Law Review*, pp. 160–1; M. Aguilar-Støen, F. Toni & C. Hirsch, 'Forest Governance in Latin America: Strategies for Implementing REDD in Environmental Governance', in F. de Castro, B. Hogenboom & M. Baud (eds), *Environmental Governance in Latin America* (Palgrave Macmillan, 2016), pp. 205–33, at 227.

¹⁸ Equivalent to USD 819 million: C. Watson, S. Patel & L. Schalatek, *Climate Finance Thematic Briefing: REDD+ Finance* (Overseas Development Institute, 2016), p. 3.

¹⁹ UN-REDD Programme website, available at: <http://www.un-redd.org>.

²⁰ FCPF website, available at: <http://www.forestcarbonpartnership.org>.

²¹ Brazil, Mexico and Peru; Ecuador, Guatemala, and Honduras joined in 2015: see Climate Investment Funds (CIF) website, available at: <http://www.climateinvestmentfunds.org>; and FIP, 'FIP Fact Sheet', 2016, available at: <https://www.climateinvestmentfunds.org/fund/forest-investment-program>.

relevant legal and practical effects of international rule making by these funding initiatives at the national level.

This article is organized as follows. The second section sketches the traditional picture of formal international lawmaking. The third section looks at UNFCCC rules for REDD+. The fourth section addresses the REDD+ rule-making activities of the FCPF, the FIP and UN-REDD, exploring their legal and practical effects. Here, three levels of lawmaking are addressed: treaty making; decision making by the UNFCCC Conference of the Parties (COP); and rule making by the funding initiatives. The contribution aims to create better insights into how processes of interpretation and implementation of REDD+ rules unfold at the transnational level. It shows that the initiatives, as hybrid approaches to rule making, result in the adoption of standards that are stricter in terms of environmental and governance expectations than those envisaged at the intergovernmental level. The emerging picture of international REDD+ rule making can thus be read as either intergovernmental collaboration in rule making – where the international community allocates functions between the UNFCCC and the REDD+ financing initiatives – or as competition for legal authority among them. Moreover, the cases explored in the Latin American region confirm that the rules of the financing initiatives may help to increase participation by indigenous peoples and forest dwellers affected by REDD+ implementation.

2. THE TRADITIONAL PICTURE OF FORMAL INTERNATIONAL LAWMAKING

In the traditional picture of international law, states are the main actors. They are the primary subjects of international law²² and the main lawmakers.²³ Their willingness, or consent, to be bound by legal principles is a key characteristic in the making of legitimate formal international law.²⁴ Formal sources of international law include treaties between states, customary international law derived from the practice of states, and general principles of law recognized by civilized nations.²⁵

²² J. Alvarez, *International Organizations as Law-makers* (Oxford University Press, 2005), p. 129 (an entity that 'is not a subject of international law ... is arguably not able to be a party to treaties, present claims against other international persons, possess other international rights and duties, or otherwise exist with relative autonomy in the legal sphere'); see also J. Klabbers, 'The Concept of Legal Personality' (2005) 11 *Ius Gentium*, pp. 35–66. On the relationship between subjecthood and international legal personality, see J. Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press, 2009), pp. 39–52.

²³ B. Simma & A.L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Armed Conflicts: A Positivist View' (1999) 93(2) *American Journal of International Law*, pp. 302–16, at 303, 305; P. Allott, 'The True Function of Law in the International Community' (1997–98) 5(2) *Indiana Journal of Global Legal Studies*, pp. 391–413, at 404; *Case of the SS Lotus (France v. Turkey)*, Judgment, 7 September 1927, 1927 *PCIJ* (Ser. A, No. 10), p. 18.

²⁴ This has also been referred to as the voluntarism principle: A. Roberts & S. Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37(1) *Yale Journal of International Law*, pp. 107–52, at 112.

²⁵ Art. 38, Statute of the International Court of Justice (ICJ), San Francisco, CA (United States (US)), 26 June 1945, in force 24 Oct. 1945, available at: <http://www.icj-cij.org/en/statute>. Treaties and international custom are considered the main sources of international law. The fourth source, judicial decisions and teachings of highly qualified publicists, is considered to provide just 'evidence of the existence of a norm': D. Shelton, 'Soft Law', in D. Armstrong (ed.), *Routledge Handbook of International Law* (Routledge, 2009), pp. 68–80, at 68, 79.

Despite states being the formal actors in international law,²⁶ non-state actors are now also assuming relevant roles in international lawmaking.²⁷ In particular, intergovernmental organizations and institutions – such as the UNFCCC, the World Bank and the UN agencies – play an increasingly prominent role in international lawmaking.²⁸ Despite being ‘creatures of state consent’,²⁹ they are not state actors.³⁰ At the same time, as ‘state-empowered bodies’,³¹ these institutions differ from other non-state actors, such as non-governmental organizations and corporations, because their mandate and powers come from their founding treaties,³² as agreed by member states.³³ Moreover, these intergovernmental organizations and institutions are recognized as subjects of international law,³⁴ with their own rights and duties.³⁵ This means that they can exist with relative autonomy in the international legal sphere.³⁶ Nevertheless, the operation of these institutions may still be subject to continuous member state oversight and consent.³⁷

There may be tensions between the powers conferred by member states to institutions and the autonomy of institutions to fulfil their functions. Klabbbers argues that this reflects the impossible conciliation of the sovereignty interests of states and the objectives of the institution or international community.³⁸ Giving institutions

²⁶ A. Berman & R. Wessel, ‘The International Legal Form and Status of Informal International Lawmaking Bodies: Consequences for Accountability’, in J. Pauwelyn, R. Wessel & J. Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012), pp. 36–58, at 36.

²⁷ J. d’Aspremont, ‘Introduction – Non-State Actors in International Law: Oscillating between Concepts and Dynamics’, in J. d’Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011), pp. 1–21, at 4.

²⁸ Roberts & Sivakumaran, n. 24 above, p. 116.

²⁹ D. Hollis, ‘Why State Consent Still Matters: Non-State Actors, Treaties, and the Changing Sources of International Law’ (2005) 23(1) *Berkeley Journal of International Law*, pp. 137–74, at 172.

³⁰ The Conference of the Parties (COP), such as the UNFCCC COP, can be seen as a treaty body: see, e.g., J. Brunnée, ‘COPing with Consent: Lawmaking under Multilateral Environmental Agreements’ (2002) 15(1) *Leiden Journal of International Law*, pp. 1–52, at 16–8; or as ‘autonomous institutional arrangements’ similar to traditional international organizations with a will of their own: R.R. Churchill & G. Ulfstein, ‘Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law’ (2000) 94(4) *American Journal of International Law*, pp. 623–59, at 658–9.

³¹ Roberts & Sivakumaran, n. 24 above, p. 116. For Hollis, they are ‘extra-national actors’: Hollis, n. 29 above, p. 161.

³² Cf. International Court of Justice (ICJ), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996*, p. 66, at 79, para. 25. On attributed powers of institutions, see Klabbbers (2009), n. 22 above, pp. 55–73.

³³ In general, non-state actors ‘are not the state, and not governmental’: A. Peters, L. Koechlin & G. Fenner Zinkernagel, ‘Non-State Actors as Standard Setters: Framing the Issue in an Interdisciplinary Fashion’, in A. Peters et al. (eds), *Non-State Actors as Standard Setters* (Cambridge University Press, 2009), pp. 1–32, at 14; P. Alston, ‘The “Not-a-Cat” Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?’, in P. Alston (ed.), *Non-State Actors and Human Rights* (Oxford University Press, 2005), pp. 3–36.

³⁴ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 Apr. 1949, *ICJ Reports 1949*, p. 174, para. 174.

³⁵ *Ibid.*, para. 179.

³⁶ Similar to international organizations: Alvarez, n. 22 above, p. 129.

³⁷ Hollis, n. 29 above, p. 173.

³⁸ Klabbbers (2009), n. 22 above, pp. 5, 9.

more autonomy through implied powers to fulfil their objectives³⁹ eventually moves institutions away from state consent and control.⁴⁰ Although international law embodies a formalistic and narrow view of how lawmaking could take place in intergovernmental organizations, this analysis will show that such descriptions do not explain much of the rule-making activity that is taking place on REDD+ around the world.

In a nutshell, the traditional picture of international lawmaking is based on state consent, as expressed through the formal sources of law. These are created by formal actors (states), represented by central government authorities, and through formal intergovernmental procedures.⁴¹ By contrast, informal international lawmaking circumvents some of these formalities.⁴² The analysis will show that rules for implementing REDD+ do not fit in the traditional picture. Indeed, my argument here is that they can be seen as an informal type of international lawmaking. I will address three levels of lawmaking: treaty making; COP decision making in the context of the UNFCCC; and rule making by the REDD+ financing initiatives.

3. UNFCCC RULE MAKING ON REDD+

REDD+ was initially devised as a mechanism under the UNFCCC. In this section I describe how the rule-making activity of the UNFCCC has resulted in rules that do not fit neatly within the traditional picture of international law. Informal lawmaking through the UNFCCC COP allowed REDD+ to develop. UNFCCC parties had intended to agree upon a formal international treaty that addressed forest protection in developing countries.⁴³ Yet, years of negotiations have produced merely a dozen COP decisions containing REDD+ rules,⁴⁴ such as the Warsaw Framework for REDD+.⁴⁵ Remarkably, the UNFCCC rules also differed from the traditional picture of law in recognizing roles for other actors in rule implementation and interpretation. For example, REDD+ host countries have to ensure the participation of indigenous peoples and forest dwellers during REDD+ policy development. Interestingly, financing entities are also invited to support REDD+ preparation, and are given an explicit role in rule interpretation and implementation.⁴⁶ The impressive progress in preparing for REDD+ across Latin American countries demonstrates that the

³⁹ C. Amerasinghe, *Principles of the Institutional Law of International Organisations* (Cambridge University Press, 2005), pp. 44–8; Churchill & Ulfstein, n. 30 above, p. 632.

⁴⁰ Klabbers (2009), n. 22 above, pp. 5, 9.

⁴¹ Berman & Wessel, n. 26 above, p. 36.

⁴² J. Pauwelyn, R.A. Wessel & J. Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25(3) *European Journal of International Law*, pp. 733–63, at 743.

⁴³ A. Wiersema, 'Climate Change, Forests, and International Law: REDD's Descent into Irrelevance' (2014) 47(1) *Vanderbilt Journal of Transnational Law*, pp. 1–66.

⁴⁴ Decisions 9/CP.19, 10/CP.19, 11/CP.19, 12/CP.19, 13/CP.19, 14/CP.19 and 15/CP.19, UN Doc. FCCC/CP/2013/10/Add.1, 31 Jan. 2014.

⁴⁵ See the Warsaw Framework website at: <https://unfccc.int/topics/land-use/resources/warsaw-framework-for-redd-plus>. M.E. Recio, 'The Warsaw Framework and the Future of REDD' (2014) 24(1) *Yearbook of International Environmental Law*, pp. 37–69.

⁴⁶ Savaresi, 'The Legal Status and Role of REDD-Plus Safeguards', n. 12 above, p. 135; van Asselt & McDermott, n. 11 above.

UNFCCC informal lawmaking activities have relevant legal and practical effects on the ground.

The UNFCCC parties adopted the Paris Agreement⁴⁷ in December 2015. This treaty affirms that parties ‘should take action’ to promote and enhance forests.⁴⁸ It explicitly ‘encourages’ countries to implement and support REDD+,⁴⁹ with reference to ‘the existing framework as set out in related guidance and decisions already agreed under the [UNFCCC],’⁵⁰ although it does not incorporate agreed REDD+ rules in its text.

COP decisions are not considered to be formal international law because of the absence of formal expression of state consent – such as ratification – and their inability to fit neatly within the traditional categories of international law.⁵¹ However, a caveat should be made. The legal nature of COP decisions is contested,⁵² and their exclusion from formal international law can be questioned. COP decisions can be seen as subsequent agreements or interpretations of the original treaties.⁵³ If the UNFCCC COP is seen as a treaty body, the decisions of which are the direct result of the will of states, then COP decisions can also be regarded as an expression of state consent.⁵⁴ However, this view hinges on the lawmaking powers conferred by states on the COP in the underlying treaty.⁵⁵ It is to be noted that, in the context of REDD+, these powers are limited.⁵⁶ Additionally, provisions in COP decisions can enshrine international principles of international law or rules of customary international law, or even lead to the generation of a new rule of customary international law.⁵⁷

COP decision making is not only a frequent occurrence in the climate change regime, but also across international regimes, such as those relating to the protection

⁴⁷ Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: http://unfccc.int/paris_agreement/items/9485.php.

⁴⁸ Art. 5(1) Paris Agreement. This provision confers less of a sense of obligation (‘should’) than the UNFCCC in Art. 4.1(d) (‘shall’).

⁴⁹ Art. 5(2) Paris Agreement.

⁵⁰ *Ibid.*

⁵¹ Cf. J. Ellis, ‘Shades of Grey: Soft Law and the Validity of Public International Law’ (2012) 25(2) *Leiden Journal of International Law*, pp. 313–34, at 318.

⁵² See, e.g., Brunnée, n. 30 above; Churchill & Ulfstein, n. 30 above; L.K. Camenzuli, ‘The Development of International Environmental Law at the Multilateral Environmental Agreements’ Conference of the Parties and Its Validity’, 2007, available at: <http://www2.ecolex.org/server2neu.php/libcat/docs/LI/MON-085461.pdf>; A. Savaresi, ‘The Paris Agreement: Reflections on an International Law Odyssey’, European Society of International Law 2016 Annual Conference, Riga (Latvia), 31 Jan. 2017, available at: <https://ssrn.com/abstract=2912001>, p. 5; H. van Asselt, F. Sindico & M. Mehling, ‘Global Climate Change and the Fragmentation of International Law’ (2008) 30(4) *Law & Policy*, pp. 423–9, at 430.

⁵³ Churchill & Ulfstein, n. 30 above, p. 641; A. Wiersema, ‘The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements’ (2009) 31(1) *Michigan Journal of International Law*, pp. 231–87, at 276–8. This view has been criticized: T. Staal, ‘Exercising or Evading International Public Authority?’ (2016) 7(1) *Goettingen Journal of International Law*, pp. 9–48, at 33–4.

⁵⁴ Brunnée, n. 30 above, pp. 16–18.

⁵⁵ *Ibid.*, p. 18.

⁵⁶ The UNFCCC’s mandate for lawmaking on REDD+ is not strong; the UNFCCC does require members to enhance the conservation of forests, but developing countries have no obligations of mitigation results: see Arts 3.3 and 4.1(d), UNFCCC.

⁵⁷ P. Sands, *Principles of International Environmental Law* (Cambridge University Press, 2003), p. 144.

of biodiversity.⁵⁸ Hence, simply dismissing COP decisions as not representing formal international law means neglecting an increasingly common practice in international rule making. Moving away from traditional international law offers an escape from its formalities, so as to enable more efficient rule making.⁵⁹ COP decisions, for example, were more suitable for developing REDD+ rules by providing a satisfactory means for negotiating issues of a technical nature.⁶⁰ In addition, COP decisions have enabled the progressive evolution of REDD+ rules, building on prior agreements among parties.⁶¹ Finally, COP decisions address gaps in the UNFCCC provisions.⁶²

The use of COP decisions in REDD+ has become de facto more convenient for states than formal treaty making. Although informal lawmaking has been associated frequently with arbitrariness,⁶³ and with the risk of allowing ‘the exercise of naked political power by the powers that be’,⁶⁴ UNFCCC COP decisions are based on formally transparent and internationally agreed procedures. These formalities – particularly the consensus requirement – do make COP rule making less efficacious compared with the even more informal REDD+ financing initiatives discussed in Section 4. For example, some of the UNFCCC REDD+ rules are vague or fail to delegate authority to a UNFCCC body to review their implementation or interpretation.⁶⁵ Such gaps can be found in the formulation of requirements for the receipt of REDD+ payments. Firstly, the requirements for REDD+ host countries to develop a national strategy or plan⁶⁶ provide little information on its substantive content or procedures.⁶⁷ Additionally, they do not provide for the UNFCCC to offer input or suggest revisions to the strategy. Another relevant area where gaps can be identified is in the requirement that REDD+ activities be consistent with social and environmental safeguards.⁶⁸ REDD+ host countries must report on how safeguards

⁵⁸ A. Vihma, ‘Analyzing Soft Law and Hard Law in Climate Change’, in K. Kulovesi, M. Mehling & E. Hollo (eds), *Climate Change and the Law* (Edwar Elgar, 2013), pp. 143–64, at 145; van Asselt, Mehling & Siebert, n. 13 above.

⁵⁹ J. Pauwelyn, ‘Informal International Lawmaking: Framing the Concept and Research Questions’, in Pauwelyn, Wessel & Wouters, n. 26 above, pp. 13–34, at 15.

⁶⁰ Similarly, the technical details of the Kyoto Protocol (Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at: <http://unfccc.int/resource/docs/convkp/kpeng.pdf>) were greatly developed through COP decisions: Brunnée, n. 30 above; A. Boyle & C. Chinkin, *The Making of International Law* (Oxford University Press, 2007), pp. 216–20; Savaresi, n. 52 above.

⁶¹ For an overview see Wiersema, n. 43 above.

⁶² See Brunnée, n. 30 above; Boyle & Chinkin, n. 60 above, pp. 216–20; Savaresi, n. 52 above, p. 5.

⁶³ J. Klabbbers, ‘The Undesirability of Soft Law’ (1998) 67(4) *Nordic Journal of International Law*, pp. 381–91; J. Klabbbers, ‘The Redundancy of Soft Law’ (1996) 65(2) *Nordic Journal of International Law*, pp. 167–82.

⁶⁴ Klabbbers (2009), n. 22 above, p. 183.

⁶⁵ The rules are, at the same time, more precise than, e.g., other provisions in the Paris Agreement. Cf. K.W. Abbott et al., ‘The Concept of Legalization’ (2000) 54(3) *International Organization*, pp. 401–19, at 412–3; but see M. Finnemore & S.J. Toope, ‘Alternatives to “Legalization”’: Richer Views of Law and Politics’ (2001) 55(3) *International Organization*, pp. 743–58.

⁶⁶ UNFCCC Secretariat, 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’, UN Doc. FCCC/CP/2010/7/Add.1, 15 Mar. 2011, paras 71–2.

⁶⁷ It should address land tenure, gender, forest governance: *ibid.*

⁶⁸ *Ibid.*, Appendix II.

are followed.⁶⁹ They are intended to avoid risks inherent in implementing REDD+, such as those that jeopardize the livelihoods of forest dwellers. However, the safeguards⁷⁰ are too broadly defined.⁷¹ Moreover, while emphasizing the gathering and presenting of information, the rules do not prioritize compliance.⁷² Similarly, the UNFCCC is not expected to review the information submitted on safeguards.⁷³ Compared with REDD+ requirements to report on GHG emissions reductions,⁷⁴ rules on both strategy development and safeguards are more vague. As both issues are specific to national circumstances, this may reflect a lack of agreement among countries or, perhaps, a manifestation of countries' willingness to tolerate divergence in these areas.

UNFCCC REDD+ rules have relevant legal and practical effects⁷⁵ in that they incentivize states to develop requirements and adopt national norms and policies. Since the UNFCCC has supported 'demonstration' activities, such as pilot projects and broader national preparatory processes,⁷⁶ many REDD+ host countries have embarked on national policy preparation (readiness), and the initial implementation of policies, supported by international financial initiatives.⁷⁷ Once the national preparation process has been completed, UNFCCC rules do not impose binding commitments to achieve mitigation results.⁷⁸ They do, however, provide a framework for the delivery of financial incentives to REDD+ host countries that demonstrate emissions reductions.⁷⁹ In other words, if countries decide to participate in REDD+ they are expected to follow a pre-determined format,⁸⁰ the fulfilment of which is necessary for the receipt of payments.⁸¹

The practical effects of the UNFCCC rules at the national level can be seen in case studies from the Latin American region. Here, REDD+ rules are increasingly

⁶⁹ Cf. Decision 12/CP.19, n. 44 above.

⁷⁰ Decision 1/CP.16, n. 66 above, Appendix II.

⁷¹ Recio, n. 45 above, pp. 60–1, Savaresi, 'The Legal Status and Role of REDD-Plus Safeguards', n. 12 above.

⁷² Cf. Decision 9/CP.19, n. 44 above, para. 4. See B. Bodin, E. Väänänen & H. van Asselt, 'Putting REDD+ Environmental Safeguards into Practice: Recommendations for Effective and Country-specific Implementation' (2015) 9(2) *Carbon & Climate Law Review*, pp. 168–82, at 171. However, see Savaresi, 'The Legal Status and Role of REDD-Plus Safeguards', n. 12 above, p. 135 ('[t]he fact ... that information on the implementation of safeguards is a requirement ... seems to indicate that compliance with safeguards is mandatory ... for Parties seeking REDD+ results-based payments').

⁷³ Savaresi, 'The Legal Status and Role of REDD-Plus Safeguards', n. 12 above, pp. 134–5; Bodin, Väänänen & van Asselt, *ibid.*, p. 168.

⁷⁴ Decision 1/CP.16, n. 66 above, para. 71; Abbott et al., n. 65 above, p. 415.

⁷⁵ Pauwelyn, Wessel & Wouters, n. 42 above, p. 756.

⁷⁶ UNFCCC Secretariat, Decision 2/CP.13, 'Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action', UN Doc. FCCC/CP/2007/6/Add.1, 14 Mar. 2008, paras 2, 3.

⁷⁷ Decision 1/CP.16, n. 66 above, para. 73.

⁷⁸ But voluntary commitments can be set in countries' nationally determined contributions: see Art. 4 Paris Agreement.

⁷⁹ Recio, n. 45 above, p. 47.

⁸⁰ Savaresi, 'The Legal Status and Role of REDD-Plus Safeguards', n. 12 above, pp. 136–7.

⁸¹ A. Angelsen et al. (eds), *Analysing REDD+: Challenges and Choices* (Center for International Forestry Research (CIFOR), 2012), p. 381.

translated into national and regional policies and laws.⁸² Also, many Latin American countries submitted to the UNFCCC the information to track their emissions reductions with REDD+ implementation,⁸³ and at least three have already presented their first results.⁸⁴ There seems to be a trend in the region to develop national REDD+ strategies with nationwide participatory procedures, including the involvement of indigenous peoples and civil society.⁸⁵ With regard to safeguards, at least two countries have presented summary reports.⁸⁶ Overall, examples from the Latin American region suggest that UNFCCC rules have successfully motivated countries to adopt national legal and policy developments, as well as to prepare for REDD+ implementation.

The impact of UNFCCC rules can also be seen with regard to international actors who have responded to the UNFCCC's call to support REDD+ financially.⁸⁷ These actors play an increasingly relevant role in interpreting and filling in the gaps in UNFCCC rules to respond swiftly to implementation needs.⁸⁸ In particular, the influence of the UNFCCC rules can be discerned in their moves to involve indigenous peoples and a growing emphasis on participatory decision making, which have provided a basis on which other REDD+ implementing actors can build. Consequently, through reliance on informal lawmaking and the integration of diverse actors into the implementation of its rules, REDD+ under UNFCCC rules is shifting the traditional picture of international lawmaking from an activity based only on state consent to rule-making approaches more open to the involvement of non-state actors.

4. THE FCPF, FIP AND UN-REDD: THEIR RULE-MAKING ROLE FOR REDD+

The UNFCCC REDD+ framework permits host countries to use funding from a variety of sources. Here, the focus is on three multilateral financing initiatives that support REDD+ implementation in several host countries. The FCPF Readiness Fund (hosted by the World Bank) and the UN-REDD Programme (hosted by three UN agencies) support countries in 'reach[ing] a capacity level at which [they] will be ready' to participate in REDD+.⁸⁹ The FIP (hosted by the World Bank) supports pilot

⁸² Countries in the region that have passed REDD+ laws include Ecuador, Costa Rica, Guatemala, Mexico, and Peru: Recio, n. 17 above. See also S. Aguilar & M.E. Recio, 'Climate Change Law in Latin America', in Kulovesi, Mehling & Hollo, n. 58 above, pp. 653–78.

⁸³ Including Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, Paraguay, and Peru: REDD+ Web Platform, available at: <http://redd.unfccc.int>.

⁸⁴ Including Brazil, Colombia, and Ecuador: REDD+ Web Platform, *ibid*.

⁸⁵ E.g., Brazil and Ecuador submitted their REDD+ strategy to the REDD+ Web Platform, *ibid*. Peru and Chile have also developed strategies: Government of Peru, *Estrategia Nacional Sobre Bosques y Cambio Climático*, Supreme Decree No. 007-2016-MINAM (2016); Government of Chile, *Estrategia Nacional de Cambio Climático y Recursos Vegetacionales 2017–2025* (2016).

⁸⁶ Brazil and Ecuador: REDD+ Web Platform, n. 83 above.

⁸⁷ Decision 9/CP.19, n. 44 above, para. 5.

⁸⁸ See van Asselt and McDermott, n. 11 above, p. 82 (arguing that regulatory gaps in the REDD+ rules allow other governance arrangements to play a role in rule making); Savaresi, 'The Legal Status and Role of REDD-Plus Safeguards', n. 12 above, p. 135.

⁸⁹ FCPF, 'FCPF Information Memorandum', 13 June 2008, p. 13, available at: <https://www.forest-carbonpartnership.org/governance>.

programmes and investments that focus on initial implementation.⁹⁰ The three initiatives share some common traits that are the focus of this analysis.⁹¹

My aim here is to show that while the FCPF Readiness Fund, the UN-REDD Programme, and the FIP help countries to implement REDD+, they also make a notable contribution to REDD+ rule making. This is interesting as most of their rule-making activities do not fully fit into the traditional picture of international lawmaking and differ from REDD+ rule making under the UNFCCC. Notably, their rule-making activities generate more prescriptive rules than those agreed on a consensus basis under the UNFCCC. This ultimately subjects REDD+ host countries to a higher standard. In the case of Latin America, where national legislation on forest-related issues has traditionally been highly divergent, the influence of REDD+ initiatives is visible and results in surprisingly similar national REDD+ policies. Also remarkable is that, as a result of the initiatives' governance and decision-making structures described below, the financing initiatives place more emphasis on the preferences of REDD+ donor countries than does consensus-based decision making under the UNFCCC.

4.1. *The Legal Design of the REDD+ Financing Initiatives*

Describing the legal status of financial initiatives for REDD+ implementation is necessary to understand their rule-making activity. Distinct from the traditional picture of international law, where states define the functions of intergovernmental institutions, the three REDD+ financing initiatives were established by decisions taken by their host institutions.⁹² Compared with international lawmaking, where state consent plays a key role, there is a less direct link between these initiatives and the member states of the parent institutions.⁹³ In practice, this has allowed broader participation from civil society and other non-state actors in their governing bodies and decision making. For example, in establishing the FIP and the FCPF, the World Bank organized ad hoc participatory processes with states, civil society, and indigenous peoples.⁹⁴ Moves towards greater participation by indigenous peoples

⁹⁰ CIF, 'Linkages between REDD+ Readiness and the Forest Investment Program', Nov. 2014, pp. 5–6, available at: https://www.climateinvestmentfunds.org/sites/default/files/knowledge-documents/linkages_between_redd_readiness_and_fip_nov2014_0.pdf.

⁹¹ Without prejudice to differences among them: see M. Young, 'REDD+ and Interacting Legal Regimes', in Voigt, n. 11 above, pp. 89–125, at 121.

⁹² The FCPF was established by the World Bank: International Bank for Reconstruction and Development, 'Charter Establishing the FCPF', 23 Dec. 2014, Art. 2 and Preamble, paras (B) and (C), available at: <https://www.forestcarbonpartnership.org/sites/fcp/files/2015/January/FCPF%20Charter%20-%2012-23-14%20clean.pdf>. The FIP is a targeted programme under the Special Climate Fund established by the World Bank: CIF, 'Governance Framework for the Strategic Climate Fund', Nov. 2008, para. 4, available at: https://www.climateinvestmentfunds.org/sites/default/files/SCF_Governance_Framework.pdf. The UN-REDD Programme was convened by the FAO, the UN Development Programme (UNDP) and the UN Environment Programme: UN-REDD Programme, 'Terms of Reference: UN-REDD Programme Multi-Partner Trust Fund', 25 Nov. 2015, para. 3.

⁹³ Similar to international agencies: cf. Berman & Wessel, n. 26 above, p. 43.

⁹⁴ FCPF, n. 89 above, p. 11. On the FIP process, see C. Lang, 'The World Bank's FIP: The Story so Far', *REDD Monitor*, 20 July 2009, available at: <http://www.redd-monitor.org/2009/07/20/the-world-banks-forest-investment-programme-the-story-so-far>.

and local communities also resonate in the establishment of a dedicated fund under the FIP for such purposes.⁹⁵ Compared with the UNFCCC and its hosting institutions, the financing initiatives seem to integrate non-state actors more openly in different stages of decision making and implementation of the funds.

All three initiatives examined here are based on trust funds.⁹⁶ This legal structure allows donor countries to contribute financially to thematic programmes through flexible arrangements. Parent institutions, such as the World Bank, maintain control of the funds, and at the same time create specific procedures and governing structures adjusted to the types of activity to support. Thus, the initiatives function according to their own rules, but the host institutions' rules also apply for the provision of support.⁹⁷ For example, the World Bank's rules apply to FIP⁹⁸ and FCPF funds, and the 'regulations, rules, directives and procedures' of each of the three UN organizations apply to UN-REDD funds;⁹⁹ this includes each organization's internal policies, such as the UN Development Programme's Social and Environmental Standards.¹⁰⁰ Another example of the strong link between the initiatives and their host institutions is that, formally, it is not the funding initiatives themselves that enter into direct legal agreements with recipient and donor countries but generally it is the host institutions.¹⁰¹

The governing structure of all three initiatives has a tripartite composition.¹⁰² Firstly, administrative functions, secretariat services and technical advisory support are generally provided by a secretariat, such as the UN-REDD Secretariat, or staff located in the host institution, such as the World Bank's Facility Management Team for the FCPF.¹⁰³ Secondly, all three have a body with advisory functions, which enjoys broad member state participation, such as the UN-REDD's Assembly.¹⁰⁴ Representatives from civil society and indigenous peoples also participate in these

⁹⁵ 'Dedicated Grant Mechanism for Indigenous Peoples and Local Communities', available at: <http://www.dgmglobal.org>.

⁹⁶ Trust funds are often placed in organizations experienced in the field: J. Gold, 'Trust Funds in International Law: The Contribution of the International Monetary Fund to a Code of Principles' (1978) 72(4) *American Journal of International Law*, pp. 856–66, at 860. The FIP's donors are the United Kingdom (UK), the US, Norway, Japan, Australia, Sweden, Spain and Denmark, see the FIP website, available at: <http://www.climatefundsupdate.org/listing/forest-investment-program>. UN-REDD's main donor is Norway, followed by the European Union (EU), Denmark, Spain, Japan, Luxemburg and Switzerland. FCPF donors are the same as those of UN-REDD, as well as the EU, Australia, Canada, Finland, France, Germany, Italy, the UK, and the US: FCPF website, available at: <https://www.forstcarbonpartnership.org>.

⁹⁷ The World Bank is the trustee for the FIP and the FCPF. The UN-REDD Programme is administered by the UNDP Multi-Partner Trust Fund Office.

⁹⁸ Unlike other funding initiatives, FIP funds can be implemented by different multilateral development banks whose rules apply. Cf. CIF, 'Design Document for the Forest Investment Program: A Targeted Program under the Special Climate Fund Trust Fund', 22 June 2009, paras 35–6, available at: http://siteresources.worldbank.org/INTCC/Resources/FIP_Design_Document.pdf.

⁹⁹ UN-REDD, n. 92 above, Section III, para. 1.

¹⁰⁰ UNDP, 'UNDP's Social and Environmental Standards', 1 Jan. 2015.

¹⁰¹ Or the implementation organization, or the trustee.

¹⁰² The FIP is under the governing structure of the Special Climate Fund.

¹⁰³ See FCPF, n. 92 above.

¹⁰⁴ FCPF, n. 92 above, Art. 10.1(b); UN-REDD, n. 92 above, paras 31–5; CIF, n. 92 above, para. 31.

collegiate bodies. Thirdly, all three initiatives have a governing body, such as the UN-REDD's Executive Board. In these decision-making bodies, donor countries and those selected as REDD+ host countries are represented by government authorities.¹⁰⁵

For the governing bodies the rules of procedure of each initiative require donor and recipient constituencies to select an equal number of representatives.¹⁰⁶ The UN-REDD Programme's Executive Board, for example, is composed of three representatives each of donor and REDD+ host countries.¹⁰⁷ As members with voting power, consensus or majority agreement of country representatives is required for decision making. Observers from indigenous peoples and civil society also participate in governing bodies.¹⁰⁸ For each initiative, the governing body has the power to make decisions on a range of issues necessary for overseeing implementation, including determining the eligibility criteria for funding, approving project proposals, and issuing operational guidance.¹⁰⁹ Powers of the governing body also include the adoption and interpretation of rules and decisions on non-compliance.¹¹⁰ In some cases their activities involve the provision of 'advice' in the 'absence of relevant UNFCCC guidance'¹¹¹ and the provision of 'guiding principles on the key methodological framework on REDD+'.¹¹² The advice approved by each initiative's governing body can offer significant rule-based guidance on the implementation of REDD+ for host countries.

Compared with the consensus-based decision making under the UNFCCC, the initiatives' voting rules typically give more prominent roles in decision making to donor countries than to REDD+ host countries.¹¹³ While perhaps more efficient than rule making under the UNFCCC, rule making under the financing initiatives can therefore be perceived as less representative of the interests of REDD+ host countries. It may be possible in some cases for donor countries to earmark funds, which can allow them to avoid subjecting the allocation of their funds to the decisions of the governing body.¹¹⁴ The distribution of voting power, coupled with the possibility of

¹⁰⁵ Exceptionally, by eligible recipient countries: see CIF, n. 98 above, para. 18; CIF, n. 92 above, para. 17.

¹⁰⁶ The FCPF's Participants Committee has 14 representatives of donors and recipients; and the FIP Sub-Committee includes six representatives from each constituency: FCPF, n. 92 above, Art. 11, paras 11.1. (a)–(d); CIF, n. 98 above, para. 25(e).

¹⁰⁷ UN-REDD, n. 92 above, para. 36.

¹⁰⁸ FCPF, n. 92 above, Art. 11; CIF, n. 98 above, paras 17–21; UN-REDD, n. 92 above, para. 36. In the past, the UN-REDD Programme's Policy Board allowed representatives of civil society and indigenous peoples as full members: UN-REDD Programme, 'Policy Board Terms of Reference', Mar. 2009; UN-REDD Programme, 'Rules of Procedure and Operational Guidance', 10 Mar. 2009, pp. 5–6.

¹⁰⁹ FCPF, n. 92 above; UN-REDD, n. 92 above; UN-REDD Programme, 'Strategic Framework 2016–2020', May 2015; CIF, n. 98 above; CIF, n. 92 above.

¹¹⁰ UN-REDD, n. 92 above, para. 4.2; FCPF, n. 92 above, para. 11.1; CIF, n. 98 above, para. 25.

¹¹¹ Such as the attribution of emissions reductions with a view to provide REDD+ payments: FCPF, n. 92 above, Art. 11.1(g) and (h).

¹¹² FCPF, n. 92 above, Art. 11.1(i).

¹¹³ The number of REDD+ host countries is greater than the number of donors, but in the governing bodies both tend to have an equal number of seats and voting power. An exemption is the FCPF Assembly, composed of a broad membership, which can overturn some decisions taken by the FCPF's governing body: FCPF, n. 92 above, Art. 10.2(a)(ii).

¹¹⁴ See, e.g., UN-REDD, n. 92 above, p. 33.

earmarking funds, may mean that donors can significantly influence the determination of priorities for the provision of funding in these initiatives.¹¹⁵

4.2. Rule-making Activities

The rule-making activities of these initiatives must be explored in the context of the role that they play based on their unique technical expertise. Generally, the initiatives' staff provide technical support before and during the implementation of the REDD+ funds. They also assist governing bodies in decision making. Their technical support roles extend to developing and updating technical guidance through ad hoc participatory processes.¹¹⁶ Such flexibility in procedures stems from the fact that the guidance and standards are primarily voluntary and addressed to the initiatives' internal bodies and employees.¹¹⁷ Thus, they are generally considered to be 'non-legally binding',¹¹⁸ merely a 'guiding framework'.¹¹⁹ Only in some cases are the guidelines endorsed by the initiatives' governing body.¹²⁰ However, despite their voluntary and informal nature, these guidelines are intended to instruct the formulation and review of the project proposals of REDD+ host countries, as well as monitoring implementation.¹²¹

An interesting example of how the financing initiatives undertake their rule-making activities can be seen in the participation of indigenous peoples in REDD+. Tropical forests are often portrayed as an 'uneven playing field',¹²² and forest protection initiatives have notoriously dispossessed, excluded and marginalized indigenous peoples in the past.¹²³ It is generally acknowledged that REDD+ can increase the risks to forest dwellers and indigenous peoples and that their participation is necessary to mitigate such risks.¹²⁴ Under the UNFCCC, the inclusion of the participation of indigenous peoples and other stakeholders in

¹¹⁵ J. Winters & D. Sridhar, 'Earmarking for Global Health: Benefits and Perils of the World Bank's Trust Fund Model' (2017) *BMJ* online articles, 358:j3394, available at: <https://doi.org/10.1136/bmj.j3394>.

¹¹⁶ As did the UN-REDD Programme: UN-REDD Programme, 'Guidelines on Free, Prior and Informed Consent', Jan. 2013, p. 4.

¹¹⁷ Similar to the World Bank's Social and Environmental Safeguards: see J.E. Alvarez, 'International Organizations and the Rule of Law: Challenges Ahead', 10 June 2016, p. 23, available at: https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2793924.

¹¹⁸ UN-REDD Programme, 'Report of the Eighth Policy Board Meeting', Apr. 2012, p. 21.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*; FCPF, 'Incorporating Environmental and Social Considerations into the Process of Getting Ready for REDD', Note FMT 2009–6, 15 Oct. 2009, available as a draft at: https://www.forestcarbonpartnership.org/sites/fcp/files/Documents/tagged/FCPF_en_soc_guidelines_10-15-09.pdf; but others have followed different procedures: see UN-REDD, n. 116 above.

¹²¹ See the description of the Social and Environmental Principles and Criteria (SEPC): UN-REDD, n. 118 above, pp. 20–2. Savaresi argues that these rules are no longer internal, but part of the obligations that will be undertaken by one of the parties: Savaresi, 'The Legal Status and Role of REDD-Plus Safeguards', n. 12 above, p. 135.

¹²² A. Larson & J. Ribot, 'The Poverty of Forestry Policy: Double Standards on an Uneven Playing Field' (2007) 2(2) *Sustainability Science*, pp. 189–204, at 189.

¹²³ T. Sikor et al., 'REDD-Plus, Forest Peoples' Rights and Nested Climate Governance' (2010) 20(3) *Global Environmental Change*, pp. 423–5.

¹²⁴ F. Seymour, *Forest, Climate Change, and Human Rights: Managing Risks and Trade Offs* (CIFOR, 2008), pp. 13, 18.

REDD+ was controversial.¹²⁵ As a result of consensus-based decision making, the UNFCCC rules provide little guidance on participation and stakeholder engagement. In particular, UNFCCC rules recognize only the need for ‘ensuring the full and effective participation of relevant stakeholders, inter alia, indigenous peoples and local communities’ in the elaboration of the REDD+ national strategy¹²⁶ without further explanation of how ‘full and effective’ stakeholder participation should be fulfilled. UNFCCC REDD+ safeguards also briefly mention consideration of the rights of indigenous peoples and local communities, ‘noting’ the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).¹²⁷ UNDRIP recognizes the rights of indigenous peoples to ‘free, prior and informed consent’ (FPIC) to activities affecting the land and resources on which they depend, such as REDD+.¹²⁸ However, the reference to UNDRIP in the UNFCCC rules is insubstantial.

In contrast, shortly after the UNFCCC rules were adopted, the FCPF and UN-REDD released harmonized joint guidelines on stakeholder involvement,¹²⁹ drawing from their own internal guidance.¹³⁰ Compared with the UNFCCC, the guidelines provide more detailed requirements. They demand that consultations with stakeholders take place prior to the design of any REDD+ project or programme.¹³¹ It is for the REDD+ host countries to identify when consultations will be required, at what level, and with whom.¹³² Participatory structures need to be created for this purpose, such as national REDD+ committees to include representatives from relevant stakeholder groups (such as indigenous peoples and civil society).¹³³ In addition, participatory fora need to be established at the local level to ensure the active engagement of local stakeholders.¹³⁴

The guidelines call for ensuring representation of diverse opinions, including those of indigenous peoples and the organizations that claim to represent them.¹³⁵ The rules also contain special requirements for obtaining indigenous peoples’ consent. UN-REDD has developed ‘Guidelines on Free, Prior and Informed Consent’, requiring REDD+ host countries to apply FPIC, which is understood as the right of indigenous peoples to refuse consent to a REDD+ project.¹³⁶ More recently, the World Bank’s rules – which are relevant for FCPF and FIP funds – have incorporated

¹²⁵ T. Griffiths & F. Martone, *Seeing ‘REDD’? Forests, Climate Change Mitigation and the Rights of Indigenous Peoples and Local Communities* (Forest Peoples Programme, 2009), p. 6.

¹²⁶ Decision 1/CP.16, n. 66 above, para. 72. Other safeguards contribute indirectly to enhance stakeholder participation, such as the consideration of international agreements.

¹²⁷ Decision 1/CP.16, n. 66 above, Appendix I, 2(c). UN Declaration on the Rights of Indigenous Peoples (UNDRIP), UNGA Resolution 61/295, 13 Sept. 2007, available at: http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf.

¹²⁸ UNDRIP, *ibid.*, Arts 19, 32.

¹²⁹ FCPF & UN-REDD Programme, ‘Guidelines on Stakeholder Engagement in REDD+ Readiness’, 20 Apr. 2012.

¹³⁰ Including the FCPF’s Readiness Preparation Proposal template, available at: <https://www.forest-carbonpartnership.org>.

¹³¹ FCPF & UN-REDD, n. 129 above, para. 9(g).

¹³² *Ibid.*

¹³³ For the UN-REDD Programme: *ibid.*, Annex 1.

¹³⁴ *Ibid.*, para. 9(i).

¹³⁵ *Ibid.*, para. 10.

¹³⁶ UN-REDD, n. 116 above, p. 9.

an FPIC requirement, although with a proviso that FPIC can also take place when ‘some individuals or groups object to project activities’.¹³⁷ This shows that there are diverse standards among the initiatives in respect of participation by indigenous peoples. In any event, they are more detailed than the UNFCCC rules.

The initiatives have developed technical guidance to ‘assist countries’ in implementing REDD+,¹³⁸ and their actions are linked, more generally, to the UNFCCC rules.¹³⁹ This shows that UNFCCC rules inform and guide the initiatives’ rule-making activities. At the same time, this is just one example of the initiatives’ more detailed and stringent approach to rule-making activities than the approach adopted for UNFCCC rules.¹⁴⁰ The initiatives’ ‘guidance/requirements’ have a ‘degree of prescriptiveness not seen in the REDD+ decisions agreed under the UNFCCC’.¹⁴¹ This suggests that, in practice, UNFCCC rules work as a minimum standard.

More stringent standards can be good for ensuring better implementation of REDD+. At the same time, they may conflict with existing national laws. It remains unclear how the conflict should be addressed in those cases. Should a country apply FPIC, as upheld by UN-REDD or FCPF, when national laws are in contradiction with the initiatives’ standards? For example, the Peruvian law on participation in implementation of the International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169)¹⁴² provides that, in some cases, the state can make a final decision on the legal or administrative measures consulted. This is inconsistent with UN-REDD’s interpretation of FPIC.¹⁴³ In such cases, how far can, or should, the rules elaborated by REDD+ financing initiatives influence national laws and policies?

The practical consequence of the rules and standards developed by the REDD+ initiatives is that host countries desiring support for REDD+ implementation from one of the initiatives must accept, internalize and implement them. In the process of securing funding, the REDD+ host country plays the role of a candidate or applicant ‘which must act subject to external rules’,¹⁴⁴ and follow thorough processes using

¹³⁷ World Bank, *Environmental and Social Framework* (World Bank, 2016), para. 55.

¹³⁸ E.g., UN-REDD, n. 118 above, p. 20.

¹³⁹ FCPF, n. 92 above, Art. 3 (FCPF will ‘seek to ensure consistency with the UNFCCC Guidance on REDD’); UN-REDD, n. 109 above, para. 14 (focusing on coherence in REDD+ support by ‘aligning country and global level support around the UNFCCC guidance’); e.g., CIF, n. 98 above, para. 9 (stating that ‘the FIP should draw upon the IPCC ... while recognizing the evolving vocabulary within the UNFCCC process’).

¹⁴⁰ Savaresi, ‘The Legal Status and Role of REDD-Plus Safeguards’, n. 12 above, p. 148.

¹⁴¹ UN-REDD Programme, ‘Comparative Analysis of the UNFCCC REDD+ Related Decisions and Other Multilateral and Bilateral Requirements to Access Results-Based Payments/Results-Based Finance for REDD+ Results-Based Actions’, Technical Resource Series 5, Jan. 2017, p. 145 (arguing that [some of these additional prescriptions may be necessary] ‘in line with the operational modalities of the various financing entities’).

¹⁴² Geneva (Switzerland), 27 Jun. 1989, in force 5 Sept. 1991, available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.

¹⁴³ Government of Peru, Law N° 2978: Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios, reconocidos en el Convenio 169 de la OIT (2011), Art. 15.

¹⁴⁴ Dann, n. 10 above, p. 372.

standardized templates to submit the funding application.¹⁴⁵ The templates used during the process are based on the internal guidelines and rules of each initiative.¹⁴⁶ Research suggests that these templates play an important role in standardizing state practice: for example, regulations applicable to the forest sector are highly diverse in the Latin American region.¹⁴⁷ Nevertheless, Sanhueza and Antonissen have found that, as a result of the use of these templates, ‘the national REDD+ strategies’ developed in Latin America, with support from UN-REDD and the FCPF, show remarkable similarities.¹⁴⁸

Following submission of the project proposal the government of the REDD+ host country enters into an intense dialogue with the initiatives’ technical staff and governing body to make the proposal conform to the initiative’s requirements. Since this process requires considerable time and effort¹⁴⁹ it increases pressure on national governments to approve REDD+ grants and accept the conditions imposed. Thus, while there is no formal obligation for candidate host countries to accept them,¹⁵⁰ the approval of an application depends on its conformity with the rules and standards of the relevant REDD+ initiatives.

To finalize the process, REDD+ host countries must sign a grant agreement in order to receive the funds. This agreement has legal and practical effects to ensure the monitoring of the funds. National teams are appointed,¹⁵¹ and the financing initiatives delegate powers to their staff to review and monitor implementation. In the event of non-compliance with the terms of the agreement, applicable measures include sanctions, the duty to enter into dialogue, termination or suspension of payment, and repayment of the support received.¹⁵² Shaming actions are also possible.¹⁵³ Although it has not been yet used for REDD+, the World Bank Inspection Panel can investigate alleged violations of the Bank’s policies and procedures, such as those pertaining to FCPF and FIP funds.¹⁵⁴

¹⁴⁵ Countries must complete a National Programme Document (NPD) for UN-REDD, a Readiness Preparation Proposal (R-PP) for the FCPF, and an Investment Plan for the FIP.

¹⁴⁶ Le Groupe-conseil baastel Itée, Nordic Agency for Development and Ecology & FCPF, ‘Final Evaluation Report’, June 2011, p. vii.

¹⁴⁷ P. Pacheco et al., ‘The Recognition of Forest Rights in Latin America: Progress and Shortcomings of Forest Tenure Reforms’ (2012) 25(6) *Society & Natural Resources*, pp. 556–71, at 563; see also FAO, ‘Leyes Forestales de América del Sur’ [‘Forestry Laws in South America’], Apr. 2010, p. 54 (in Spanish).

¹⁴⁸ J.E. Sanhueza & M. Antonissen, *REDD+ en América Latina: Estado Actual de las Estrategias de Reducción de Emisiones por Deforestación y Degradación Forestal* (Economic Commission for Latin America and the Caribbean, Deutsche Gesellschaft für Internationale Zusammenarbeit, 2014), p. 27.

¹⁴⁹ The grant approval procedure for FCPF funds took longer than the two-year average time required for the Global Environment Facility projects in some Latin American countries.

¹⁵⁰ The World Bank’s safeguards applicable to the FIP and the FCPF are described as mandatory, while the UN-REDD guidelines may seem less obligatory. However, both inform decision making and are ‘considered in the formulation, review ... and monitoring of implementation’: UN-REDD, n. 118 above, pp. 20–1.

¹⁵¹ E.g., the UN-REDD programme establishes a national team together with the recipient country, which includes civil society and indigenous peoples’ representatives: UN-REDD, n. 109 above, p. 18.

¹⁵² Dann, n. 10 above, p. 360.

¹⁵³ Under the FCPF, e.g., countries that fail to fulfil agreed obligations lose all rights and privileges, including eligibility to become a member of the governing body: FCPF, n. 92 above, para. 6.5.

¹⁵⁴ K. Hite, ‘Adjudicating Disputes Across Scales: Global Administrative Law Considerations for REDD+’, in Voigt, n. 11 above, pp. 408–47, at 426.

It has been argued that, through the grant agreement, the rules and standards developed by REDD+ initiatives become formalized and legally binding upon REDD+ host countries.¹⁵⁵

Therefore, rules and standards that emanate from informal lawmaking end up ‘affect[ing] a wide range of countries, companies and people, without being considered sources of international law’.¹⁵⁶ When guidelines acquire the effect of law through grant agreements, they ultimately subject REDD+ host countries to more stringent rules than those agreed under the UNFCCC. These rules can play a significant role, particularly in countries that lack national laws for implementing REDD+, or in those whose norms do not comply with the minimum standards. The rules become ‘a normative stream’, feeding into the national regulatory landscape.¹⁵⁷ They can also be effective even without national implementing legislation, or before such legislation is in place.¹⁵⁸

Overall, there is tension between these rule-making activities and their imposition on REDD+ host countries on the one hand, and UNFCCC rules based on consensus decision making on the other. However, some factors might alleviate such tension. Firstly, REDD+ host country governments are engaged during the entire process of developing the funding proposals and during implementation. In addition, there is constant dialogue between in-country teams and national authorities. Secondly, once a REDD+ host country ‘joins’ a REDD+ financing initiative, it can also participate in its decision-making bodies. Thirdly, the involvement of civil society and indigenous peoples in the preparation of REDD+ proposals contributes to legitimizing the financing initiatives’ requirements, as the Latin American case studies show. Nevertheless, the interaction between the initiatives’ rule-making activities and the UNFCCC rules implies that the initiatives will ultimately implement tighter standards than those contained in the UNFCCC rules and have substantive practical effects on the ground, both before and after their ‘formalization’ in a grant agreement.

4.3. *Indigenous Peoples and their Involvement in Latin American REDD+ Implementation*

Indigenous peoples in Latin America – many of whom live in, or adjacent to, primary forests – face potential risks arising from REDD+ projects.¹⁵⁹ Yet, few countries in the region acknowledge the rights of indigenous peoples in their national legal frameworks,¹⁶⁰ or have regulations on consultation and participation,¹⁶¹ including

¹⁵⁵ B. de Chazournes, ‘Policy Guidance and Compliance: The World Bank Operational Standards’, in Armstrong, n. 25 above, pp. 289–90. See also Dann, n. 10 above, p. 376; Savaresi, ‘The Legal Status and Role of REDD-Plus Safeguards’, n. 12 above, p. 135.

¹⁵⁶ Berman & Wessel, n. 26 above, p. 37.

¹⁵⁷ N. Walker, *Intimations of Global Law* (Cambridge University Press, 2015), p. 41.

¹⁵⁸ Alvarez, n. 22 above, p. 246.

¹⁵⁹ Collaborative Partnership on Forests, ‘SFM and Primary Forests’, 2012, available at: <http://www.cpfweb.org/32823-0b5a559f83d86c120294bcacc537703e.pdf>.

¹⁶⁰ R. Sieder, ‘Pueblos Indígenas y Derecho(s) en América Latina’, in C. Rodríguez Garavito (coord.), *El Derecho en América Latina* (Siglo Veintiuno Editores, 2011), pp. 303–21, at 303 (in Spanish).

¹⁶¹ Economic Commission for Latin America and the Caribbean (ECLAC), ‘Acceso a la Información, Participación y Justicia en Temas Ambientales en América Latina y el Caribe: Situación Actual, Perspectivas y Ejemplos de Buenas Prácticas’, Serie Medio Ambiente y Desarrollo No. 151, 2013, p. 52 (in Spanish).

those relating to the implementation of REDD+.¹⁶² Consequently, the first project proposals submitted to the REDD+ financing initiatives were criticized for insufficient participation by indigenous peoples.¹⁶³

The financing initiatives' rules on stakeholder engagement have demonstrated relevant practical effects on national governments' compliance with participation requirements during the preparation of a project proposal as a condition for future funding. This has facilitated the involvement of indigenous peoples in the development of REDD+ proposals in some Latin American countries. In Peru – after long negotiations and preparatory work for a project proposal to the FCPF – an indigenous association¹⁶⁴ submitted a complaint, arguing that the government had not adequately consulted indigenous peoples during the preparatory process.¹⁶⁵ According to groups representing the indigenous peoples, the complaint was made before the FCPF governing body's assessment of the Peruvian proposal,¹⁶⁶ when the government needed 'to ensure (its) approval'.¹⁶⁷ This arguably provided the adequate environment for an 'intense' and 'unprecedented' dialogue between indigenous peoples and the government. As a result, both agreed to create REDD+ indigenous roundtables (*Mesas Indígenas*) at the national and regional levels.¹⁶⁸ This achievement has not only ensured that participatory mechanisms are in place but also that they are translated into subnational law.¹⁶⁹ Other claims presented before the FIP by indigenous peoples have also helped to ensure that their representative groups consent to REDD+ projects before governing body approval.¹⁷⁰

The possibility that REDD+ financial initiatives will reject a project proposal seems to make national governments more open to negotiating the conditions for implementing REDD+ projects with indigenous peoples and other stakeholders. In some cases this has resulted in new legal arrangements,¹⁷¹ as exemplified in a project

¹⁶² E.g., Government of Ecuador, Ministerial Agreement 128 (2013) (setting procedures for consultation and negotiation with traditional communities for REDD+ implementation).

¹⁶³ A.M. Larson et al., 'Rights to Forests and Carbon under REDD+ Initiatives in Latin America', CIFOR Infobrief No. 33, Nov. 2010, p. 6, available at: <https://www.cifor.org/library/3277/rights-to-forests-and-carbon-under-redd-initiatives-in-latin-america>.

¹⁶⁴ The Interethnic Association for the Development of the Peruvian Rainforest (AIDESEP), unlike the Confederation of Amazonian Nationalities of Peru (CONAP), rejected REDD+ implementation if it was not adapted to the priorities of indigenous peoples. AIDESEP required budget allocation to enhance land rights of indigenous peoples by, e.g., demarcating lands and recognizing indigenous practices: F. Zelli et al., *REDD in Peru: A Challenge to Social Inclusion and Multi-Level Governance* (Deutsches Institut für Entwicklungspolitik, 2014), p. 46.

¹⁶⁵ Ibid.

¹⁶⁶ R. Espinoza Llanos & C. Feather, *La Realidad de REDD+ en Perú, entre el Dicho y el Hecho* (Forest Peoples Programme, 2011), p. 21 (in Spanish).

¹⁶⁷ Ibid.

¹⁶⁸ Ibid., p. 53. AIDESEP, 'Se conformó la Mesa Nacional de REDD Indígena de Perú', AIDESEP blog, 31 Jul. 2013, available at: <http://www.aidesep.org.pe/se-conformo-la-mesa-nacional-de-redd-indigena-de-peru> (in Spanish).

¹⁶⁹ See, e.g., Regional Government Madre de Dios, Regulation N° 018-2013-RMDD/CR (2013), available at: <http://www.gruporedperu.net/OrdenanzaregionalMADREDIOS.pdf>.

¹⁷⁰ Zelli et al., n. 164 above, p. 47.

¹⁷¹ Similarly in Indonesia: D. Lee & T. Pistorius, 'The Impacts of International REDD+ Finance', Climate and Land Use Alliance, Sept. 2015, p. 35, available at: http://www.climateandlandusealliance.org/wp-content/uploads/2015/09/Impacts_of_International_REDD_Finance_Report_FINAL.pdf.

proposal submitted by the government of Honduras to the FCPF.¹⁷² Following a complaint by a Honduran indigenous peoples' association that they had not been given adequate opportunities to be involved in the preparation of the project proposal, the FCPF put the application process on hold. The process continued only after the government and the indigenous groups signed an agreement to create a national roundtable for the participation of indigenous peoples in the REDD+ process (*Mesa Nacional Indígena y Afrohondureña de Cambio Climático*).¹⁷³ During the negotiations the government agreed to address long-standing land tenure claims. It also promised to cooperate to develop a law on the FPIC, even if the FPIC had not yet been considered in the national legal framework.¹⁷⁴

The practical effects of the financing initiatives' rules also become manifest after the signing of the grant agreement, as illustrated in the implementation of REDD+ funds in Panama.¹⁷⁵ Indigenous peoples and the government had concluded an agreement on a project funded by the UN-REDD Programme, which contained 19 conditions for the implementation of REDD+. The conditions included integration of the traditional 'Balu Wala' participatory methodology,¹⁷⁶ recognition of land title to indigenous peoples in forested areas, and a commitment to reconsider ratification of ILO Convention 169.¹⁷⁷ During implementation, however, differences arose regarding the modalities and budget for participation by indigenous peoples, who threatened to withdraw from the REDD+ process, alleging that the conditions agreed during the preparation of the project had not been fulfilled.¹⁷⁸

The UN-REDD Programme temporarily suspended implementation of the project and commissioned an independent review, which found no infringement of rights.¹⁷⁹ The financing initiative subsequently instigated an intense participatory process, and activities recommenced following the signature of a new agreement between the government and the leaders of each indigenous group,¹⁸⁰ which, inter alia, restated

¹⁷² M.E. Recio, 'Honduras Resource Tenure and Sustainable Landscapes Assessment: Tenure and Global Climate Change (TGCC)', US Agency for International Development (USAID), Mar. 2015, pp. 1–26, available at: https://www.land-links.org/wp-content/uploads/2016/09/USAID_Land_Tenure_TGCC_Honduras_Assessment_En.pdf.

¹⁷³ *En el marco del proceso REDD Gobierno y CONPAH firman acta sobre derechos indígenas y afrohondureños sobre su territorio*, UNDP, 21 Jan. 2013, available at: <http://www.hn.undp.org/content/honduras/es/home/presscenter/articles/2013/01/21/en-el-marco-del-proceso-redd-gobierno-y-conpah-firman-acta-sobre-derechos-ind-ge-nas-y-afrohondure-os-sobre-su-territorio-.html> (in Spanish).

¹⁷⁴ Agreement signed between SERNA, ICF, SEDINAFROH, INA and CONPAH, 9 Jan. 2013: see Recio, n. 172 above, pp. 3, 70.

¹⁷⁵ M.E. Recio, 'Panama Resource Tenure and Sustainable Landscapes Assessment: Tenure and Global Climate Change (TGCC)', USAID, Sept. 2014, pp. 1–22, available at: https://www.land-links.org/wp-content/uploads/2016/09/USAID_Land_Tenure_TGCC_Panama_Assessment_En.pdf.

¹⁷⁶ Coordinadora Nacional de Pueblos Indígenas De Panamá (COONAPIP), 'Informe Final Elaboración de un Marco de Referencia sobre la Participación de los Pueblos Indígenas de la República de Panamá dentro del Contexto de la Propuesta de UN-REDD Panamá', 12 Oct. 2009, Annex III, available at: http://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/PDF/Jul2010/Informe_Final_COONAPIP_UN_REDD_HL.pdf.

¹⁷⁷ Recio, n. 175 above, pp. 3, 13.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

the 19 original conditions.¹⁸¹ The authority of UN-REDD to monitor implementation of the project agreement played a key role. However, the case also leaves a question mark over the sustainability of agreements between indigenous peoples and governments on longer-term issues than those relating to the implementation of funded REDD+ projects.

These cases demonstrate that the higher standards and requirements elaborated by the financing initiatives have served the interests of indigenous peoples since the early stages of REDD+ implementation, perhaps more effectively than the UNFCCC rules have done.

5. RULE MAKING IN REDD+ IMPLEMENTATION

This article started with a discussion of the traditional image of international formal lawmaking, with state consent expressed in formal legal instruments at its centre. It then explained how the UNFCCC regime has relied largely on COP decisions to develop the regulatory and governance framework for REDD+, and argued that, despite their informal legal nature, UNFCCC rules have practical legal effects, which include supporting international institutions in implementing REDD+ projects.

Governance structures were then explored, including what is characterized as the largely informal rule making by the REDD+ financing initiatives. The article then explained how the financing initiatives play a relevant role in the regulatory landscape for REDD+ implementation at the transnational level, and demonstrated that, in contrast to the REDD+ rules developed under the UNFCCC, rules and standards developed by the REDD+ financial initiatives become legally binding through their inclusion in grant agreements with REDD+ host countries. The practical effects of the rules are experienced both before and after their inclusion in formal grant agreements to implement REDD+ funds.

Looking at the international regulatory landscape for REDD+, an interesting picture emerges. The UNFCCC and the REDD+ financing initiatives can be seen as two parallel and coexisting sources of authority for REDD+ regulation.¹⁸² The study illustrates how the international community allocates functions between them. Given that it operates under consensus-based decision making, the ability of the UNFCCC COP to keep pace with the needs of REDD+ implementation is precarious. Considerable space to fill the rule-making void, therefore, is left to other actors. The FCPF, the FIP and UN-REDD have proved themselves able to address divisive issues with greater flexibility, efficacy and speed than the UNFCCC. Thus, rules developed under the UNFCCC have become international minimum standards for REDD+, while the REDD+ financial initiatives develop stricter and more specific standards, and interpret the meaning of UNFCCC rules.¹⁸³ Hence, the international community turns to more flexible mechanisms of decision making, and the financing

¹⁸¹ *Ibid.*

¹⁸² Similarly, see van Asselt & McDermott, n. 11 above, p. 63 (arguing that institutional complexity in REDD+ can lead to a 'benevolent jigsaw' or 'conflicting fragmentation').

¹⁸³ Savaresi, 'The Legal Status and Role of REDD-Plus Safeguards', n. 12 above.

initiatives ‘complement and supplement’ the UNFCCC rules,¹⁸⁴ taking advantage of each initiative’s technical expertise.

Compliance with these more precise REDD+ norms developed by the three financial initiatives tends to be high. This is, firstly, because they are incorporated in grant agreements with REDD+ host countries and backed by financial, technical and implementation support. Secondly, the REDD+ initiatives’ interpretation and development of REDD+ requirements are legitimized in multiple ways. These include through state participation in their governance structure, the involvement of indigenous peoples and civil society in the preparation and implementation of REDD+ projects, and through technical support in the form of workshops, technical briefs and so on.

Yet, it is possible to view the REDD+ regulatory landscape less optimistically. Arguably, power has shifted from consensus-based rule making under the UNFCCC to the financial initiatives involved in REDD+ implementation. Rule making by the COP, the only international body with specific competences regarding the interpretation and further development of the UNFCCC rules,¹⁸⁵ is outpaced by the activity of the REDD+ financing initiatives. Their decision making is more rapid because it requires the agreement of fewer like-minded donor countries, and of fewer developing countries. Notably, the allocation of power in the initiatives’ governing structure allows donors more weight in decision making than is allowed under the UNFCCC legal framework.

From this perspective, a shift in decision-making power from developing (REDD+ host) countries to developed (donor) countries is accentuated in the way in which rules are imposed *de facto* on REDD+ host countries as mandatory preconditions for financial support to implement REDD+. This, then, arguably leads to a legitimacy deficit in the rules, because they are imposed on states that have not participated in their elaboration.¹⁸⁶ The picture of the REDD+ regulatory landscape can, therefore, be seen either as one of intergovernmental cooperation and parallel rule making – taking advantage of institutional collaboration – or one of competition, which results in power shifts from developing to developed countries. Which of these represents reality lies in the eye of the beholder; or, perhaps, they are merely two sides of the same coin.

At the same time, the study has shown that states play a more nuanced role in the REDD+ financing initiatives for a number of reasons. Firstly, states have a less direct role in the creation of the initiatives. Secondly, their technical workers have the powers and influence to develop informal guidance, lead consultation processes, and guide the decision-making activities of the governing bodies. Thirdly, non-state actors have an increasingly relevant role in the initiatives’ governing, technical and implementation activities. In contrast to the UNFCCC, where decision making remains largely state-based, these initiatives have swiftly adapted to incorporate

¹⁸⁴ *Ibid.*, p. 135.

¹⁸⁵ Recio, n. 45 above; Savaresi, ‘A Glimpse into the Future of the Climate Regime’, n. 12 above, pp. 191–4.

¹⁸⁶ S. Wheatley, ‘A Democratic Rule of International Law’ (2011) 22(2) *European Journal of International Law*, pp. 525–48, at 527.

stakeholders – including tribal and indigenous peoples – as a means to strengthen their accountability and legitimacy.¹⁸⁷ As a result, these hybrid approaches to rule making have yielded stricter social and environmental standards. Moreover, the cases explored in the Latin American regional context confirm that the effects of their rules, if correctly implemented, may help to raise the voice of those who could be most directly affected by, or benefit from REDD+ implementation.

6. CONCLUSION

This article explored how the implementing rule-making processes developed by the REDD+ financing initiatives operate at the transnational level and examined the way in which they are changing the regulatory landscape for REDD+ implementation. It confirmed that fund-based hybrid approaches to REDD+ rule making result in the adoption of standards that are stricter in terms of environmental and governance expectations than those envisaged at the intergovernmental level. A challenge ahead, beyond their extensive incorporation into national laws and policies in developing countries, is ensuring that these standards are respected even after the funded projects are completed.

¹⁸⁷ Cf. Pauwelyn, Wessel & Wouters, n. 42 above, pp. 743, 748.