

Executive Summary

The FCPF's Carbon Fund became operational in 2011 as one of the first multilateral initiatives to support the "results based financing" stage of REDD+, providing payments for verified emissions reductions generated under REDD+ programs. As such, the Carbon Fund is influential in setting standards and precedents for the development of REDD+ at international and national levels. The Carbon Fund's Methodological Framework, adopted in December 2013, drew widespread criticisms from civil society for not requiring progress on securing equitable land tenure reform, and at the same time creating new property rights to carbon that could potentially impinge upon existing statutory and customarily held rights. Furthermore, despite widespread agreement on the importance of tenure to REDD+ "readiness," legal recognition of indigenous and community tenure is – in the aggregate – weaker in countries selected to participate in the Carbon Fund program development pipeline than in other developing countries, raising additional risks when project approval requirements do not necessarily include time-bound action plans to address tenure reform issues relevant to REDD+.

This analysis concludes that the FCPF CF general safeguard framework for the ERPs is mostly adequate on paper, being more robust in some respects than traditional WB carbon finance operations. Whether those standards are applied on the ground remains an open question, as well as whether Bank executed resources for the development of ER-PDs will be used to support preparation of realistic safeguard plans that will be implemented or will go inordinately towards other program requirements such as carbon accounting. Continuing revelations about the disarray of the safeguard system within the World Bank (on the management of involuntary resettlement for example) raises concerns that even high risk projects may not be handled adequately in countries where the current capacity to comply with WB standards is limited.

The MF provisions for dealing with land, forests and carbon rights specifically are inadequate for the types of risks the proposed ER Programs are likely to entail. These risks include potential negative impacts on the rights and livelihoods of indigenous people and forest communities and risks of ER revenue streams creating conflict, allowing elite capture or fostering corruption. Because land tenure issues are generally complicated in the majority of countries, where unclear and overlapping legal and customary claims to lands and forests have gone unresolved for many years, compounded by the fact the CF seeks to create a quantified emission reductions whose ownership is transferred, that are not covered by the existing legal frameworks in most countries—further rules and guidance are needed to protect the rights and interests of the most vulnerable—indigenous peoples and forest dwelling communities whose land and forest tenure is insecure.

The assumption that rights to carbon emissions reductions can be legally disentangled from the bundle of rights to lands forests and other natural resources underlying them should be questioned and alternative approaches to requiring legal transfer of title to these assets should be explored. This would allow more flexible packages of investments and results based payments to be assembled to implement national REDD+ strategies as transformative programs that are linked to long term predictable finance for climate and sustainable development which may include performance based payments for a variety of public goods (transparent forest governance, ecosystem services, biodiversity) including carbon.

This analysis concludes that the FCPF model, of creating a new asset class of ER's, raises a deeper issue of whether rights to carbon can in fact be disentangled from rights to the forest and land which generate, holds or absorbs it. Many CSO and IP organizations have argued, including in the discussions and negotiations around the MF, that selling off title to the carbon would necessarily impinge on the rights to

use and enjoy the underlying lands and forests, if for no other reason than selling an emission reduction implies that, at a minimum, some restrictions on use or provisions for sustainable management will be applied, potentially including that the trees will not be cut down for a very long period- 30 to 100 years to preserve environmental integrity, which thus create an encumbrance on the rights to land and forest. While this is not necessarily a bad thing (it can in fact be a good thing), the distribution of costs and benefits needs to be fairly and transparently negotiated and agreed. The other potential risk raised by this approach is the creation of a perverse incentive to nationalize the ownership of carbon, thus simplifying the ability of the government to demonstrate the legal authority to sell the ERs. Some countries, such as the DRC, have already taken this step.

If the right to carbon is legally de-linked from ownership of land and forests, this does provide more clarity for the transfer of title to those ERs to the CF, but raises equity concerns as it may undermine the rationale for equitably sharing benefits with local communities, may undermine progress towards legal recognition and titling of IP/LC land and forests, and also potentially undermines the ability of WB safeguards to require action plans to legally recognize community land and forest tenure.

Part one is a brief overview of the context of the FCPF Methodological Framework and its significance. Part two is an analysis of the framework and associated documents, rules and guidance. Part three presents conclusions and recommendations.

Annex One contains a general orientation to the FCPF safeguard framework, including a brief description of each of the frameworks and documents and where they fit in the CF business process and can be read first for those unfamiliar with this aspect of the FCPF. Annex Two contains a brief summary of the process to design the CF Methodological Framework.

Summary Recommendations on the Methodological Framework:

- Include more systematic coverage of gender issues in the criteria and indicators for social assessment including resource access and tenure security, participation, benefit sharing
- Inclusion of FPIC as the standard for IP and community participation in ER programs and benefit sharing agreements
- More specific consultation and participation requirements or good practice guidance for ERP development that include how FPIC and benefit sharing agreements are reached and documented
- Make clear that CF operations require clear land tenure to be sustainable, and require time bound action plans for legal recognition of IP and community rights to land and forest in ERP accounting areas
- Further guidance is needed on the linkages between land, forest and carbon tenure and how countries can establish a legal right to transfer ERs to the CF
- Strengthen requirements for more systematic linkages between planned governance reform measures under the national REDD strategy needed to address the primary drivers of deforestation and create an enabling environment for the ERP measures proposed
- The inclusion of non-market modalities, i.e. performance based payments not based on creation of a tradable carbon asset and not using carbon as the sole metric of performance

I. Introduction

International initiatives for Reducing Emissions from Deforestation and Degradation, and conserving, sustainably managing and enhancing forest carbon stocks (commonly known as REDD+) are intended to create financial incentives for countries, and stakeholders within them, to reduce carbon emissions from forest loss as a strategy to mitigate climate change. Parties to the UNFCCC agreed on text for REDD+ at the 2013 Warsaw Conference of Parties, and major donor initiatives – including the World Bank’s Forest Carbon Partnership Facility (FCPF), the UN-REDD program, and Norwegian bi-lateral funding – have provided support to countries for various stages of REDD+ program development.

Concerns regarding the impacts of REDD+ on the rights and livelihoods of indigenous peoples and local communities have been prominent from the outset of REDD+ discussions. Concerns have focused in particular on risks that REDD+ initiatives could lead to displacement of forest communities (especially in situations where their tenure is insecure), that programs will not address the real drivers of deforestation but rather unfairly blame and place undue restrictions on communities and their forest use activities, and that forest communities at the front lines of forest protection will not have access to benefits and incentives associated with REDD+. Increasing tenure security of indigenous peoples and local communities is widely recognized as essential to address these risks and provide a foundation for more effective REDD+ programs; however, this awareness has not yet translated into increased legal recognition of indigenous and community land rights on the ground.

The FCPF’s Carbon Fund became operational in 2011 as one of the first donor initiatives to support the “results based financing” stage of REDD+, providing payments for verified emissions reductions from REDD+ programs. As such, the Carbon Fund is influential in setting standards and precedents for the development of REDD+ at international and national levels. The Carbon Fund’s Methodological Framework, adopted in December 2013, drew widespread criticisms from civil society for not requiring progress on securing equitable land tenure reform, and at the same time creating new property rights to carbon that will likely impinge upon existing statutory and customarily held rights. Furthermore, despite widespread agreement on the importance of tenure to REDD+ “readiness,” legal recognition of indigenous and community tenure is – in the aggregate – weaker in countries selected to participate in the Carbon Fund project development pipeline than in other developing countries, and review requirements do not include time-bound action plans to address tenure reform issues relevant to REDD+.

In this context, the objective of this study is to assess both the Carbon Fund framework documents, as well as the country proposals (Emissions Reduction Project Idea Notes, or ER-PINs) that have been selected into the Carbon Fund pipeline, in terms of their potential impacts on the tenure rights and livelihoods of forest communities in those countries. The assessment are intended to produce findings and recommendations that can be used to inform both country advocacy on development of Emissions Reduction Project Documents (the next stage of proposal development), as well as direct engagement with the FCPF Carbon Fund in its review of country proposals. While revisions to the Methodological Framework are not anticipated in the timeframe of this work, this paper will aim to promote increased attention to indigenous and community rights in how it is interpreted and applied.

The significance of the Carbon Fund MF extends beyond the six to eight emission reduction programs that will likely be funded by the FCPF—as the first set of methodological guidance for international performance based payments under REDD+, it represents both an attempt to give flesh to the bones created by the principles embodied in the Cancun Accord, and is likely to set precedents for both bilateral

donor performance based deals, and potentially for any system emerging from the UNFCCC negotiations, including a REDD+ window at the Green Climate Fund. The fact that the Carbon Fund Participants have now extended the CF beyond its charter mandated 2020 “sunset” to 2025, and other international REDD+ initiatives, notably the Forest Investment Program under the Climate Investment Fund, are also expanding the number of participating countries, also indicates that the FCPF CF, the CIF’s and other multilateral REDD initiatives such as UNREDD, may become part of the “permanent” climate finance architecture, rather than serving as interim readiness vehicles as originally planned, potentially undermining the role of the GCF, and the governance of the convention.

Box on CF Contributors (as of 10/14)

Entity	Tranche	Amount (US\$ million)
Australia	A	18.4
BP Technology Ventures	A	5
Canada	B	5
European Commission	B	6.7
France*	B	5
Germany	B	131.4
Norway	B	171.3
Switzerland	B	10.8
The Nature Conservancy	A	5
United Kingdom	B	90.8
United States	A	14
Total funds		468.4

A=unrestricted tranche, b=restricted

*France bought out the CDC Climat share in the CF in late 2014

II. Analysis of CF framework to protect Indigenous Peoples and local community rights to land and forests

This analysis will cover a range of programmatic issues that have most often been raised by civil society groups as potential problems in the FCPF approach to social and environmental safeguards, with a particular focus on rights to land and forest which is one of the chief concerns around the Carbon Fund. The exclusion of issues around the setting of reference levels and development of systems for monitoring reporting and verification does not mean these issues are any less important, or that they don’t have profound implications for the environment and climate change mitigation. One of the ongoing criticisms of the CF however has been however that through its assumptions and approach, it is incentivizing a misguided focus on carbon and over-investment in technical systems to monitor and report on carbon at the expense of missing opportunities to advance no-regrets activities which could slow deforestation, protect biodiversity and improve the livelihoods of forest dependent communities in the short term, such as investments in land titling, community forestry and local governance strengthening.

Full and effective participation

In the CF guidance around stakeholder engagement, consultation and participation there is a reliance on processes to be initiated or strengthened during the readiness phase—the consultation and participation plan in the R-PP, the SESA process, all of which were supposed to have produced ongoing multi-stakeholder dialogues to develop and refine a national REDD+ strategy. The extent to which this has been true obviously varies from country to country, but ongoing critical feedback from civil society and indigenous peoples organizations often speak of rushed information sharing more than real consultation, short periods to give feedback on highly technical documents often not even in the national language, processes concentrated in capital cities, and ongoing capacity constraints for the involvement of sub-national stakeholders outside of the capital, whether those be local elected officials, communities or NGOs. In terms of execution of the SESAs, there has been considerable delay in many countries, with only the DRC and Nepal having publically posted final SESA reports by mid-2015.¹ The process to develop the ER-PINs themselves was again often marked by relatively small circles of discussion and consultation and a more prominent role for international NGOs rather than national civil society, mirroring the weaknesses around the elaboration of the R-PPs some years before. The extent to which ongoing multi-stakeholder bodies have effectively participated in preparation of the ER-PINs is not well documented and has likely not been as inclusive as hoped. Many countries are also experiencing sequencing issues carrying out different aspects of the readiness work, which can diminish their impact and usefulness.

The Guiding Principles for the MF agreed to by the FCPF Participants Committee has a specific criterion on stakeholder engagement: “The design and implementation of ER Programs is based on and utilizes transparent stakeholder information sharing and consultation mechanisms that ensure broad community support and the full and effective participation of relevant stakeholders.” This specificity dropped out of the MF criteria on safeguards however, and there is only a general requirement (Criteria 24) to meet WB safeguard policies and promote and support the Cancun safeguards. WB safeguard policies require consultation with relevant non-governmental organizations and affected communities, and broad community support for indigenous peoples. Community participation in monitoring (criteria 16.1) is encouraged, but not required. In reference to the design of benefit sharing plans, the MF Criteria 31 states:

“The benefit sharing arrangements are designed in a consultative, transparent, and participatory manner appropriate to the country context. This process is informed by and builds upon the national readiness process, including the SESA, and taking into account existing benefit-sharing arrangements, where appropriate.”²

This criterion is somewhat further elaborated by indicator 31.1, which adds that benefit sharing arrangements “reflects inputs by relevant stakeholders, including broad community support by affected Indigenous Peoples.”

One of the widely recognized foundations for effective participation is access to information, which while not treated separately in the MF, is mentioned in several places, and the CF Information Disclosure Guidance also covers fairly systematically. In the MF, transparent processes are required around additional assessment of land and natural resources (indicator 28.1) elaboration of the benefit sharing mechanism (indicator 31.1), as mentioned above, around the implementation of the benefit sharing mechanism (indicator 32.1), where there is a requirement to provide publically available information on

¹ All eleven countries in the CF pipeline have started their SESAs, some as early as 2010-11, however only Mexico, RoC and Indonesia have posted terms of reference for this work.

² MF, p.25

implementation in the form of annexes to the periodic (likely two) monitoring reports during the course of the ERPA. The CF Information Disclosure Guidance also requires, in line with WB policy, that final safeguard plans are disclosed in a form and language understandable to communities affected by the project, and specifies that this must occur at least 30 to 60 days before ERPA signing, depending on whether a project is classified with a WB risk rating of “B” or “A”, respectively. There is however an exception if the plans are not ready, in which case advanced drafts must be disclosed, and final plans become conditions of effectiveness for the ERPA. Benefit sharing plans are not included in this one or two month prior to ERPA signing rule, the disclosure guidance saying only that drafts are disclosed when appraisal begins, which is also the case for draft safeguard plans. When appraisal actually starts is not always entirely clear, but would generally start once an ER-PD is being prepared and would be known by stakeholders outside the World Bank when appraisal stage Public Information Documents (PID) and Integrated Safeguard Data Sheets (ISDS) are published to the WB website.³

With respect to the ER-PD’s, the requirement is for public disclosure only three weeks before they are considered at a CF meeting, leaving little time for analysis by national and international stakeholders. Rules changes in 2014 would indicate that draft versions of the ER-PDs are likely to circulate publically on the FCPF website and be reviewed by CF Participants and Technical Advisory Panels before the final documents are submitted to the WB for approval. The WB appraisal of the ER-PD, called a Carbon Finance Assessment Memorandum (CFAM) and the FMT’s “safeguard issues note” is also required to be disclosed before ERPA signing, but a specific amount of lead time is not defined. Other WB documents, such as the concept stage Public Information Document and Integrated Safeguard Data Sheets are disclosed much earlier in the process, but contain only very general information. For the ERPA’s themselves, there is a presumption of disclosure, but either party is allowed to request confidentiality, in which case they would not be disclosed, but a rationale for non-disclosure would need to be made public. The WB has never disclosed ERPAs from its many carbon funds, citing business confidentiality, and the agreement to disclose ERPAs under the CF, a key demand of civil society and indigenous people’s advocacy, was hard won, and also responded to the objective of the FCPF to generate learning and no real need for business confidentiality in the absence of a broader market for ER’s.

In terms of gender inclusion, a key aspect of full and effective participation, the MF has gender specific language in only two places: Indicator 30.1 requires that benefit sharing systems be gender inclusive and indicator 34.1 requires that priority non-carbon benefits also be gender inclusive. The gender specific language in Readiness Fund documents, including the R-PP template, stakeholder engagement guidelines and the SESA/ESMF guidance is more extensive, but the inclusion of specific requirements around women is a weak point for the MF.⁴

Finally, as noted above, free prior informed consent is not the standard in the MF for indigenous peoples or forest communities, despite its being widely recognized as international best practice and despite the UNREDD program having developed over a two year period a widely consulted set of FPIC Guidelines specifically for the REDD+ context. The Guiding Principles, approved by the Readiness Fund’s governance body, do include a proviso that acknowledges this difference and commits the World Bank to supporting country implementation of FPIC where the country has decided to do so.⁵ Given that the majority of

³ See presentation World Bank Due Diligence Process from CF5:
https://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/5a%20World%20Bank%20Due%20Diligence%20Process_CF5_Final.pdf

⁴ For a fuller treatment of gender issues at the FCPF see: Amerasinghe, N.; *Advancing Women’s Tenure Rights in REDD+*, forthcoming

⁵ The rationale for Element 4 of the guiding principles (p.8) states: Although the World Bank policy does not expressly refer to “free, prior and informed consent (FPIC)” per se, if the country has ratified ILO Convention No.169 and adopted national legislation on FPIC, or if the Bank is

countries in the CF pipeline have committed to the application of FPIC for REDD+, it is safe to assume that there will be a series of pilot experiences of FPIC in the design of the ER Programs that will undoubtedly generate important lessons. The differences in practice between the application of a broad community support and an FPIC standard are not well known, the WB insists that they are generally consistent. The pilot experiences applying FPIC for REDD under the UNREDD program received mixed reviews. In both cases agreement of the affected peoples is required to proceed with the project, but a key difference is who determines whether that agreement has been reached—with BCS that is usually a social specialist at the WB, with FPIC it would have to be indigenous or community authorities themselves.

Rights to forest and land

The rights to natural resources including forest and land are supposed to be protected through assessment of these issues during the readiness phase, and analytical and planning work conducted under the SESA, and then through specific social safeguard instruments such as an Indigenous Peoples Plan or Planning Framework, and a Resettlement Plan, Policy Framework or Process Framework or a Social and Environmental Management Framework. These safeguard instruments are developed specifically for World Bank projects, in this case the Carbon Fund Emission Reduction Programs, which is one of their weaknesses in practice—the same policies, measures and mechanisms are not necessarily established in national law, policy and/or administrative regulations or procedure, making their effective application often challenging in terms of government capacity and compliance on the ground uneven. This is something that may well change with the new WB social and environmental standards, which posit a much greater reliance on borrower country systems where feasible.

The carefully worded rationale of section 5.1 of the methodological framework, on drivers and land and resource use assessments, states the following:

Land tenure and resource rights are complex in REDD+ country settings, and efforts to address them are being explored by a range of REDD+ initiatives. Information on land tenure and resource rights can help inform sound ER Program design, as it may help identify affected rights-holders in the Accounting Area, can guide the targeted design of ER Program Measures, can contribute to efforts to draft equitable Benefit-Sharing Plans, and can demonstrate the ER Program Entity's ability to transfer Title to ERs. Beyond what is required to implement an ER Program, the ER Program potentially may contribute to progress towards clarifying land and resource tenure in the Accounting Area.

While not coming from a rights perspective, the rationale above accurately identifies many of the reasons why clarity on land and forest tenure is needed for successful ER Programs. The formulation of “may contribute to progress” was an attempt to find a compromise between recognizing the historic demands of indigenous peoples to their lands and territories, developing countries who did not want more conditionality associated with the ER Programs, and donors focused on carbon who did not want to “over burden” REDD+ with too many “other issues”. The rationale begs the question then, what is required to implement an ER Program?

working on an ER Program with a development partner that expressly applies the principle of FPIC, the Bank should in turn require the application to the ER Program of ILO Convention 169 in that country, or should agree to the development partner's application of its provisions pertaining to FPIC in that country or for that ER Program.

The MF goes on to require, in Criterion 28, that the ER Program make publically available an assessment of land and resource rights in the area. Indicator 28.1 states that the ER Program must review the information available in the SESA, and if this is not sufficient, undertake additional assessments of any issues that are related to successful program implementation, and includes a list specifying the following:

- i. The range of land and resource tenure rights (including legal and customary rights of use, access, management, ownership, exclusion, etc.) and categories of rights-holders present in the Accounting Area (including Indigenous Peoples and other relevant communities);
- ii. The legal status of such rights, and any significant ambiguities or gaps in the applicable legal framework, including as pertains to the rights under customary law;
- iii. Areas within the Accounting Area that are subject to significant conflicts or disputes related to contested or competing claims or rights, and if critical to the successful implementation of the ER Program, how such conflicts or disputes have been or are proposed to be addressed; and
- iv. Any potential impacts of the ER Program on existing land and resource tenure in the Accounting Area.⁶

This list, and the language indicating that these issues are required for successful program implementation, gives them the status of requirements. Indicator 28.1 goes on to say that, as noted above, the “ER Program demonstrates that the additional assessment has been conducted in a consultative, transparent and participatory manner, reflecting inputs from relevant stakeholders.”⁷ This further requires that stakeholders (and rights-holders) in the ER-Program area were aware of the assessment, had opportunity to participate in it, and that the information and concerns they provided were taken into account. This was added to guard against superficial box-ticking studies with no involvement of the people affected.

The next indicator in this section (28.2) requires that program proponents explain how this information was taken into account in the design of the ER Program and/or the safeguards and/or benefit-sharing plans. Here an additional element is also included:

If the ER Program involves activities that are contingent on establishing legally recognized rights to lands and territories that Indigenous Peoples have traditionally owned or customarily used or occupied, the relevant Safeguards Plan sets forth an action plan for the legal recognition of such ownership, occupation, or usage.

This component of the indicator stops short of requiring across the board time bound action plans for the legal recognition of IP land rights, but goes on to repeat the encouragement to contribute to progress in clarifying land and resource tenure. The question then becomes which activities are contingent on establishing legally recognized rights? The World Bank’s Policy on Indigenous Peoples (OP and BP 4.10) is not clear on this, as this was the source of the language on “contingent on establishing legal rights” (paragraph 17, under Special Considerations), but there is no definition of which projects or activities are contingent on establishing legal rights, although land titling projects are mentioned as an example. The policy was drafted in 2005, before rights to carbon had become an international issue, but we can infer that, at least, any ER Program that involves some activities around land tenure mapping, titling or demarcation in areas where indigenous peoples are present would require a time bound action plan to formally recognize their legal rights to land and forests.

⁶ MF, p. 23

⁷ Ibid

The last indicator in this section (28.3) requires a description of how the information in this assessment is linked to the ability of the program proponent to transfer title to ER, an issue that will be discussed further below.

Assignment and Transfer of Rights to Carbon

Rights to carbon, or more specifically in this case, rights to the potential revenue stream from the sale of verified emission reductions, is still an issue that is difficult for many stakeholders to understand, as the sale of carbon emission reductions is not a tangible asset, is not defined in most country's legal frameworks, and is also clearly a public good, hence the global interest in it for climate change mitigation purposes. The World Bank's approach to carbon rights has been an insistence, from the beginning, that ER's are in fact a distinct asset, and that the rights to title over them could be disentangled from the notoriously complex bundles of rights to land, forests and other natural resources in and around forested lands. This seems more plausible in the context of the WB's Kyoto era carbon funds, which were all project based, and few of which were in the forest sector, but much more of an unwarranted assumption when funding the implementation of national REDD+ strategies. Whether this proves true remains to be seen, but in practice at the CF, carbon rights have been treated as distinct from rights to land and forests. Hence when the MF or ERPA GC speaks of title to emission reductions, they are not referring to who owns the land or trees that generate or absorb the carbon. Title to emission reductions is thus dealt with separately in the MF from other aspects of land and forest tenure, in the section six on ER Program transactions.

For the ERPA to function as a model of results based finance for REDD+, the country or program proponent has to not only demonstrate that they are reducing deforestation or forest degradation, or increasing forest carbon stocks, within the accounting area, it needs to also transfer those verified ERs or credits, to the World Bank on behalf of the public and private sector donors and investors in the CF. It is this transfer (the purchase/sale) of REDD+ credits, that opens a potential Pandora's box for the CF because it is unclear how this can be done fairly and sustainably if there are unresolved competing claims and legal uncertainty around land and forest tenure in the area generating the emission reductions.

The relevant requirements in the MF are covered by one criterion (36) and three indicators. Criterion 36 says that the ER Program proponent must demonstrate that it has the legal right to transfer title to the ERs to the Carbon Fund. Indicator 36.1 specifies that this can be done through reference to a law or regulation, or in lieu of that, through a letter from a relevant government agency, this latter a demonstrably weak foundation for the carbon asset. Indicator 36.2 says that it must do this "while respecting the land and resource tenure rights of the potential rights-holders, including Indigenous Peoples (i.e., those holding legal and customary rights, as identified by the assessment conducted under Criterion 28), in the Accounting Area."⁸ Indicator 36.2 goes on to say that demonstrating authority to transfer title can also be done with reference to sub-arrangements or benefit sharing agreements with rights-holders in the area. The logic underpinning the inclusion of sub-arrangements⁹ and benefit sharing agreements here is that if the country has not yet defined the rights to carbon in the national legal framework, they could make ER-Program specific agreements with parties in the accounting area to cede

⁸ MF, p.26

⁹ Sub arrangements are defined as: "any agreements, contracts, or other arrangements between the ER Program Entity and one or more relevant potential rights-holder(s)", footnote, p.25

their current and/or future rights to carbon in return for specific benefits defined in a contract or the actual benefit sharing mechanism of the ER Program.

While this approach may hold out some opportunities to deal with the issue equitably, it also carries its own risks, as it is unclear, especially in Africa, that there is enough of a level playing field in terms of access to information and power dynamics between local communities and the government for such sub-arrangements to be fair, and to be based on an effective process of free prior informed consent. Most poor communities, when asked if they wish to obtain a benefit, any benefit, will say yes, especially if the risks to saying yes, or the understanding of what they may be exchanging the benefits for, is not very clear or has been downplayed by the authorities. This is likely even more true of an asset like carbon, which is invisible and when understood at all, is often conceived of by local communities as a freely available public good—“air”. It could also be that saying “no” carries with it risks of exclusion, marginalization or even repression.

The deeper issue here is whether rights to carbon can in fact be disentangled from rights to the forest and land which generate, holds or absorbs it. Many CSO and IP organizations have argued, including in the discussions and negotiations around the MF, that selling off title to the carbon would necessarily impinge on the rights to use and enjoy the underlying lands and forests, if for no other reason than selling an emission reduction implies that the trees will not be cut down for a very long period- 30 to 100 years to preserve environmental integrity, which thus create an encumbrance on the rights to land and forest. The other potential risk raised by this approach is the creation of a perverse incentive to nationalize the ownership of carbon, thus simplifying the ability of the government to demonstrate the legal authority to sell the ERs. Some countries, such as the DRC, have already taken this step. If the right to carbon is legally de-linked from ownership of land and forests, this does provide more clarity, but raises equity concerns as it may undermine the rationale for equitably sharing benefits with local communities, may undermine progress towards legal recognition and titling of IP/LC land and forests, and also potentially undermines the ability of WB safeguards to require action plans to legally recognize community land and forest tenure.

The last indicator under criterion 36 states:

The ER Program Entity demonstrates its ability to transfer Title to ERs prior to ERPA signature, or at the latest, at the time of transfer of ERs to the Carbon Fund. If this ability to transfer Title to ERs is still unclear or contested at the time of transfer of ERs, an amount of ERs proportional to the Accounting Area where title is unclear or contested shall not be sold or transferred to the Carbon Fund.

This is problematic for two reasons. First, it allows ER Program proponents to postpone achieving clarity on the issue of title to ERs until after the first verification (when ERs would need to be transferred to the CF), which is likely at least two years into the execution of the program. This could delay the finalization of benefit sharing agreements, or the design of ER Program measures, until after approval of a project and signing of an ERPA, making it much less likely that significant changes in design could be effected. Secondly, by allowing the ER Program proponent to simply remove a contested area from the accounting area it creates a disincentive to solve the underlying tenure issues, creates a potential perverse incentive that would allow governments to threaten communities with removal from program benefits if they don't sign away their rights to carbon, and creates a “swiss cheese effect” in the accounting area, undermining environmental integrity as those areas would no longer be subject to monitoring for reversals and leakage, reporting on safeguards or benefit sharing.

Right to equitable benefit sharing (and inclusion in management)

Given that equitable benefit sharing within performance based payments for REDD+ is one of the core objectives of the FCPF, this issue received some attention during the formulation of the MF, and section 5.2 is devoted to this subject. Criterion 29 just requires a description of the benefit sharing mechanism in the ER Program document, to the extent known at the time; while Criterion 30 goes on to lay out some requirements for the information provided. These include the categories of eligible beneficiaries, the types and scale of benefits they can receive, the criteria, processes and timelines for distributing benefits, and the monitoring arrangements for the mechanism. Criterion 30 further specifies that:

“The identification of such potential Beneficiaries takes into account emission reduction strategies to effectively address drivers of net emissions, anticipated implementers and geographical distribution of those strategies, land and resource tenure rights (including legal and customary rights of use, access, management, ownership, etc. identified in the assessments carried out under Criterion 28), and Title to ERs, among other considerations.”¹⁰

This is important as it links benefit distribution to both activities to address the drivers, and land and resource tenure in the accounting area. The benefit sharing section goes on to require a transparent, participatory process to elaborate the system (Criterion 31) and reporting on its implementation (Criterion 32). The final criterion of the section (33) requires that the benefit sharing system be aligned with both the national legal context and the country’s international obligations. This later point is important for countries that have, for example, signed ILO Convention 169 or the Convention on Biological Diversity, both of which have references to equitable benefit sharing.¹¹

A few additional points are worth mentioning. Indicator 31.1 requires that the design of the benefit sharing plan have the broad community support of indigenous peoples and indicator 30.1 requires that at least an advanced draft of the plan be disclosed in a form and language understandable to communities before ERPA signing. This inclusion of the final benefit sharing plan as one of the documents which could be delayed until after ERPA signing was done in response to developing country concerns that it would be difficult, and unreasonably raise expectations of communities, to sign benefit sharing agreements with specific individuals or communities before an actual deal was reached with the Carbon Fund. So the presumption then is that the system is designed in conjunction with potential beneficiaries, but actual signed agreements for benefit sharing arrangements might not be agreed to until the ER Program is actually approved and funded. If the final benefit sharing plans are not disclosed before ERPA signing, they become a condition of effectiveness for the ERPA, meaning that the purchase/sale provisions can’t be executed (i.e. no monies can be transferred) until the final plan is submitted.¹²

The use of benefit sharing plans is not new for the World Bank, but they are not routinely disclosed nor well documented¹³, so it is difficult to establish whether their use has been either fair or effective in distributing carbon finance revenues. While there are serious concerns about the fairness of past and current models for distributing logging concession revenues to communities (“social agreements”) in central Africa for example, the payments for environmental service schemes in Mexico and Costa Rica,

¹⁰ MF, p.23

¹¹ See for example CBD Article 1, ILO 169 Articles 2 and 15

¹² Pending confirmation from FMT whether this includes advance payments

¹³ A search for benefit sharing agreements in the WB project data base for example was unable to find any examples, and multiple access to information requests for B/S plans for carbon finance projects were denied.

which have been widely studied, are generally well received by communities. Whether such payments can be made on a sustained basis, and whether they can incentivize additional significant changes in behavior with respect to deforestation or forest degradation will be one of the central tests for REDD+.

Safeguards framework: FCPF framework for the protection of the rights of IP/LC

Two additional aspects of the safeguard framework that were not discussed above can be further explored here: non carbon benefits and the accountability requirements for programs financed by the CF. In terms of non-carbon benefits, the MF states that they should be integral to all ER Programs (Criterion 34) approved for financing, and this is also reflected in the selection criteria for admission to the CF pipeline. The PC guiding principles for the MF take a broad view of non-carbon benefits, stating: “The ER Program contributes to broader sustainable development. This could include, but is not limited to, improving local livelihoods, building transparent and effective forest governance structures, making progress on securing land tenure and enhancing or maintaining biodiversity and/or other ecosystem services.”

The MF notes that non-carbon benefits should also be generated by application of the safeguards plans, but then goes on to require that additional non-carbon benefits should be part of the expected results of an ER Program, and requires that program proponents, in conjunction with stakeholders, identify priority non-carbon benefits that will be reported on, as feasible, as part of the program monitoring. There was considerable discussion around this issue during the design of the MF, and resistance on the part of developing countries to additional burdensome reporting requirements, hence the “as feasible” clause which would allow this requirement to be waived with reasonable justification. The concept of priority non-carbon benefits emerged as a compromise, given that a wide range of possible co-benefits might be generated by ER Programs, but monitoring systems for issues like biodiversity and ecosystem services are still relatively undeveloped in many countries. By requiring that priority non carbon benefits be reported on (as feasible), and that stakeholder engagement processes inform that prioritization, it is possible that issues of most concern to stakeholders, such as land tenure, livelihoods or aspects of forest governance, be selected and included for monitoring during the implementation of the ER Program. Whether this comes to pass will depend in part on the quality of stakeholder engagement in ER Program design, whether stakeholders are aware of this requirement in the MF and the willingness of government to include issues which are more politically sensitive in monitoring plans. Indicator 35.1 also specifically allows the use of proxy indicators to measure them, adding increased flexibility for countries trying to report on these benefits.

Lastly, the accountability requirements of the MF are an important and integral part of the safeguards framework for ER Programs. Building on the requirement that countries should establish a feedback and grievance redress mechanism (FGRM) during the REDD readiness phase, the MF requires in Criterion 26 that that mechanism be operable before ER Program design starts, and that it have the capacity to respond to questions, complaints or grievances during ER Program implementation. Indicator 26.1 requires that an assessment of the new or existing FGRM be made public (this is a requirement from the readiness phase, where each R-PP implementation grant was provided an additional \$200k to assess existing mechanisms and support design or strengthening for their operation), and further specifies aspects of quality for that FGRM:

Legitimacy, accessibility, predictability, fairness, rights compatibility, transparency, and capability to address a range of grievances, including those related to benefit-sharing arrangements for the ER Program; and Access to adequate expertise and resources for the operation of the FGRM.

The next indicator (26.2) requires that the information provided about the FGRM include “the process to be followed to receive, screen, address, monitor, and report feedback on, grievances or concerns submitted by affected stakeholders”, while the final indicator (26.3) requires that a plan be developed to improve the function of the mechanism if so indicated by the assessment. It is important to note that the FGRM is required to have the capacity to operate at the local, sub-national and national levels, and that the existence of program level grievance mechanisms does not hinder the ability of aggrieved parties from taking a complaint to the World Bank’s Inspection Panel, which also has jurisdiction over all FCPF financed operations.

One additional outstanding safeguard concern is whether the FMT will produce and publically disclose (and when) a “Safeguards Issue Memo” in relation to each ER-PD. Because safeguard implementation support and compliance monitoring is shared between the FMT and WB task teams working under the Environment General Practice (through work-sharing agreements), both teams have some responsibility for identifying issues during preparation and helping countries take the needed steps to comply with WB operational policies, and both teams have input for the concept review and quality control meetings during preparation and appraisal of the ER Program. This document was mentioned in CF presentations in 2013, but has dropped out of subsequent discussion of the CF business process. Such a synthetic identification of key issues from readiness that will carry over to design of the ER Programs makes sense, probably early in the preparation process, as it is the FMT who are more frequently in touch with a wide range of REDD+ stakeholders than most task team leaders. The safeguard issues memo can perhaps be a draft of the issues to be included in the ISDS for concept review, after a LOI is signed.

Pricing and budget considerations

Another of the overriding civil society concerns as the CF programs get designed is whether the funding available for each program is sufficient to leverage the broader national governance strengthening that is needed for ER programs to succeed. This has become especially urgent since 2014 when CF donors expressed that their “willingness to pay” was about \$5/ton for carbon, a price below the going rate in the voluntary carbon markets and well below the likely implementation costs of entities implementing the ER activities¹⁴. There is fear that this will again create a perverse incentive where the more expensive and time consuming activities of “readiness”, many of them no-regrets governance reforms, will be skipped in favor of the lowest cost measures available to produce carbon results, and investments in the technical monitoring systems to ensure that results are captured and paid for. There is a further fear that the lowest cost measures available may target poor, marginalized indigenous and non-indigenous forest communities, whose shifting cultivation and use of timber and non-timber products in forests is often mistakenly blamed for deforestation and forest degradation, raising the specter of potentially serious abuses of human rights.

The development of a pricing approach for the CF is another charter mandated area that the PC was charged with providing overarching guidance on. The working group that developed the recommendations for the MF also developed guiding principles for this pricing approach. These included four elements: 1) Fairness, flexibility and simplicity; 2) Price structure; 3) Informed negotiation and 4) Non-carbon benefits. For the purposes here, three points are most relevant: the idea of flexibility and fairness were linked and informed both elements one and two; that it was recommended that space be left in the price negotiations for non-carbon benefits to be taken into account and the bigger picture question of

¹⁴ See the RRI assessments of the ER-PINs for more details on estimated implementing costs

how the cost of implementing the quality ER Programs that address both drivers and governance would be financed, given that the CF was paying for ex-post results and only for carbon.

Element one says simply that “Pricing should be fair and flexible, be kept as simple as possible, and protect both parties from extreme price fluctuations.” The notion of price fluctuations for REDD+ credits was based on the idea that an international regulatory framework for REDD+ crediting may emerge from the UNFCCC negotiations, along with a global market for their re-sale and/or use for compliance purposes, both of which are looking increasingly unlikely these days. Element two goes on to suggest that the final price for ERs should be a combination of a fixed and floating price where feasible. The fixed portion allows the seller to rely on a minimum amount of income, while the fixed portion would allow buyers and sellers to share risks and benefits from the price going up or down, and there was mention of specific mechanisms to accomplish this (setting upper and lower limits for example).

It was later decided however that there was not enough of a market reference to be able to establish a floating portion, as apart from the voluntary forest carbon market which is small and project based, there is no market similar to that being piloted by FCPF CF. This was based on both the State of the Carbon Markets reports and additional FMT analysis of pricing in WB carbon funds and other schemes. The FMT further developed a number of possible options for the pricing approach, including a more rigorous assessment of the total cost of implementing the ER Programs (an idea suggested and supported by CSOs), all of which were rejected by CF participants however and any rules or guidance on both pricing and financial planning was subsequently dropped from the MF. This was reflected in decisions made in March 2013 (CF6): “Cost analysis and financial viability as a basis for price negotiation: CFPs agreed with the need for costs and financial viability analysis to be done by the Sellers to assess their willingness to receive payments, but considered that these parameters should not be the only ones informing price negotiation.”¹⁵

With respect to non-carbon benefits and pricing, which was one of the most difficult and contentious issues for the Working Group to agree on, the PC Guiding Principles, in Pricing Element 4 states: “The ERPA price negotiation process offers an opportunity for non-carbon benefits to be taken into consideration, although there would be no systematic quantification of non-carbon benefits for pricing under the Carbon Fund.” The decision to have no systematic quantification stems from the difficulty in both establishing accurate valuation for things like ecosystem services, biodiversity, or transparent and effective forest governance and also the difficulty of measuring changes in them, and methods used by other WB CFs, such as adding a fixed amount to the price (fifty cents or a dollar per ton) for community livelihoods or biodiversity was not deemed in keeping with the (mostly donor driven) focus on carbon as the metric for REDD+.

On the other side, it was important to a number of developing countries representatives and to civil society and indigenous peoples observers to have the delivery of additional non-carbon benefits be able to influence the price— while a ton of carbon is a ton of carbon, all REDD results (or REDD credits) are not necessarily equal, hence the compromise that allowed inclusion of NCBs on a case by case basis.

At CF6 in early 2013 CF Participants decided that “A strategic view for the treatment of non-carbon benefits is needed but CFPs felt that such a strategic view should not be reflected in the pricing approach.

¹⁵ CF6 Chair Summary, p.4, emphasis added

Non-carbon benefits would be negotiated on a case by case basis.”¹⁶ Henceforth pricing issues were removed from the MF discussions and dealt with separately.

III. Conclusions and recommendations

The final section of the paper will make some reflections on the analysis above, primarily with a view to informing the development of ER Programs in countries already in the CF pipeline, but taking into account the changing international framework for REDD+ under the UNFCCC and the potential for the Carbon Fund to modify its rules and guidance going forward in response to learning from this first phase of program development.

Conclusions

The FCPF CF general safeguard framework for the ERPs is mostly adequate on paper, being more robust in some respects than traditional WB and CFU operations. Whether those standards are applied on the ground remains an open question, as well as whether bank executed resources for the development of ER-PDs will be used to support safeguard issues or will go inordinately towards RL, MRV and carbon accounting work.

The framework for dealing with land, forests and carbon rights specifically is inadequate for the types of risks the proposed ER Programs are likely to entail. Because land tenure issues are generally complicated in the majority of countries, where unclear and overlapping legal and customary claims to lands and forests have gone unresolved for many years, compounded by the fact the CF seeks to create a new class of tradable, fungible assets—emission reductions, that are not covered by the existing legal frameworks in most countries—further rules and guidance are needed to protect the rights and interests of the most vulnerable—indigenous peoples and forest dwelling communities whose land and forest tenure is insecure.

In thinking through how to approach additional rules and guidance on this issue, the assumption that rights to carbon emissions reductions can be legally disentangled from the bundle of rights to lands forests and other natural resources underlying them should be questioned and alternative approaches to requiring legal transfer of title to these assets should be explored. This could include simply paying for performance, without the transfer of emission reductions, as, for example, the Government of Norway has done with their bilateral REDD+ deals.

Implementation of adequate country systems for transparency, consultation and participation, gender inclusion, free prior, informed consent, environmental management, benefit sharing and grievance redress that are the aims of the safeguard plans associated with each ER program is much more challenging than designing paper plans to do so. Implementation support, supervision, participatory monitoring and third party evaluation are more important to successful programs than changes to the legal rules on paper.

Recommendations

¹⁶ CF6 Chair Summary, p.5

The areas that require some strengthening in the safeguard framework of the CF include:

- Ensure resources and plan for piloting of FPIC in ER Program design and implementation in several REDD+ countries and ensure that documentation exists for real time evaluation, learning and dissemination of best practice
- Ensure resources and plan for piloting the use of benefit sharing agreements for REDD and ensure that documentation exists for real time evaluation, learning and dissemination of best practice
- Enhance budgets for national governments and implementing agencies implementing safeguards as well as expand implementation support, including through better donor coordination
- Expand support to civil society and indigenous peoples organizations for capacity building, information dissemination and participation in ER design and national REDD processes (the current FCPF Capacity Building Program is not functioning)
- Utilize proposed ERP inclusion of participatory monitoring to foster expanded south-south learning with all stakeholders for rapid learning and dissemination of best practice
- Revise the CF Process Guidelines to accurately reflect the internal steps of World Bank concept review, due diligence and appraisal so these are more transparent
- Include the elaboration and public dissemination of an FMT Safeguards Issues Memo in the Process guidelines and the CF Disclosure Guidance
- Consider opening the MF to a periodic review in late 2015 or early 2016 to consider incorporating changes based on: 1) revised WB safeguard policies, 2) lessons learned through early ERP development on both the carbon accounting and programmatic issues, 3) the FCPF external evaluation and 4) the outcomes of the UNFCCC negotiations
- In terms of revisions to the MF, additionally consider the following:
 - More systematic coverage of gender issues, including gender analysis in land and forest tenure assessments
 - More systematic coverage of consultation and participation requirements for ERP development such as minimal or suggested standards for ERP consultations
 - Inclusion of FPIC as the standard for IP participation in ER programs and benefit sharing agreements
 - Require time bound action plans for legal recognition of IP and community rights to land and forest in ERP accounting areas
 - Further guidance on the linkages between land, forest and carbon tenure and how countries can establish a legal right to transfer ERs to the CF
 - Strengthen requirements for more systematic linkages between planned governance reform measures under the national REDD+ strategy needed to address the primary drivers of deforestation and the ERP measures proposed for funding, for example by assessing consistency with the REDD strategy and assessment of governance related drivers
 - The inclusion of non-market modalities, i.e. performance based payments not based on creation of a tradable carbon asset and not using carbon as the sole metric of performance
- If extending the operational life of the CF, consider how CF rules and procedures can relate to the UNFCCC framework, including a possible REDD+ window in the GCF and take steps to link the extension of the life of the CF to transferring knowledge and practices to the GCF
- Reconsider whether it is transparent and inclusive to review ER PDs virtually and whether it is prudent to review draft ER PDs before countries have had their R-Packages endorsed (in violation of the Charter).
- Ensure that ER PD reviews have clear indicators (such as those in the R-Package Assessment Framework) to assess to what degree proposed program builds on and advances REDD readiness..

- Increase coordination among WB social and environmental safeguard specialists working on ERP development, both within and across regions, to ensure timely sharing of best practice, lessons and obstacles.

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Annex 1: General Orientation to the FCPF safeguards framework

There are a significant number of documents in addition to the MF that define and affect the approach to applying social and environmental safeguards for Carbon Fund financed operations; a brief overview of these is useful to understanding both the underpinnings of the MF and its operational context. In the main body of this paper the salient features of these instruments with respect to the issues of concern is discussed in more detail.

The FCPF Charter

The founding document of the FCPF is its Charter, which was approved in 2008 and defines the purpose, structure and rules of both the readiness and carbon funds. In signing their participation agreements and thus joining the FCPF, countries agree to abide by the rules of the Charter. The Charter has been amended from time to time, which can only be done with unanimous approval of all members. For the purposes here, it is important to note three things: 1) World Bank operational policies, including their safeguards, apply to all FCPF projects, this also means that the World Bank's accountability mechanism, the inspection panel, has oversight of all FCPF financed activities; 2) that promotion of equitable benefit sharing and livelihood enhancement are a core objective of the FCPF; and 3) the FCPF commits to both respect the rights of indigenous peoples and forest dependent communities and to uphold the international obligations of participating countries.

World Bank Operational Policies

The World Bank has a well elaborated social and environmental safeguard framework that has been in place for many years and which consists of ten individual policies which were developed at different times over the past two decades, often in response to social and environmental problems with projects. The policies most relevant for the REDD+ context include: an umbrella environmental assessment policy, an indigenous peoples policy, an involuntary resettlement policy, policies for forests and natural habitats, a physical and cultural resources policy, and one on integrated pest management. It is important to note that the FCPF considers WB safeguards to be consistent with the Cancun Accord safeguards, i.e. that through application of WB operational policies countries will be meeting requirements specified under the UNFCCC, although there are differing views on this in civil society.¹⁷

While a full description of the strengths and weaknesses of these safeguards in relation to REDD+ is beyond the scope of this paper, a few points are worth mentioning here. One is that current WB safeguard policies require broad community support as the standard for the results of consultations under the indigenous people's policy. Broad community support is usually determined by an external (to the community) actor and does not require written agreements with affected communities. In REDD+ programming generally over the past few years a more stringent standard, that of free prior informed consent, has come to prevail, with most countries pledging to implement FPIC for REDD+, despite its not being a requirement of either the WB or (explicitly) the Cancun Accord. FPIC is generally determined by the community, or traditional governance structures of indigenous peoples, and would tend to require some written documentation to that effect.

A second point important for the CF context is that the involuntary resettlement policy covers not just physical relocation, but restriction of access to natural resources, one of the most likely scenarios in

¹⁷ See https://www.forestcarbonpartnership.org/sites/fcp/files/2013/june2013/FMT%20Note%20CF-2013-3_FCPF%20WB%20Safeguard%20Policies%20and%20UNFCCC%20REDD%2B%20Safeguards_FINAL.pdf

REDD+ where communities may well be asked to forgo use of or access to forest resources, perhaps in return for a share of future benefits from the sale of carbon emission reductions. The policy requires that prior informed consultations take place, and any restrictions be avoided or mitigated, including through appropriate compensation. This policy would also cover small scale loggers, charcoal producers, artisanal miners and the like who rely on deforestation or forest degradation for their livelihoods. Lastly, the WB forest policy is generally strict in not allowing support for industrial logging in tropical forest countries, an issue that may well also be relevant to some of the ER Programs under the CF which have significant involvement of the private sector, however the Bank may be poised to loosen those restrictions.

Responsibilities for applying social and environmental safeguards rests with the borrowing country, but safeguard plans need to be approved by the World Bank before a project can be approved. While WB policies are generally thought to be reasonably good, although no longer international best practice, there is a well-documented pattern of uneven implementation (the borrowers responsibility), oversight and supervision (WB responsibility) and monitoring and evaluation (a joint responsibility). These issues have been well summarized by the WB's Independent Evaluation Group.¹⁸

It is also important to note that a three year review process to modernize and update the safeguard policies is currently approaching its conclusion, and it is possible that it would be the revised safeguard policies, now called environmental and social standards, which would apply to FCPF Carbon Fund operations. While it is still speculative what the contents of those final standards will be, it is notable that free prior informed consent was included in the first draft proposed by World Bank management. The CF MF contains a revisions clause, so that changes to WB policies would necessarily need to be reflected in the MF, although if an ERPA is already signed countries would not be forced to make changes and, in any case, projects already under development using the old policies could be “grandfathered” in.

The Readiness Preparation Proposal

The Readiness Preparation Proposal or (R-PP) template is the basic format for countries to prepare projects for FCPF support under the Readiness Fund. It outlines a country designed process for REDD+ readiness, including for consultation and participation, development of a national REDD+ strategy, safeguards, the development of a MRV system, and a forest reference level. The R-PP template has evolved significantly since 2008, and is now in its sixth version, and is also now a harmonized template with the UNREDD Program, which can be used for submission of National Programs to that institutions Policy Board. It was originally designed and approved as a set of standards for REDD+ readiness, including that the country proposal “recognizes major land tenure and natural resource rights and relevant governance issues and shortcomings”.¹⁹

In terms of the issues of focus here, the R-PP template requires countries to conduct an assessment of land use, land use change drivers, forest law, policy and governance. It requests countries take into consideration “issues surrounding land tenure and resource rights, and traditional land use of indigenous people, extent of titled and untitled indigenous lands, indigenous claims for additional land “extensions;” and process of land title demarcations”²⁰ The assessments in the R-PP are meant to be preliminary, and to help identify what additional studies and analytical work needs to be done during the readiness phase.

The Common Approach

¹⁸ See IEG, *Safeguards in a Changing World...*, FCPF Global Program Review, Review of the Forest Strategy, etc.

¹⁹ R-PP Template v.6, p.35

²⁰ R-PP Template v.6, p.34

The Common Approach to Social and Environmental safeguards was developed during in 2010-2011 in response to the need to engage additional international agencies to channel FCPF readiness grants to countries where the World Bank was not actively engaged in the forest sector, and thus creates a common safeguard platform among the WB, the Inter-American Development Bank (IDB) and the United Nations Development Program (UNDP). It is possible that the UN Food and Agriculture Organization (FAO) and the Asian Development Bank (ADB) may also administer future readiness grants. The Common Approach, in formalizing the FCPF safeguard framework, goes somewhat beyond traditional WB safeguards in a few respects: 1) the information disclosure provisions go a bit further in that, like the CIFs, aide memoires from preparation missions are being disclosed, as are the Procurement Plans for the readiness grants and public discussions of the draft appraisal documents are held for project approval by a semi-independent governance body; 2) the stakeholder engagement guidelines (developed jointly with the UNREDD Program) are more fulsome and specific than the general guidance under the WB environmental assessment policy and provide FPIC for UNREDD countries or others that are applying the standard; and, 3) there is a requirement for a project level grievance redress mechanism; and 4) for the FCPF Carbon Fund there is a requirement for publically disclosed signed benefit sharing agreements with communities who are selling their emission reductions as well as the purchase/sale contracts—the Emission Reduction Payment Agreements, neither of which the Bank has disclosed in the past. These reflect learning from the early years of REDD+, where clearly information sharing and consultation and participation processes were seen to be critical to moving national processes forward; and that in addition, REDD+ was risky and potentially conflictive given the competing economic and political interests driving deforestation and pushing for the conservation of forests, as well the concerted advocacy of civil society and indigenous peoples on the FCPF from 2008 on.

Strategic environmental and social assessment and management frameworks

The approach to safeguards under the FCPF was informed by the fact that traditional WB safeguards were designed for investment projects with more tangible and evident impacts on the ground—typically the construction of infrastructure. The REDD+ readiness grants are not supposed to support pilot projects, and so are essentially thought of as pre-project planning processes—implementation of consultations, studies, legal and policy analysis, leading to the elaboration of strategies, systems and programs. Nonetheless it was recognized that REDD+ could have potentially profound impacts on indigenous peoples and forest communities, as well as potentially a large sphere of actors on the forest fringe, not the least through the formulation of policy. Strategic environmental and social assessment is a tool designed for such purposes, and relies on a combination of studies and analytical work produced in an iterative fashion and linked to consultation and policy dialogue, with the aim of informing the design of policies and programs. While well defined in the technical literature and enshrined in the legal frameworks of some countries, is not very widely practiced in developing countries, raising some capacity issues both at the WB and in developing countries. SESA's are also more typically carried out for specific regions and/or for specific economic sectors—carrying out a SESA for a national level process which cuts across multiple economic sectors is a relatively new approach. After a good deal of internal deliberation at the WB and continuing pressure from civil society for the robust application of safeguards to the readiness phase, SESA was identified as the safeguard tool of choice for the FCPF, and was in fact included in modifications to WB environmental assessment policy in 2011.

The complementary safeguard instrument which accompanies SESA under the FCPF is the use of an environmental and social management framework. Management frameworks are used widely across the international financial institutions in situations where geographically specific impacts are not known at the time of project design and approval, usually for projects which entail a large number of smaller sub-projects that will be decided on later, by either the borrowing government agency, or a sub-national

entity, including communities. Management frameworks then attempt to identify specific social and environmental risks (without actually identifying specific people or places) and put in place processes, measures and protocols to handle the mitigation of these risks at the sub-project level. The quality and efficacy of frameworks varies tremendously, depending mostly on the diligence and capacity of the entities designing and applying them and how well they are linked to the national policy framework and enforceable by policy or law²¹.

Conducting a SESA, and developing an ESMF are both requirements under the Readiness Fund for a country to be eligible for funding under the Carbon Fund- they are, in FCPF parlance, elements of a country's Readiness Package, which needs to be endorsed by the governance body before a country can submit their emissions reduction program document for consideration to the Carbon Fund. While completing a SESA and an ESMF are necessary to develop an ERP for the CF, they are not necessarily sufficient—additional safeguards work may well be required. This determination will be made by the WB task teams supporting country development of the ER Programs. Interestingly, it is a requirement under the Readiness Fund to develop a SESA and an ESMF, but it is only a requirement to apply the ESMF if a country is proceeding to receive support under the Carbon Fund, at which point “second generation” management frameworks, that are more specific to the risks and geographies of the proposed ERP interventions, would also be required. It is at this level when community consultation and FPIC must come in as well as a functioning grievance redress mechanism at the local level, and include the signed benefit sharing agreements for the purpose of selling rights to ERs.

Readiness-Package Assessment Framework

The last piece of the framework of the Readiness Fund relevant for the Carbon Fund is the R-Package Assessment Framework. This framework was approved in March 2013, after close to two years of discussions and deliberations, and is designed to guide assessment of a country's progress through REDD+ readiness. It is not however a set of standards, but a set of criteria and indicators (in the form of questions) for country self-assessment, on a sliding scale relative to national circumstances, to measure progress. It was developed with significant input of civil society and indigenous peoples, and includes some specific content around land tenure and the rights of indigenous peoples and forest communities. The most central one is criteria 14:

“Do action plans to make progress in the short, medium and long-term towards addressing relevant, land-use, land tenure and titling, natural resource rights, livelihoods, and governance issues in priority regions related to specific REDD+ programs, outline further steps and identify required resources?”²²

PC guiding principles for the CF MF & Pricing Approach

The first, Charter mandated, step for the FCPF to develop the rules for the Carbon Fund was the elaboration of a set of guiding principles, this allowed the broader involvement of the (more representative) governance body of the Readiness Fund (the Participants Committee), whilst the MF itself was approved by the governance body of the Carbon Fund, which is made up of donors and investors only, and has developing country participation as observers only (voice but no vote, similar to the status of other observers such as civil society, indigenous peoples and the private sector). The Guiding Principles were approved in June 2012, after a yearlong PC working group process that involved representatives from all of the stakeholder groups in the FCPF. The guiding principles include a series of “elements” and

²¹ Ref Ken Green's paper

²² Pages 11-12

“rationales” which cover both the carbon accounting and programmatic aspects of ER Program design. On the programmatic side, there are elements for government capacity, scale and ambition, safeguards, stakeholder engagement, benefits sharing and non-carbon benefits. Programmatic element five, on benefit sharing, states: “The ER Program uses clear, effective and transparent benefit sharing mechanisms with broad community support and support from other relevant stakeholders”, these additional points are included in the rationale:

“The design of the benefit sharing mechanisms should respect customary rights to lands and territories and reflect broad community support, so that REDD+ incentives are used in an effective and equitable manner.

The status of rights to carbon and relevant lands should be assessed to establish a basis for successful implementation of the ER Program. Its assessment may identify potential key issues for the ER Program and agree a work program to advance progress on key issues to effectively implement the benefit sharing mechanisms.”²³

Programmatic element six, on non-carbon benefits, states that ER Programs should contribute to broader sustainable development, including “making progress to secure land tenure”.

Carbon Fund Methodological Framework

The CF MF, as noted above, was approved in December 2013 and is a set of criteria and indicators designed to set standards for the design and assessment of ER Programs for funding by the CF. ER Programs are expected to “demonstrate conformity” with the MF, although there is some variation across criteria around when conformity must be demonstrated, which will be discussed below. The MF has six sections and thirty eight criteria, with each criteria having between one and four indicators to verify its application. For the purposes of this analysis, section four on safeguards, section five on sustainable program design and implementation (which includes drivers and land and resource tenure assessments, benefit sharing, and non carbon benefits) and section six on ER Program transactions, will be the focus of discussion.

Emission Reduction Payment Agreement General Conditions and Commercial Terms (ERPA GC/CT)

The ERPA general conditions and commercial terms are another piece of the CF framework of rules and guidance, which complement, and may at times override, the MF, and are thus critical to understanding how programs will be designed and implemented in practice. The FCPF CF, and the ER Programs it funds, are designed to produce a new class of fungible financial assets, called verified emission reductions, which can in theory be sold, traded or used for compliance purposes by a country under an eventual international REDD+ scheme or national emission trading system. The ERPA is the contract that governs the sale and purchase of these ER's, and thus differs from a traditional WB lending instrument or grant agreement. Previous to the CF, ERPA's were used by the Kyoto Protocol era Carbon Funds on a project scale only, often in conjunction with the Clean Development Mechanism—the CF is the first time their use has been attempted at a large national or sub-national (jurisdictional) scale, where ERs measured at the district level are not necessarily attributable to individual households, communities or enterprises.

At present there are no publically available signed ERPA's from the WB, although their general contours are now well known. As a legal purchase/sale contract the ERPA's have two parts—their general terms, which are the same across all ERPA's, and the commercial terms, which are negotiated with each seller individually and can (potentially) vary from program to program. The commercial terms cover things like

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the volume of ERs to be sold, the price per unit of ER's, the frequency of monitoring and verification events and who will carry out that verification.

ER's under the Carbon Fund will be bought from countries or program proponents by the World Bank on behalf of the CF participants, i.e. it is the donors to the CF who are purchasing the ER's, and whether they are free to trade or on-sell them depends on which tranche of the CF they belong to. Most of the donors (and 90% of the capital) are participants in the "restricted" Tranche B, which requires them to "retire" their ERs after purchase (i.e. not sell/trade them or use them for national compliance purposes); while about 10% of the capital and a few of the donors (Australia, France, the US) and all of the investors (now just BP and TNC) are in the "un-restricted" tranche A, which allows such use. According to MF rules, developing countries who sell ERs to the CF are not allowed to use those ERs for national compliance purposes under the UNFCCC or other international accounting regimes, without permission from the CF but the broader fungibility of ERs from the CF is not known.

ER-PIN and ER-PD templates

The CF has developed formats for countries to develop their ER programs. There are three stages to this process: the first is the elaboration of an emission reduction program idea note (ER-PIN), which basically outlines the proposed program, and are used to decide if the CF Participants want to include the program in the "pipeline" which entails signing a letter of intent (to purchase ERs) and allocating bank executed funding (up to \$650k) for the development of the program. The ER-PIN, the subject of this review, is not expected to fully comply with the MF. The next step is the elaboration of the emission reduction program document, which is expected to comply with the MF, and is the document which would be approved for funding by the World Bank Board of Executive Directors, likely on a no-objection basis. In addition to being subject to World Bank due diligence, ER-PDs are likely to be reviewed by an independent Technical Advisory Panel, and need to be approved by the CF Participants as well. The ER-PD is to be accompanied by a Carbon Finance Assessment Memorandum (CFAM), an FMT safeguards issues memo (developed by the Carbon Finance Unit now part of the Climate Finance Policy unit), the specific safeguard plans required by the WB, likely an ESMF which would include sections on environmental management, indigenous peoples, involuntary resettlement, forests, natural habitat and any other safeguard policies triggered which are developed by the Task Team assigned from the General Practice (formally specialists from a region). An approved ER-PD would then lead to the negotiation and signing of an ERPA.²⁴ These templates do not add any new conditions or requirements to the MF, but outline the information countries need to produce to get their program financed.

Carbon Fund Process Guidelines

Lastly, the CF has a set of internal process guidelines which describe the steps to follow for the design, assessment, approval and implementation of ER Programs. These are complemented by internal due diligence and supervision guidance for the Carbon Finance Unit within the World Bank, which are not public. The process guidelines specify that countries need to have their R-Package endorsed by the Participants Committee before they can submit an ER-PD, but they do not describe the WB due diligence steps in any detail. The process guidelines were revised in 2014²⁵ to allow both earlier submission (and disclosure) of draft ER-PD's, before a country's R-Package has been endorsed, to speed up the process, and the virtual review by CFP's (i.e. not discussion in the CF meeting where CSO and IP Observers are present) of these draft documents, and potentially most troubling, the review of draft documents by the

²⁴ The decision whether the ER-PD meets WB requirements and to proceed to ERPA negotiation is not made by the FMT, but by the WB Country Manager in conjunction with the manager of the Carbon Finance Unit.

²⁵ See FMT Note CF-2014-3

Technical Advisory Panels. This would mean that none of the groups reviewing the ER-PD's (WB, TAP, CFP's) would have the context and benefit of a country's endorsed R-Package available while making that review, significantly reducing the amount of information on readiness available. Given the importance of making progress on readiness for being able to implement an ER program in the context of a supportive policy framework, this change risks, at best, causing serious delays between ER-PD approval and ERPA signature; and at worst going ahead with ER programs that have missing pieces.

The Carbon Fund Information Disclosure Guidance

The disclosure regime for the CF was finalized in late 2013, although it is not technically approved by the CF Participants because it is an internal WB guidance in line with the Bank's Access to Information Policy. The guidelines go through each of the documents produced in the course of the CF business cycle and spell out when documents need to be publically disclosed, by whom, and how. In keeping with the FCPF's progressive take on information disclosure, in line with the facility's mandate to generate learning, the CF disclosure guidelines break some new ground for the WB. ERPA's and benefit sharing agreements have never been publically disclosed by the WB before, but both are mandated for disclosure under the CF, barring requests for confidentiality by the borrowing country, or seller in this case. These provisions were made in the interest of maximizing transparency and in recognition that business confidentiality (one of the exclusions in the WB ATI policy) are not relevant in the current context of the CF where a compliance carbon market with many competing sellers and buyers does not exist. The language on presumption of disclosure in the CF disclosure guidance, and the ERPA General Conditions (section 18.07) are not repeated in the ERPA Commercial Terms (section 10.02), which technically override other guidance, creating a risk of non-disclosure.

The disclosure guidance also mandates public dissemination of draft ER-PIN's and ER-PD's, both of which would normally be considered "deliberative" and hence excluded from disclosure under the ATI policy, but are disclosed to foster learning in line with the FCPF's core objectives. In keeping with Bank policy, disclosure of draft safeguard documents is required before appraisal begins and final documents thirty days prior to ERPA signature in the case of category B projects, and sixty days in the case of category A projects.

Annex 2: Process to develop Carbon Fund Methodological Framework

The process used to develop the CF methodological framework was both an intensive and extensive one, and provided multiple opportunities for input from the range of stakeholders, much of which is reflected in the products. As mentioned above, the FCPF Charter mandated PC oversight of two elements of the overall set of guidance—the Guiding Principles and the ERPA GC and CT. For the former, a working group was formed which met twice in person and held ten teleconferences over a nine month period to discuss and negotiate the final principles. The ERPA conditions and terms were discussed at multiple PC meetings over a two year period, which included a number of mini-workshops devoted to these issues specifically. The highly technical and legalistic language of the ERPA materials was a barrier to general understanding of the issues at stake, and developing country inputs, whether from governments, CSOs or Indigenous Peoples, tended to be limited to those countries and individuals already deeply engaged in the CF process.

After the guiding principles were approved by the PC in June of 2012, a second Working Group was formed, this time under the auspices of the Carbon Fund not the Readiness Fund, which held one in person meeting and four teleconferences. In December 2012 an open call for submissions on the MF was issued by the FMT, which garnered inputs from a range of civil society organizations and donor governments, but no developing country governments. A series of thirteen “issue papers”²⁶ were also commissioned from a range of experts, including on issues around safeguards and land and carbon rights, although these two were the only ones not made publically available. Additionally three “design forums” were held between January and April 2013, which drew experts from a range of stakeholder constituencies to discuss and debate the issues and options. The third of these design forums included focus on the issues of land and carbon rights. Additionally updates were provided and discussions held on the MF related issues at the PC meetings In June and December 2013.

²⁶ Available at : <https://www.forestcarbonpartnership.org/issues-papers-methodological-framework>