University of Strathclyde
Faculty of Humanities and Social Sciences
School of Law

INTERNATIONAL HUMAN RIGHTS LAW IN THE CONTEXT OF THE CONVENTION ON BIOLOGICAL DIVERSITY'S FINANCIAL MECHANISM:

THE RESPONSIBILITY OF THE GLOBAL ENVIRONMENT FACILITY'S IMPLEMENTING AGENCIES TO RESPECT, PROTECT AND FULFIL HUMAN RIGHTS IN BIODIVERSITY-RELATED FINANCIAL ASSISTANCE

By Naomi Kenney

2024

DECLARATION OF AUTHENTICITY AND AUTHOR'S RIGHTS

This thesis is the result of the author's original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree.

The copyright of this thesis belongs to the author under the terms of the United Kingdom Copyright Acts as qualified by University of Strathclyde Regulation 3.50. Due acknowledgement must always be made of the use of any material contained in, or derived from, this thesis.

Signed:

Date: 11/03/2024

ACKNOWLEDGEMENTS

I am immensely grateful to my supervisors, family, friends and colleagues, without whom I would never have found the stamina to complete this thesis.

Firstly, I wish to thank my supervisor, Professor Elisa Morgera, whose personal dedication to environmental sustainability and human rights has been a true inspiration since I began my postgraduate journey in 2010, and throughout my professional career at the UN. Her expertise, kindness and ability to steer me in the right direction have been so incredibly valuable. Equally, my co-supervisor, Professor Francesco Sindico, has been a steady source of thought-provoking questions and comments, for which I am very grateful. I also wish to thank Dr. Elaine Webster, my reviewer, whose keen observations and guidance have helped me through this academic journey.

I extend my gratitude to Professor John Knox for taking the time to talk to me and for sharing his thoughts on some of the points that I cover in this thesis. This research draws heavily from his work as UN Special Rapporteur on Human Rights and the Environment, and I am extremely grateful for his conceptualisation of the human right to a clean, healthy and sustainable environment.

I owe a huge debt of gratitude to my fiancé Jonathan for his unwavering support, patience, and faith in my abilities during all the challenging times when I felt I would never be able to juggle work, studies and motherhood. Thank you.

Finally, I wish to thank my parents Catherine and Timothy Kenney who have always indulged my penchant for all things green and wonderful and inspired a life-long enthusiasm for learning.

I dedicate this thesis to my son Lawrence, and my nieces Agathe and Alice whose right to a clean, healthy and sustainable environment I hope to see realised.

Table of Contents

Abbreviations *7*

CHAPTER 1: INTRODUCTION *11*

1. Background for this thesis *11*

1.1. Rapid declines in biodiversity and their impact on the enjoyment human rights 13

1.2. The global biodiversity funding gap 18

1.3. Biodiversity projects and human rights 21

1.4. The Kunming-Montreal Global Biodiversity Framework 23

2. Broader context for development assistance *25*

2.1. An evolving geopolitical context for development cooperation 25

2.2. The role of the Asian Infrastructure Investment Bank in biodiversity finance 29

3. Terminological clarifications *31*

4. Rationale for the thesis and contribution to the literature *32*

5. Methodology *35*

6. Limitations of the thesis *36*

7. Outline of the thesis *38*

CHAPTER 2. RETHINKING AID EFFECTIVENESS FOR BIODIVERSITY IN THE POST-2020 ERA *40*

1. Introduction *40*

2. International architecture for the delivery of biodiversity and human rights-related ODA 42

2.1. The CBD as the legal basis for biodiversity-related ODA 43

2.1.1. CBD Articles 20 and 21 43

2.1.2. The operational arm of the CBD's financial mechanism: the Global Environment Facility 46

2.2. Legal foundations for human rights-related ODA 57

2.3. The OECD's Development Assistance Committee 59

3. Human rights as a contributor to aid effectiveness *64*

3.1. Human rights in global cooperation fora for aid effectiveness 65

3.1.1. UN-driven efforts to establish a new aid architecture: the Monterrey Consensus and the Rome Declaration on Harmonisation 65

3.1.2. Other high-level fora on aid effectiveness 67

3.1.3. Challenges to the aid effectiveness agenda 69

3.2. Human rights as a marker of aid effectiveness in programme evaluation 73

4. Effectiveness of the CBD regime *76*

4.1. Effectiveness of treaty regimes 77

4.2. Financial assistance as a parameter for measuring the effectiveness of the CBD regime 80

4.3. How does aid effectiveness affect treaty effectiveness under the CBD? 81
4.3.1. The fragmentation of international law 81
4.3.2. Contribution of the fragmentation of international law to the fragmentation of aid 83
4.4. Strengthening the effectiveness of the CBD regime by applying a human rights-based approach to financial assistance 86
4.4.1. Negative effects of the limited engagement of human rights on the CBD's effectiveness 86
4.4.2. The principle of mutual supportiveness 88
4.4.3. Obligation of states to provide effective financial assistance for the realisation of human rights 89
4.5. Convergence of human rights and financial assistance in the Kunming-Montreal Global Biodiversity Framework 91
5. Conclusions 95
CHAPTER 3. THE PROVISION OF NEW AND ADDITIONAL FINANCIAL RESOURCES UNDER THE CBD 97
1. Introduction 97
2. Scope and content of the financial provisions 99
2.1. Specificities of the CBD 99
2.2. Obligation to mobilise national resources to fund the implementation of the Convention 100
2.3. Obligation of developed countries to provide new and additional financial resources 101
2.4. Obligation to provide financial resources through different channels 102
2.5. Obligation to prioritise certain categories of states in the provision of financial resources 103
2.6. Obligation to provide financial resources through the financial mechanism 103
2.7. Centrality of CBD's financial mechanism 104
3. International legal foundations for the CBD's financial mechanism 106
3.1. Duty to cooperate in international law 106
3.2. Emergence of differential treatment of financial obligations 108
3.2.1. Compliance assistance through financial mechanisms 110
3.2.2. Compensatory elements of financial mechanisms 111
3.3. Human rights 113
4. Legal nature of the obligation to provide new and additional financial resources 115
4.1. The provision of new and additional financial resources as an obligation derived from the VCLT 115
4.1.1. The principle of good faith 115
4.1.2. The obligation to provide new and additional resources as an obligation of conduct 117

4.2. The obligation to provide new and additional financial resources as a general principle of international law ... 118
4.2.1. What are general principles of international law? ... 118
4.2.2. The provision of financial resources as an obligation derived from the principle of common but differentiated responsibility ... 119
4.2.3. Wide incorporation of CBDR into international instruments ... 121
4.2.4. CBDR underlying the general rules of conventional or customary international law 122
4.2.5. The CBDR principle underlies the financial mechanism of the CBD ... 123

5. The CBD paradox: a hard legal obligation to provide voluntary contributions to the GEF124

5.1. Voluntary nature of ODA contributions ... 124

5.2. Voluntary nature of GEF contributions ... 127

6. Can the CBD COP address this antagonism? ... 129

6.1. The facilitative function of the COP ... 129

6.2. The COP and financial resources under the Convention ... 132

6.3. Could the COP help determine the contributions of developed country Parties?.. 134

6.4. Could the COP initiate a revision of the GEF's founding instrument? ... 136

6.5. The most likely scenario: a soft alignment with the climate change regime ... 137

7. Conclusions ... 139

CHAPTER 4. THE HUMAN RIGHTS OBLIGATIONS OF STATES IN BIODIVERSITY-RELATED ODA ... 142

1. Introduction ... 142

2. Human rights obligation to cooperate for the realisation of the right to a clean, healthy and sustainable environment ... 144

2.1. Substantive and procedural human rights obligations related to biodiversity ... 144

2.2. The obligation to cooperate under Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) ... 147
2.2.1. Obligation to take steps ... 149
2.2.2. Obligation to take steps to the maximum of its available resources ... 151
2.2.3. Non retrogression ... 151

2.3. Human rights obligations derived from *pacta sunt servanda* ... 153

2.4. Human rights obligations of States in the delivery of financial assistance ... 155

3. Human rights responsibility of GEF implementing agencies ... 157

3.1. Legal status of the GEF and its implementing agencies ... 157

3.2. Legal responsibility of GEF implementing agencies towards human rights ... 158
3.2.1. Responsibility to respect and protect human rights ... 159
3.2.2. Responsibility to fulfil human rights ... 162

4. Human rights in CBD COP decisions ... 164

4.1. Indigenous peoples and local communities ... 165
4.1.1. The ambivalent relationship between the CBD COP and human rights ... 165

4.1.2. Conceptual differences and importance of the relationship to land 166
4.1.3. CBD States Parties' obligations under Article 8(j) 168

4.2. Human rights in the Kunming-Montreal Global Biodiversity Framework 176
4.2.1. The rights of Indigenous peoples and local communities 176
4.2.2. Recognition of the human rights-based approach 177
4.2.3. The rights of women 178
4.2.4. The rights of children, persons with disabilities and environmental human rights defenders 179

4.3. GEF obligation to comply CBD COP guidance 180
4.3.1. Direct guidance to the GEF 181
4.3.2. Indirect guidance 182

5. Conclusions 183

CHAPTER 5: HUMAN RIGHTS AND THE GEF 186

1. Introduction 186

2. GEF's approach to human rights 187

2.1. Safeguards and the responsibility not to cause harm 188

2.2. Grievance mechanisms 193

2.3. Overview of the GEF's policies 199

3. Extent of GEF's alignment with COP guidance on human rights 202

3.1. The respect for human rights, including the rights of women, children, persons with disabilities and environmental human rights defenders 203

3.2. Respect for biodiversity-related international instruments and CBD guidance 206

3.3. Definitions 206

3.4. The respect for prior informed consent and/or approval and involvement 208

3.5. Enabling the participation of Indigenous peoples and local communities in development projects 210

3.6. The prevention of involuntary resettlements and the provision of compensation in cases of voluntary resettlement 211

3.7. Conducting cultural, environmental and social impact assessments 212

3.8. Ensure the fair and equitable sharing of benefits 216

3.9. The provision of accountability, evaluation and compliance mechanisms 217

4. Social and environmental frameworks of the GEF's implementing agencies 218

4.1. GEF's overarching framework 219

4.2. The World Bank's Environmental and Social Framework 220
4.2.1. Is the World Bank a "human rights-free zone"? 220
4.2.2. The "gold standard" of safeguards frameworks 222

4.3. UNDP's Social and Environmental Standards 225

4.4. UNEP's Environmental, Social and Sustainability Framework 228

4.5. Disparities in human rights protections 230

5. Operationalising the Kunming-Montreal Global Biodiversity Framework through a human rights-based approach 231

5.1. Advancing the realisation of human rights 231

5.2. Shifting the narrative from "affected stakeholder" to "rights holder" 233

5.3. Incorporating international human rights standards into GEF policies and safeguards 234

5.4. Incorporating human rights impact assessments in the design, implementation and monitoring of projects 236

6. Conclusions 239

CHAPTER 6: CONCLUSIONS 242

1. Inspiration for this thesis 242

2. Contribution of this thesis to legal scholarship 242

3. Key findings of this thesis 245

4. Impact of these findings and areas of future research 248

Table of Legal Instruments 251

Bibliography 256

Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
AIIB	Asian Infrastructure Investment Bank
ASEAN	Association of Southeast Asian Nations
BBNJ	Agreement under the UN Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction
CBD	Convention on Biological Diversity
CBDR	Principle of Common but Differentiated Responsibilities
CBDRRC	Principle of Common but Differentiated Responsibilities and Respective Capabilities
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMS	Convention on the Conservation of Migratory Species of Wild Animals
COP	Conference of the Parties
CRS	Creditor Reporting System
DCD	Organisation for Economic Co-operation and Development' Development Co-operation Directorate
DRS	Dispute Resolution Service
DRTD	Convention on the Right to Development
ECOSOC	United Nations Economic and Social Committee
EBRD	European Bank for Reconstruction and Development
ECHR	European Convention on Human Rights
ESS	Environmental and Social Safeguards
FCPF	Forest Carbon Partnership Facility
FPIC	Free Prior and Informed Consent
GBF	Global Biodiversity Framework
GBFF	Global Biodiversity Framework Fund
GCF	Green Climate Fund

GHG	Greenhouse gas
GNI	Gross National Income
GNP	Gross National Product
HDI	Human Development Index
HRIA	Human Rights Impact Assessment
IBRD	International Bank for Reconstruction and Development
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IDB	Inter-American Development Bank
IEG	World Bank's Independent Evaluation Group
IEO	GEF's Independent Evaluation Office
IFI	International Finance Institution
ILA	International Law Association
ILC	International Law Commission
IMF	International Monetary Fund
IPBES	Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services
IPCC	Intergovernmental Panel on Climate Change
MEA	Multilateral Environmental Agreement
MDB	Multilateral Development Bank
MoU	Memorandum of Understanding
NBSAP	National Biodiversity Strategy and Action Plan
NBFPs	National Biodiversity Finance Plans
NGO	Non-Governmental Organisation
NDC	Nationally Determined Contributions
NDCP	National Development Cooperation Policy
NRMP	Natural Resources Management Project
OCHA	Office for the Coordination of Humanitarian Affairs
ODA	Official Development Assistance
OHCHR	Office of the United Nations High Commissioner for Human Rights
OECD	Organisation for Economic Co-operation and Development
OECD DAC	Organisation for Economic Co-operation and Development's Development Assistance Committee

OOF	Other Official Flows
PAC	UNDP's Project Appraisal Committee
POPs	Persistent Organic Pollutants
RAF	Resource Allocation Framework
SDGs	Sustainable Development Goals
SES	Social and Environmental Standards
STAP	Scientific and Technical Advisory Panel
STAR	System for Transparent Allocation of Resources
SECU	UNDP's Social and Environmental Compliance Unit
ToRs	Terms of Reference
UN	United Nations
UNCCD	United Nations Convention to Combat Desertification
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNICEF	United Nations International Children's Emergency Fund
UNODC	United Nations Office on Drugs and Crime
USAID	United States Agency for International Development
VCLT	Vienna Convention on the Law of Treaties
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
WEC	World Economic Forum

ABSTRACT

Despite decades of development assistance in support of the conservation of biological diversity, the rate of decline in biodiversity keeps accelerating. The international architecture for the delivery of biodiversity-related Official Development Assistance (ODA) does not provide for the systematic integration of human rights into biodiversity-related development projects and programmes. Yet, the interdependence between the protection of human rights and the protection of the environment that was recently recognised by the United Nations General Assembly (UNGA) in the form of a human right to a clean, healthy and sustainable environment means that development assistance must address these issues jointly to achieve effective results. This thesis explores how a mutually supportive interpretation of International Biodiversity Law and International Human Rights Law (IHRL) addresses some of the key challenges to the effectiveness of the Convention on Biological Diversity (CBD)'s financial mechanism. It makes the argument that IHRL plays an intrinsic role in strengthening the effectiveness of the financial mechanism. In particular, it contends that the progressive cross-fertilisation between the biodiversity regime and IHRL in CBD Conference of the Parties (COP) decisions extends to the financial mechanism with several legal consequences. First, the Global Environment Facility (GEF), as the CBD's financial mechanism, must comply with CBD guidance on human rights. Second, the implementing agencies that make up the GEF partnership have a responsibility to respect, protect and fulfil human rights in the design, implementation, monitoring and evaluation of biodiversity-related projects. Third, to comply with the commitment of CBD Parties to apply a human rights-based approach to the implementation of the Kunming-Montreal Global Biodiversity Framework (GBF), GEF normative instruments should be reviewed to ensure a close alignment with CBD COP guidance and IHRL.

Chapter 1: Introduction

1. Background for this thesis

In July 2022, the General Assembly of the United Nations (UNGA) recognised the human right to a clean, healthy and sustainable environment.[1] This decision consolidates five decades of normative development in international, regional and national legal frameworks and acts as a catalyst for the protection and realisation of human rights through the implementation of biodiversity-related projects. The former United Nations (UN) Special Rapporteur on Human Rights and the Environment, John Knox, articulated this relationship and acknowledged that the full enjoyment of human rights, including the rights to life, health, food and water depends on biodiversity. As such, the degradation and loss of biodiversity undermine the ability of human beings to enjoy their human rights.[2]

The protection of substantive and procedural rights is an essential aspect of the conservation and sustainable use of biodiversity. Indigenous women for example, are holders and keepers of conservation knowledge and practices and are critical to finding solutions for halting the dramatic pace of biodiversity loss.[3] Similarly, Indigenous peoples and local communities with secure rights to natural resources deliver a wide range of ecological and social benefits, notably biodiversity conservation.[4]

As the current UN Special Rapporteur on Human Rights and the Environment, David Boyd, pointed out in his 2020 report, the ongoing failure to conserve, protect and sustainably use the Earth's ecosystems is having catastrophic consequences for the enjoyment of a wide

---

[1] United Nations General Assembly (UNGA), 'The Human Right to a Clean, Healthy and Sustainable Environment' (2022) UN Doc A/76/L.75, para 1.

[2] United Nations Human Rights Committee (HRC), 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2017) UN Doc. A/HRC/34/49, para 5; HRC, 'Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox' (2013) UN Doc A/HRC/25/53, paras 17-25.

[3] CBD, 'Report of the Expert Workshop to Develop Recommendations for Possible Gender Elements in the Post-2020 Global Biodiversity Framework' (5 August 2019), UN Doc CBD/GB/OM/2019/1/2, para 21.

[4] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David, R. Boyd' (2020) UN Doc A/HRC/43/53, para 105. See also Don Gilmour, 'Forty Years of Community-Based Forestry: A Review of Its Extent and Effectiveness' (FAO, 2016).

range of human rights.[5] Evidence is growing that the lack of progress in halting biodiversity loss and environmental degradation facilitated the emergence of the COVID-19 pandemic.[6] If such threats to basic human rights are to be avoided in the future, the international community must rethink its approach to the implementation of the CBD. This requires scaling up biodiversity conservation, large-scale restoration of degraded ecosystems, and a rapid transition towards clean energy. Biodiversity-related Official Development Assistance (ODA) plays a critical role in the implementation of the Convention on Biological Diversity (CBD)[7] by providing essential financial resources to help developing countries meet their obligations under the Convention.[8] However, the steady decline in biodiversity and its consequences on fundamental human rights raise questions about the ability of the current architecture for ODA to deliver results. It forces us to think critically about its weaknesses, and to find alternative approaches to accelerate the achievement of the CBD's objectives. In particular, ODA must ensure that substantive and procedural human rights in relation to biodiversity are respected, protected and fulfilled in the design and implementation of biodiversity-related projects.

Since the adoption of the CBD, numerous reports have sounded the alarm on the slow pace of progress towards the achievement of the Convention's objectives.[9] At the heart of the Convention, the financial mechanism plays a critical role in supporting the achievement of these objectives.[10] The financial mechanism provides financial assistance to developing countries to enable them to meet their obligations under the Convention. The Global Environment Facility (GEF) serves as the financial mechanism for the CBD.[11]

The GEF, established in 1991, provides grants and concessional funds to support projects related to biodiversity, climate change, international waters, land degradation, the ozone layer, mercury and persistent organic pollutants. It operates under the authority and guidance of the Conference of the Parties (COP) to the CBD.[12] The GEF is required to align its funding with the strategies, priorities, and eligibility criteria set by the COP.[13] It is made up

---

[5] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd (2020), UN Doc A/75/161, para 81.

[6] United Nations General Assembly (UNGA), 'Implementation of the Convention on Biological Diversity and its contribution to sustainable development' (2022) UN Doc A/RES/77/167, para 30.

[7] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 [hereinafter "CBD"], Article 21.

[8] CBD, Article 39.

[9] United Nations General Assembly (UNGA), 'Implementation of the Convention on Biological Diversity and its contribution to sustainable development' (2022) UN Doc A/RES/77/167, para 10.

[10] Ibid, paras 28 and 30.

[11] CBD, Article 39.

[12] Conference of the Parties to CBD Decision III/8 (11 February 1997), UN Doc UNEP/CBD/COP/DEC/III/8, Annex, para 2.1.

[13] Ibid.

of three implementing agencies, which include the United Nations Development Programme (UNDP), the United Nations Environment Programme (UNEP) and the World Bank. In addition to these, several other agencies with specific expertise and regional reach have acquired the status of "accredited agencies". These include *inter alia* the Food and Agriculture Organization (FAO), the United Nations Industrial Development Organization (UNIDO), the African Development Bank (AfDB), the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (EBRD), and the Inter-American Development Bank (IDB).

The next subsections provide an overview of the most recent knowledge at the intersection of human rights, biodiversity and biodiversity-related ODA. Section 1.1. paints a picture of the scale of biodiversity loss and highlights the consequences of such declines on the enjoyment of human rights. Section 1.2. provides evidence of the global biodiversity gap and Section 1.3 considers the negative impacts of biodiversity projects on human rights. Finally, Section 1.4. introduces the Kunming-Montreal Global Biodiversity Framework (GBF) and its implications for biodiversity-related financial assistance and human rights.

1.1. Rapid declines in biodiversity and their impact on the enjoyment human rights

Declines in biodiversity worldwide are well documented. In 2006, the World Economic Forum (WEC) identified the loss of biodiversity as a "potentially significant risk" that had "not yet penetrated public consciousness, but which might have severe consequences".[14] The report pointed to two major concerns, namely a reduced ability to use nature as a blueprint for pharmaceutical remedies, and profound negative effects on environmental sustainability.[15] Biodiversity loss officially entered the list of global risks in 2009 with an estimated 5-10 percent likelihood of a USD 2-10 billion economic loss globally.[16] Ten years later, the WEC made a bleak assessment, linking biodiversity loss with climate inaction, resulting in a 60 percent drop in species abundance since 1970.[17] The consequences of biodiversity loss stretch far and wide, affecting the food chain and accelerating nutritional deficiencies,[18] and impacting

[14] WEC, 'Global Risks' (2006) 3.
[15] Ibid.
[16] WEF, 'Global Risks 2009 - A Global Risk Network Report' (2009) 3.
[17] WEF, 'Global Risks 2019 - A Global Risk Network Report' (2019) 15.
[18] Ibid.

health and socioeconomic development, with implications for well-being, productivity, and regional security.[19]

The drivers of environmental degradation and biodiversity loss however, have evolved over the years leading up to the adoption of the CBD and in the decades that followed. The 2019 report by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) provides the most recent global assessment on the state of biodiversity and its interactions with human development.[20] The results illustrate the impact of human activities on biodiversity.

Currently, 75 percent of the total land surface and 40 percent of the ocean area are severely altered,[21] threatening ecosystems and human well-being. It shows that fisheries have the largest footprint, owing to industrial extraction, aquaculture and mariculture, with nearly 75 percent of the major marine fish stocks being currently depleted, or overexploited.[22] It is estimated that in 2011, illegal, unreported or unregulated (IUU) fishing made up 33 percent of the world's total catch and occurs primarily off the coast of West Africa and in the Southwest Atlantic.[23] This is particularly challenging for small-scale fishing communities that depend on local fisheries for their livelihoods.[24] Small-scale and artisanal fisheries encompass the pre-harvest, harvest and post-harvest stages of the value chain and are undertaken by both men and women. They provide nutritious food for local, national and international markets and generate income to support local and national economies. As such, they contribute to food security and nutrition, poverty eradication, equitable development and sustainable resource utilisation.[25]

Agriculture has wide-ranging impacts on terrestrial ecosystems, with an estimated contribution to greenhouse gas emissions of 25 percent, as a result of land clearing, crop production, and fertilisation, largely for the production of animal feed.[26] The accelerated rate of reduction in forest cover raises concerns for the 350 million people who depend on non-timber forest products (NTFPs) for their subsistence and income.[27] Additionally, timber from

---

[19] Ibid.
[20] IPBES, 'Conceptual framework for the Intergovernmental Science Policy Platform on Biodiversity and Ecosystem Services' (Decision IPBES-2/4, 2013), Annex, para 2.
[21] IPBES, 'Global Assessment Report on Biodiversity and Ecosystem Services, Summary for Policymakers' (IPBES 2019) 60.
[22] Ibid, 58 – 59.
[23] Ibid, 60.
[24] See Food and Agriculture Organization, 'Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication' (2015).
[25] Ibid, ix.
[26] IPBES, 'Global Assessment Report on Biodiversity and Ecosystem Services, Summary for Policymakers' (IPBES 2019), p. 59.
[27] Ibid.

illegal sources supplies 10 to 15 percent of the global trade in timber.[28] FAO points to the impact of a growing global population and unsustainable productive systems on the natural resources which support life on Earth.

As natural resources dwindle, the likelihood of conflicts is rising and driving people to migrate within and across borders.[29] Across the world, food production and consumption patterns are under threat from the narrow genetic base on which they rely.[30] Climate change is projected to become increasingly important as a direct driver of changes in nature and its contributions to people in the next decades.[31] Finally, another major driver of biodiversity loss is the extractive industry, with mining exerting a large toll on terrestrial and marine biodiversity, particularly in areas with weak social and environmental regulation.[32]

The international community has long recognised that the loss of biodiversity and the degradation of the environment have implications for security, access to basic material, health, social relations as well as freedoms and decision-making, all of which contribute to human well-being.[33] The protection of the environment contributes to the enjoyment of human rights, including the right to life, the right to the highest attainable standard of physical and mental health, the right to an adequate standard of living, to adequate food, to safe drinking water and sanitation and to housing, as well as cultural rights.[34] Conversely, the loss of biodiversity from climate change, the unsustainable management and use of natural resources, pollution and the unsound management of chemicals and waste interferes with the enjoyment of a safe, clean, healthy and sustainable environment, with direct and indirect consequences on the enjoyment of all human rights.[35] Among the human rights being threatened are the rights to a healthy environment, life, health, food, water, sanitation, an adequate standard of living, development and culture.[36] Importantly, while the full impact of biodiversity loss on human rights is still

---

[28] Ibid, 60.
[29] FAO, 'Biodiversity for Sustainable Agriculture: FAO's Work on Biodiversity for Food and Agriculture' (FAO, 2018) 4-7.
[30] Ibid. Food systems mainly rely on five crops (rice, wheat, maize, millet and sorghum), five terrestrial animal species (cattle, sheep, goats, pigs and chickens) and ten species of fish.
[31] IPBES, 'Global Assessment Report on Biodiversity and Ecosystem Services, Summary for Policymakers' (IPBES 2019) XX.
[32] Ibid, 59.
[33] Joseph Alcamo and others, 'Ecosystems and Human Well-being: A Framework for Assessment' (Island Press 2003).
[34] HRC, 'Human rights and the environment' (2021) UN Doc A/HRC/RES/46/7, Preamble.
[35] Ibid.
[36] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd (2020), UN Doc A/75/161, para 31.

unknown, it will challenge our ability to achieve many development priorities, from health to food security to disaster risk reduction.[37]

The number of emerging infectious diseases in humans, animals and plants reported has increased in recent decades[38] and has been linked to rapid habitat changes and decreased biodiversity caused by urbanisation, agriculture intensification and deforestation.[39] It has been reported that the COVID-19 pandemic was caused by a "perfect storm of human actions that damage ecosystems and biodiversity, such as deforestation, land clearing and conversion for agriculture, the wildlife trade, the expanding human population, settlements and infrastructure, intensified livestock production and climate change."[40] The pandemic has demonstrated the interconnectedness of the human rights to life, health, food, water, freedom of association, an adequate standard of living and a healthy, sustainable environment.[41]

The loss of biodiversity threatens the right to health and the right to life due to human reliance on biodiversity for medicinal drugs and microbial diversity. The rise in infectious diseases has direct and indirect adverse effects on mental health.[42] Similarly, studies show that the loss of genetic diversity, with local varieties and breeds of domesticated plants disappearing at an alarming speed, poses a serious risk to global food security by undermining the resilience of many agricultural systems to threats such as pests, pathogens and climate change.[43] This also has an effect on access to water and sanitation. Fulfilling the right to water requires ensuring safe and sufficient water for personal and domestic use, but pollution and pathogens can make water unsafe for human consumption.[44] The protection of forest areas can improve water flow regulation by reducing runoff and providing greater water storage. Additionally,

[37] Dilys Roe, Nathalie Seddon and Joanna Elliott, 'Biodiversity Loss is a Development Issue: A Rapid Review of Evidence' (IIED 2019) 11.
[38] A study carried out in 2001 shows that 75 per cent of all emerging diseases come from wildlife. See Louise Taylor and others, 'Risk Factors for Human Disease Emergence' (2001) 356 Philos Trans R Soc Lond B Biol Sci 983.
[39] FAO, J Bélanger and D Pilling (eds), 'The State of the World's Biodiversity for Food and Agriculture' (FAO Commission on Genetic Resources for Food and Agriculture Assessments 2019), 87.
[40] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd (2020), UN Doc A/75/161, para 11.
[41] Ibid, para 10.
[42] United Nations Human Rights Committee (HRC), 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2017) UN Doc. A/HRC/34/49, para 12.
[43] IPBES, 'Global Assessment Report on Biodiversity and Ecosystem Services, Summary for Policymakers' (IPBES 2019) 12.
[44] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd' (2021) UN Doc A/HRC/46/28, para 31.

protecting biological diversity in water helps to draw excess nitrogen and phosphorus from aquatic ecosystems and contribute to water purification.[45]

International human rights law (IHRL) provides specific protections to the rights of Indigenous peoples,[46] women,[47] persons with disabilities,[48] children[49] and environmental defenders[50] for whom the loss of biodiversity poses specific threats.[51] The increasing pressures on biodiversity from deforestation, the loss of wetlands, mining, logging and other developments entail a loss of subsistence and traditional livelihoods for Indigenous peoples.[52] These challenges have a ripple effect on the transmission of indigenous and local knowledge, and on the potential for sharing of benefits arising from the sustainable use and conservation of these biological resources.[53] It also generates a disproportionate burden on women and girls as it increases the time required to obtain resources such as water, fuel wood, and medicinal plants. This, in turn, reduces the time they have available for income generating activities and education.[54] Children suffer the same impacts as adults but are particularly affected because they are still developing.[55] And their behaviour, such as playing, can expose them to more harmful chemicals and organisms.[56] Economically vulnerable populations are exposed to

[45] United Nations Human Rights Committee (HRC), 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2017) UN Doc. A/HRC/34/49, para 21.

[46] UNGA, 'United Nations Declaration on the Rights of Indigenous Peoples' (2007) UN Doc A/RES/61/295; Convention (No. 169) concerning indigenous and tribal peoples in independent countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383.

[47] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

[48] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

[49] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

[50] UNGA, 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms' (1999) UN Doc A/RES/53/144.

[51] See also United Nations Human Rights Committee (HRC), 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2017) UN Doc. A/HRC/34/49.

[52] IPBES, 'Global Assessment Report on Biodiversity and Ecosystem Services, Summary for Policymakers' (IPBES 2019) 14.

[53] Ibid, 78.

[54] Cristiana Pașca Palmer, 'The Role, Influence and Impact of Women in Biodiversity Conservation' (IIED, 9 October 2018) <https://www.iied.org/role-influence-impact-women-biodiversity-conservation> Accessed 27 November 2023.

[55] See HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H Knox' (2018) UN Doc A/HRC/37/58, paras 16 and 69.

[56] Ibid, para 37.

heightened risk of disease from environmental degradation. Watershed degradation for example, has been linked with increased diarrhoea, which is a major cause of child mortality.[57]

States have the obligation to respect, protect and fulfil human rights in all actions related to the environment, and must take measures to protect the human rights of all.[58] 31 States provide constitutional recognition of the right to food,[59] while approximately 140 States have enacted framework climate legislation.[60] Several constitutions contain obligations in relation to biodiversity and wildlife, with some recognising the rights of non-human species and Mother Earth. The right to a clean, healthy and sustainable environment encapsulates the interdependence between human rights and the environment. On the one hand, the enjoyment of the full range of human rights, including the rights to life, health, food, water and development is dependent on a clean, healthy and sustainable environment.[61] On the other hand, the exercise of procedural human rights, including the rights to information, participation and remedy, is essential to the protection of the environment.[62]

1.2. The global biodiversity funding gap

Worryingly, the acceleration of biodiversity loss means that goals for conserving and sustainably using nature and achieving sustainability cannot be met by current trajectories.[63] The pathway to meet these goals in 2030 and beyond requires transformative changes across economic, social, political and technological factors.[64] Inadequate funding is a major impediment,[65] and if economically-advanced states met their commitment to allocating 0.7 percent of their gross national income (GNI) to developing countries and 0.15 to 0.20 percent

[57] Dilys Roe, 'Biodiversity Loss—More Than an Environmental Emergency' (2019) 3 The Lancet Planetary Health 287.
[58] UNGA, 'The Human Right to a Clean, Healthy and Sustainable Environment' (2022) UN Doc A/76/L.75, Preamble.
[59] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David, R. Boyd' (2020) UN Doc A/HRC/43/53, para 74.
[60] Ibid, para 51.
[61] United Nations Human Rights Committee (HRC), 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2017) UN Doc. A/HRC/34/49, para 5.
[62] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2018) UN Doc A/HRC/37/59, para 2.
[63] Ibid, 772.
[64] Ibid.
[65] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd (2022), UN Doc A/77/284, para 56.

of their GNI to least developed countries this would produce approximately USD 200 billion in additional funds annually.[66]

Biodiversity-related finance encompasses financial resources towards conservation, restoration, and sustainable use of biodiversity, as well as investments into the biophysical systems supporting biodiversity.[67] Financial resources for biodiversity conservation derive from three main sectors which include government funding, official development assistance, and private capital.[68]

The quantification and the measurement of biodiversity health has been a constant element underpinning the measurement of biodiversity-related aid effectiveness. But quantifying aid flows and measuring the aid gap in biodiversity finance has been an extremely challenging process, particularly in an increasingly complex landscape for development cooperation.

Although biodiversity-related aid has increased substantially since 1980, funding commitments fall well short of the amounts agreed at the 1992 Rio Conference.[69] Recent research into global biodiversity conservation financing shows that in 2019, the total global annual flow of funds toward biodiversity protection amounted to approximately USD 124–143 billion per year.[70] Of this total figure, ODA made up about 5 percent, which translates into a bracket of between USD 4 and 10 billion. In contrast, domestic budgets made up 57 percent of total contribution which equates to between USD 75 and 78 billion. Despite these contributions, the total estimated financing need for biodiversity conservation is thought to be between USD 722 and USD 967 billion per year, leaving a current biodiversity financing gap of between USD 598 billion and USD 824 billion per year.[71] The funding needs of specific thematic areas is estimated to be between USD 315 – 420 billion for croplands, USD 149 – 192 billion for protected areas, USD 81 billion for rangelands, USD 73 billion for urban environments, USD 36 – 84 billion to tackle invasive species, USD 27 – 37 billion for coastal areas, USD 23 – 47 billion for fisheries, and USD 19 – 32 billion for forests.[72]

Official development finance is composed of both ODA and other official flows (OOF), which are delivered through a variety of bilateral and multilateral channels. The Organisation

[66] Ibid, para 76.
[67] Ibid, 47.
[68] Ibid.
[69] Danial C. Miller, Arun Agrawal and J. Timmons Roberts, ‘Biodiversity, Governance, and the Allocation of International Aid for Conservation’ (2013) 6 Conservation Letters 12, 17.
[70] Andrew Deutz and others, ‘Financing Nature: Closing the global biodiversity financing gap’ (The Paulson Institute, The Nature Conservancy, and the Cornell Atkinson Center for Sustainability 2020).
[71] Ibid, 12.
[72] Ibid, 16.

for Economic Co-operation and Development's Development Assistance Committee (OECD DAC) statistical system collects data on biodiversity-related official development finance, identified through the use of the biodiversity "Rio marker". This information is reported by members of the OECD DAC, as part of the Creditor Reporting System (CRS).[73] While bilateral biodiversity-related ODA is systematically reported by 28 OECD DAC members, multilateral flows and other official flows for biodiversity are not yet fully identified or reported within the DAC statistical system.[74]

The picture therefore remains incomplete for multilateral development finance flows, non-DAC development finance flows, and private flows.[75] Although these are not systematically tracked, multilateral biodiversity-related flows have been estimated to be more than double bilateral ODA flows. Over the period 1991-2012, the GEF mobilised USD 12.9 billion for biodiversity, made up of USD 3.4 billion provided by national governments (including DAC members), and leveraged USD 9.5 billion as co-finance.[76] The indicative GEF-8 resource allocation table following the conclusion of the GEF replenishment negotiations show that biodiversity makes up 36 percent of budget allocation.[77] The GEF-8 Programming Directions commit the GEF to supporting the implementation of the goals and action targets of the Kunming-Montreal GBF through its biodiversity focal area investments and associated programming through other focal areas. In addition, the GEF-8 strategy promotes a mutually supportive implementation and programmatic synergies amongst the CBD and its Protocols, and other CBD-relevant objectives of under biodiversity-related multilateral instruments/agreements.[78] Similarly, biodiversity-related development assistance from non-DAC countries, such as China and Brazil, isn't fully accounted for but may also be important.[79] The biodiversity funding gap raises important questions for the CBD's financial provisions and the international community's ability to respond to the challenges posed by the rapid loss in biodiversity.

[73] OECD, 'Financing for Development in Support of Biodiversity and Ecosystem Services' (OECD Development Co-operation Working Papers, No 23, 2015), para 12.
[74] Ibid, para 12.
[75] Ibid, p. 5.
[76] Ibid, para 31.
[77] Global Environment Facility (GEF), 'Indicative GEF-8 Resource Allocation Table Following the Conclusion of the Replenishment Negotiations on April 8, 2022' (GEF/R.08/Misc.01, 2022), Annex 2.
[78] Ibid, para 279.
[79] OECD, 'Financing for Development in Support of Biodiversity and Ecosystem Services' (OECD Development Co-operation Working Papers, No 23, 2015), para 32.

1.3. Biodiversity projects and human rights

Outcome documents and statements around development assistance from international fora frequently describe it as "crucial"[80] to sustainable development and "important"[81] to the achievement of global biodiversity goals. This language however, hides the potential drawbacks associated with the delivery of financial assistance. The negative impacts of development projects have been highlighted in literature, with studies showing a negative impact on governance, [82] including on markers such as law and order, bureaucracy quality, and corruption.[83] One study also concludes that these negative impacts on the quality of governance may have serious consequences for economic growth.[84]

While scaling up biodiversity finance is a key mechanism for the achievement of the CBD's goals, it also generates concerns over human rights issues.[85] The World Bank's Inspection Panel reviews complaints from people and communities who believe that they have been, or are likely to be, adversely affected by a World Bank-funded project. Since its creation in 1993, the Inspection Panel has reviewed 150 complaints,[86] the majority of which relate to projects in Africa, South Asia and Latin America.[87] The large majority of these complaints are brought in by the communities themselves, or by communities with the support of local civil society organisations,[88] to investigate issues related to *inter alia* environmental assessments, consultations and disclosures, natural habitats, indigenous peoples, and forests.[89]

23 percent of complaints were submitted by indigenous communities, of which 25 percent allege involuntary resettlement, and 47 percent involve projects with a high predicted

---

[80] UNGA, 'Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)' (27 July 2015), UN Doc A/RES/69/313, para 51.
[81] CBD, 'Evaluation and Review of the Strategy for Resource Mobilization and Aichi Biodiversity Target 20 - First Report of the Panel of Experts on Resource Mobilization' (8 June 2020) UN Doc CBD/SBI/3/INF/2, para 85.
[82] Justin Yifu Lin, 'A Modeling Framework for Enhancing Aid Effectiveness' (2020) 23(2) *Journal of Economic Policy Reform* 138, 142-143.
[83] Matthias Busse and Steffen Gröning, 'Does Foreign Aid Improve Governance?' (2009) 104(2) Economics Letters 76, 78.
[84] Stephen Knack, 'Aid Dependence and the Quality of Governance: Cross-Country Empirical Tests' (2001) 68(2) *Southern Economic Journal*, 319.
[85] CBD, 'Discussion Paper: Safeguards for Scaling-Up Biodiversity Finance and Possible Guiding Principles' (7 October 2012) UN Doc UNEP/CBD/COP/11/INF/7.
[86] World Bank Inspection Panel, 'Panel Cases' <https://www.inspectionpanel.org/panel-cases> Accessed 27 November 2023.
[87] Ibid, 'Regional Distribution of Cases' <https://www.inspectionpanel.org/panel-cases> Accessed 27 November 2023.
[88] Ibid, 'Type of Complainants' <https://www.inspectionpanel.org/panel-cases> Accessed 27 November 2023.
[89] Ibid, 'Major Policy Issues Raised in Requests' <https://www.inspectionpanel.org/panel-cases> Accessed 27 November 2023.

environmental impact. Some complaints fall into two or all three of these categories.[90] One case in particular put the World Bank in the spotlight in 2013 when a request was lodged from Swenger communities in the Cherangany Hills in Kenya. The communities claimed that the World Bank's Natural Resources Management Project (NRMP) had resulted in the destruction of the property of Sengwer ethnic minority forest indigenous peoples,[91] in threats and intimidations when Sengwer families objected to the planting of trees[92] and in resettlement plans for Sengwer families without carrying effective and efficient free prior and informed consultations.[93] This case attracted a lot of criticism in the press[94] and in the literature.[95] The investigation did show a number a failures in the design and implementation of the project.[96]

At the third International Conference on Financing for Development, governments encouraged all development banks "to establish or maintain social and environmental safeguards systems, including on human rights, gender equality and women's empowerment."[97] Despite these safeguards, the human rights aspects of biodiversity-related development projects come out very strongly in the complaints filed against GEF implementing agencies. Complaints about GEF-funded projects often involve issues such as consultations with affected stakeholders, including FPIC, and a lack of compliance with GEF policies.[98]

GEF-funded projects implemented through UNDP are regularly flagged for their lack of adherence with the Programme's own social and environmental safeguards. In the Republic of Congo, a project for the Integrated and Transboundary Conservation of Biodiversity failed to identify critical project risks and was shown to have implemented partnerships with government organisations that have employed violence and intimidation against indigenous

---

[90] Kelebogile Zvobgo, & Benjamin Graham, 'The World Bank as an Enforcer of Human Rights' (2020) 19 Journal of Human Rights 4, 425, 432.
[91] World Bank Inspection Panel, 'Request for inspection Kenya: Natural Resource Management Project (P095050)' (30 January 2013) Doc number lPN REQUEST RQ 13/02, para 3(a).
[92] Ibid, para 3(e)
[93] Ibid, para 3(f)
[94] Nafeez Ahmed, 'World Bank and UN carbon offset scheme 'complicit' in genocidal land grabs – NGOs,' (*The Guardian*, 3rd July 2014) <https://www.theguardian.com/environment/earth-insight/2014/jul/03/world-bank-un-redd-genocide-land-carbon-grab-sengwer-kenya> Accessed 27 November 2023. See also Justin Kenrick, 'Kenyan Government torches hundreds of Sengwer homes in the forest glades in Embobut,' *(Forest Peoples Programme*, 20 January 2014, <https://www.forestpeoples.org/topics/legal-human-rights/news/2014/01/kenyan-government-torches-hundreds-sengwer-homes-forest-glade> Accessed 27 November 2023.
[95] See Simone Dietrich, 'Donor Political Economies and the Pursuit of Aid Effectiveness' (2016) 70(1) International Organization 65.
[96] International Bank for Reconstruction and Development International Development Association, 'Progress Report to the Board of Executive Directors on the Implementation of Management's Action Plan In Response to the Inspection Panel Investigation Report on the Kenya Natural Resource Management Project (IDA Credit No. 42770-KE)' (17 September 2015), Annex 1.
[97] UNGA, 'Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)' (27 July 2015), UN Doc A/RES/69/313, para 75.
[98] GEF Secretariat, 'Conflict Resolution - Voice and Right of Recourse for Affected People' (2018).

communities to achieve project objectives.[99] In a similar case in Cameroon, another project for the Integrated and Transboundary Conservation of Biodiversity led to local communities being evicted from their ancestral lands to make way for the creation of national parks, preventing these communities from engaging in traditional hunting and resource gathering within these areas.[100] They were also shown to have been subjected to violence as a means of enforcing such restrictions.[101] The improper or incomplete identification of risks is a common cause of complaint with investigations showing agency failures in the identification of all communities that might be impacted, and how they might be impacted.[102]

Despite UNDP's Social and Environmental Compliance Unit (SECU)'s position that risks to the human rights, lands, natural resources and traditional livelihoods of indigenous peoples must always be considered high,[103] the lack of harmonised methodology across GEF implementing agencies for the identification of risks means that "affected stakeholders" may not all be identified, their concerns may not all be mitigated and they may be treated differently from project to project and from agency to agency.

1.4. The Kunming-Montreal Global Biodiversity Framework

The Kunming-Montreal GBF was adopted in December 2022 through COP Decision 15/4 after a long preparatory process, carried out through five meetings of the Open-ended Working Group on the Post-2020 Global Biodiversity Framework, and a series of regional and

[99] United Nations Development Programme – OAI, Social and Environmental Compliance Unit, 'Final Investigation Report, Investigating allegations of non-compliance with UNDP social and environmental commitments relating to the following UNDP activities: Integrated and Transboundary Conservation of Biodiversity in the Basins of the Republic of Congo, TRIDOM II, Case No. SECU0009' (4 June 2020), para 9.

[100] United Nations Development Programme – OAI, Social and Environmental Compliance Unit, 'Final Investigation Report, Final Investigation Report, Investigating allegations of non-compliance with UNDP social and environmental commitments relating to the following UNDP activities: Integrated and Transboundary Conservation of Biodiversity in the Basins of the Republic of Cameroon, TRIDOM II, Case No. SECU0008 (27 August 2020), para 20.

[101] Ibid.

[102] United Nations Development Programme – OAI, Social and Environmental Compliance Unit, 'Final Investigation Report, Final Investigation Report, Investigating allegations of non-compliance with UNDP social and environmental commitments relating to the following UNDP activities: Integrated and Transboundary Conservation of Biodiversity in the Basins of the Republic of Cameroon, TRIDOM II, Case No. SECU0008 (27 August 2020), para 37. See also United Nations Development Programme – OAI, Social and Environmental Compliance Unit, 'Draft Investigation Report Part 1 of 2, Investigating allegations of non-compliance with UNDP social and environmental commitments relating to the following UNDP project: Integrated Protected Area Land and Seascape Management in Tanintharyi, Case No. SECU0010' (9 February 2022), para 38.

[103] United Nations Development Programme – OAI, Social and Environmental Compliance Unit, 'Draft Investigation Report Part 1 of 2, Investigating allegations of non-compliance with UNDP social and environmental commitments relating to the following UNDP project: Integrated Protected Area Land and Seascape Management in Tanintharyi, Case No. SECU0010' (9 February 2022), para 39.

thematic consultations and workshops.[104] The Framework is supported by 6 additional COP decisions to address issues of planning, monitoring, reporting and review,[105] resource mobilisation,[106] capacity-building,[107] digital sequence information[108] and cooperation with other Conventions and international organisations.[109] It recognises the intrinsic links between biodiversity and human well-being, a healthy planet, and economic prosperity for all people, and people's reliance on biological diversity for food, medicine, energy, clean air and water, security from natural disasters as well as recreation and cultural inspiration.[110]

The decision includes a commitment to mobilise at least USD 200 billion per year by 2030 in financial flows from all sources, including domestic, international, public and private resources, to progressively close the biodiversity finance gap.[111] Although a welcome development, this commitment continues to fall well short of bridging the estimated USD 711 billion financing gap per year.[112] Importantly however, the Kunming-Montreal GBF includes a commitment to apply a human rights-based approach to the implementation of the Framework.[113]

Considering the role of the GEF in supporting the realisation of the GBF, it is important that its implementing agencies have adequate policies and procedures in place to not only prevent violations to human rights but also to ensure the application of a human rights-based approach to the design, implementation, monitoring and evaluation of GEF-funded biodiversity projects. The Framework Principles on Human Rights and the Environment call on providers of development assistance to develop and implement environmental and social safeguards that are consistent with human rights obligations.[114] These safeguards should include requiring the environmental and social assessment of every proposed project and programme, providing for effective public participation, providing for effective procedures to enable those who may be harmed to pursue remedies, requiring legal and institutional protections against environmental

[104] Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4.
[105] Conference of the Parties to CBD Decision 15/6 (19 December 2022), UN Doc CBD/COP/DEC/15/6.
[106] Conference of the Parties to CBD Decision 15/7 (19 December 2022), UN Doc CBD/COP/DEC/15/7.
[107] Conference of the Parties to CBD Decision 15/8 (19 December 2022), UN Doc CBD/COP/DEC/15/8.
[108] Conference of the Parties to CBD Decision 15/9 (19 December 2022), UN Doc CBD/COP/DEC/15/9.
[109] Conference of the Parties to CBD Decision 15/13 (19 December 2022), UN Doc CBD/COP/DEC/15/13.
[110] Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4, para 1.
[111] Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4, Annex, Section H, Target 19.
[112] Andrew Deutz and others, 'Financing Nature: Closing the global biodiversity financing gap' (The Paulson Institute, The Nature Conservancy, and the Cornell Atkinson Center for Sustainability 2020), 12.
[113] Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4, Annex, para 7(a).
[114] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2018) UN Doc A/HRC/37/59, Annex, para 39.

and social risks, and including specific protections for indigenous peoples and those in vulnerable situations.

2. Broader context for development assistance

Today, the responsibility of developed countries to provide financial assistance to less economically advanced nations is well established in the international agenda for development.[115] The intricate international architecture developed to channel aid to developing countries may reinforce the impression that aid is a permanent fixture of development, built on strong conceptual and theoretical foundations, regulated by a set of common rules and overseen by impartial accountability mechanisms. The reality however, is that aid draws from and feeds into a complex web of intersecting fields, including political science, trade and finance, history, philosophy, anthropology, and law. Aid has emerged empirically from the geopolitical dynamics that shaped the post-World War II era and is increasingly challenged by new and emerging political forces.[116] These dynamics have direct implications on the provision of financial assistance for the realisation of CBD objectives.

2.1. An evolving geopolitical context for development cooperation

The traditional dichotomy between North and South, developed and developing, donors and recipients is being shaken up by powerful economic actors that are pushing the conceptual, theoretical and operational boundaries of development cooperation. These shifting dynamics have ramifications deep into the multilateral world order established since the Cold War. Today, new actors from the private sector and civil society, are pushing the normative boundaries of state sovereignty and are exerting a growing influence over the international agenda in many areas, including environmental governance.[117]

The last decade has seen increased challenges to globalisation, with cross-national threats such as the COVID-19 pandemic, leading some to question the ability of collective

[115] See United Nations, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (2015), Sustainable Development Goal 17 on Partnerships for the Goals.
[116] See Gerardo Bracho, 'The origins of development aid: a historical perspective' in Bracho and others, *Origins, Evolution and Future of Global Development Cooperation: The Role of the Development Assistance Committee (DAC)* (Deutsches Institut für Entwicklungspolitik gGmbH, 2021).
[117] Christiana Lopes, 'Adjusting Multilateralism to the 21st Century in UNDESA' (UNDESA 2020).

mechanisms to solve local issues, and to demand more sovereignty and independence. This has resulted in a retreat from multilateral commitments, characterised by a decoupling between political intentions and measurable results which reflects three deficits.[118] First, a regulatory-legal deficit characterised by a pushback against the foundational principles of international law and its global processes which are seen as encroaching on national sovereignty. Second, a deficit of participation, whereby non-state actors challenge the dominance of intergovernmental processes as the main avenue of decision-making. Third, a deficit of incentives, which is hampering progress in the achievement of global commitments such as the SDGs. Taken together, these deficits slow down the implementation of treaties and international commitments.[119] In this context it is crucial to reassess the normative strength of international legal commitments and remind countries of the binding nature of the obligations that they consent to be bound to through the regular process of negotiation and ratification of treaties.

Over its 60+ years of existence, the OECD DAC has seen a remarkable evolution and demonstrated considerable resilience and adaptability in the face of ever-evolving challenges.[120] Despite the introduction and mobilisation of new sources of financing for biodiversity, the contribution of ODA for the implementation of biodiversity-related activities remains strong.[121] Yet the DAC is at a pivotal time in its history. The new world order that has been gradually unfolding since the fall of the Berlin Wall is laying bare the weakening of the old North-South power structures and the growing role of the rising super-powers, particularly China's. These new dynamics are turning the OECD DAC into a battleground for ideological supremacy,[122] forcing it to adapt and think creatively to forge new partnerships in a rapidly changing geopolitical landscape.[123] On a procedural level, the increasing proliferation and fragmentation of aid caused by what Jean-Michel Severino and Olivier Ray have termed

[118] Ibid.
[119] Ibid.
[120] See Gerardo Bracho, 'Diplomacy by stealth and pressure: the creation of the Development Assistance Group (and the OECD) in 51 days' in Bracho and others, *Origins, Evolution and Future of Global Development Cooperation: The Role of the Development Assistance Committee (DAC)* (Deutsches Institut für Entwicklungspolitik gGmbH, 2021).
[121] See OECD, 'A Comprehensive Overview of Global Biodiversity Finance' (OECD Publishing 2020).
[122] See Paulo Esteves and Manaira Assunção, 'South–South cooperation and the international development battlefield: between the OECD and the UN' (2014) 35(10) *Third World Quarterly* 1775.
[123] See Brian Atwood and Richard Manning, 'DAC High Level Forums on aid effectiveness' in Bracho and others, *Origins, Evolution and Future of Global Development Cooperation: The Role of the Development Assistance Committee (DAC)* (Deutsches Institut für Entwicklungspolitik gGmbH, 2021).

"hypercollective action", is affecting the ability of aid flows to meet their objectives.[124] Although the fragmentation of aid presents complex challenges, it also brings new opportunities to adjust the balance of power in donor-recipient relations. The increasingly diverse field of development cooperation introduces an element of competition between providers of aid and broadens the options for developing countries. As such, it increases the potential for mutual learning, innovation and competitive selection among the various different providers of development cooperation.[125]

International development emerged within the context of Europe's reconstruction following WWII and the collapse of colonial empires. These two processes have had long-lasting impacts on the field of development cooperation and the birth of South-South Cooperation (SSC). On the one hand, the Marshall Plan enabled the creation of a set of harmonised practices built around the peer review of policies, programmes and projects which have become standard practice in North-South cooperation. These find a practical application in the concept of ODA.[126] On the other hand, the dismantling of colonial powers led to a "re-hierarchisation" of international relations around the dichotomy between developed and underdeveloped countries (later referred to as "developing countries"), and donors and recipients of ODA.[127] This dichotomy has dominated the field of development cooperation since the 1970s but it is gradually being challenged by other providers of aid who are gaining increasing influence in the field.

Development cooperation today is characterised by a growing diversification in the countries that provide aid. These are commonly referred to as non-DAC "providers" of aid but they do not form a homogeneous group. They are broadly made up of three sub-groups which include: emerging donors that are new to providing aid programmes and mostly set up legal and institutional frameworks to channel their development assistance programmes as part of their EU accession process; providers of South-South Cooperation (SSC) who are primarily developing countries, middle income countries and emerging economies that share expertise and financial support with other countries. These include Brazil, China, India and South Africa,

[124] Jean-Michel Severino, and Olivier Ray, 'The End of ODA (II): The Birth of Hypercollective Action' (Center for Global Development, 2010). See also UNGA, 'Innovative mechanisms of financing for development' (2011) UN Doc A/RES/65/146.
[125] Stephan Klingebiel and others, 'Fragmentation: A Key Concept for Development Cooperation' in Stephan Klingebiel and others (eds), *The Fragmentation of Aid* (Palgrave Macmillan, 2016), 5.
[126] Paulo Esteves and Manaira Assunção, 'South–South cooperation and the international development battlefield: between the OECD and the UN' (2014) 35(10) *Third World Quarterly* 1775,1776.
[127] Ibid.

as well as Colombia, Egypt and Thailand;[128] finally, Arab donors such as Kuwait, Saudi Arabia and the United Arab Emirates provide their own development assistance.[129]

SSC emerged out of the Asian-African Conference held in Bandung in 1955 to strengthen the capacities of newly independent states both individually and collectively[130] "on the basis of mutual interest respect for national sovereignty.[131] It expressed its commitment to the respect of fundamental human rights and the Charter of the United Nations, the promotion of mutual interests and cooperation, the respect for justice and international obligations.[132] This coalition of countries in the South was gradually strengthened in the 1960s and 1970s, with the creation of the UNCTAD), the G77 which was originally formed by 77 non-aligned nations in the wake of UNCTAD and has now evolved into a coalition of 134 countries, and the Declaration on the Establishment of a New International Economic Order (NIEO).[133] In its Resolution 32/183 of 1977, the UN General Assembly recognised the role of technical co-operation among developing countries as a "new dimension of international co-operation".[134]

These movements are evidence of the lack of trust of developing countries in the OECD DAC and the suspicion that it would perpetuate inequalities, through a process that would turn economic asymmetries into political hierarchy. These suspicions weren't limited to the DAC but extended to other institutions, particularly financial institutions such as the World Bank.[135] In the early 2000s, ODA came under intense pressure due to the implementation of fiscal austerity policies in developed economies that contributed to the emergence of the "aid that benefits us" narrative.[136] Aid effectiveness which had always been an objective of the DAC[137] gained increased momentum and led to the adoption of the Paris Declaration on Aid Effectiveness in 2005 and the Accra Agenda for Action in 2008. The Paris Declaration lays out Partnership Commitments[138] around the principles of ownership, harmonisation, alignment,

---

[128] OECD, 'Beyond The DAC: The Welcome Role of Other Providers of Development Co-Operation' (Issue Brief, 2010) 1.
[129] Ibid.
[130] Paulo Esteves and Manaira Assunção, 'South–South cooperation and the international development battlefield: between the OECD and the UN' (2014) 35(10) Third World Quarterly 1775, 1778.
[131] Final Communiqué of the Asian-African Conference in Asia-Africa Speak from Bandung (Ministry of Foreign Affairs, Indonesia, 1955) 161-169, Section A, para 1.
[132] Ibid, 10.
[133] UNGA, 'Declaration on the Establishment of a New International Economic Order' (1974) UN Doc A/RES/3201(S-VI).
[134] UNGA, 'Technical co-operation among developing countries' (1977) UN Doc A/RES/32/182.
[135] Paulo Esteves and Manaira Assunção, 'South–South cooperation and the international development battlefield: between the OECD and the UN' (2014) 35(10) *Third World Quarterly* 1775, 1779.
[136] Ibid, 1781.
[137] OECD, 'Resolution of the Council Concerning The Mandate of the Development Assistance Committee' Doc number [C(2022)208], para 2(c).
[138] OECD, 'Paris Declaration on Aid Effectiveness' (OECD Publishing 2005) para 13.

results and mutual accountability. The increasing weight of emerging powers as actors of development cooperation revitalised SSC and contributed to a shift in the development cooperation narrative at the DAC. These powers – particularly China – are challenging the long-standing dichotomy between donors and recipients, developed and developing countries.[139] In contrast to DAC members, they do not consider themselves to be donors but equal partners. To illustrate this point, China's Policy on International Development Cooperation in the New Era, published in January 2021, shows a clear departure from North-South cooperation as led by the OECD DAC. The policy starts by asserting that "all countries are members of a global village with [a] shared future", and "China advocates fairer and more equitable international relations, and steadfastly contributes to global development." The policy acknowledges China's duty to actively engage in development cooperation as a responsible member of the international community and does so with a focus on SSC and the implementation of the 2030 Development Agenda. The policy puts forward the South-South Cooperation Assistance Fund (SSCAF) which works in partnership with UN agencies and programmes to support agricultural development and food security, poverty reduction, health care for women and children, response to public health emergencies, education and training, post-disaster reconstruction, migrant and refugee protection, and aid for trade.[140]

2.2. The role of the Asian Infrastructure Investment Bank in biodiversity finance

This competition highlights some of the weaknesses of post-war institutions and offers opportunities for emerging providers of aid to learn from these weaknesses and adjust their approach accordingly. A report commissioned by the World Bank in 2009 – known as the Zedillo report – found some areas of vulnerability in the governance architecture of the World Bank Group. These centre around important aspects such as strategy formulation, voice and participation of its member countries and accountability due to the poor delineation of responsibilities among governing bodies.[141] In particular, the Commission found that the Bank lacks effective means to formulate a clear strategy that can be used to set priorities, balance trade-offs and align operations and resources with strategic goals. It is also lacking mechanisms

[139] See Branislav Gosovic, 'The Resurgence of South–South Cooperation' (2016) 37(4) Third World Quarterly 733.
[140] China's State Council Information Office, 'China's International Development Cooperation in the New Era' (2021).
[141] Ernesto Zedillo, 'Repowering the World Bank for the 21st Century: Report of The High-Level Commission on Modernization of World Bank Group Governance' (The World Bank Group 2009).

for meaningful stakeholder engagement in strategy formulation.[142] These shortcomings in the current structure risks producing strategies that do not enjoy widespread support among members, alienating them and undermining their trust in the institution.[143] The lack of reform in the World Bank following the Zedillo report is likely to have contributed to China's decision to launch its own development bank, the Asian Infrastructure Investment Bank (AIIB) in 2016.

In recent years, this competition has played out in the development and implementation of social and environmental standards that aim to avoid and mitigate adverse impacts to people and the environment. The World Bank's social and environmental standards are notoriously long and detailed and set out a number of steps to follow prior to the approval of a project. As will be discussed Chapter 5, these include *inter alia*, carrying out environmental and social impact assessments to identify and mitigate risks, the disclosure of information, and consultations with affected individuals and communities. AIIB adopted its own Environmental and Social Framework, which was updated in 2021. Its current version contains many similarities with the World Bank's Environmental and Social Framework, with mandatory standards covering environmental and social assessment and management, land acquisition and involuntary resettlement, and Indigenous peoples.[144] It also requires the AIIB's clients to *inter alia*, analyse potential environmental and social risks and impacts of projects, identify actions to avoid, minimise, mitigate, offset or compensate for environmental and social impacts of projects, and to provide "a sound mechanism" for ongoing public engagement of stakeholders through consultation and disclosure of information on environmental and social risks and impacts of projects, and measures to manage them.[145] Although similar in spirit to the World Bank's standards they are much less prescriptive in nature and allow more flexibility in the application of the framework.

The implementation of AIIB's standards has come under scrutiny, following reports that its environmental and social safeguards have allowed negative impacts on communities.[146] Similarly and despite its more stringent criteria for the application of its own ESF, the World Bank is regularly held accountable for failures to ensure adequate implementation of its standards.[147] AIIB is betting that it can meet international standards in a more timely and cost-

[142] Ibid, p. x.
[143] Ibid, para 74.
[144] Asian Infrastructure Investment Bank (AIIB), 'Environmental and Social Framework (ESF)' (2021), 11.
[145] Ibid, 11-12.
[146] Shi Yi and Wawa Wang, 'AIIB's Environmental and Social Safeguards Under Scrutiny Ahead of Annual Meeting' (*China Dialogue*, 26 October 2021) <https://chinadialogue.net/en/business/aiib-agm-environmental-and-social-safeguards-under-scrutiny/> Accessed 27 November 2023.
[147] Yvonne Wong and Benoit Mayer, 'The World Bank's Inspection Panel: A Tool for Accountability' (World Bank 2015).

effective way than the World Bank. Only time will tell if this approach is successful, but if AIIB can meet social and environmental standards more efficiently, it would have positive implications for development cooperation.[148] However, as will be argued throughout this thesis, environmental and social risk avoidance frameworks on their own cannot be relied upon by international organisations to meet their responsibility to respect, protect and fulfil human rights.

While China's increasingly prominent role on the development stage offers more opportunities for developing countries to determine which options for financial support meets their needs, a study carried out by the International Monetary Fund (IMF) in 2022 concludes that China's development cooperation has had a positive effect on economic and social outcomes, but the opposite effect on governance. In addition, it found no evidence of a significant effect on socio-economic stability. Whilst Chinese development assistance has had some impact on development outcomes in recipient countries, its effect is heterogeneous and very small in size. In this regard it presents similarities with the effects of traditional aid from OECD DAC donors that has been documented in the aid effectiveness literature.[149]

3. Terminological clarifications

This thesis makes reference to the terms "international aid", "development cooperation", "Official Development Assistance", and "financial assistance". While these terms are sometimes used interchangeably in the field of international development, they are conceptually distinct from one another.

"International aid" or "foreign aid" is an umbrella term that is usually used to refer to the international transfer of financial support. However, it can also encompass technical assistance, military assistance, and emergency humanitarian relief.[150]

"Development cooperation" is used to denote a partnership between donors and recipient States working towards common development goals, rather than a one-way provision

[148] David Dollar, 'Is China's Development Finance a Challenge to the International Order?' (2018) 13(2) Asian Economic Policy Review 283, 296.
[149] International Monetary Fund, 'Has Chinese Aid Benefited Recipient Countries? Evidence from a Meta-Regression Analysis' (IMF Working Paper WP/22/46, 2022) 22.
[150] Victoria Williams, 'Foreign Aid' (*Encyclopedia Britannica*, 2023) <https://www.britannica.com/money/topic/foreign-aid> Accessed on 27 November 2023.

of aid.[151] It is rooted in the concept that both donors and recipients are mutually invested in the process and outcomes of development initiatives.[152] It encompasses not only the transfer of resources but also the sharing of knowledge, skills, and policy advice.[153]

"Official Development Assistance" (ODA) typically refers to financial support, technical assistance, or goods provided by developed countries or international organisations to developing countries with the explicit aim of promoting economic development and welfare. ODA focuses on the intention behind the transfer: it must be concessional in character, with the primary aim of promoting the economic development and welfare of developing countries.[154] It can be either bilateral when it is given directly by the donor country to a recipient country or multilateral when it is provided to an international agency, such as the United Nations.

In this thesis the terms "financial assistance" refer to the transfer of financial assistance by developed country Parties to developing country parties in accordance with CBD Articles 20 and 21. This financial assistance is provided in the form of ODA either bilaterally or through the CBD's financial mechanism. Consequently, this thesis uses the terms "financial assistance" and "ODA" interchangeably. The focus of this thesis is on financial assistance/ODA provided through the financial mechanism.

4. Rationale for the thesis and contribution to the literature

The research presented in this thesis adds to the growing field of academic literature in international law that explores the connection between IHRL and biodiversity. The relevance and timeliness of this research is evidenced by recent CBD COP decisions[155] and by the former UN Special Rapporteur's Framework Principles on Human Rights and the Environment.[156]

---

[151] UNGA, 'Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Léo Heller' (2016) UN Doc A/71/302, Footnote No. 2.

[152] Ibid.

[153] Ibid.

[154] OECD, 'Official Development Assistance (ODA)' in *OECD Glossary of Statistical Terms*. <https://www.oecd.org/dac/dac-glossary.htm#ODA> Accessed on 27 November 2023.

[155] See Conference of the Parties to CBD Decision XII/3 (17 October 2014), UN Doc UNEP/CBD/COP/DEC/XII/3, Annex III; Conference of the Parties to CBD Decision 14/15 (30 November 2018), UN Doc CBD/COP/DEC/14/15, Annex; Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4, Annex, para 7(a).

[156] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2018) UN Doc A/HRC/37/59, para 39.

These documents alert to the risks posed by biodiversity finance to human rights and highlight the need to ensure that they respect IHRL.

For several decades now, academic literature has been progressively unpacking the relationship between IEL and IHRL, framing environmental protection as a human rights issue,[157] highlighting the increasing greening of existing human rights through case law, [158] and contributing to the emergence in 2022 of the human right to a clean, healthy and sustainable environment.[159] At the intersection of International Biodiversity Law (IBL) and IHRL specifically, the academic literature has highlighted the cross-fertilisation process between the human rights and CBD regimes and has discussed how the normative work of the CBD COP can influence the interpretation of binding human rights obligations.[160] Despite the interconnectivity between biodiversity, human rights and financial assistance, Articles 20 and 21 have attracted very little interest from scholarship. As such, the legal nature, scope and content of these articles remain poorly understood, as well as their interaction with other international obligations. Crucially, while the GEF has been studied from the perspective of strengthening compliance with international environmental agreements[161] and its legitimacy,[162] no research has been conducted to test whether the GEF's founding instrument and its operational modalities provide a suitable framework to enable compliance with these articles. This study is the first to explore the legal implications of Articles 20 and 21 and to interpret the obligation to provide financial assistance in light of general international law and international human rights frameworks, including human rights treaties and conventions, the decisions of regional courts of human rights and the interpretative work of UN Special Rapporteurs on human rights and the environment.

The decision to focus on the relationship between the CBD's financial mechanism and human rights stems from two main assumptions. First, the compliance of developed countries

---

[157] Dinah L. Shelton, 'What Happened in Rio to Human Rights?' (1992) 3 Y.B. OF Int'L ENV'L L. 75, 82; Gilbert J, *Natural Resources and Human Rights: An Appraisal* (Oxford University Press 2018); Morgera E, 'Dawn of a New Day? The Evolving Relationship Between the Convention on Biological Diversity and International Human Rights Law' (2018) 53 Wake Forest Law Review 691; Knox J, 'The Past, Present, and Future of Human Rights and the Environment' (2018) 53 Wake Forest Law Review 649.

[158] Alan Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2007) 18(3) Fordham Environmental Law Review 471, 484; Birnie P, Boyle A and Redgwell C, *International Law and the Environment* (3rd edn, Oxford University Press 2009);

[159] United Nations General Assembly (UNGA), 'The Human Right to a Clean, Healthy and Sustainable Environment' (2022) UN Doc A/76/L.75, para 1.

[160] Elisa Morgera, 'Dawn of a New Day? The Evolving Relationship Between the Convention on Biological Diversity and International Human Rights Law' (2018) 53(4) Wake Forest Law Review 691.

[161] Nele Matz, 'Environmental Financing: Function and Coherence of Financial Mechanisms in International Environmental Agreements' (2002) 6 Max Planck Yearbook of United Nations Law 473, 478.

[162] Nele Matz, 'Financial Institutions between Effectiveness and Legitimacy – A Legal Analysis of the World Bank, Global Environment Facility and Prototype Carbon Fund' (2005) 5 Int Environ Agreements 265.

with their obligation to provide new and additional financial resources to the CBD's financial mechanism is of critical importance to the compliance of developing countries with CBD obligations and, by extension, to the achievement of CBD objectives. Second, the literature has conceptualised the many connections between biodiversity and human rights and aided the CBD COP in its interpretative function[163] in relation to *inter alia*, traditional knowledge, free prior and informed consent, benefit sharing, and the protection of cultural rights.[164] However, the COP has drawn a connection between human rights and biodiversity finance[165] and committed Parties to apply a human rights-based approach to the implementation of the GBF which has not yet been commentated on in the literature.[166]

The evidence is mounting that the application of a human rights-based approach to conservation is essential to the generation of long-term benefits for biological diversity.[167] The existing literature on human rights-based approaches to development in international law has conceptualised the human rights principles that frame their implementation generally[168] but so far no research has been carried out on human rights based-approaches to the implementation of biodiversity-related projects specifically. The small body of research that has considered the handling of human rights violations through the accountability mechanisms of international

[163] See in particular Conference of the Parties to CBD Decision IX/13 (9 October 2008), UN Doc UNEP/CBD/COP/DEC/IX/13; Conference of the Parties to CBD Decision 15/13 (19 December 2022), UN Doc CBD/COP/DEC/15/13, para 15(a); Conference of the Parties to CBD Decision XIII/18, UN Doc UNEP/CBD/COP/DEC/XIII/18, Mo'otz Kuxtal Voluntary Guidelines (17 December 2016) [hereinafter Mo'otz Kuxtal Voluntary Guidelines]; Conference of the Parties to CBD Decision VII/16, UN Doc UNEP/CBD/COP/DEC/VII/16, Annex, para. F (13 April 2014) [hereinafter Akwé: Kon Guidelines].

[164] See in particular Elisa Morgera, Elsa Tsioumani, and Matthias Buck, *Unraveling the Nagoya Protocol* (Brill | Nijhoff, Leiden 2014); Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit-sharing' (2016) 27 European Journal of International Law 353; Elisa Morgera, 'Dawn of a New Day? The Evolving Relationship Between the Convention on Biological Diversity and International Human Rights Law' (2018) 53(4) Wake Forest Law Review 691.

[165] Conference of the Parties to CBD Decision XII/3 (17 October 2014), UN Doc UNEP/CBD/COP/DEC/XII/3, Annex III. See also Claudia Ituarte-Lima and others, 'Biodiversity financing and safeguards – Lessons learned and proposed guidelines' (Stockholm Resilience Centre, 2014).

[166]

[167] UNGA, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd - The human right to a clean, healthy and sustainable environment: a catalyst for accelerated action to achieve the Sustainable Development Goals' (2022) UN Doc A/77/284, para 78.

[168] Morten Broberg and Hans Otto Sano, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – An Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22(5) The International Journal of Human Rights 664.

organisations has concluded that despite their quasi-judicial nature[169] they are inadequate as redress mechanisms for human rights violations.[170]

Against this backdrop, the primary research question that this thesis seeks to answer is "*Does the obligation for CBD developed country Parties to provide new and additional financial resources entail a responsibility for the GEF and its implementing agencies to respect, protect and fulfil human rights?*"

To answer this question, this thesis considers how the CBD's financial provisions and international human rights frameworks should be interpreted in a mutually supportive way to strengthen the effectiveness of the CBD's financial mechanism. It argues that applying a mutually supportive interpretation of international biodiversity law and IHRL clarifies the content and normative strength of developed countries' obligation to provide new and additional financial resources. It further argues that this obligation of States entails a responsibility for the GEF and its implementing agencies to respect, protect and fulfil human rights in the formulation, implementation, monitoring and evaluation of biodiversity projects. It considers the following questions: How do human rights and biodiversity intersect in the CBD's financial mechanism? What are the human rights obligations of states and GEF implementing agencies in the delivery of biodiversity-related ODA? How does the GEF approach human rights in the design, implementation, evaluation and monitoring of biodiversity projects? To what extent does the Facility comply with CBD guidance on human rights? What normative changes does it need to implement to abide by the Parties' commitment to apply a human rights-based approach to the implementation of the Kunming-Montreal GBF?

5. Methodology

Oliver Wendell Holmes eloquently stated that "[t]he business of the jurist is to make known the content of the law; that is, to work upon it from within, or logically, arranging and distributing it, in order, from its *summum genus* to its *infima species*, so far as practicable." [171] As such, this research employs a doctrinal approach rooted in international law to understand

---

[169] Lynn Ta, and Benjamin A. T Graham, 'Can Quasi-Judicial Bodies at the World Bank Provide Justice in Human Rights Cases?' (2018) Available at SSRN: <https://ssrn.com/abstract=3191690 or http://dx.doi.org/10.2139/ssrn.3191690>; Kelebogile Zvobgo K and Benjamin Graham, 'The World Bank as an Enforcer of Human Rights' (2020) 19(4) Journal of Human Rights 425;

[170] Giedre Jokubauskaite and David Rossati, 'A Tragedy of Juridification in International Development Finance' (2021) Canadian Journal of Development Studies / Revue canadienne d'études du développement.

[171] Oliver Wendell Holmes Jr, *The Common Law* (Little, Brown, and Co., 1881) 219.

the legal principles and frameworks governing the human rights responsibility of international organisations in relation to biodiversity-related ODA.

The primary sources for this research are the CBD itself, Article 38(1) of the Statute of the International Court of Justice,[172] the Vienna Convention on the Law of Treaties,[173] and the core international human rights instruments. These sources are complemented by secondary material, including academic articles, monographs and reports by the Special Rapporteurs on Human Rights and the Environment discussing the relationship between international environmental law (IEL) and IHRL and State obligations in relation to financial assistance. In addition, this thesis relies heavily on CBD COP decisions as well as the constitutive and operational documents of the GEF and its implementing agencies.

By employing this methodology, the research aims to expand the understanding of the scope of CBD Articles 20 and 21 and bring to light the human rights responsibilities of the GEF and its implementing agencies in the design, implementation, monitoring and evaluation of biodiversity-related projects.

6. Limitations of the thesis

Due to time and space constraints, this thesis has at least three limitations. First, while this study considers the relationship between IHRL and the CBD's financial mechanism, it does not consider the implications of the provision of new and additional financial resources for individual human rights. It outlines the general human rights obligations of states and those of the GEF in relation to GEF-funded projects as a starting point for further research in this area. A detailed review of the implications of applying a human rights-based approach for the protection of the right to food in the implementation of biodiversity projects for example would be of great benefit to advance the understanding of the issue from a sectoral perspective.

Second, this thesis considers how and to what extent the GEF's social and environmental policies incorporate CBD COP direct and indirect guidance to the financial mechanism. In doing so, it reflects on the direction taken by the GEF's three implementing agencies in their recent revisions of their own social and environmental safeguards. However, due to time constraints it does not provide a comprehensive assessment of these agencies' safeguards against the CBD COP's guidance. Nor does it seek to assess the social and environmental safeguards of the other accredited entities that make up the current GEF

---

[172] Statute of the International Court of Justice adopted 18th April 1946, entered into force 33 UNTS 993.
[173] United Nations, Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331 [hereinafter "VCLT"].

partnership. This is undoubtedly a limitation of this study, as a close review of these frameworks would help paint a clearer and more accurate picture of how the GEF partnership complies with CBD guidance on human rights in the implementation of biodiversity projects. Building this complete picture is all the more important that in 2019 only four agencies were found to be in compliance with the GEF's minimum standards.[174] However, the assessment of the GEF's policies and safeguards is a valuable first step to understand how these can be more closely aligned with COP guidance. Any future revision of GEF policies and safeguards would have a knock-on effect on GEF implementing and accredited agencies, as they work to update their own frameworks to bring them in line with GEF requirements.

Third, this study does not consider the many ramifications of aligning GEF policies and safeguards with CBD COP guidance into other areas under the GEF's mandate. The GEF serves as the financial mechanism for the United Nations Framework Convention on Climate Change (UNFCCC),[175] the Stockholm Convention on Persistent Organic Pollutants (POPs),[176] the UN Convention to Combat Desertification (UNCCD),[177] the Minamata Convention on Mercury[178] and will also serve as the financial mechanism for the new Agreement under the UN Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ).[179] Currently, GEF policies and safeguards apply uniformly across all focus areas and any review of such policies would necessarily affect the implementation of all GEF-funded projects. Going forward, it will be very important to examine the implications of the CBD COP's commitment to applying a human rights-based approach to the implementation of the Kunming-Montreal GBF on these other areas under the GEF's mandate. The arguments laid out in this thesis however, are not unique to the area of biodiversity and the GEF's responsibility to protect, respect and fulfil human rights applies across all areas under its mandate.

[174] GEF, 'Progress Report on Agencies' Compliance with Minimum Standards in the GEF Policies on: Environmental and Social Safeguards; Gender Equality; and Stakeholder Engagement' (GEF/C.59/Inf.16, 9 November 2020), para 8.

[175] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 [hereinafter "UNFCCC"].

[176] Stockholm Convention on Persistent Organic Pollutants (adopted 22 May 2001, entered into force 17 May 2004) 2256 UNTS 119.

[177] United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (adopted 14 October 1994, entered into force 26 December 1996) 1954 UNTS 3 [hereinafter "UNCCD"].

[178] Minamata Convention on Mercury (adopted 10 October 2013, entered into force 6 August 2017) 3202 UNTS.

[179] Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (adopted 19 June 2023, opening for signature) C.N.203.2023.TREATIES-XXI.10 [hereinafter "BBNJ"].

Finally, the emerging and fascinating role of blockchain technology in the delivery of biodiversity-related aid was left out of this study. It holds tremendous potential for the protection of the rights of indigenous and local communities[180] in the context of biodiversity projects, and this is an area of research that would provide a timely contribution to the emerging body of literature on the applications and regulation of blockchain technology.

7. Outline of the thesis

In addition to this introductory chapter, this thesis comprises 5 chapters. Chapter 2 lays out the key factors identified by CBD outcome documents, UNGA resolutions and independent evaluation reports that constrain the implementation of the three objectives of the CBD. These include the fragmentation of financial assistance,[181] the limited integration of indigenous and local knowledge and plurality of values in governance processes,[182] and the lack of coordination in the implementation of bilateral and multilateral agreements, and international initiatives.[183] This Chapter examines these challenges from an international law perspective, and sheds some light on the international legal regimes applicable to biodiversity-related ODA and human rights-related ODA. It makes the following arguments: first, that the international legal regimes applicable to these issues are fragmented and treated in isolation from each other which contributes to the fragmentation of aid and negatively impacts the achievement of the CBD's objectives. Second, that IHRL is an essential contributor to the effectiveness of the CBD's financial mechanism and that the application of a human rights-based approach to the implementation of Articles 20 and 21 could help address some of the challenges to the effectiveness of the CBD regime.

After having established that human rights are an essential part of the effectiveness of the financial mechanism, Chapter 3 turns to the international legal foundations for the CBD's financial mechanism. The biodiversity funding gap is a major challenge to the achievement of the CBD's objectives and this Chapter advances the understanding in scholarship of the normative strength of the obligation of developed country Parties to provide new and additional

[180] MJ Palau-McDonald, 'Blockchains and Environmental Self-Determination for the Native Hawaiian People: Toward Restorative Stewardship of Indigenous Lands' (2022) 57(1) Harvard civil rights-civil liberties law review 393.
[181] Global Environment Facility Independent Evaluation Office (GEF IEO), 'OPS6 Final Report: The GEF in the Changing Environmental Finance Landscape' (GEF IEO, Washington, DC 2018) xiv.
[182] Conference of the Parties to CBD Decision 14/1 (30 November 2018) UN Doc CBD/COP/DEC/14/1, Annex, Para 2(i).
[183] Global Environment Facility Independent Evaluation Office (GEF IEO), 'OPS6 Final Report: The GEF in the Changing Environmental Finance Landscape' (GEF IEO, Washington, DC 2018), Annex B, p. 167.

financial resources. Using the criteria of the International Law Commission (ILC) for the identification of general principles of law, it argues that this obligation meets the characteristics of general principles of law. However, despite the strong normative strength of this obligation, in practice this obligation is blunted by the voluntary nature of financial contributions to the GEF. It considers the role of the COP in navigating this paradox, and concludes that an alignment with the provisions on financial assistance in the Paris Agreement could help mobilise additional resources for the implementation of the Convention.

Having clarified the legal nature of the obligation to provide new and additional financial resources in Chapter 3, Chapter 4 examines the interplay between human rights obligations under IHRL and the obligation to provide new and additional financial resources under the CBD regime. It examines the international legal framework for the provision of financial resources using the principle of mutual supportiveness to elucidate how financial assistance under IHRL and international biodiversity law intersect in the context of the CBD's financial mechanism. It posits that GEF implementing agencies have a responsibility to fulfil human rights in the implementation of their activities which is derived from the UN Charter and the human rights obligations of their Member States. It follows that the implementing agencies that make up the GEF partnership have a responsibility to ensure that they have adequate safeguards and frameworks in place to identify, respect, protect and fulfil the human rights of the individuals and communities affected by their projects and programmes.

Chapter 5 builds on the findings from Chapter 4 and considers the extent to which the GEF complies with CBD COP guidance on human rights. It proposes an assessment of GEF policies and operational guidelines against the CBD COP guidance and concludes that there are notable areas of incompatibility, including in relation to free, prior and informed consent (FPIC) of Indigenous and local communities, involuntary resettlement and benefit sharing. It provides a summary of recommendations to strengthen alignment with CBD COP guidance and IHRL and explores opportunities to give effect to these recommendations through the Global Biodiversity Framework Fund (GBFF).

Chapter 6 provides a summary of the key findings of this thesis and invites further research into the responsibility of GEF accredited agencies to protect, respect and fulfil human rights. Such research would be very welcome to provide a fuller picture of the GEF's alignment with international biodiversity law and IHRL. The Chapter also invites further research into the implication of the findings in this thesis for other areas under the GEF's mandate, most notably climate change.

Chapter 2. Rethinking aid effectiveness for biodiversity in the Post-2020 era

"The greatest development of the postwar era lies in the concept of international development aid as a permanent and inevitable feature of contemporary international organisation."

Wolfgang Friedmann, 1964

1. Introduction

The provision of biodiversity-related financial assistance is a relatively recent creation in international law and global cooperation for the environment.[184] It coincides with the growing realisation in the 70s that environmental degradation was having "undesirable effects on the material wellbeing of mankind".[185] Like other aspects of development that have gradually been incorporated into the international agenda for development assistance and cooperation,[186] biodiversity-related ODA is still largely tied to the overarching aid coordination efforts led by the Organisation for Economic Co-operation and Development's Development Assistance Committee (OECD DAC).

Alternatively hailed as one of humanity's greatest achievements,[187] condemned as an instrument of colonial dominion[188] or decried as a waste of taxpayers' money,[189] development

---

[184] On the emergence of the environmental agenda at the DAC, see Alexandra Trzeciak-Duval, 'Tipping point: environmental protection and sustainable development' in Gerardo Bracho and others, *Origins, Evolution and Future of Global Development Cooperation: The Role of the Development Assistance Committee (DAC)* (Deutsches Institut für Entwicklungspolitik gGmbH, 2021).
[185] Edwin M Martin, 'Development Co-operation: Efforts and Policies of the Members of the Development Assistance Committee' (OECD, Paris 1972).
[186] See for example the DAC's integration of women into the development process and the adoption in 1983 of the Guiding Principles to Aid Agencies for Supporting the Role of Women in Development".
[187] See Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press, New York 1964).
[188] See for example Zoe Williams, 'The UK peddles a cynical colonialism and calls it aid' (*The Guardian*, 23 July 2017) <https://www.theguardian.com/commentisfree/2017/jul/23/uk-colonialism-aid-spending> Accessed on 27 November 2023. For an analysis of the legacy of colonialism on Britain and France's aid strategies in the area of social protection see Bastian Becker, 'Colonial Legacies in International Aid: Policy Priorities and Actor Constellations' in Carina Schmitt (ed), *From Colonialism to International Aid. Global Dynamics of Social Policy* (Palgrave Macmillan, Cham 2020).
[189] See for example a post from the United Kingdom's Tax Payers' Alliance, 'New Report Confirms That Aid Money Is Wasted (We Told You So)' (19 July 2017) <https://www.taxpayersalliance.com/new_report_confirms_that_aid_money_is_wasted_we_told_you_so> Accessed on 27 November 2023.

assistance divides opinions. Yet, it underlies much of the negotiations that surround the development of binding and non-binding international instruments in the environmental field, and plays a key role in the implementation of the resulting international obligations and commitments.[190] In the area of biodiversity, the CBD provisions on financial assistance have been studied from the perspective of legitimacy in international law making[191] but there is still a dearth of research on the relationship between human rights and biodiversity-related ODA, despite the acknowledgment by the CBD COP of the need to safeguard the rights of indigenous and local communities in biodiversity financing mechanisms.[192] The literature at the intersection of IEL and IHRL highlights the role of human rights-based approaches in achieving positive outcomes for people and the environment.[193] However, the links between human rights, aid effectiveness and treaty effectiveness remain poorly understood in legal scholarship.

There is a dearth of research in international law on the relationship between IHRL and aid effectiveness. The limited scholarship that exists in IHRL points to the legal and normative baseline that international human rights framework present for the planning and implementation of development activities.[194] In the field of international development, recent scholarship has shown that the protection and realisation of human rights contributes to the effectiveness of aid.[195] The incorporation of human rights objectives in the design and implementation of projects has been shown to add value to the agenda for development by promoting State accountability on the obligation to respect, protect, promote and fulfil human rights.[196] There is much potential for the international human rights framework and the Paris Declaration to reinforce and benefit from each other, with human rights contributing to the effectiveness of aid. [197] Indeed, an increased focus on accountability through human rights can

[190] On this topic see Nele Matz, 'Financial Institutions between Effectiveness and Legitimacy – A Legal Analysis of the World Bank, Global Environment Facility and Prototype Carbon Fund' (2005) 5 Int Environ Agreements 265.
[191]Ibid.
[192] Conference of the Parties to CBD Decision XII/3 (17 October 2014) UN Doc UNEP/CBD/COP/DEC/XII/3, Annex III. See also Chapters 3 and 4 of this thesis.
[193] David R Boyd and Stephanie Keene, 'Human Rights-based Approaches to Conserving Biodiversity: Equitable, Effective and Imperative' Policy Brief No. 1 (2021).
[194] Siobhán McInerney-Lankford, 'Human Rights and Development: a Comment on Challenges and Opportunities from a Legal Perspective' (2009) 1 J Human Rights Practice 51.
[195] Mustapha Douch, Terence Edwards, Todd Landman and Sushanta Mallick, 'Aid effectiveness: Human rights as a conditionality measure' (2022) World Development 158; See also OECD, 'Action-oriented policy paper on human rights and development' (2007) Document Number DCD/DAC (2007)15, para 35.
[196] UNDP, 'A Human Rights-Based Approach to Development Programming in UNDP – Adding the Missing Link' (2020).
[197] OECD, 'Action-oriented policy paper on human rights and development' (2007) Document Number DCD/DAC (2007)15, para 35.

strengthen the effectiveness and the transparency of aid.[198] Conversely, the lack of integration of human rights considerations in biodiversity-related projects context undermines the effectiveness of biodiversity-related ODA.

This Chapter draws from these different fields of scholarship to demonstrate that applying a human rights-based approach to the provision of financial resources through the CBD's financial mechanism can enhance the effectiveness of the Convention. It is built around four Parts. Part 2 situates biodiversity-related ODA and human rights related-ODA within the broader international framework for development assistance. It highlights the international legal basis for biodiversity-related ODA in the CBD's financial provisions, and the role of the GEF in operating the financial mechanism. It also shows the intricate relationship between the GEF and the DAC as the primary coordinator of ODA. It concludes that while the DAC recognises the important contributions of human rights to aid effectiveness, the linkages between biodiversity-related ODA and the realisation of human rights are not clearly articulated. Part 3 explores the concept of aid effectiveness and shows that the realisation of human rights is integral to the effectiveness of aid. It shows that the Paris Declaration provides fertile grounds for the implementation of human rights-based approaches to biodiversity management in national development cooperation strategies. Finally, Part 4 considers the relationship between treaty effectiveness and aid effectiveness and shows that the effectiveness of the CBD regime is hampered by the lack of systematic engagement with human rights in the provision of biodiversity-related ODA. The Kunming Montreal GBF provides an avenue for mutual supportiveness between biodiversity and human rights obligations in the CBD's financial mechanism.

2. International architecture for the delivery of biodiversity and human rights-related ODA

This Part demonstrates that biodiversity-related ODA and human rights-related ODA have their own separate foundations in international law and their own delivery mechanism. Sections 2.1 and 2.2 show that while the CBD sets out the legal foundations for the provision of biodiversity-related ODA, the Vienna Declaration on human rights acted as a catalyst for the provision of human rights-related ODA. However, while the CBD creates a specific

[198] UNDP, 'A Human Rights-Based Approach to Development Programming in UNDP – Adding the Missing Link' (2020).

mechanism for the transfer of biodiversity-related ODA, no such mechanism exists in the area of human rights. Section 2.3 highlights the role of the OECD DAC as a forum to build the linkages between these two areas.

2.1. The CBD as the legal basis for biodiversity-related ODA

2.1.1. CBD Articles 20 and 21

In response to the General Assembly's call for a United Nations Conference on Environment and Development (UNCED),[199] 178 governments came together in Rio in 1992 to express their commitment to tackling the global environmental challenges that the international community had recognised as a threat to the ecological balance of the Earth.[200] Evidence of this commitment can be found in the profusion of binding agreements,[201] declarations,[202] principles[203] and action agenda[204] that members of the United Nations were invited to sign. One such instrument is the CBD, a legally binding instrument for the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources.[205]

The United States is remembered for its resounding criticism of the CBD, which they refused to sign.[206] It was on their proposal however, that a global convention on biological diversity was first discussed at UNEP's 14th Governing Council, in 1987.[207] Concerned about the co-ordination of existing international instruments on conservation, they had called for an umbrella convention to streamline these instruments and to focus efforts on *in situ* conservation.[208] A year later, the international community embraced the idea of an instrument on biological diversity but favoured a broader scope that would include *ex situ* conservation

---

[199] UNGA, 'United Nations Conference on Environment and Development' (1989), UN Doc A/RES/44/228.
[200] Ibid, Preamble.
[201] CBD; United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (adopted 14 October 1994, entered into force 26 December 1996) 1954 UNTS 3 [hereinafter "UNCCD"]; United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 [hereinafter "UNFCCC"].
[202] UNGA, 'Report of the United Nations Conference on Environment and Development' (1992) UN Doc A/CONF.151/26(Vol. I), Annex I.
[203] Ibid, Annex III.
[204] United Nations Conference on Environment and Development, 'Agenda 21' (Rio de Janeiro, 3-14 June 1992) [hereinafter "UNCED"].
[205] CBD, Article 1.
[206] CBD Secretariat, 'CBD Handbook' (3rd edn, 2005) Section VIII, Declaration of the United States of America.
[207] Fiona McConnell, *The Biodiversity Convention – A Negotiating History* (Kluwer Law International 1996) 5.
[208] Laurence Boisson de Chazournes, 'Introductory Note on the Convention on Biological Diversity and its Protocol on Biosafety' (United Nations Audiovisual Library of International Law, 2009).

and serve as a framework convention for the adoption of subsequent instruments.[209] The result is a global instrument for biological diversity which contains measures for both *in situ* and *ex situ* conservation; incentives for the conservation and sustainable use of biological diversity; research and training; public awareness and education; assessing the impacts of projects upon biological diversity; regulating access to genetic resources; access to and transfer of technology; and, crucially, the provision of financial resources.[210]

In December 1989, UNGA Resolution 44/228 established that the responsibility for containing, reducing and eliminating global environmental damage was to be borne by the countries causing the damage, in accordance with their respective capabilities and responsibilities.[211] In addition, the Resolution exhorted countries to identify ways and means of providing *new* and *additional* financial resources, particularly to developing countries and in accordance with national development objectives.[212]

These three demands from the UNGA served as a cornerstone for the negotiations of the financial provisions at the first UNCED Preparatory Committee (Prepcom 1), in August 1990. The Resolution boosted the various coalition groups of developing countries who held considerable influence in the negotiations, as custodians of the largest remaining areas of biodiversity in the world. Two years later, all three Rio Conventions introduced an obligation for developed country Parties to provide new and additional financial resources[213] to enable developing country Parties to meet the cost of implementing the measures under these instruments.

In keeping with the geographic, economic and political coalitions that marked the negotiations of the CBD,[214] the financial obligations for the Parties to the Convention are determined by their economic status. Under the Convention, countries are either developed, in transition or developing.[215] The distinction is a fundamental one as it is the primary determinant of a Party's obligation to contribute to the financial mechanism under Article 21. At the time of drafting the Convention, the funding mechanism of the CBD – and ultimately the achievement of all three of the Convention's objectives – therefore relied on two conditions:

---

[209] Ibid.
[210] CBD Secretariat, 'CBD Handbook' (3rd edn, 2005), Section VIII.
[211] UNGA, 'United Nations Conference on Environment and Development' (1989), UN Doc A/RES/44/228, Preamble.
[212] Ibid, Para 8.
[213] CBD, Preamble and Article 20(2); UNCCD, Preamble and Article 6(c); UNFCCC, Article 4(3).
[214] See generally Fiona McConnell, *The Biodiversity Convention – A Negotiating History* (Kluwer Law International 1996).
[215] CBD, Article 20(2).

that the country Parties are classified according to economic status, and that members of the developed Party category meet their financial obligations under Articles 20 and 21.

How then are countries slotted into the various categories? The classification of country Parties is primarily a political exercise, although Article 20(2) provides a legal basis for its execution. It requires Parties at COP 1 to "establish a list of developed countries and other Parties which voluntarily assume the obligations of developed countries." The identification process started well ahead of COP 1, at the second session of the Intergovernmental Committee on the Convention on Biological Diversity, when the question of the methodology to be used was discussed.[216] On this occasion a proposal was made to simply draw a list of developed country Parties to the Convention "provided that there was no doubt regarding their status as developed countries".[217] However, the determination beyond doubt of the economic status of a country has economic, legal and political implications for countries, which cannot be answered using national income as the main criterion for drawing up lists of countries. Although economic progress is one of the primary objectives of the UN Charter,[218] the General Assembly has long acknowledged and sought to address the gap between developed and developing countries[219] without ever classifying its members according to their economic status. In the absence of official lists and in the lead up to the first COP, proposals were made to use the lists of the World Bank, UNCTAD and UNDP, or to rely on the list of contracting Parties that were donors but not recipients of GEF.[220] These proposals were rejected by donor countries who referred to the wording of Article 20(2), stating that "developed countries were donor countries, not that donor countries were developed countries".[221]

It is on the basis of this second session that the Interim Secretariat for the Intergovernmental Committee prepared a list of developed country Parties and other Parties which voluntarily assume the obligations of developed country Parties, to be discussed at COP 1. This list identified a number of developed countries as well as a list of countries in the process of transition to a market economy.[222] Ultimately, COP 1 followed the usual practice in

---

[216] Hereinafter [Intergovernmental Committee].
[217] Conference of the Parties to CBD Decision I/4 (28 February 1995) UN Doc UNEP/CBD/COP/DEC/I/4, para 203. This proposal came from the Chairperson of Working Group II.
[218] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 55(a).
[219] UNGA, 'Declaration on the Establishment of a New International Economic Order' (1994) UN Doc A/RES/S-6/3201.
[220] Conference of the Parties to CBD Decision I/4 (28 February 1995) UN Doc UNEP/CBD/COP/DEC/I/4, para 205.
[221] Ibid.
[222] Conference of the Parties to CBD (6 October 1994) UN Doc UNEP/CBD/COP/1/7.

international law, leaving it up to countries to determine what category they fall under. Decision I/2 only retained the list of developed countries, with some exceptions.[223]

The "developing country" category that the CBD refers to is equally unclear. In practice, three main methods are used in international law to identify developing countries: treaty definition, listing and auto-election.[224] The text of the CBD contains no definition of the category and the COP outcome documents provide no indication of the qualifying country Parties. Unlike with developed countries, the CBD does not mandate the COP to establish a list of developing countries. Similarly, the text of the CBD makes no reference to auto-election to the developing country category. To fill this gap, the GEF draws from UN practice,[225] and members of the G77 and China all fall under this category.

2.1.2. The operational arm of the CBD's financial mechanism: the Global Environment Facility

To understand the role of the GEF as the CBD's funding mechanism, it is important to first examine its legal status and mandate. This Section then considers how the oversight by the CBD COP of GEF-funded biodiversity projects operates in practice.

2.1.2.1. Legal status and mandate

The GEF was established by Resolution No. 91–5 of 1991,[226] which included the World Bank, the United Nations Development Programme (UNDP), and the United Nations Environment Programme (UNEP). It was originally set up under the International Bank for Reconstruction and Development (IBRD) as a pilot programme for the protection of the global environment and with the ambitious objective of promoting environmentally sound and sustainable economic development at its core.[227] The GEF was born out of a general proposal from Germany, and a specific request made by France to the World Bank to assess the requirements for additional funding and the degree of interest from donors in supporting actions

[223] For example, Israel and Liechtenstein were removed.
[224] Lavanya Rajamani, *Differential Treatment in International Law* (Oxford University Press 2006) 165.
[225] Ibid.
[226] World Bank, 'Documents Concerning the Establishment of the Global Environment Facility' (1991) 30(6) International Legal Materials 1735.
[227] See Robert Lake, 'Finance for the Global Environment: The Effectiveness of the GEF as the Financial Mechanism to the Convention on Biological Diversity' (1998) 7(1) Review of European Community & International Environmental Law 68.

to address global environmental concerns in developing countries.[228] At an operational level, the GEF was to provide grants or concessional loans to developing countries to help them implement programmes that protect the global environment in four sectoral areas. These include the protection of the ozone layer, the limitation of greenhouse gas emissions, the protection of biodiversity, and the protection of international waters.[229] The GEF was established quickly, to acquire enough experience to provide practical input into the negotiations of the UNCED in 1992. From the outset, the GEF was created with the objective of providing technical and financial support to programmes and activities that would generate benefits for the world at large. Specifically, it would provide financial support to developing countries to cover the additional cost to them of adopting and implementing environmental measures. An important aspect of the GEF funding is that it comes on top of existing aid flows, not as a substitute. As a result, the GEF relies on broad-based multilateral participation in funding.

Unlike most funds and financial institutions,[230] the GEF does not have an explicit international legal personality or legal capacity derived from an international agreement. The legal status of an international organisation determines the rights, privileges, duties, and powers within which the organisation operates at the international level. Similarly, the legal status of a fund determines the extent to which a fund or funding institution – and in this case the GEF – can operate independently to achieve its objectives and meet its responsibilities. This is because funds and funding institutions are limited in their capacity, and can only operate within the confines of the rights, privileges, duties, and powers that have been conferred on them explicitly or implicitly by their Member States. In accordance with its Instrument, the GEF derives its legal identity from the World Bank, which acts as a trustee.[231] Similarly, there are no explicit privileges and immunities for the GEF, its organs, or its officials. In practice however, all GEF secretariat staff hold World Bank appointments and benefit from the privileges and immunities of the World Bank in accordance with the Articles of Agreement of the World Bank. GEF Council members are treated as delegates attending meetings of the World Bank, and they may have diplomatic and/or special status conferred by their governments. The GEF Trust Fund, established by the World Bank as trustee, is subject to the

[228] World Bank, 'Documents Concerning the Establishment of the Global Environment Facility' (1991) 30(6) International Legal Materials 1735, 1739.
[229] Ibid.
[230] See UNFCCC Transitional Committee, 'Review of the Legal Status of Select International Funds and Financial Institutions' (2011) UN Doc TC-2/WSII/2.
[231] World Bank, 'Documents Concerning the Establishment of the Global Environment Facility' (1991) 30(6) International Legal Materials 1735, 1758.

privileges and immunities accorded to the World Bank.[232] The specificities of the GEF's legal status have contributed to building a close institutional relationship between the GEF and the World Bank both *de jure* and *de facto*.

The GEF plays a unique role in the global financing architecture. It acts as the primary funding mechanism for major Multilateral Environmental Agreements (MEAs), including the CBD, the United Nations Framework Convention on Climate Change (UNFCCC), the Stockholm Convention on Persistent Organic Pollutants, and the United Nations Convention to Combat Desertification (UNCCD) and the Minamata Convention on Mercury. The GEF also funds projects in International Waters and Sustainable Forest Management that are consistent with the objectives of the United Nations Forum on Forests (UNFF).

2.1.2.2. Composite nature of the GEF

The GEF operates under the guidance of its governing bodies, namely the Assembly, the Council, and the Secretariat. The Assembly is the highest decision-making body and consists of representatives from all GEF member countries. It meets every four years[233] to provide strategic direction, review policies, and approve key decisions.[234] The Council is composed of 32 members and represents various constituencies, including developed and developing countries, with equal representation from donor and recipient nations.[235] The Council meets twice a year to oversee the GEF's operations, approve projects, and review policies.[236] The GEF Secretariat is responsible for the day-to-day management and coordination of the GEF's activities.[237] It supports the Assembly and Council, facilitates project development and implementation, and ensures effective communication and cooperation with stakeholders.[238]

In addition, the GEF receives advisory support from a Scientific and Technical Advisory Panel (STAP).[239] While the Assembly operates on a "one member, one vote" rule,

[232] See UNFCCC Transitional Committee, 'Review of the Legal Status of Select International Funds and Financial Institutions' (2011) UN Doc TC-2/WSII/2.
[233] GEF, 'Amendments to Instrument for the Establishment of a Restructured Global Environment Facility' (GEF/A.7/08, 24 August 2023), para 13.
[234] Ibid, para 14.
[235] Ibid, para 16.
[236] Ibid, paras 17 and 20.
[237] Ibid, para 21.
[238] Ibid, para 21.
[239] Ibid, para 25.

the Council is made up of 32 Members, representing constituency groupings.[240] In binary terms, these groupings can be categorised as donors and recipients but on both sides they merge different economic and political coalitions, such as the G77 and China, and the Latin American and Caribbean Group. The Council's composition is an attempt to achieve a balanced and equitable representation of all Participants,[241] giving a substantial decisional weight to donors in recognition of their funding efforts. As a result, the Council comprises 16 Members from developing countries, 14 Members from developed countries and 2 Members from the countries of central and Eastern Europe, and the former Soviet Union. Decisions of the Assembly and the Council are taken by consensus, or when no consensus is attainable, through a formal vote.[242] When a formal vote is required, decisions are taken by a double weighted majority, representing both a 60 percent majority of the total number of Participants and a 60 percent majority of the total contributions, *ie.* 60 percent of donors.[243] This decision-making system is evidence of the tension between the need to respect the principle of equality of Participants and the need to satisfy the demands of donor countries to have a say in the administration of financial resources and to allow them the possibility to veto proposals that they deem unacceptable.[244] Since its inception, the GEF has been criticised for being dominated by donors.[245] It is true that despite the GEF's stated objective to operate under the principle of equal partnership between donor and recipient countries, donors exert considerable influence within the GEF, through its decision-making processes and governance structure. During replenishment cycles, donors are able to shape the overall strategic direction and funding priorities of the GEF. Donors' contributions and their positions on specific issues and country preferences can influence the outcome of the replenishment negotiations, which involve decisions on financial commitments and the allocation of resources across different focal areas and countries.

Originally, GEF-funded projects and programmes were implemented through a tripartite arrangement between the UN Environment Programme (UNEP), the United Nations Development Programme (UNDP) and the World Bank, but since 2010 the Fund has expanded its partnership to include a much more diverse group of "accredited agencies". In particular,

[240] Ibid, para 16.
[241] The name given to Members of the GEF.
[242] CBD Secretariat, 'CBD Handbook' (3rd edn, 2005) Section VIII, Rule 40.
[243] GEF, 'Amendments to Instrument for the Establishment of a Restructured Global Environment Facility' (GEF/A.7/08, 24 August 2023), para 26(c).
[244] Ibid, paras 26(b) and (c).
[245] Andrew Jordan, 'Paying the Incremental Costs of Global Environmental Protection: The Evolving Role of GEF' (1994) 36(6) Environment 12, 19.

discussions around the establishment of the GEF have from very early on recognised the benefits of engaging with non-governmental organisations (NGOs) on biodiversity-related matters. One such benefit is the grassroot knowledge of how people interact with their surrounding environment which in the GEF's own admission, can significantly enhance the quality of project design and implementation. Early discussions suggest a commitment to engaging with NGOs, recognising that their advice should be sought in both the design and implementation of environmental activities, whenever the groups that they engage with are likely to be affected by the proposed investment, or when their contribution can strengthen project design. In the biodiversity area, NGOs may be directly involved in project implementation, on their own or in conjunction with governmental implementing agencies, subject to the agreement by the recipient government.[246] Despite this commitment, early on in the GEF's operations as the CBD financial mechanism, NGOs have expressed frustration at the apparent resistance of the GEF to working with NGOs, pointing to a combination of inappropriate project processing and procurement procedures, and minimum project sizes.[247] The implementation by UNDP of the Small Grants Programme for NGOs and community-based organisations partly addresses this concern, and represents UNDP's "deepest global engagement at community level".[248]

The selection of UNDP, UNEP and the World Bank as the implementing agencies of the GEF, was strategic, with each of the three agencies bringing specialised knowledge, operational and programmatic strengths – as well as weaknesses – and technical mandates. Each agency supports the implementation of GEF-funded activities within its respective sphere of competence, but also rely on their networks to promote the cooperation with other financial institutions, UN agencies and programmes, as well as other international organisations, and national institutions and bilateral development agencies, local communities, NGOs, the private sector, and academia, in accordance with paragraph 28 of the Instrument.[249] The agencies follow a results-oriented approach to the implementation of GEF activities, and aim to operate "in a spirit of partnership, and consistent with the principles of universality, democracy, transparency, cost-effectiveness and accountability".[250] Importantly, the GEF Instrument

[246] World Bank, 'Documents Concerning the Establishment of the Global Environment Facility' (1991) 30(6) International Legal Materials 1735, 1747.
[247] Robert Lake, 'Finance for the Global Environment: The Effectiveness of the GEF as the Financial Mechanism to the Convention on Biological Diversity' (1998) 7(1) Review of European Community & International Environmental Law, 71.
[248] UNDP, 'Small Grants Programme Monitoring and Evaluation Strategy' (2021).
[249] GEF, 'Instrument for the Establishment of the Restructured Global Environment Facility' (2019), Annex D, para 3.
[250] Ibid, para 4.

commits the implementing agencies to putting these principles into practice by ensuring the development and implementation of programmes and projects that are country-driven and based on national priorities designed to support sustainable development.[251]

2.1.2.3.The World Bank

The GEF Instrument confers on the World Bank a primary role in ensuring the development and management of investment projects.[252] In particular, the World Bank promotes investment opportunities and mobilises private sector resources that are consistent with GEF objectives and national sustainable development strategies.[253] In addition to this, the World Bank serves as the Trust Fund Administrator which gives it oversight powers to review progress in the work of implementing agencies and a role to play in addressing the operational challenges that they may face. In the countries where it operates, the World Bank organises the project identification, appraisal, and supervision process in collaboration with UNDP and UNEP. [254]

2.1.2.4.UNDP

UNDP was established in 1965 through a merger of the UN's Expanded Program of Technical Assistance and the United Nations Special Fund in order to pool resources, simplify procedures, improve planning, and generally strengthen the delivery of Official Development Assistance (ODA).[255] Within the GEF, UNDP's primary role is to ensure the development and management of capacity building programmes and technical assistance projects. This is because of its global network of field offices, which allows it to facilitate dialogue and to build partnerships between State and non-State actors in the development of policies, and the strengthening of institutional capabilities and leadership skills.[256] As such, UNDP cooperates with other implementing agencies in the development of regional and global projects to assist

[251] Ibid, para 5.
[252] Ibid, para 11.
[253] Ibid.
[254] World Bank, 'Documents Concerning the Establishment of the Global Environment Facility' (1991) 30(6) International Legal Materials 1735, 1748.
[255] Richard Estes, 'United Nations Development Programme' in AC Michalos (ed), *Encyclopedia of Quality of Life and Well-Being Research* (Springer, Dordrecht 2014).
[256] UNDP, 'About Us' <https://www.undp.org/about-us> Accessed 27 November 2023.

countries in promoting, designing and implementing activities in line with GEF objectives and national sustainable development strategies. [257]

UNDP's presence in the GEF partnership ensures that "the strategic planning maximizes the complementarity between developmental and environmental concerns." Critics however, argue that UNDP has over time operated a rapprochement with the World Bank's market-oriented approach to development, gradually shifting away from its original promotion of a liberal, people-centred form of development, to one that one that promotes capitalist development.[258] Paul Cammack contends that UNDP's Human Development Reports have gradually aligned themselves with the Organisation for Economic Co-operation and Development (OECD)'s and the World Bank's approach to the political economy of adjustment. This, according to him, seeks to change individual attitudes and behaviour by shaping risks and incentives to the logic of global competitiveness thereby promoting the continuous development of the social relations of capitalist production on a global scale. He claims that as a result, the "UNDP's rhetoric of resilience, empowerment and choice now figures purely as ideology".[259] However, it is important to point out that the studies and assessments that UNDP carries out are typically developed in collaboration with a number of institutions and carry the disclaimer that they do not represent the official position of the UNDP or of any of the UN Member States that are part of its Executive Board.[260] In addition, as will be discussed in the final Chapter of this thesis, UNDP's framework for social and environmental risk assessment reflect a strong commitment to the realisation of human rights, and a much higher degree of operational autonomy from the World Bank than some of its UN sister organisations like UNEP.

2.1.2.5.UNEP

UNEP's primary role in the GEF partnership it to act as a catalyst for the development of scientific and technical analysis and to oversee the "environmental management" in GEF-

---

[257] GEF, 'Instrument for the Establishment of the Restructured Global Environment Facility' (2019), Annex D, para 11.
[258] Paul Cammack, 'The UNDP, the World Bank and Human Development through the World Market' (2017) 35(1) Development Policy Review 3-21, 4.
[259] Ibid.
[260] UNDP, 'Human Development Report 2020, The Next Frontier – Human Development and the Anthropocene' (2020).

financed activities.[261] UNEP provides guidance to the GEF on the implementation of GEF-financed activities at a global, regional and national level. It also has a technical role in the development of national policy frameworks and plans, and international environmental agreements.[262] UNEP hosts the STAP which acts as an advisory body to the GEF.[263]

At a strategic level, UNEP is the coordinator for existing and emerging global environmental conventions, and having it in the GEF partnership is intended to help ensure that the global policy framework for the GEF is consistent with existing conventions and related legal instruments and agreements.[264] It works closely with UNDP in providing the scientific and technological support needed in the areas of institution building and training.[265] UNEP's action however is hampered by a number of challenges which include insufficient stakeholder awareness and involvement, limited country capacity or buy-in and competing regional agendas with other UN agencies.[266]

2.1.2.6. Accredited agencies

Under paragraph 28 of the GEF Instrument, the Secretariat and implementing agencies are required to cooperate with other international organisations to promote the achievement of the GEF's objectives. These include specialised agencies and programmes of the UN, as well as other international organisations, bilateral development agencies, multilateral development banks, national institutions, non-governmental organisations, private sector entities and academic institutions. Implementing agencies can make arrangements for the preparation and execution of GEF-funded projects by these partner organisations.[267] During the Fifth Replenishment of the GEF Trust Fund (GEF-5), it was proposed to broaden the GEF partnership to allow additional agencies to cooperate with the GEF to assist recipient countries in preparing and implementing GEF-financed projects.[268] This move was intended to build

[261] GEF, 'Instrument for the Establishment of the Restructured Global Environment Facility' (2019), Annex D, para 11.
[262] Ibid.
[263] Ibid.
[264] World Bank, 'Documents Concerning the Establishment of the Global Environment Facility' (1991) 30(6) International Legal Materials 1735, 1748.
[265] Ibid, 1748.
[266] See Laurence Mee, 'The Role of UNEP and UNDP in Multilateral Environmental Agreements' (2005) 5(3) International Environmental Agreements: Politics, Law and Economics 227, 242-243.
[267] GEF, 'Instrument for the Establishment of the Restructured Global Environment Facility' (2019), Annex D, para 28.
[268] GEF, 'Broadening the GEF Partnership Under Paragraph 28 of the GEF Instrument', (GEF/C.40/09, 26 April 2011)

country capacities, improve performance and lower costs but it reflects a growing appetite from recipient countries for greater legitimacy and country ownership of project development and implementation.[269] Broadening the partnership also strengthen the GEF's ability to accomplish its mission as the financial mechanism to several international environmental conventions,[270] by drawing on the expertise of other organisations.

In assessing the suitability of new institutions, the GEF applies some "value-added review criteria" which score them on the basis of their relevance to the GEF, demonstrated environmental or climate change adaptation results, their scale of engagement, their capacity to leverage co-financing, their institutional efficiency, networks and contacts.[271] These criteria suggest that a greater emphasis is being put on facilitation and coordination than on the achievement of the GEF's objectives and that of the international instruments that it serves. In addition, the criteria do not make any reference to the applicant's policies on social and environmental safeguards and impact assessments. This is problematic because their policies may not meet the GEF's policies on environmental and social safeguards. Mindful of this gap, in 2011 the GEF adopted a policy on Agency Minimum Standards on Environmental and Social Safeguards.[272] This policy was introduced to ensure that all agencies that implement GEF-financed activities – including any new agencies accredited as part of the pilot to broaden the Partnership – have robust systems in place to avoid, minimise and mitigate any potentially adverse environmental and social impacts.[273] Despite this, in 2019 only four agencies in the partnership were found to be in compliance with GEF standards.[274]

2.1.2.7.Relationship to the CBD COP

During the negotiations of the CBD, the restructuring of the facility was a key concern of developing parties,[275] and in the lead up to UNCED, participants in the GEF agreed that its

[269] Ibid, para 7.
[270] Ibid.
[271] Ibid, paras 25-38.
[272] GEF, 'GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards, (GEF/C.41/10/Rev.01, 18 November 2011).
[273] Ibid, para 8.
[274] GEF, 'Progress Report on Agencies' Compliance with Minimum Standards in the GEF Policies on: Environmental and Social Safeguards; Gender Equality; and Stakeholder Engagement' (GEF/C.59/Inf.16, 9 November 2020), para 8.
[275] GEF, 'Instrument for the Establishment of the Restructured Global Environment Facility' (2019), Resolution No. 94-2, Preamble. See also United Nations Conference on Environment and Development, 'Agenda 21' (Rio de Janeiro, 3-14 June 1992).

structure and modalities should be modified to increase universality, flexibility, transparency and democracy in its administration and operational procedures.[276] It also committed itself to ensuring new and additional financial resources on grant and concessional terms to developing countries.[277] Despite these reforms, the move to include a provision on financial interim arrangements, which establishes the GEF as the interim structure to operate the delivery mechanism under Article 21 until the CBD COP formally designates the institutional structure,[278] was hotly debated.[279] Crucially, in 1994 the requirement for all Participating states (*ie.* Members) to make a financial contribution[280] was dropped.[281] Although this reform wasn't finalised until well after the UNCED in 1994, the argument of the restructuring of the GEF was nonetheless the basis of the UK and German delegations' strategy during the CBD negotiations, to garner support from developing countries for the proposal to establish the GEF as the financial mechanism.[282] COP 2 confirmed the status of the GEF as the interim institutional structure[283] and, the GEF came of age at COP 3 with the formal adoption of the Memorandum of Understanding (MoU) between the COP and the Council of the GEF.[284] The GEF has never formally lost its interim status and continues to operate on an interim basis. This status quo provides some depth to Malaysia's view that "[a]s we all know, in spite of our best efforts and intentions, these interim measures have the habit of becoming permanent features."[285]

The GEF replenishment cycle follows a complex calculation methodology which draws from different sources to allow some degree of flexibility in the allocation process. The order of consideration within the ToRs suggests a hierarchy in these sources. At the top of these sources is the information communicated by the Parties to the COP in the national reports.[286] These national reports are one of the accountability mechanisms set up under the CBD to

[276] GEF, 'Instrument for the Establishment of the Restructured Global Environment Facility' (2019), Resolution No. 94-2, Preamble.
[277] United Nations Conference on Environment and Development, 'Agenda 21' (Rio de Janeiro, 3-14 June 1992), Chapter 33.14.a)iii).
[278] CBD, Article 39.
[279] See Fiona McConnell, *The Biodiversity Convention – A Negotiating History* (Kluwer Law International 1996).
[280] Donald M Goldberg, 'The Global Environment Facility: Green Fund or Green Folly?' (Center for International Environmental Law 1993). https://www.ciel.org/reports/the-global-environment-facility-green-fund-or-green-folly-383-wise-news-communique-special-edition-energy-development-1993-goldberg-cc93-2-2/ Accessed 27 November 2023.
[281] Laurence Boisson de Chazournes, 'The Global Environment Facility (GEF): A Unique and Crucial Institution' (2005) 14(3) Review of European Community & International Environmental Law 193, 197.
[282] Fiona McConnell, *The Biodiversity Convention – A Negotiating History* (Kluwer Law International 1996) 89.
[283] Conference of the Parties to CBD Decision II/6 (30 November 1995), UN Doc UNEP/CBD/COP/DEC/II/6, para 1.
[284] Conference of the Parties to CBD Decision III/8 (11 February 1997), UN Doc UNEP/CBD/COP/DEC/III/8.
[285] CBD Secretariat, 'CBD Handbook' (3rd edn, 2005) Section VIII, 391.
[286] Conference of the Parties to CBD Decision 15/15 (19 December 2022), UN Doc CBD/COP/DEC/15/15, Annex III, Para 3(d).

measure progress towards the implementation of the Convention.[287] Parties are invited to provide up-to-date information on *inter alia* the process of preparation of the report; the status of the revised or updated national biodiversity strategy and action plan (NBSAP) in the light of the Kunming-Montreal GBF; an assessment of progress towards national targets; an assessment of progress related to the goals and targets of the Kunming-Montreal GBF; and some conclusions on the implementation of the Convention and the Kunming-Montreal GBF.[288] In the funding needs assessment methodology, these national reports are contrasted with the information provided through the financial reporting framework.[289]

As will be discussed in the next Chapters, CBD COP decisions taken on matters outside of the financial mechanism also have a bearing on GEF-funded activities. The Akwé: Kon Guidelines and the Voluntary guidelines on safeguards in biodiversity financing mechanisms have implications for the GEF and the COP regularly requests the Facility to report on how it is taking them into account.

2.1.2.8. The review of the financial mechanism's effectiveness

The primary legal basis for the COP's review of the GEF's activities is Article 21(3) of the CBD, which requires the COP to review the effectiveness of the financial mechanism, including the criteria and guidelines, "on a regular basis". At COP 2 it was clarified that these reviews should occur every three years,[290] but they are now carried out every four years to make them coincide with the COPs.[291] These are conducted through an independent evaluator that acts under the authority of the COP and assesses the reports produced by the GEF with respect to its operations as the CBD's financial mechanism.[292] The objective of the evaluation is first to determine whether the mechanism is effective in providing financial resources for the purpose of assisting developing country Parties with the implementation of the Convention. The evaluation also determines whether the relevant requirements of the Convention and the

---

[287] CBD, Article 26.
[288] Conference of the Parties to CBD Decision 15/6 (19 December 2022), UN Doc CBD/COP/DEC/15/6, Annex II, para 6.
[289] Conference of the Parties to CBD Decision 15/15 (19 December 2022), UN Doc CBD/COP/DEC/15/15, Annex III, Para 3(d).
[290] Conference of the Parties to CBD Decision II/6 (30 November 1995), UN Doc UNEP/CBD/COP/DEC/II/6, para 2.
[291] Conference of the Parties to CBD Decision X/24 (29 October 2010), UN Doc UNEP/CBD/COP/DEC/X/24, Annex, E. 1.
[292] Conference of the Parties to CBD Decision VII/22 (13 April 2004), UN Doc UNEP/CBD/COP/DEC/VII/22, Annex para 2.

guidance provided by the COP have been applied in the mechanism's activities, and to assess whether the impact and outcome of the activities funded contribute to the realisation of the CBD's objectives.[293] The effectiveness of the financial mechanism is assessed taking into account the steps and actions taken by the financial mechanism in response to the actions requested by the COP to improve the effectiveness of the financial mechanism; the actions taken by the financial mechanism in response to the guidance of the COP in specific decisions; and other issues raised by the Parties.[294] The results of these reviews are then used by CBD Parties to identify ways to improve the effectiveness of the mechanism. [295]

2.2.Legal foundations for human rights-related ODA

Unlike the CBD, human rights instruments do not typically have financial mechanisms that support developing countries in meeting the cost of complying with their obligations. As a result, ODA providers have been integrating human rights through direct projects, in their country programmes through bilateral ODA, and at a global level through international organisations through multilateral ODA.[296]

The World Conference on Human Rights held in Vienna in 1993 acted as a catalyst for the provision of ODA for the implementation of human rights activities, in support of the implementation of the body of human rights instruments adopted since the Universal Declaration of Human Rights of 1948. The Conference laid the foundations for coordinating the delivery of aid for the implementation of human rights instruments. First, the Vienna Declaration and Programme of Action devised a common plan to strengthen human rights work around the world. The Declaration stressed the critical importance of reinforcing international cooperation in the field of human rights for the full achievement of the purposes of the United Nations.[297] Importantly, it also encourages governments, the United Nations system, and other multilateral organisations to considerably increase the resources allocated to programmes aiming at the establishment and strengthening of national legislation, national institutions and related infrastructures that uphold the rule of law and democracy, electoral

[293] Conference of the Parties to CBD Decision 2/9 (21 September 1995), UN Doc UNEP/CBD/COP/2/9, para 15.
[294] Conference of the Parties to CBD Decision VII/20 (13 April 2004), UN Doc UNEP/CBD/COP/DEC/VII/20, para 19. See also Conference of the Parties to CBD Decision VII/22 (13 April 2004), UN Doc UNEP/CBD/COP/DEC/VII/22, Annex para 4.
[295] CBD, Article 20(3).
[296] World Bank and OECD, 'Integrating Human Rights into Development: Donor Approaches, Experiences, and Challenges' (2nd edn, World Bank Publications, 2013) 38.
[297] UNGA, 'Vienna Declaration and Programme of Action' (1993) UN Doc A/CONF.157/23, para 1.

assistance, human rights awareness through training, teaching and education, popular participation and civil society.[298]

The action plan notes the dire situation of funding for human rights activities, which shows that the fragmentation of resources was already having a negative impact on the implementation of international human rights instruments. The reliance on regular UN budgets was already insufficient to cover the resources needed for other important United Nations programmes. As a result, the action plan requests the Secretary-General and the General Assembly to take immediate steps to substantially increase the resources for the human rights programme from within the existing and future regular budgets of the United Nations, and to take urgent steps to seek increased extrabudgetary resources.[299] Another outcome of the Conference was the creation of the post of High Commissioner for Human Rights.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) is the principal United Nations office mandated to promote and protect human rights. Through its Technical Cooperation in the Field of Human Rights it provides assistance to governments, such as expertise and technical trainings in the areas of administration of justice and legislative reform to help implement international human rights standards on the ground.[300] It is built around key pillars *ie.*, the importance of anchoring technical cooperation in the universality and indivisibility of all human rights (civil, cultural, economic, political and social rights) including both protection and promotion aspects; support to national frameworks and institutions for human rights protection; follow up of recommendations by human rights mechanisms, national Development Objectives and 2030 Sustainable Development Goals; partnerships with all entities on the ground, human rights integration in UN programmes and operations in each country and region. This last pillar acknowledges that to be effective, technical cooperation in the field of human rights should be mainstreamed throughout the work of all United Nations programmes and operations in each country and region.[301] This echoes the closing statement made by the Secretary-General of the World Conference on Human Rights in which he concluded that to accelerate the implementation of human rights instruments, it is necessary to adopt a holistic approach to promoting human rights and the

[298] Ibid, para 34.
[299] Ibid, para II(A)(2).
[300] Office of the High Commissioner for Human Rights (OHCHR), 'What We Do: An Overview' <https://www.ohchr.org/en/about-us/what-we-do> Accessed on 27 November 2023.
[301]OHCHR, 'Technical Cooperation in the field of human rights' https://www.ohchr.org/en/countries/technical-cooperation> Accessed on 27 November 2023.

necessity of involving actors at all levels, international, national and local.[302] However, despite the call of the Conference to increase the budget allocated to human rights implementation activities, OHCHR remains vastly underfunded. Two thirds of its budget come from voluntary contributions from Member States and other donors, and the remainder is funded through the UN regular budget. Despite the centrality of human rights in the work of the UN system, human rights only receive 3.7 percent of the UN regular budget. This puts it in a challenging financial situation which affects the delivery of its activities.[303]

2.3.The OECD's Development Assistance Committee

The DAC was created in 1960[304] with the current objective to "promote development co-operation and other relevant policies so as to contribute to implementation of the 2030 Agenda for Sustainable Development, including sustained, inclusive and sustainable economic growth, poverty eradication, improvement of living standards in developing countries, and to a future in which no country will depend on aid."[305] It does so by *inter alia* reviewing development co-operation policies and practices against internationally agreed objectives and targets, and international norms and standards.[306] For this purpose, the DAC "collaborate[s] closely with other relevant bodies of the OECD on cross-cutting issues and in particular on policy coherence for sustainable development".[307] The DAC provides analysis, guidance and good practices to assist the members of the DAC and the expanded donor community "to enhance innovation and promote the relevance, coherence, effectiveness, impact, and sustainability of results in development co-operation".[308] Furthermore, it aims to "maximise sustainable development results".[309]

[302] Ibrahima Fall, 'Closing Statement by the Secretary-General of the World Conference on Human Rights' (Vienna, 25 June 1993), p. 8. https://www.ohchr.org/sites/default/files/Documents/AboutUs/WC1993_statements/Statement_closing_vienna25June93_Fall_en.pdf Accessed 27 November 2023.
[303] Ibid.
[304] Originally named 'Development Assistance Group'.
[305] OECD, 'Resolution of the Council Concerning The Mandate of the Development Assistance Committee' Doc number [C(2022)208], Preamble.
[306] Ibid, para 2(b).
[307] Ibid, para 3(a).
[308] Ibid, para 2(c).
[309] Ibid, para 2(d).

In the absence of a definition of biodiversity finance in the CBD regime[310] the OECD refers to biodiversity finance as expenditure that contributes – or intends to contribute – to the conservation, sustainable use and restoration of biodiversity. It stems from both public and private sources, and may be channelled through intermediaries such as public finance institutions and private asset owners and managers. It can be mobilised and delivered through various finance instruments and mechanisms, domestically and internationally.[311]

The primary legal basis for the DAC's engagement with biodiversity finance is the CBD.[312] This includes Articles 20 and 21 and the Kunming-Montreal Global Biodiversity Framework.[313] Since 2010, the OECD has made it a priority for donors to integrate biodiversity and ecosystem services into development policies, sector plans and budget processes, and address coherence and synergies with the Rio Conventions and international development agendas,[314] which include the Sustainable Development Goals.[315] Importantly, this support should also draw upon the traditional knowledge of complex ecosystems held by local and traditional peoples.[316] In its recommendation on Environmental Assessment of Development Assistance Projects and Programmes, the OECD Council recognises the benefit of assessing the environmental impact of development assistance projects and programmes, noting that it "can help reduce the risk of costly and potentially adverse effects on the environment and society".[317] It also points out that while developing countries have the responsibility for managing their own environment, donor agencies are responsible for carrying out environmental assessments having regard to any relevant domestic legislation in the host country.[318]

The DAC measures and monitors biodiversity-related development finance, based on the Rio marker for biodiversity as part of the Creditor Reporting System (CRS). The data show

[310] The absence of definition of biodiversity finance was highlighted by the World Bank as a shortcoming of the resource mobilisation strategy 2011-2020. See CBD, 'Evaluation and Review of the Strategy for Resource Mobilization and Aichi Biodiversity Target 20 - First Report of the Panel of Experts on Resource Mobilization' (8 June 2020) UN Doc CBD/SBI/3/INF/2, para 21.
[311] OECD, 'A Comprehensive Overview of Global Biodiversity Finance' (OECD Publishing 2020), para 5.
[312] OECD, 'Financing for Development in Support of Biodiversity and Ecosystem Services' (OECD Development Co-operation Working Papers, No 23, 2015), para 9.
[313] Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4.
[314] OECD, 'Policy Statement on Integrating Biodiversity and Associated Ecosystem Services into Development Co-Operation' (2010).
[315] OECD, 'Financing for Development in Support of Biodiversity and Ecosystem Services' (OECD Development Co-operation Working Papers, No 23, 2015), para 10.
[316] OECD, 'Policy Statement on Integrating Biodiversity and Associated Ecosystem Services into Development Co-Operation' (2010).
[317] OECD, 'Recommendation of the Council on Environmental Assessment of Development Assistance Projects and Programmes' (OECD/LEGAL/0458, 2020) Preamble.
[318] Ibid.

that the priority given to biodiversity in individual donor ODA portfolios varies. The Rio marker methodology used by donors to report on their biodiversity-related development finance distinguishes between projects that target biodiversity as their primary objective, and those that have biodiversity as their secondary objective. Data from 2016-2017 show that less than half of the biodiversity-related aid targeted biodiversity as a primary objective,[319] with most of the aid being split between "general environmental protection" and "agriculture, forestry and fishing". Other sectors include "water supply and sanitation", "government and civil society" and "disaster preparation".[320] Data also show that in the same year, climate-related ODA was over threefold the amount committed to biodiversity, with donors increasingly addressing biodiversity through climate projects.[321] While there is strong evidence that building synergies with the climate regime could yield substantial co-benefits,[322] the financial obligations of donors derived from CBD Articles 20 and 21 should not be seen as secondary to those derived from the climate regime. In line with this, a comment made by Cameroon during the consultations organised as part of the development of the new resource mobilisation strategy under the post-2020 Global Framework for Biodiversity, that donors do not sufficiently integrate biodiversity in their development assistance plans[323] has led to a proposition that the resources allocated for biodiversity-related assistance should be ring-fenced.[324] Because biodiversity-related development assistance falls under the umbrella of the DAC it is driven by considerations linked to aid effectiveness.[325] Aid effectiveness however, remains poorly understood in the context of CBD implementation.

The DAC adheres to the principles recognised at the 1993 Vienna World Conference on Human Rights.[326] These include the recognition that "[a]ll human rights are universal, indivisible and interdependent and interrelated",[327] and the commitment of all States "to fulfil

[319] OECD, 'Biodiversity-Related Official Development Finance' (OECD, 2017) <https://public.tableau.com/views/RioMarkers/ByProvider?:embed=y&:display_count=no&%3AshowVizHome=no%20#3> Accessed 27 November 2023.
[320] Ibid.
[321] OECD, 'Mainstreaming Biodiversity for Sustainable Development' (OECD Publishing, 2018) 148.
[322] See Risa Smith and others, 'Ensuring Co-benefits for Biodiversity, Climate Change and Sustainable Development' in Walter Leal Filho and others (eds), *Handbook of Climate Change and Biodiversity* (Springer Link 2019) 151.
[323] GIZ, 'Atelier régional préparatoire sur le financement de la biodiversité et la mobilisation des ressources pour l'appui du cadre mondial pour la biodiversité après 2020 en Afrique francophone, 06-08 Novembre 2019, Rapport final' (2019).
[324] CBD, 'Evaluation and Review of the Strategy for Resource Mobilization and Aichi Biodiversity Target 20 - First Report of the Panel of Experts on Resource Mobilization' (8 June 2020) UN Doc CBD/SBI/3/INF/2, para 18.
[325] OECD, 'Financing for Development in Support of Biodiversity and Ecosystem Services' (OECD Development Co-operation Working Papers, No 23, 2015), para 11.
[326] OECD, 'DAC Guidelines on Conflict, Peace and Development Co-Operation' (1997), para 120.
[327] UNGA, 'Vienna Declaration and Programme of Action' (1993) UN Doc A/CONF.157/23, para 5.

their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law."[328] As such, DAC Members are required to support the international principles contained in the UN Charter, the Universal Declaration of Human Rights, and the Vienna Declaration. They must also comply with the provisions of the international and regional conventions that they have ratified, such as the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the ILO's Convention 69 on Indigenous and Tribal Peoples Convention.[329] The DAC has long been committed to using donor assistance as part of a wider promotion of "just and sustainable development," providing vulnerable and disadvantaged groups with knowledge about their human and legal rights. In addition, the OECD has taken noticeable steps to link the protection of human rights with the financing for the achievement of the SDGs.[330] Its recommendation on policy coherence for sustainable development notes that improved coherence is needed to promote different forms of financing from public, private, domestic and international sources that better leverage inclusive sustainable development impact, and to accelerate progress towards the implementation of the 2030 Agenda.[331] In particular, it encourages adherents to systematically apply a poverty, gender and human rights perspective to policy coherence for sustainable development frameworks,[332] and to adopt *ex-ante* and *ex-post* impact assessment practices that take into account transboundary impacts, paying particular attention to the economic, social, gender and environmental impacts on developing countries as well as the promotion and protection of human rights.[333] However, although the OECD has the power to take decisions that are binding on its Members,[334] on the topic of human rights and sustainable development it has so far limited itself to issuing non-binding recommendations.

Ten years before the endorsement of the UN Framework Principles, the OECD produced an Action-Oriented Policy paper on Human Rights and Development which recognised that human rights can strengthen efforts towards equitable, pro-poor economic growth. In particular, the DAC pointed to a "growing consensus" that linking human rights

[328] Ibid, para 1.
[329] OECD, 'DAC Guidelines on Conflict, Peace and Development Co-Operation' (1997), para 120.
[330] OECD, 'Recommendation of the Council on Policy Coherence for Sustainable Development' (OECD/LEGAL/0381, 2010), Preamble.
[331] Ibid, Preamble.
[332] Ibid, para 1(b).
[333] OECD, 'Recommendation of the Council on Policy Coherence for Sustainable Development' (OECD/LEGAL/0381, 2010), para IV.1(b).
[334] Convention on the Organisation for Economic Co-operation and Development (adopted 14 December 1960, entered into force 30 September 1961) 888 UNTS 179, Article 5.

principles, such as participation, non-discrimination and accountability with development assistance is a "good and sustainable development practice".[335] However, DAC members' approaches to human rights lack harmonisation. Many donors support human rights through funding human rights projects[336] but some development agencies seek to mainstream human rights as a cross-cutting issue in development assistance, beyond the direct support to human rights programmes and stand-alone projects that support human rights organisations.[337] Additionally, some agencies are implementing human rights-based approaches, that feature the integration of human rights principles such as participation, inclusion and accountability into policies and programmes. They also draw on specific human rights standards such as freedom of expression or assembly to help define development objectives and focus programmatic action.[338] Importantly, the DAC noted the potential for the international human rights framework and the Paris Declaration to reinforce and benefit from each other, through the partnership commitments of the Paris Declaration.[339] The DAC committed to foster the international consensus on how to promote and protect human rights and integrate them more systematically into development, drawing up 10 principles for harmonised donor action in relation to human rights in the design of policies and programmes.[340] In particular, the DAC encourages its members to consider human rights in decisions on alignment and aid instrument,[341] to consider human rights principles, analysis and practice in the roll-out of the Paris Declaration's partnership commitments, [342] to do no harm[343] and to ensure that the scaling-up of aid is conducive to human rights.[344] Human rights analysis already guides both aid allocations and the choice of aid modalities, and is often used in mutual accountability frameworks, holding both donors and partners to account.[345]

DAC members are also committed to strengthening the rule of law and respect for human rights through national institutions and processes.[346] This commitment to human rights however, while rooted in State obligations, remains largely driven by non-legal, domestic

[335] OECD, 'Action-Oriented Policy Paper on Human Rights and Development' (DCD/DAC (2007)15, 2007), para 12.
[336] Ibid, para 21.
[337] Ibid, para 23.
[338] Ibid, para 24.
[339] Ibid, para 39.
[340] Ibid, para 40.
[341] Ibid, para 40(6).
[342] Ibid, para 40(7)
[343] Ibid, para 40(8)
[344] Ibid, para 40(10)
[345] OECD, 'Integrating Human Rights into Development, Donor Approaches, Experiences and Challenges' (OECD Publishing 2006) 18.
[346] OECD, 'DAC Guidelines on Conflict, Peace and Development Co-Operation' (1997) para 121.

considerations. As such, DAC members' rationales for incorporating human rights in their development activities vary from donor to donor.[347] These are centred around the recognition of human rights as an international obligation of States, the understanding that human rights are integral to development, and the theory that human rights enhance aid effectiveness. While these approaches aren't mutually exclusive, the prevailing justification for the inclusion of human rights into development activities is their use as a marker for aid effectiveness.

The OECD DAC however, acknowledges that human rights offer a coherent normative framework that can guide development assistance. This human rights framework has built near universal consensus, as demonstrated by the near universal ratification of most human rights instruments. They lay out clear entitlements for individuals and communities, and obligations for states to respect and protect them. As such, it lays out a global legal regime that enjoys normative legitimacy and consistency, and that can help streamline and coordinate development interventions.[348]

While the recommendation on Environmental Assessment of Development Assistance Projects and Programmes does not directly spell out safeguards for human rights, it contains references to the human environment,[349] human health[350] and recommends that adherents conduct social assessments which include the identification of areas of particular social interest to specific vulnerable population groups such as nomadic people and other people with traditional lifestyles.[351]

Having explained the layered architecture of human rights and biodiversity-related ODA and the influence of the OECD DAC's narrative on aid effectiveness, the next Part considers the role of human rights in enhancing aid effectiveness.

3. Human rights as a contributor to aid effectiveness

This Part considers the relationship between human rights and ODA and demonstrates that human rights are an essential contributor to aid effectiveness. Section 3.1 begins by

[347] OECD, 'Integrating Human Rights into Development, Donor Approaches, Experiences and Challenges' (OECD Publishing 2006) 16.
[348] World Bank and OECD, 'Integrating Human Rights into Development: Donor Approaches, Experiences, and Challenges' (2nd edn, World Bank Publications, 2013) 58.
[349] Ibid, Annex I.
[350] Ibid, Annex I.
[351] Ibid, Annex II.

exploring the ongoing cooperation between donors and recipients of aid to improve the coordination of aid and harmonise it with recipient country priorities. Importantly, it shows that there is a strong recognition at the policy level of the contribution of human rights to the effectiveness of aid. This recognition however, fails to translate into a systematic engagement with human rights in the delivery of aid. Section 3.2 shows that at a programmatic level, human rights are used as a key marker for the evaluation of development projects.

3.1. Human rights in global cooperation fora for aid effectiveness

The aid effectiveness agenda was born out of the realisation that more coordination and coherence was needed to make the best use of financial resource in development assistance. This subsection shows a progressive acknowledgement of the role of human rights in strengthening the effectiveness of aid, with foundations laid under the aegis of the UN and carried forward by the OECD DAC.

3.1.1. UN-driven efforts to establish a new aid architecture: the Monterrey Consensus and the Rome Declaration on Harmonisation

At the turn of the new millennium, States came to realise that development assistance was often fragmented, with multiple donors providing aid to recipient countries through different channels and with different priorities and procedures. Importantly, the lack of coordination and coherence in development assistance was reducing the impact of aid on poverty reduction and sustainable development.[352] In addition, donor requirements and processes for preparing, delivering, and monitoring development assistance were drawing down the limited capacity of partner countries and did not match national development priorities and systems, including their budget, programme, and project planning cycles and public expenditure and financial management systems.[353] The UN provided the impetus for laying the foundations for a new aid architecture, aimed at improving aid effectiveness through greater harmonisation, alignment, and coordination among development partners.

[352] United Nations, *Monterrey Consensus on Financing for Development* (2002) UN Doc A/CONF.198/11, para 43.
[353] OECD, 'Rome Declaration on Harmonisation' in *Harmonising Donor Practices for Effective Aid Delivery* (OECD DAC guidelines and Reference Series, 2003) 10.

The first International Conference on Financing for Development took place in Monterrey, in 2002. The objective was to consider new approaches to domestic and international finance to promote a more equitable global development. The Monterrey Consensus laid the foundations for a new vision of development cooperation, built on shared responsibilities and mutual commitment between donors and recipients. [354] At this Conference, participants stressed the need to formulate clear development strategies at country level, to improve aid coherence.[355] Importantly, developed countries committed themselves to taking full responsibility for their own development by undertaking structural reforms, based on the respect and support for human rights, gender equality and the protection of the environment.[356] On the other hand, the international community committed itself to supporting developing countries' efforts through enhanced resource flows and a more development friendly international environment.[357] To carry forward the commitments of the draft Monterrey Consensus, participants agreed that human rights commitments should guide the implementation of the draft Monterrey Consensus.[358]

A year later, 28 recipient countries and more than 40 multilateral and bilateral development institutions endorsed the Rome Declaration on Harmonisation, renewing their commitment to eradicating poverty, achieving sustained economic growth, and promoting sustainable development. The main outcomes of the Rome Declaration included the creation of country-level aid coordination mechanisms, and the commitment to harmonising practices.[359] The Declaration also emphasised the importance of aligning aid with recipient countries' national development strategies and building capacity at the country level to manage and implement aid programmes effectively.[360] It came a step further to building a greater international consensus on how to pursue the objective of more effective aid.[361]

---

[354] United Nations, 'International Conference on Financing for Development, Summaries of multi-stakeholder round tables, Summit round table C.2, on the theme "International Conference on Financing for Development: looking ahead"' (2002) UN Doc A/CONF.198/8/Add.12, para 2.
[355] United Nations, 'International Conference on Financing for Development, Summaries of multi-stakeholder round tables, Ministerial round table B.1, on the theme "Coherence for development"' (2002) UN Doc A/CONF.198/8/Add.6, para 5.
[356] United Nations, 'International Conference on Financing for Development, Summaries of multi-stakeholder round tables, Summit round table C.2, on the theme "International Conference on Financing for Development: looking ahead"' (2002) UN Doc A/CONF.198/8/Add.12, para 2.
[357] Ibid, para 2.
[358] United Nations, 'International Conference on Financing for Development, Summaries of multi-stakeholder round tables, Summit round table C.4, on the theme International Conference on Financing for Development: "Looking ahead"' (2002) UN Doc A/CONF.198/8/Add.9, para 19.
[359] OECD, 'Rome Declaration on Harmonisation' in *Harmonising Donor Practices for Effective Aid Delivery* (OECD DAC guidelines and Reference Series, 2003) 10.
[360] Ibid.
[361] ECOSOC, 'Background Study for the Development Cooperation Forum - Towards a Strengthened Framework for Aid Effectiveness' (2008), para 3.

3.1.2. Other high-level fora on aid effectiveness

Building on the UN's efforts to revitalise and modernise development cooperation, the OECD pushed the agenda forward with several high-level events. The DAC's aid effectiveness agenda coincided with a gradual shift in the global landscape, characterised by a blurring of the lines between developed and developing countries.[362] This evolution has given rise to a new form of cooperation, the partnership. This shift is evident in the Paris Declaration on Aid Effectiveness (2005),[363] which lays out Partnership Commitments[364] around the principles of ownership, harmonisation, alignment, results and mutual accountability.

Under this Declaration, donors commit to respect partner country leadership and help strengthen their capacity to exercise it[365] and to base their overall support including country strategies, policy dialogues and development co-operation programmes on partners' national development strategies.[366] Donors and Partners[367] also commit to a harmonised approach to environmental assessments to address the Rio Conventions on climate change, desertification and loss of biodiversity.[368]

The Paris Declaration does not make any direct reference to human rights, despite the calls from civil society organisations to establish a clear link with human rights[369] and the DAC's acknowledgement that human rights, gender equality and environmental sustainability are "functionally essential" to achieving the ultimate goal of the Declaration.[370] The closest it comes to using elements of human rights language is through a reference to gender equality.[371] This absence is notable considering the DAC's narrative that human rights contribute to enhancing the effectiveness of aid.[372] In particular, the human rights principles of accountability, rule of law and participation are largely seen as contributing to more effective,

[362] HRC, 'Report of the Independent Expert on human rights and international solidarity, Virginia Dandan' (2015) UN Doc A/HRC/29/35, para 35.
[363] OECD, *Paris Declaration on Aid Effectiveness* (OECD Publishing 2005).
[364] Ibid, para 13.
[365] Ibid, para 14.
[366] Ibid, para 16.
[367] Recipient countries are referred to in the Declaration as 'partners'.
[368] OECD, 'Paris Declaration on Aid Effectiveness' (OECD Publishing 2005) para 40.
[369] ECOSOC, 'Background Study for the Development Cooperation Forum - Towards a Strengthened Framework for Aid Effectiveness' (2008), para 43.
[370] DCD DAC, 'Workshop On Development Effectiveness in Practice: Applying the Paris Declaration to Advancing Gender Equality, Environmental Sustainability and Human Rights' (DCD/DAC(2007)40, 2007), para 1.
[371] OECD, 'Paris Declaration on Aid Effectiveness' (OECD Publishing 2005) para 42.
[372] OECD, 'Integrating Human Rights into Development, Donor Approaches, Experiences and Challenges' (OECD Publishing 2006) 30.

legitimate and accountable governance.[373] This absence may be the result of a compromise to achieve universal participation and endorsement of the Declaration's principles, as donors and partners alike remain split on the issue of human rights. It wasn't until 2011 and the Fourth High Level Forum on Aid Effectiveness that the Busan Partnership for Effective Development Cooperation emphasised the link between fighting poverty and protecting human rights.[374] Under the partnership, aid must be invested in accordance with commitments towards human rights, decent work, gender equality, environmental sustainability and disability.[375] This was hailed as a shift from a technical aid effectiveness approach to development effectiveness based on long-term sustainability, addressing the root causes of poverty and the realisation of human rights.[376] This shift was confirmed in 2016 at the Second High-Level Meeting of the Global Partnership for Effective Development Co-operation, where participants committed to effective development co-operation as a means to achieve the universal and inter-related Sustainable Development Goals (SDGs).[377] The outcome document proclaims the death of "the donor-recipient relationships of the past" which have been replaced by approaches that view all stakeholders as equal and interdependent partners in development.[378] Despite this affirmation, the Global Partnership remains firmly rooted in the aid effectiveness agenda of the Paris Declaration, as evidenced by the commitment to "to maximise the effectiveness and impact of all forms of co-operation for development."[379] But in a departure from the Paris Declaration, it recognises international commitments on environmental sustainability, human rights, decent work, gender equality and the elimination of all forms of discrimination.[380] Interestingly, while the document asserts the equality of all partners in development, only civil society partners commit to respecting and promoting human rights and social justice. It falls on them to develop and implement strategies, activities and practices that promote individual and collective human rights, including the right to development with dignity, decent work, social justice and equity for all people. [381]

---

[373] Ibid, 30.
[374] OECD, 'The Busan Partnership for Effective Development Co-operation' <www.oecd.org/dac/effectiveness/busanpartnership.htm> Accessed 27 November 2023.
[375] Global Partnership for Effective Development Co-operation, 'Busan Partnership for Effective Development Cooperation' (2011).
[376] See HRC, 'Report of the Independent Expert on human rights and international solidarity, Virginia Dandan' (2015) UN Doc A/HRC/29/35, para 36.
[377] Global Partnership for Effective Development Co-operation, 'Nairobi Outcome Document' (Nairobi, 2016), para 1.
[378] Ibid, para 3.
[379] Ibid.
[380] Ibid, para 4.
[381] Ibid, para 68(c).

This new narrative around development co-operation as a partnership has had two major implications from the perspective of human rights. First, it shows a gradual rapprochement between the DAC's long-standing commitment to human rights and the priorities of recipient countries. Second, donors and partners have – at least on paper – found a more inclusive and participatory way of facilitating domestic change processes in relation to human rights and sustainable development. In this context, human rights offer a coherent normative framework for implementing what the DAC refers to as "good programming practices",[382] such as consultation, participation, decision making and the rights of vulnerable groups. As will be discussed in Chapter 4, this approach ties in with the human rights obligations identified by the UN Special Rapporteur on Human Rights and the Environment.[383] This trend was confirmed in 2022, with the adoption in Geneva of the Effective Development Co-operation Summit Declaration which reiterated support for previous development cooperation principles and emphasised a commitment to the realisation of human rights through the implementation of a human rights-based approach.[384]

3.1.3. Challenges to the aid effectiveness agenda

This subsection shows that there are two key challenges to the successful implementation of the aid effectiveness agenda: first the insufficient implementation of the Paris Declaration and second, the lack of recognition among donors of the contribution of human rights to aid effectiveness.

3.1.3.1. Insufficient implementation of the Paris Declaration

While the declaration made important strides in highlighting the need for better coordination and alignment of aid efforts, it has faced challenges and limitations that have hampered its overall success. In particular, the Paris Declaration places much emphasis on the importance of recipient countries taking ownership of their development priorities. However, this ownership has been limited in practice due to various factors such as political instability,

[382] OECD, 'Integrating Human Rights into Development, Donor Approaches, Experiences and Challenges' (OECD Publishing 2006) 21.
[383] See United Nations Human Rights Committee (HRC), 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2017) UN Doc A/HRC/34/49.
[384] Global Partnership for Effective Development Co-operation, 'Effective Development Co-operation Summit Declaration' (2022), para 15.

weak governance structures, and a lack of capacity to effectively manage aid resources.[385] Similarly, despite the focus on recipient country ownership, aid programmes have often been driven by donor priorities and conditions, leading to increased fragmentation and a lack of alignment with recipient country needs.[386] Donors have been reluctant to adapt to recipient country contexts and preferences, undermining the overall effectiveness of aid efforts. While the Paris Declaration called for better coordination among donors to avoid duplication and ensure the efficient use of resources, in practice donors continue to operate in a fragmented aid architecture, with multiple donors operating independently, resulting in a lack of harmonisation, coordination, and information sharing. A proliferation of actors, including bilateral donors, multilateral institutions, and non-state actors, has created a complex aid architecture.[387] This complexity has made it difficult to streamline and coordinate aid efforts, reducing the effectiveness of aid in achieving development outcomes.

The focus on quantitative targets in the Paris Declaration, such as aid volume and disbursement timelines, has sometimes overshadowed the importance of the qualitative aspects of aid effectiveness, such as the relevance of aid projects, and their impact on national development goals. This narrow focus on targets may have hindered the achievement of long-term development outcomes. In addition, whilst the Paris Declaration committed donors and recipients to mutual accountability, there have been challenges in effectively monitoring results, as evidenced by the Global Partnership for Effective Development Cooperation (GPEDC)'s adoption of new targets without any concrete follow up process.[388] Progress in measuring aid effectiveness has often been slow, with limited transparency and inadequate mechanisms for holding both donors and recipients accountable for their commitments.[389]

3.1.3.2. Varying approaches to human rights in donor practices

[385] Stephen Brown, 'The Rise and Fall of the Aid Effectiveness Norm' (2020) 32(4) The European Journal of Development Research 1230, 1242.
[386] Ibid, 1243.
[387] Jean-Michel Severino, and Olivier Ray, 'The End of ODA (II): The Birth of Hypercollective Action' (Center for Global Development, 2010).
[388] Stephan Klingebiel and Xiaoyun Li, 'Crisis or Progress? The Global Partnership for Effective Development Cooperation (GPEDC) after Nairobi' (International Development Blog, 2016) <https://www.idos-research.de/en/the-current-column/article/crisis-or-progress-the-global-partnership-for-effective-development-cooperation-gpedc-after-nairobi/> Accessed 27 November 2023.
[389] Stephen Brown, 'The Rise and Fall of the Aid Effectiveness Norm' (2020) 32(4) The European Journal of Development Research 1230, 1243.

A review of DAC member practices shows that although human rights is "seen as an objective in its own right", the legal obligations derived from the international human rights framework does not lead to the systematic inclusion of human rights considerations into development cooperation activities. National development agencies follow different rationales for working on human rights, with some choosing not to work on human rights explicitly, due to legal, political or empirical issues.[390] Others simply do not accept that they are under a legal obligation to promote and respect human rights through their assistance.[391] As a result, national approaches to human rights vary greatly. The Swiss Agency for Development and Cooperation for example, operates on the basis of Article 54 of the Constitution of Switzerland which gives it a clear mandate to "assist in the alleviation of need and poverty in the world and promote respect for human rights and democracy, the peaceful co-existence of peoples as well as the conservation of natural resources."[392] USAID however, does not explicitly acknowledge the promotion of human rights as an objective, stating instead that its aim is to "promote and demonstrate democratic values abroad, and advance a free, peaceful, and prosperous world."[393]

This lack of uniform recognition of the linkages between human rights and aid effectiveness in donor practices is at odds with the recommendations of the Inter-agency Task Force on Financing for Development which regularly reminds providers of ODA that efforts to support the goals of the Addis Ababa Action Agenda, the Sustainable Development Goals and the Rio Conventions must include non-economic issues such as human rights, including gender equality.[394]

A key entry point for the integration of human rights considerations into biodiversity-related ODA is the national development cooperation policies (NDCPs) that developing countries adopt, in line with the Paris Declaration on aid effectiveness. These plans should be anchored in cohesive and nationally owned sustainable development strategies and integrated financing[395] to help mobilise and align development cooperation with developing countries'

---

[390] OECD, 'Integrating Human Rights into Development, Donor Approaches, Experiences and Challenges' (OECD Publishing 2006) 22.
[391] Ibid, 28.
[392] Federal Constitution of the Swiss Confederation (Switzerland) of 18 April 1999, Article 54(2).
[393] USAID, 'Mission, Vision and Values' < https://www.usaid.gov/about-us/mission-vision-values#:~:text=Our%20Mission%3A%20On%20behalf%20of,%2C%20peaceful%2C%20and%20prosperous%20world.> Accessed 27 November 2023.
[394] See United Nations Department of Economic and Social Affairs (UNDESA), 'Financing for Development: Progress and Prospects, Report of the Inter-agency Task Force on Financing for Development' (2019) 132; UNDESA, 'Financing for Development: Progress and Prospects, Report of the Inter-agency Task Force on Financing for Development' (2021) 154; UNDESA, 'Financing for Development: Progress and Prospects, Report of the Inter-agency Task Force on Financing for Development' (2022) 150;
[395] UNDESA, 'Financing for Development: Progress and Prospects, Report of the Inter-agency Task Force on Financing for Development' (2018) 105;

national sustainable development goals. According to the Task Force, these have proven to be an effective tool to ensure broad-based country ownership and leadership; improve the quality of development partnerships; and get better results from development cooperation, including through increased transparency and accountability. They are now an integral part of developing countries' integrated financing frameworks. [396]

Costa Rica's national policy for effective development cooperation,[397] sets out a mechanism to manage and coordinate ODA, South-South cooperation, and other funding modalities and partnerships for the 2030 Agenda for Sustainable Development. The policy recognises the centrality of human rights and sustainability in the 2030 agenda,[398] and clearly sets out the type of support that the country needs in relation to biodiversity, which includes support to the implementation of the National Strategy for Biodiversity.[399] At the same time, it requests support for the development of institutional guidelines that integrate a human rights perspective, including a gender equality perspective in all normative work,[400] and assistance with development and strengthening environmental human rights.[401]

In Honduras, the development of the National Cooperation Policy for Sustainable Development, was carried out in the wake of a Global Partnership for Effective Development Cooperation meeting. A national event titled "Effectiveness of Co-operation for Sustainable Development" identified effectiveness priorities for the government and development partners. The strategic objectives of the National Cooperation Policy are guided by the principles of Aid Effectiveness: national ownership, focus on results, inclusive partnerships, transparency and mutual accountability and linked to the 2030 Agenda for Sustainable Development.[402] The policy has a strong focus on human rights, gender equality and environmental sustainability. The policy points out the lack of alignment between the country's national development plans and the support that it receives through development cooperation.[403] The policy is intended to remedy this gap.[404] Importantly, it clearly states that all cooperation actions for sustainable

[396] UNDESA, 'Financing for Development: Progress and Prospects, Report of the Inter-agency Task Force on Financing for Development' (2019) 92; UNDESA, 'Financing for Development: Progress and Prospects, Report of the Inter-agency Task Force on Financing for Development' (2020) 99;
[397] Ministerio de Planificación Nacional y Política Económica, 'Política de Cooperación Internacional de Costa Rica, 2014-2022' (2014).
[398] Ibid, 33.
[399] Ibid, 62.
[400] Ibid, 78.
[401] Ibid, 84.
[402] See Gobierno de la Republica de Honduras, 'Política Nacional de Cooperación para el Desarrollo Sostenible' (2019).
[403] Ibid, 22.
[404] Ibid.

development must be guided by the rules and agreements signed by Honduras in the field of Human Rights, and national instruments such as the National Human Rights Action Plan of Honduras.[405]

In 2016, the COP recommended to explore the feasibility of linking financial reporting under the Convention with the monitoring process for the follow-up and review of the commitments of the Addis Ababa Action Agenda, through the Inter-agency Task Force on Financing for Development, to reduce the overall reporting burden for Parties.[406] This Task Force was convened by the UN Secretary General to follow up on the Addis Ababa Action Agenda. It is made up of over 50 United Nations agencies, funds and programmes, regional economic commissions, the World Bank Group and other relevant international institutions. It sits within the Financing for Development Office of the UN Department of Economic and Social Affairs and was established by the Addis Ababa Action Agenda to report annually on progress in implementing the financing for development outcomes and the means of implementation of the post-2015 development agenda, and advise on progress, implementation gaps and recommendations for corrective action.[407] In its first report, the Task Force provided useful guidance on the monitoring of ODA flows to biodiversity, aligned with SDG indicators.[408] The next reports however, are heavily skewed towards climate finance and have for the most part ignored the specific challenges of biodiversity-related ODA. However, the COVID-19 crisis reignited interest in biodiversity-related aid.[409]

3.2. Human rights as a marker of aid effectiveness in programme evaluation

Despite the varying levels of engagement of donors with human rights, the OECD establishes a clear link between aid effectiveness and the ability of projects to yield benefits for human rights. Indeed, the OECD considers project evaluation as a key tool in improving the quality and effectiveness of development cooperation, as evidenced by the work of the Network on Development Evaluation. This Network was set up as a subsidiary body of the DAC as an international forum for exchange on emerging practice, innovative approaches and

[405] Ibid, Principle 7A.
[406] Conference of the Parties to CBD Decision XIII/20 (15 December 2016), UN Doc CBD/COP/DEC/XIII/20, para 17(a).
[407] UNGA, 'Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)' (2015), UN Doc A/RES/69/313, para 133.
[408] UNDESA, 'Addis Ababa Action Agenda -Monitoring commitments and actions, Inaugural Report 2016 by the Inter-agency Task Force on Financing for Development' (2016) pp 21-22.
[409] UNDESA, 'Report of the Inter-agency Task Force on Financing for Development 2021, Financing for Sustainable Development Report' (2021).

new ideas in the development evaluation community. The network's primary goal is to increase the effectiveness of development cooperation policies and programmes through rigorous evaluation. It keeps the DAC Evaluation Resource Centre (DEReC) which provides over 3 800 evaluation reports.[410]

This focus on evaluation as a tool for measuring and strengthening aid effectiveness acts a bridge between the broad international policy commitments on the coordination of aid and its implementation at programme level. This is important because policy commitments are typically entered into by States, and do not automatically apply to all providers of development assistance such as UN agencies, IFIs and international funds and programmes. Some non-State providers however have taken steps to align their activities with the principles of the Paris Declaration on Aid Effectiveness. The Asian Development Bank notes its commitment to the implementation of the Declaration, as it provides a framework for improving its impact on development and poverty reduction.[411] It identifies a list of programmatic actions to align the ADB's activities with the Declaration's principles.[412]

The OECD's guidelines on evaluation provide some interesting insights into the concept of effectiveness, as applied in the context of programme development. The guidelines define effectiveness as "the extent to which the intervention achieved, or is expected to achieve, its objectives and its results, including any differential results across groups."[413] The work of the OECD DAC on the six evaluation criteria that should form part of an evaluation strategy provides some conceptual clarity around the concept of effectiveness, mostly from an exclusionary perspective. Indeed, effectiveness is only one of the OECD's six evaluation criteria used to support consistent evaluation of development interventions, that encompass policies, strategies, programmes, projects and activities. The other five criteria are:

relevance – extent to which the intervention's objectives and design respond to beneficiaries' needs and priorities, as well as alignment with national, global and partner/institutional policies and priorities;

*coherenc*e – extent to which other interventions (particularly policies) support or undermine the intervention and vice versa;

---

[410] OECD, 'DAC Evaluation Resource Centre' < https://www.oecd.org/derec/aboutus/> Accessed 27 November 2023.

[411] Asian Development Bank (ADB), 'At a Glance: The Paris Declaration and Accra Agenda for Action - What Do They Mean for ADB?' (2011).

[412] Ibid.

[413] OECD, 'Applying Evaluation Criteria Thoughtfully' (OECD Publishing 2021) 52.

efficiency – extent to which the intervention delivers, or is likely to deliver, results in an economic and timely way;

impact – extent to which the intervention has generated or is expected to generate significant positive or negative, intended or unintended, higher-level effects; and

sustainability – extent to which the net benefits of the intervention continue or are likely to continue.[414]

Importantly, the OECD clarifies that effectiveness also entails identifying unintended effects, as part of a risk management strategy. This includes identifying negative as well as positive results. As such, the guidelines create linkages between effectiveness, risk management and human rights.

The OECD's guidance on evaluation shows some linkages with social and environmental assessment frameworks, particularly in relation to procedural aspects such as stakeholder consultations. However, the language used is soft, suggesting a voluntary and optional monitoring of these risks. This is regrettable as the systematic monitoring of these risks could help identify missed opportunities to generate results for the intervention's target population or beneficiaries, including contributing to longer term change, such as reduction in inequalities.

In summary, effectiveness at a programmatic level entails:

- Defining intended results which serves as the key reference point for management, monitoring and evaluation;
- Assessing the negative and positive results arising from an intervention's output, outcome or impact;
- Assessing the extent to which the intervention contributed to the realisation of national or other relevant development goals and objectives in the context;
- Assessing the procedural aspects of the interventions, such as whether consultations were held with stakeholders;
- Assessing the extent to which an intervention integrates the principles of equality, non-discrimination and accountability, particularly in relation to the most marginalised;
- Identifying unintended social, economic or environmental effects of the intervention, both positive and negative, including in relation to human rights.

An additional conceptual clarification of "effectiveness" comes from the analysis that the OECD offers on the issue of the relationship between effectiveness and the other five

[414] Ibid.

criteria that it puts forward in the development of evaluation strategies. In particular, it clarifies that whilst the criterion on relevance focuses on the design of the intervention and the identification of results, effectiveness determines progress towards the achievement of these objectives.[415] In addition, by looking at the other five criteria, one can apply a process of elimination of what doesn't form part of effectiveness. Effectiveness is separate from efficiency, which looks at how funds, expertise, natural resources, and time are being used in the most cost-effective way possible. It is also separate from impact which looks at transformative and enduring changes as opposed to the narrower focus of effectiveness on the intervention's specific intended and unintended results. Finally, effectiveness is separate from sustainability, ie. the long-term benefits generated as a result of the intervention.

Having established the clear linkages between human rights and aid effectiveness in international policy processes and project implementation, the next Part turns to the specific human rights challenges that are holding back the effectiveness of the CBD regime.

4. Effectiveness of the CBD regime

This Part examines the relationship between treaty effectiveness and aid effectiveness. It demonstrates that the application of a human rights-based approach to the implementation of biodiversity projects is an essential aspect of Parties' obligations to provide financial resources for the realisation of human rights. In addition, owing to the clear benefits of strengthening human rights for aid effectiveness, applying a human rights-based approach to the delivery of financial assistance can strengthen the effectiveness of the CBD regime. Section 4.1. introduces the factors that contribute to the effectiveness of treaty regimes. Section 4.2. highlights the role of financial assistance as a parameter for measuring the effectiveness of the CBD regime. Section 4.3. considers how aid effectiveness can affect treaty effectiveness under the CBD. In particular, the fragmentation of international law leads to a fragmentation of aid which in turn exacerbates the global biodiversity financing gap. Section 4.3. draws on the literature at the intersection of IEL and IHRL to demonstrate that applying a human-rights based approach to financial assistance can strengthen the effectiveness of the CBD regime. Finally, Section 4.4. shows that the Kunming-Montreal GBF provides the foundations for the practical application of a human rights-based approach through the CBD's financial mechanism.

[415] Ibid.

4.1. Effectiveness of treaty regimes

Aid effectiveness and treaty effectiveness are distinct concepts within the fields of development assistance and international law, respectively. As discussed in the last Section, aid effectiveness refers to the ability of development assistance to achieve its intended goals and have a positive impact on the socio-economic development of recipient countries. It focuses on maximising the efficiency, relevance, and sustainability of aid efforts to effectively address development challenges. Aid effectiveness involves improving the coordination, harmonisation, and alignment of aid programmes, as well as enhancing the capacity of recipient countries to manage and use aid resources. It also rests on principles such as country ownership, mutual accountability, and the alignment of aid with recipient country priorities.

On the other hand, the term "effectiveness" when used in relation to treaty regimes refers to whether a treaty has achieved its stated objectives and whether the agreement successfully addresses the problem it was intended to solve.[416] In the field of IEL, Peter H. Sand notes that the effectiveness of international environmental agreements remains an elusive concept, that requires the development of effectiveness indicators to measure and compare the performance of states in applying these agreements. On this point, commentators point out that the reliance on shallow rules to limit the opportunities for non-compliance can result in ineffective regime.[417] The literature on the effectiveness of human rights treaties shows that human rights treaties have a beneficial impact on State practices but that compliance is contingent on levels of commitment and treaty content.[418] However, compliance alone isn't sufficient to determine the effectiveness of treaty regimes in generating benefits for the environment.[419]

The literature generally agrees that the effectiveness of a treaty in achieving its goals is determined by the way that it was designed.[420] Treaty effectiveness takes into account factors such as the degree of adherence by parties, the actual realisation of the treaty's goals, and its

---

[416] Joan E Donoghue and others, 'Theme Plenary Session: Implementation, Compliance and Effectiveness' (1997) 91 Proceedings of the Annual Meeting (American Society of International Law) 50, 59. See also Rachel Brewster, 'Chapter 3: The Effectiveness of International Law and Stages of Governance' in *Research Handbook on the Politics of International Law* (Edward Elgar Publishing, Cheltenham 2017).

[417] Kal Raustiala, 'Form and Substance in International Agreements' (2005) 99(3) The American Journal of International Law 581, 610.

[418] Wade Cole, 'Human Rights as Myth and Ceremony? Reevaluating the Effectiveness of Human Rights Treaties, 1981-2007' (2012) 117(4) The American Journal of Sociology 1131, 1165.

[419] Peter H Sand, 'International Environment Agreements' in International Environmental Agreements (Edward Elgar Publishing Limited, 2019).

[420] Edith Brown Weiss, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths' (1998) 32 University of Richmond Law Review 1555-1589, 1564.

influence on state behaviour. [421] An interesting perspective can be gained from looking at the literature in the field international relations, where the emphasis has been put on the procedural nature of governance and the dynamic nature of the effects of treaty regimes.[422] Rachel Brewster considers that there are at least three types of parameters to understand effectiveness in the context of assessing a treaty's impact on state policy. These include "change effectiveness," "optimal effectiveness," and "policy effectiveness." Change effectiveness looks at whether a treaty causes an observable alteration in state behaviour. Optimal effectiveness measures the treaty's success against what could have been ideally achieved given the negotiating constraints. Finally, policy effectiveness examines whether a treaty accomplishes its intended policy goal.[423]

There are a number of factors that can contribute to treaty effectiveness. First and foremost, parties involved must consent to be bound by its provisions. This consent is typically expressed through ratification,[424] where the relevant negotiating delegations of each state formally consent to the treaty's binding effect.[425] The more states become parties to a treaty, the greater its potential effectiveness, as widespread participation increases the normative influence of a treaty and its legitimacy.[426] Whilst some commentators have argued that the clarity and specificity of a treaty's provisions are important for the effective implementation of a treaty with ambiguity and open-endedness in the language potentially leading to differing interpretations,[427] the practice of MEAs has shown that the facilitative and interpretative function of the COP serves to address these concerns over time.[428]

The effectiveness of a treaty also depends on the extent to which its provisions are implemented at the domestic level. States must enact legislation or take other necessary measures to ensure compliance with their treaty obligations. The concept of compliance focuses not only on whether implementing measures are adopted, but also on whether there is

---

[421] Joan E Donoghue and others, 'Theme Plenary Session: Implementation, Compliance and Effectiveness' (1997) 91 Proceedings of the Annual Meeting (American Society of International Law) 50, 59. See also Rachel Brewster, 'Chapter 3: The Effectiveness of International Law and Stages of Governance' in *Research Handbook on the Politics of International Law* (Edward Elgar Publishing, Cheltenham 2017) 52.

[422] Rachel Brewster, 'The Effectiveness of International Law and Stages of Governance' in *Research Handbook on the Politics of International Law* (Edward Elgar Publishing, Cheltenham 2017).

[423] Ibid, 56-61.

[424]VCLT, Article 11.

[425] See Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, Oxford and New York 2007) 24-25.

[426] Peter Lawrence, 'International Relations Theory' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd edn, Oxford Handbooks 2021).

[427] Richard R Baxter, 'International Law in "Her Infinite Variety"' (1980) 29(4) International & Comparative Law Quarterly 549.

[428] See Jutta Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15(1) Leiden Journal of International Law 1.

compliance with the implementing actions.[429] Compliance can be determined by assessing whether a) states have adopted measures that contribute to the realisation of their treaty obligations into their domestic laws; b) have taken necessary measures to fulfil their obligations; and c) have acted consistently with the treaty's requirements.[430] As Edith Brown Weiss points out, compliance can be substantive or procedural. Procedural compliance refers to state actions in relation to reporting or institutional obligations. Substantive compliance refers to implementing measures taken by the state to meet the targets or requirements of the treaty.[431]

The traditional framework for compliance relies on sanctions, penalties, and coercive measures such as the withdrawal of privileges under the convention to enforce treaty commitments.[432] Mechanisms to ensure compliance with treaty provisions have been built into the MEA law-making process to facilitate compliance by Parties who do not have the financial and administrative capacity to comply with the new agreement's obligations.[433] Typically, developed country Parties provide financial resources to developing country Parties for the purpose of promoting compliance with the treaty's objectives.[434] Such provisions therefore encapsulate elements of both corrective and distributive justice,[435] with the aim of encouraging participation, implementation and compliance. These financial mechanisms therefore contribute to treaty effectiveness by enabling Parties to comply with all three determinants of compliance. The creation of monitoring bodies, dispute settlement procedures, and enforcement mechanisms also act as incentives to promote compliance with a treaty's obligations.

Treaty effectiveness therefore encompasses the overall success and impact of a treaty, whilst compliance evaluates the extent to which parties adhere to the specific obligations and requirements of a treaty. As such, compliance is an important aspect of treaty effectiveness, but other factors must also be taken into account to determine its effectiveness.

---

[429] Edith Brown Weiss, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths' (1998) 32 University of Richmond Law Review 1555, 1563.
[430] Ibid, 1563.
[431] Ibid.
[432] Edith Brown Weiss, 'Strengthening National Compliance with International Environmental Agreements' (1997) 27(4) Environmental Policy and Law 297, 298.
[433] See CBD, Preamble and Article 20(1); UNCCD, Preamble and Article 6(c); UNFCCC, Article 4(3).
[434] Nele Matz, 'Environmental Financing: Function and Coherence of Financial Mechanisms in International Environmental Agreements' (2002) 6 Max Planck Yearbook of United Nations Law 473, 478.
[435] Philippe Cullet, 'Common but Differentiated Responsibilities' in *Research Handbook on International Environmental Law* (Edward Elgar Publishing, Cheltenham 2021) 212.

4.2. Financial assistance as a parameter for measuring the effectiveness of the CBD regime

In IEL scholarship, the issue of the effectiveness of the CBD regime highlights the role of financing in the realisation of the Convention's objectives.[436] A review of CBD outcome documents, UNGA resolutions and independent evaluation reports points to the insufficient provision of financial resources as a fundamental challenge to the implementation of the Aichi Biodiversity Targets[437] which is likely to carry over into the implementation of new Kunming-Montreal GBF. To achieve greater progress there is a clear need to improve the flow of, and access to, financial resources for the conservation and sustainable use of biodiversity.[438]

In 2008, the CBD's Executive Secretary carried out an in-depth review of the availability of financial resources to *inter alia*, examine how financial resources from the financial mechanism and other relevant sources were being used to support the achievement of the objectives of the CBD. The review considered how the (then) Resource Allocation Framework (RAF) adopted by the GEF[439] might affect the availability of resources given to developing countries and countries with economies in transition for the implementation of the Convention, and identified opportunities from different sources for implementation, including through innovative mechanisms, such as environmental funds.[440]

It also explored options to promote the synergy among the financial mechanisms of the three Rio conventions, keeping in mind each Convention's scope and mandate, and ensuring the integrity of resources available to each convention through their respective financial mechanism.[441] The report noted the need for a substantial increase of international financial support to the implementation of the Convention and the easier flow of such assistance,[442] the lack of comprehensive information about trends in development assistance with respect to biological diversity,[443] the existence of funding gaps at all levels in achieving the three

[436] Philippe LePrestre, 'The CBD at Ten: The Long Road to Effectiveness' (2002) 5(3) Journal of International Wildlife Law and Policy 269, 271.
[437] Conference of the Parties to CBD Decision 14/1 (30 November 2018), UN Doc CBD/COP/DEC/14/1; UNGA, 'Convention on Biological Diversity' (2009) UN Doc A/RES/64/203; OECD, 'Mainstreaming Biodiversity for Sustainable Development' (OECD Publishing, 2018) 138.
[438] Conference of the Parties to CBD Decision 14/1 (30 November 2018), UN Doc CBD/COP/DEC/14/1, Annex, para l).
[439] It is now the System for Transparent Allocation of Resources (STAR).
[440] Conference of the Parties to CBD Decision 9/16 (26 February 2008), UN Doc UNEP/CBD/COP/DEC/9/16, para 1.
[441] Ibid, para 1(g).
[442] Ibid, para 3(a).
[443] Ibid, para 3(c).

objectives of the Convention.[444] It also noted that the "close inter-linkages between poverty eradication, sustainable development and the achievement of the three objectives of the Convention",[445] and the opportunities that exist for a more synergistic implementation of the Rio conventions to increase the effectiveness of the use of financial resources.[446]

The fragmentation of international law has implications for the availability of financial resources for the implementation of the CBD. It exacerbates the global biodiversity funding gap, and shows that building synergies with other treaty regimes is critical to the effectiveness of the CBD regime.

4.3. How does aid effectiveness affect treaty effectiveness under the CBD?

This subsection posits that the fragmentation of international law contributes to the fragmentation of aid.

4.3.1. The fragmentation of international law

The fragmentation of international law is a complex phenomenon that reflects the evolving nature of international relations and the diverse interests, values, and legal traditions of states. Balancing the need for specialisation and the desire for coherence and consistency poses ongoing challenges for the international legal system, requiring continued efforts to enhance coordination, promote cooperation, and strengthen the effectiveness of international law.

The emergence and expansion of specialist systems – or "self-contained regimes" – such as IHRL, IEL, international trade law or law of the sea continue to bring challenges for the international community. In particular, lawyers have raised concerns about the consequences of these autonomous regimes for the integrity of the field of public international law.[447] Each regime constructs its own separate rules, legal institutions and spheres of legal practice, which from an interpretative perspective may lead to inconsistencies, tensions and conflicts between international norms. The potential for normative conflicts is an important consideration in a legal order which tends to follow a needs-based approach to international

[444] Ibid, para 3(d).
[445] Ibid, para 3(d).
[446] Ibid, para 3(f).
[447] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law Report of the Study Group' (2006).

law-making, addressing specific needs as they arise or building upon the existing regimes to provide more targeted or comprehensive answers to new challenges. The combination of ever more specialised regimes and rapid expansion of the international legal order creates a situation of legal pluralism that can lead to actual and potential conflicts between treaty regimes.[448] The relationship between these treaty regimes has mostly been studied from the perspective of treaty coherence and conflict resolution.[449] The problem, however, goes well beyond the interpretation of conflicting treaty provisions. It can affect the implementation of individual legal instruments within and across specialist systems, which in turn can affect the attainment of their objectives.[450]

Scholarship is divided in radically opposed views on the issue of fragmentation. At one end of the spectrum, the International Law Commission (ILC) has firmly anchored the debate within treaty coherence and conflict resolution, with the key objective being to preserve the integrity of the international legal order against the threats of fragmentation.[451] Despite its acknowledgement of the "positive" sides of fragmentation, the ILC clearly approaches the issue from the perspective of the risks that it poses to the international legal order.[452] It is particularly concerned with potential areas of conflict between special and general law, between prior and subsequent law, and between laws at different hierarchical levels.[453] It does not appear to contemplate new and innovative approaches to fragmentation, stating instead that "[a]lthough fragmentation may create problems, they are neither altogether new nor of such nature that they could not be dealt with through techniques international lawyers have used to deal with the normative conflicts that may have arisen in the past."[454] In stark contrast with this approach, a growing body of scholarship sees fragmentation as an opportunity rather than a threat. Some even question fragmentation as a valid characterisation of the situation, suggesting that

---

[448] Clarence Wilfried Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 BYBIL 403.
[449] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law Report of the Study Group' (2006) 246.
[450] See Musa Shongwe, 'The Fragmentation of International Law: Contemporary Debates and Responses' (2020) 2016(1) The Palestine Yearbook of International Law 177.
[451] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law Report of the Study Group' (2006) 246.
[452] Ibid, '[a]lthough fragmentation may create problems, they are neither altogether new nor of such nature that they could not be dealt with through techniques international lawyers have used to deal with the normative conflicts that may have arisen in the past.'
[453] Ibid, para 18.
[454] Ibid, para 246.

international law isn't fragmenting, but is evolving into a pluralistic system which provides opportunities for the international legal order.[455]

4.3.2. Contribution of the fragmentation of international law to the fragmentation of aid

This subsection demonstrates that the fragmentation of aid has negative implications for aid effectiveness. The fragmentation of the international architecture of IEL agreements, funds and programmes exacerbates these impacts.

4.3.2.1. Conceptual underpinnings of aid fragmentation

The multiplication and diversification of actors that provide financial assistance is a core feature of the evolving landscape for international cooperation.[456] Despite the numerous implications of this diversification on donor commitment, donor coordination and recipient resilience, there is currently no universal measure of the fragmentation of aid.[457]

To understand the impact of the fragmentation of aid we must first understand the theoretical foundations of the concept in development studies. The fragmentation of aid can be understood as a fragmentation of three things. First, the fragmentation of development cooperation as a policy field which leads to challenges of coherence, a plurality of concepts that may used in silos by different actors and contributes to a growing state of confusion and a lack of coordination. [458] Second, the fragmentation of institutions, which manifests itself through an expansion of the numbers and types of development cooperations. This has been described as a "proliferation" of actors[459] that leads to an expansion in bilateral and multilateral aid channels. Third, the fragmentation of interventions, which is characterised by two main phenomena: a. the response to new areas of concern through the creation of new specialised

---

[455] William Burke-White, 'International Legal Pluralism' (2004) 25 Michigan Journal of International Law 963, 963; Laurence Boisson de Chazournes and Makane Mbengue, 'A "Footnote as a Principle". Mutual Supportiveness and its Relevance in an Era of Fragmentation' in *Coexistence, Cooperation and Solidarity* (Brill | Nijhoff, Leiden 2012).
[456] Erik Lundsgaarde, 'Bilateral Donor Bureaucracies and Development Cooperation Pluralism' in Stephan Klingebiel and others (eds), *The Fragmentation of Aid* (Palgrave Macmillan, London 2016).
[457] Daniela Buscaglia and Anjula Garg, 'A Composite Index of Aid Fragmentation' in Stephan Klingebiel and others (eds), *The Fragmentation of Aid* (Palgrave Macmillan, London 2016).
[458] See Stephan Klingebiel and others, 'Fragmentation: A Key Concept for Development Cooperation' in Stephan Klingebiel and others (eds), *The Fragmentation of Aid* (Palgrave Macmillan, London 2016) 4.
[459] Jean-Michel Severino, and Olivier Ray, 'The End of ODA (II): The Birth of Hypercollective Action' (Center for Global Development, 2010) 5.

institutional solutions which leads to an increase in aid channels; and b. a growing variety of actors involved in development cooperation. These two factors lead to an increase in operational projects.[460]

The root causes of fragmentation are diverse. Despite the DAC's efforts to encourage greater coordination among providers of aid, each of them has their own priorities and areas of focus, approaches, values and set of norms that guide their international development policy and the allocation of financial resources.[461] The motivations for the allocation of resources are just as varied, ranging from the persistence of historical ties, geographical proximity, economic interests, peace and security issues, and broader development goals.[462]

The multilateral allocation of aid, despite using more standardised resource allocation frameworks, adds to fragmentation by a lack of coordination among agencies and allocation practices that ignore the allocation decisions of other actors.[463] Despite international commitments to streamline the delivery of aid, a study of three developing countries shows a continued preference for greater funding diversification, despite the absence of development finance frameworks to manage and coordinate these different sources nationally.[464]

The literature on the impact of fragmentation has mostly emphasised the negative effects of aid fragmentation on aid effectiveness. Lau Schulpen *et al* note that the fragmentation of aid is responsible for a long list of short-term or long-lasting consequences that include reduced transparency, increased corruption, diffused policy dialogues, the misallocation of resources, the underfunding of less attractive countries and sectors, a waste of resources, negative consequences on the quality of governance, thwarted development of public sector capacity, and a redirection of internal management processes towards donor processes.[465] Severino and Ray describe the situation as an "institutional jungle" characterised by "hypercollective action" that leads to building more cooperation frameworks. To tackle the issues generated by the combination of fragmentation and proliferation, they suggest expanding the scope of the Paris Declaration and shifting the focus away from rules and norms of

---

[460] Stephan Klingebiel and others, 'Fragmentation: A Key Concept for Development Cooperation' in Stephan Klingebiel and others (eds), *The Fragmentation of Aid* (Palgrave Macmillan, London 2016) 4.
[461] Ibid, 4. See also Jean-Michel Severino, and Olivier Ray, 'The End of ODA (II): The Birth of Hypercollective Action' (Center for Global Development, 2010) 5.
[462] Fredrik Ericsson and Suzanne Steensen, 'Measuring Fragmentation: The Financial Significance of Aid Relations' in Stephan Klingebiel and others (eds), *The Fragmentation of Aid* (Palgrave Macmillan, London 2016) 4.
[463] Ibid, 23.
[464] OECD, 'The New Development Finance Landscape: Developing Countries' Perspective (OECD Publishing 2014) 9.
[465] Lau Schulpen and others, 'Worse than expected? A comparative analysis of donor proliferation and aid fragmentation' (2011) 31 Public Administration and Development 321, 322.

harmonisation towards processes of convergence through a system of incentives and disincentives.[466] However, the literature also suggests that the analysis of the impact of fragmentation should be sector-specific, with some evidence of negative impacts of aid concentration in the education sector which contrasts with the overall assumption that aid fragmentation has a negative impact on economic growth.[467]

4.3.2.2. The fragmentation of biodiversity-related ODA as a result of the international architecture of environmental conventions, funds, and programmes

The Independent Evaluation Office of the GEF notes that "the international environmental architecture of conventions, funds, programs and donors continues to show increasing fragmentation, making it more difficult to coordinate and harmonize funding for the implementation of environmental activities globally."[468] Similarly, the Paris Declaration on Aid Effectiveness acknowledges that the fragmentation of aid impairs its effectiveness.[469] The situation has only been made worse by the UNFCCC COP Agreement to establish the Green Climate Fund and the adoption of the Paris Agreement, which affect the balance of funding within the international environmental architecture.[470]

Multilateral institutions develop resource allocation frameworks to determine their aid allocation to countries, in line with their specific mandates. The approaches taken vary quite significantly in terms of their inclusivity. For instance, International Finance Institutions (IFIs) such as the World Bank, allocate resources on the basis of both country needs – measured by population and income per capita – and institutional performance – measured by annual assessments of countries' policies and institutions for promoting economic growth and poverty reduction.[471] The UN on the other hand focuses primarily on needs.[472]

[466] Jean-Michel Severino, and Olivier Ray, 'The End of ODA (II): The Birth of Hypercollective Action' (Center for Global Development, 2010) 43.
[467] Kai Gehring and others, 'Aid Fragmentation and Effectiveness: What Do We Really Know?' (2017) 99(C) World Development, Elsevier 320.
[468] Global Environment Facility Independent Evaluation Office (GEF IEO), 'OPS6 Final Report: The GEF in the Changing Environmental Finance Landscape' (GEF IEO, Washington, DC 2018), Annex B, para 16.
[469] OECD, *Paris Declaration on Aid Effectiveness* (OECD Publishing 2005), para 33.
[470] Global Environment Facility Independent Evaluation Office (GEF IEO), 'OPS6 Final Report: The GEF in the Changing Environmental Finance Landscape' (GEF IEO, Washington, DC 2018), Annex B, para 16.
[471] Fredrik Ericsson and Suzanne Steensen, 'Measuring Fragmentation: The Financial Significance of Aid Relations' in Stephan Klingebiel and others (eds), *The Fragmentation of Aid* (Palgrave Macmillan, London 2016) 23.
[472] Ibid

Specialised institutional solutions to new and emerging issues include the creation of vertical funds which are designed to channel resources that are earmarked for a specific purpose such as global environmental governance.[473] Whilst these funds have been largely perceived as adding to the problem of fragmentation, some authors argue that vertical funds fill a gap in ODA and multilateral assistance by supporting actions with transborder impacts to address problems that require collective global action, thus moving away from a traditionally country-focused approach. Vertical funds provide an avenue for addressing global challenges at the national level, while at the same time producing knowledge with a global reach on the lessons learnt, what works and what does not. This adds transparency to the process of fund allocation and individual country action in a "global–local development nexus".[474] The Global Environment Facility is one such example of a vertical fund.

4.4. Strengthening the effectiveness of the CBD regime by applying a human rights-based approach to financial assistance

Transposing the above conclusions to the CBD context, this subsection posits that the limited engagement with human rights in biodiversity-related ODA negatively affects the effectiveness of the biodiversity regime. The principle of mutual supportiveness in international law provides a useful interpretative lens through which to understand the obligation of CBD Parties to promote the effectiveness of the Convention. Finally, this subsection clarifies that CBD States Parties have the obligation to mobilise effective financial assistance for the realisation of human rights.

4.4.1. Negative effects of the limited engagement of human rights on the CBD's effectiveness

The CBD COP has regularly called for the effective mobilisation of resources from all sources, for the implementation of the Convention and its Protocols, and for the synergistic implementation of other biodiversity-related conventions.[475] In 2018, the CBD COP raised

[473] On this topic see Margret Thalwitz, 'Fragmenting Aid or a Platform for Pluralism? The Case of 'Vertical Funds'' in Stephan Klingebiel and others (eds), *The Fragmentation of Aid* (Palgrave Macmillan, London 2016) 96.
[474] Ibid, 97.
[475] Conference of the Parties to CBD Decision XIII/20 (15 December 2016), UN Doc CBD/COP/DEC/XIII/20, Preamble.

concerns that the Aichi Biodiversity Targets were not on track to be achieved, thus jeopardising the achievement of the Strategic Plan for Biodiversity 2011-2020, and of the Sustainable Development Goals, and ultimately the planet's life support systems themselves.[476] Building on the findings of the IPBES regional and thematic assessments and on the conclusions drawn from scientific literature,[477] it further acknowledged that the mobilisation of financial resources should be done in accordance with the CBD and, importantly, other relevant international obligations, taking into account national socioeconomic conditions.[478] To accelerate progress towards the realisation of CBD objectives, the COP noted the role of inclusive and coherent governance systems in facilitating the achievement of the CBD's objectives.[479] These governance systems should better integrate global biodiversity commitments and build synergies between indigenous and local knowledge, bilateral and multilateral agreements, the Sustainable Development Goals, and other international and regional initiatives.[480]

There is mounting evidence that efforts to conserve biological diversity without recognising and protecting the rights of Indigenous peoples, local communities, peasants, women, and the rural youth perpetuate human rights abuses without achieving desired conservation outcomes.[481] Traditional exclusionary approaches to conservation, referred to as "fortress conservation" by the current UN Special Rapporteur on Human Rights and the Environment, David R. Boyd, threaten the human rights to life, food, health, safe drinking water, and culture.[482] The creation of protected areas is often carried out without the involvement and consultation of those affected by the measure, without respect for their legitimate tenure rights, without the right of free, prior, and informed consent of indigenous peoples, and without access to fair and equitable benefit sharing and without compensation.[483] This lack of recognition of procedural and substantive human rights can lead to poaching and other violations of conservation laws, and unsustainable practices.[484]As a result, conservation initiatives that overlook the rights of affected people often fail to achieve their intended

---

[476] Conference of the Parties to CBD Decision 14/1 (30 novembre 2018), UN Doc CBD/COP/DEC/14/1, Preamble.
[477] Ibid, Annex, para 2.
[478] Conference of the Parties to CBD Decision 14/22 (30 novembre 2018), UN Doc CBD/COP/DEC/14/22, para 9.
[479] CBD/COP/DEC/14/1 (2018), Annex para h).
[480] Ibid.
[481] See David R Boyd and Stephanie Keene, 'Human Rights-based Approaches to Conserving Biodiversity: Equitable, Effective and Imperative' Policy Brief No. 1 (2021).
[482] Ibid, 5.
[483] Ibid.
[484] Ibid, 10.

purpose.[485] On the other hand, inclusive, rights-based approaches to conservation have generated mutual benefits for both people and the environment. In particular, conservation areas that grant local users of biodiversity ownership, management and use rights over natural resource as well as rights to benefit from tourism activities and rights to participate in decision-making processes, have successfully restored fragile areas in a sustainable manner.[486]

4.4.2. The principle of mutual supportiveness

The principle of mutual supportiveness provides a useful lens through which to understand the interactions between human rights and financial assistance in the CBD's financial mechanism. It is rooted in the VCLT's principle of "systemic integration" and has been conceptualised by Riccardo Pavoni as a key tool for the interpretation and creation of norms of international law, particularly in the context of international trade.[487] Laurence Boisson de Chazournes argues that today the pursuit of coherence and harmonisation in treaty regimes goes beyond simply seeking compatibility between treaty regimes.[488] The principle of mutual supportiveness aims to ensure coherence and harmonisation between the objectives pursued by different treaty regimes. In this context, mutual supportiveness implies "peaceful and active cooperation" between various agreements, such as trade and MEAs,[489] but also human rights and biodiversity. Within the confines of their own mandates and procedures, these regimes should be "mutually reinforcing" in the pursuit of the realisation of their common objectives, *ie*. sustainable development.

The ILC points to the interpretative function of MEA treaty bodies, and their process of internal legislation through the creation of specific and technical rules of a programmatic nature under special "soft responsibility" regimes.[490] In these regimes where so much of the responsibility for the operationalisation of the treaty obligations rests on the COP, mutual supportiveness has a role to play not only in promoting coherence between treaty provisions

---

[485] Ibid.
[486] See for example UNDP, 'N≠a Jaqna Conservancy: Namibia' in 'Equator Initiative Case Studies - Local Sustainable Development Solutions for People, Nature, and Resilient Communities' (UNDP, 2012).
[487] Riccardo Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the "WTO-and-Competing-Regimes" Debate?' (2010) 21(3) European Journal of International Law 649.
[488] Laurence Boisson de Chazournes and Makane Mbengue, 'A "Footnote as a Principle". Mutual Supportiveness and its Relevance in an Era of Fragmentation' in *Coexistence, Cooperation and Solidarity* (Brill | Nijhoff, Leiden 2012) 1619.
[489] Ibid, 1620.
[490] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission finalized by M Koskenniemi' (2006) UN Doc UN Doc A/CN.4/L.682, para 493.

but also in guiding the COP in its interpretative functions. This should apply a) in the context of negotiating COP decisions to avoid conflicts with other treaty regimes and b) with a view to enhancing the effectiveness of treaty regimes that further similar objectives. As the ILC point out, mutual supportiveness is linked to the legal principles of good faith and effectiveness.

4.4.3. Obligation of states to provide effective financial assistance for the realisation of human rights

The literature at the intersection of IEL and IHRL has mostly approached the issue of aid effectiveness and human rights from the perspective of human rights-based approaches, as a tool to support states obligations in relation to development cooperation.[491] As will be discussed in Chapter 4, states have the obligation to respect, protect and fulfil biodiversity-related human rights in the development cooperation projects that they finance both at the national and extraterritorial levels. To fulfil this obligation, a human rights-based approach should form part development cooperation policies, to ensure that the human rights framework guides the project from conception to implementation.[492] States must take steps to ensure that development assistance funds are "spent in an effective, efficient and equitable way," and in adherence with a human rights-based approach.[493]

The UN Special Rapporteur on Human Rights and the Environment notes that "[w]hen we take a human rights-based approach to development, the outcomes are more sustainable, powerful and effective."[494] A "human rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress."[495]

[491] See in particular UNGA, 'Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Léo Heller' (2016) UN Doc A/71/302; HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2018) UN Doc A/HRC/37/59; HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd (2022), UN Doc A/77/284.
[492] UNGA, 'Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Léo Heller' (2016) UN Doc A/71/302, para 60.
[493] Ibid, para 69.
[494] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd (2022), UN Doc A/77/284, para 8.
[495] OHCHR, 'Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation' (2006) p. 15.

In the context of development cooperation, the UN Special Rapporteur on the Rights to Water and Sanitation emphasised that a human rights-based approach requires that the main objective of cooperation policies, projects and programmes should be to fulfil human rights.[496] To this end, they should identify rights-holders and their entitlements, as well as duty-bearers and their obligations, with the aim of strengthening the capacities of right-holders to claim their rights. They should also integrate human rights principles, particularly the principles of equality and non-discrimination, accountability, access to information, participation and sustainability.[497] The application of a human rights-based approach in the formulation of development cooperation policies, projects and programmes remains rare in the current policies of bilateral and multilateral funders.[498] The 2020 Draft convention on the right to development recalls "that all human persons and peoples are entitled to a national and global environment conducive to just, equitable, participatory and human-centred development, respectful of all human rights".[499]

The recognition of the human right to a clean, healthy and sustainable environment by the UN General Assembly provides a catalyst for a mutually supportive implementation of the human rights and biodiversity regimes through development assistance. As will be discussed in Chapter 4, developed countries have an obligation to provide financial assistance to realise the right to a healthy environment for all.

Scholarship has highlighted that applying human rights-based approaches in development cooperation yields many benefits, notably: increased accountability; a higher levels of individuals' empowerment, ownership, and free, meaningful, and active participation; greater normative clarity and detail; easier consensus and increased transparency in national development processes; a more complete and rational development framework; integrated safeguards against unintentional harm by development projects; more effective and complete analysis; and a more authoritative basis for advocacy.[500]

In addition, from a programmatic perspective, applying a human rights-based approach to development cooperation produces operational benefits, by encouraging a more integrated

---

[496] UNGA, 'Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Léo Heller' (2016) UN Doc A/71/302, para 15.
[497] Ibid.
[498] Ibid, para 59.
[499] HRC, 'Draft convention on the right to development' (2020) UN Doc A/HRC/WG.2/21/2, Annex, Preamble.
[500] Mary Robinson, 'What Rights Can Add to Good Development Practice' in Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (online edn, Oxford Academic 2012) 38.

approach to programming that considers the range of factors that constrain or facilitate the realisation of human rights,[501] and promoting inter-agency collaboration.[502]

4.5. Convergence of human rights and financial assistance in the Kunming-Montreal Global Biodiversity Framework

The Kunming-Montreal GBF makes an important contribution to the operationalisation of the human right to a clean, healthy and sustainable environment. The nexus between human rights and biodiversity was an important topic of discussion during the preparatory process. The works of the consecutive Special Rapporteurs on the right to a safe, clean, healthy and sustainable environment permeate the new Framework, not only in relation to the rights of Indigenous peoples and local communities, but also in relation to those of women, children, persons with disabilities and human rights defenders. Crucially, the new Framework heeds the repeated calls of the UN Special Rapporteurs to apply a human-rights based approach to its implementation.

The Kunming-Montreal GBF acknowledges the roles and contributions of indigenous peoples and local communities as custodians of biodiversity and as partners in its conservation, restoration and sustainable use.[503] As such, the Framework's implementation must follow a human rights-based approach[504] and ensure that "the rights, knowledge, including traditional knowledge associated with biodiversity, innovations, worldviews, values and practices of Indigenous peoples and local communities are respected, and documented and preserved with their free, prior and informed consent, including through their full and effective participation in decision-making", in line with IHRL.[505]

In line with the recommendations of the UN Special Rapporteur on human rights and the environment and those of the UN High Commissioner for Human Rights,[506] the new Framework puts a special emphasis on the need to apply a human rights-based approach to the implementation of the new Targets. This has major implications for the development and implementation of National Biodiversity Strategies and Action Plans (NBSAPs), which

[501] OECD, 'Integrating Human Rights into Development, Donor Approaches, Experiences and Challenges' (OECD Publishing 2006) 65.
[502] Ibid, 66.
[503] Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4, Annex, para 7(a).
[504] Ibid.
[505] Ibid
[506] OHCHR, 'Open Letter from the United Nations High Commissioner for Human Rights on the Post-2020 Global Biodiversity Framework' (2 December 2022).

currently show a great lack of harmonisation in how they tackle human rights.[507] The OHCHR estimates that although 44 percent of NBSAPs refer directly to at least one human right, these references vary from country to country and human rights considerations tend to be referred to implicitly, using language that only indirectly references human rights standards and principles.[508] The GEF and its implementing agencies will need to refocus the delivery of their financial and technical support, to ensure that countries have the capacity to integrate a human rights-based approach in their NBSAP. Additionally and very importantly, the new focus on rights holders and duty bearers will require projects to not only avoid causing harm but to ensure that their activities actively contribute to the protection, promotion and fulfilment of human rights.[509] On this point, it is worthy of note that Sweden attributes its own increase in biodiversity-related funding to new strategies and budget lines which explicitly target development interventions in the area of biodiversity and ecosystem services, with initiatives on strengthening the links between human rights and the environment. Sweden notes that by linking these two areas it was able to mobilise resources from other budget lines, and improve policy coherence within its operational modalities for development assistance.[510]

The discussions on resource mobilisation at COP 15 followed a parallel process which aimed to ensure coherence and coordination with other ongoing processes in the development of the post-2020 framework.[511] This process was built on the back of the conclusions laid out in the evaluation and review of the strategy for resource mobilisation and Aichi biodiversity targets. The evaluation showed that Target 1(a) of the COP 12 targets,[512] which committed Parties to doubling international financial flows (2015/2020), was met in 2015 with DAC members even exceeding this target.[513]

The negotiations surrounding the adoption of a new, Post-2020 resource mobilisation strategy showed encouraging signs of mutually supportive agendas in relation to human rights and biodiversity. This is noticeable in the report of the Thematic Workshop on Resource Mobilisation for the Post-2020 Global Biodiversity Framework, which summarises the key

---

[507] See OHCHR, 'Integrating Human Rights in National Biodiversity Strategies and Action Plans' (2022).
[508] Ibid, 22.
[509] Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4, Annex, Section C(7)(g).
[510] Submission by the EU and its Member States to CBD Notification 2019-086: Call for evidence on Resource Mobilisation: Questionnaire, Annex 7, Sweden.
[511] Conference of the Parties to CBD Decision 14/22 (30 November 2018), UN Doc CBD/COP/DEC/14/22, para 14.
[512] Agreed under Aichi Biodiversity Target 20 in Conference of the Parties to CBD Decision XII/3 (17 October 2014), UN Doc UNEP/CBD/COP/DEC/XII/3.
[513] CBD, 'Evaluation and Review of the Strategy for Resource Mobilization and Aichi Biodiversity Target 20 - First Report of the Panel of Experts on Resource Mobilization' (8 June 2020) UN Doc CBD/SBI/3/INF/2, para 7.

issues that needed to shape the new resource mobilisation strategy. In particular, the report shows a greater awareness of the interconnectedness between biodiversity and certain elements of human rights. It points out that the "strategy should not look only at biodiversity but also at improving livelihoods and ensuring that no one is left behind".[514]

Together, the new biodiversity Framework and its resource mobilisation strategy update the previous target on resource mobilisation, with several noticeable changes. First, the language of the new Target 19 is significantly more assertive, with an agreed percentage increase in financial resources. Under this Target, Parties have committed to substantially and progressively increase the level of financial resources from all sources, mobilising at least USD 200 billion per year by 2030.[515] ODA flows are to rise to at least USD 20 billion per year[516] and the resource mobilisation strategy reminds developed countries of their obligation to provide adequate, new and additional financial resources.[517] Second, the resource mobilisation target is no longer contingent upon the needs assessments reported by Parties, but driven by the objective to meet the resources needed for implementing the post-2020 Global Biodiversity Framework. Third, the new target aims to enhance the effectiveness, efficiency and transparency of resource provision and use.[518] The new resource mobilisation strategy emphasises the need to ensure country ownership[519] and policy coherence,[520] which is in line with the parallel process on aid effectiveness initiated with the Paris Declaration, and with the Busan partnership in particular. While this change does not affect the core legal obligation of developed countries to provide new and additional financial resources, it is likely to influence the normative work of the COP on resource mobilisation. In particular, it may place a greater focus on the responsibility of partners (developing countries) in relation to aid management.[521]

[514] CBD, 'Report on the Thematic Workshop on Resource Mobilization for The Post-2020 Global Biodiversity Framework' (12 February 2020) UN Doc CBD/POST2020/WS/2020/3/3 at para 45.
[515] Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4, Annex, Target 19.
[516] Ibid, Target 19(a).
[517] Conference of the Parties to CBD Decision 15/7 (19 December 2022), UN Doc CBD/COP/DEC/15/7, Annex I, para C(1)(a)(i).
[518] Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4, Annex, Target 19(g).
[519] Conference of the Parties to CBD Decision 15/7 (19 December 2022), UN Doc CBD/COP/DEC/15/7, Annex I, para C(6)(a).
[520] Ibid, para C(6)(b).
[521] OECD, 'Paris Declaration on Aid Effectiveness' (OECD Publishing 2005).

Fourth, both Target 19 and the resource mobilisation strategy put a focus on enhancing the role of collective actions, including by Indigenous peoples and local communities, for the conservation of biodiversity.[522]

This is a point that had been raised by the Thematic Workshop on Resource Mobilisation for the Post-2020 Global Biodiversity Framework which highlighted "the necessity of cooperation between all types of actors: subnational, national and local governments, Indigenous peoples and local communities, and the private sector".[523] This cooperation extends to the new Global Biodiversity Framework Fund to be established under the GEF which will boast an Advisory Committee made up *inter alia* of representatives of stakeholders, Indigenous peoples and local communities, women, and youth.[524] This Committee will provide recommendations to the Subsidiary Body on Implementation to steer the Parties and other actors towards the mobilisation of adequate resources.[525] Fifth, the discussions show a commitment to building synergies with the financial systems under other conventions,[526] a point already expressed in COP Decision 14/22. [527] This point did not make into the new Target 19 but it has been including into the resource mobilisation strategy.[528] This commitment however, continues to lack concrete mechanisms to enable this collaboration in practice.

Finally, neither the new Framework nor its accompanying resource mobilisation strategy make any reference to the Voluntary Guidelines on safeguards in biodiversity financing mechanisms. This is a missed opportunity, especially considering that this was a point raised by the evaluation report which recognised the role of Indigenous peoples and local communities in the context of Article 8(j) of the Convention, and the endorsement of the Voluntary Guidelines in biodiversity financing mechanisms.[529] However, the COP reiterated

[522] Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4, Annex, Target 19(f).
[523] CBD, 'Report on the Thematic Workshop on Resource Mobilization for The Post-2020 Global Biodiversity Framework' (12 February 2020) UN Doc CBD/POST2020/WS/2020/3/3, para 46.
[524] Conference of the Parties to CBD Decision 15/7 (19 December 2022), UN Doc CBD/COP/DEC/15/7, Annex I, para B(1).
[525] Ibid, Annex II, para 1.
[526] CBD, 'Report on the Thematic Workshop on Resource Mobilization for The Post-2020 Global Biodiversity Framework' (12 February 2020) UN Doc CBD/POST2020/WS/2020/3/3, para 46.
[527] Conference of the Parties to CBD Decision 14/22 (30 November 2018), UN Doc CBD/COP/DEC/14/22, para 7.
[528] Conference of the Parties to CBD Decision 15/7 (19 December 2022), UN Doc CBD/COP/DEC/15/7, para 47(g).
[529] CBD, 'Evaluation and Review of the Strategy for Resource Mobilization and Aichi Biodiversity Target 20 - First Report of the Panel of Experts on Resource Mobilization' (8 June 2020) UN Doc CBD/SBI/3/INF/2, para 7.

in a separate decision on the financial mechanism that the GEF should report on how it is taking them into account in its activities.[530]

5. Conclusions

This Chapter demonstrated that applying a human rights-based approach to the provision of financial resources through the CBD's financial mechanism can enhance the effectiveness of the Convention. It provides an original contribution to the literature in IEL, IHRL and international development by bringing out the point of intersection between them within the CBD's financial mechanism. In particular, the findings in this Chapter build on and add to the emerging body of evidence gathered by the successive Special Rapporteurs on Human Right and the Environment to bring out and clarify the linkages between human rights and treaty effectiveness within the context of the CBD's financial mechanism.

As a first conclusion, this Chapter showed an intrinsic link between human rights and aid effectiveness in international policy processes. This is apparent in the global cooperation efforts around aid effectiveness where the commitment to human rights was confirmed in the Geneva Summit Declaration on Effective Development Co-operation.

Second, it showed that the effectiveness of the CBD regime is hampered by the lack of systematic engagement with human rights in the provision of biodiversity-related ODA. It follows that the respect, protection and fulfilment of biodiversity-related human rights should be an integral part of the formulation, implementation and monitoring and evaluation of biodiversity projects.

Third, applying a human rights-based approach to the disbursement of biodiversity-related ODA can help to address some of the challenges of fragmentation and promote a more coherent and effective development cooperation in the field of IEL generally, and within the CBD regime especially. It can help to ensure that biodiversity-related ODA is aligned with human rights principles and that it contributes to the realisation of human rights. The Kunming Montreal GBF provides an avenue for mutual supportiveness between biodiversity and human rights obligations in the CBD's financial mechanism.

[530] Conference of the Parties to CBD Decision 15/15 (19 December 2022), UN Doc CBD/COP/DEC/15/15, Annex II A, para 109.

Building on these findings, the next Chapter will show the critical importance of the CBD's financial mechanism in facilitating compliance with CBD obligations by developing countries.

Chapter 3. The provision of new and additional financial resources under the CBD

1. Introduction

The negotiation of provisions on financial assistance has become a trademark of international environmental law-making. In one of her first articles following the adoption of the CBD, Françoise Burhenne-Guilmin commented that it had never been questioned that a flow of resources from the North to the South would be necessary to achieve the objectives of the Convention.[531] The first reports of the Ad Hoc Working Group of Technical and Legal Experts, established in 1988 to lay the groundwork for the development of the Convention, confirm the need for financial transfers from industrialised countries to less economically advanced nations.[532] In fact, the real point of contention at the time was not *whether* but *how* these resources would be channelled.[533] During the negotiations, discussions on Articles 20 and 21 stonewalled around the legal nature of the obligation to provide financial resources. The final text reflects a compromise that allows states with diverging interests to enter into a basic agreement on financial assistance, in which they commit to concepts, objectives, principles, and open-textured obligations rather than to clear-cut norms that would restrict state sovereignty.

The provisions on financial assistance are of paramount importance to the CBD system. Although recent developments under the climate regime have made the dichotomy between developed and developing countries less striking, under the CBD, the extent to which developing countries comply with their treaty obligations continues to be heavily contingent on developed countries' compliance with their own obligation to provide new and additional financial resources.[534] This has important implications for the realisation of the Convention's

---

[531] Francoise Burhenne-Guilmin and Susan Casey-Lefkowitz, 'The Convention on Biological Diversity: A Hard Won Global Achievement' (1992) 3 Yearbook of International Environmental Law 43, 47.

[532] UNEP, 'Report of the Ad Hoc Working Group on the Work of its Second Session in Preparation for a LEGAL Instrument on Biological Diversity of the Planet' (23 February 1990) UN Doc UNEP/Bio. Div.2/3, Para 17.

[533] Lyle Glowka and others, 'A Guide to the Convention on Biological Diversity' (IUCN, Gland and Cambridge 1994) 101; Robert Lake, 'Finance for the Global Environment: The Effectiveness of the GEF as the Financial Mechanism to the Convention on Biological Diversity' (1998) 7(1) Review of European Community & International Environmental Law, 68-75.

[534] Laurence Boisson de Chazournes, 'The Global Environment Facility (GEF): A Unique and Crucial Institution' (2005) 14(3) Review of European Community and International Environmental Law 193-201, 193.

objectives. Put simply, the effective conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising from the utilisation of genetic resources depend on developed countries meeting their obligations under Articles 20 and 21.

Despite the importance of the financial provisions to the effectiveness of the biodiversity regime, little research has been conducted to advance our understanding of the legal nature, scope, and content of these articles. Furthermore, the implementation of the financial obligation of developed countries to provide new and additional financial resources through the financial mechanism is critical to the effectiveness of the CBD regime. Yet, very little research has been conducted to understand how developed countries comply with this obligation and whether the GEF's founding instrument and operational modalities provide a suitable institutional framework to enable compliance with this obligation.

This chapter contends that the obligation of developed countries to provide new and additional financial resources to developing countries is a hard legal obligation derived from general international law. The institutional mechanism established under the CBD to enable the delivery of funds to developing countries does not however, reflect the binding nature of this obligation. This discrepancy at the heart of the financial mechanism undermines the effectiveness of the CBD regime.

This chapter is built around six parts. Part 2 considers the scope and content of financial obligations under Articles 20 and 21 of the CBD. It highlights the centrality of the financial mechanism in the achievement of the CBD's objectives. Part 3 explores the foundations of financial mechanisms in international law. The introduction of differential treatment in multilateral environmental agreements is a legal construction devised by negotiating states under the duty to cooperate. Part 4 shows that the obligation to provide new and additional financial resources is a hard obligation rooted in general international law and capable of triggering state responsibility. Part 5 considers how this obligation is implemented in practice. Importantly, it points to a paradox within the CBD regime: although developed countries have a hard legal obligation to provide financial resources under the Convention, financial contributions to the GEF are voluntary. This situation dilutes the strength of the financial mechanism and affects CBD's effectiveness. Finally, Part 6 considers the role of the COP in addressing this antagonism. The climate regime provides a useful case study of how countries have progressively softened the distinction between developed and developing countries.

2. Scope and content of the financial provisions

The CBD's financial provisions are located half way through the text of the Convention, in Articles 20 and 21. This location typifies the central role of financial resources in the achievement of CBD objectives. This Part first provides an overview of the specificity of the CBD as a multilateral environmental agreement (Section 2.1) before discussing the financial obligations of developed and developing countries under the Convention. These include an obligation for all Parties to mobilise national resources to fund the implementation of the Convention (Section 2.2) and a specific obligation for developed country Parties to provide new and additional financial resources (Section 2.3) through bilateral, regional, and multilateral channels (Section 2.4) and to prioritise least developed country Parties in the provision of financial resources (Section 2.5). Developed country parties have an obligation to provide these resources through the financial mechanism (Section 2.6) which is a central element in the biodiversity regime (Section 2.7).

2.1. Specificities of the CBD

While the CBD exhibits the characteristics of an international instrument of a legally binding nature, its provisions often use indeterminate language to qualify state obligations and build on norms whose legal status in international law remains unclear. This ambiguity has drawn much criticism from country delegates[535] and legal scholars[536] alike, who regret the open textured language of its legal provisions and the weak normative quality of its legal obligations.

From a structural perspective, the CBD follows a dynamic treaty system similar to other MEAs. Pierre-Marie Dupuy describes it as a hybrid structure between traditional institutional treaties that set forth substantive rules and an international organisation established for ongoing communication and decision-making purposes.[537] The CBD drafting process certainly falls within the procedural framework set out by the VCLT. Article 9 of the VCLT highlights the

---

[535] CBD Secretariat, 'CBD Handbook' (3rd edn, 2005) Section VIII, Declaration of the United States of America.
[536] In defence of the CBD, see Veit Koester, 'The Nature of the Convention on Biological Diversity and Its Application of Components of the Concept of Sustainable Development' (2006) 16(1) The Italian Yearbook of International Law Online 57-84.
[537] Pierre-Marie Dupuy, 'Formation of Customary International Law and General Principle' in Jutta Brunnée and others (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 449-466, 458. This idea is also supported by Robin R. Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2014) 94 American Journal of International Law 623.

centrality of international conferences in the adoption process, and Article 11 lays down the means through which states express their consent to be bound by the treaty. These include "signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed." It also gives states the opportunity to opt out of certain legal obligations by using reservations.[538] The CBD was formally adopted at the UNCED in 1992, and states have the possibility of expressing consent through signature,[539] ratification, acceptance, approval or accession.[540] The formally binding nature of the CBD also comes through in its provision on the settlement of disputes.[541] Parties can seek a solution to disputes relating to the interpretation or application of the Convention, but primarily through negotiation.[542] If negotiations cannot be reached, parties can request mediation by a third-party.[543] They can also refer their case to the International Court of Justice (ICJ) if they have formally accepted the competence of the Court as a compulsory means of dispute settlement.[544]

From a substantive perspective, the legal nature of CBD provisions is less clear. In his typology of international norms, Ulrich Beyerlin refers to these obligations as "amorphous concepts" and "principles" which he locates in the grey area between hard law and soft law.[545] Unlike rules that have a clearly defined result and entail binding legal effect, these grey norms do not set out clear legal consequences for Parties.[546] They are open to interpretation and development, providing flexibility to Parties to adapt their behaviour to changing national and international circumstances, priorities and needs. The financial provisions in the CBD typify the ambiguity surrounding the legal significance of state obligations under the Convention.

2.2. Obligation to mobilise national resources to fund the implementation of the Convention

Article 20(1) states that "[e]ach Contracting Party undertakes to provide, in accordance with its capabilities, financial support and incentives regarding those national activities which

538 VCLT, Section 2.
539 CBD, Article 33.
540 Ibid, Article 34.
541 Ibid, Article 27.
542 Ibid, Article 27(1).
543 Ibid, Article 27(2).
544 CBD, Article 27.
545 Ulrich Beyerlin, 'Different Types of Norms in International Environmental Law: Policies, Principles, and Rules' in Ulrich Beyerlin and others (eds), *The Oxford Handbook of International Environmental Law* (2007) 426.
546 Ibid, 428.

are intended to achieve the objectives of this Convention, in accordance with its national plans, priorities and programmes." This is one of only two financial obligations in the Convention that explicitly applies to both developed and developing countries. However, the language used in this Article differs from that used elsewhere in the Convention. This paragraph does not use the peremptory word "shall", and the formulation is reminiscent of the soft language of political declarations. It reads more as a general commitment to mobilise financial resources nationally to achieve the Convention's objectives. This is further reinforced by the ambiguity of the requirement that financial support and incentives must be compatible with national plans and priorities. The paragraph does not specify whether this requirement for compatibility applies only to national plans, priorities, and programmes that relate to the conservation and sustainable use of biological resources, or if they can be interpreted more broadly to include other development plans. The growing attention to policy coherence in international development[547] and the practice of EU states[548] suggests that this applies to all national plans. The indeterminacy of the commitment makes the obligation to "undertake" difficult to breach, depriving it of much of its binding strength. Overall, Paragraph 20(1) appears to be an obligation of "best efforts".[549]

2.3. Obligation of developed countries to provide new and additional financial resources

Article 20(2) contains the bulk of the financial obligations under the CBD. It allocates responsibilities for the provision of financial resources between developed countries, developing countries, and countries undergoing the transition to a market economy. Each of these categories has differentiated responsibilities with regard to the provision of financial resources on the basis of their economic status. Unlike Article 20(1), Article 20(2) uses the peremptory word "shall", indicating a hard legal obligation for developed countries to provide new and additional financial resources. This is for a) enabling developing country Parties to

[547] See Maria Righettini and Renata Lizzi, 'How Scholars Break Down "Policy Coherence": The Impact of Sustainable Development Global Agendas on Academic Literature' (2022) 32(2) Environmental Policy and Governance 98.
[548] See European Commission. (2019). 2019 EU report on Policy Coherence for Development, Commission Staff Working Document.
[549] Lyle Glowka and others, 'A Guide to the Convention on Biological Diversity' (IUCN, Gland and Cambridge 1994), 100; IUCN, *Draft International Covenant on Environment and Development — Implementing Sustainability (Fifth Edition: Updated Text)* (IUCN Environmental Policy and Law Paper No 31 Rev 4 2015), 150.

meet the "agreed full incremental costs" of implementing measures that fulfil the obligations of the Convention and b) enabling them to benefit from the Convention's provisions. The requirement that financial resources are new and additional means that they are provided separately from and in addition to regular ODA budgets, [550] and not just diverted from existing levels of ODA towards financing that would simply be relabelled as biodiversity finance.

The tone contrasts with other paragraphs in Article 20, which rely on softer language such as "may also provide"[551] and "shall take full account"[552] to nudge countries towards a course of action rather than imposing it. The Paragraph presses developed countries to "take into account the need for adequacy, predictability, and timely flow of funds and the importance of burden-sharing among the contributing Parties included in the list." These are more akin to implementing guidelines than to binding legal obligations. Importantly, it allows each developing country Party to determine the extent of its own financial contribution.

2.4. Obligation to provide financial resources through different channels

Paragraph 3 complements Paragraph 2 by reminding developed countries of the option available to them to contribute financially through other channels of development assistance, including bilateral, regional, and other multilateral channels. Although the use of the word "also" could be interpreted as providing an alternative rather than a complementary channel to funding under the financial mechanism of Article 21, it is unlikely to be the objective of this Paragraph.[553] Indeed, the soft language of Paragraph 3 "may also provide" contrasts with the binding language used in Paragraph 2 "shall provide". It is more likely that Paragraph 3 was drafted in anticipation of the role of other streams of funding in filling the resource gap between annual biodiversity finance needs and annual global biodiversity funding.[554] Paragraph 3 aims to respond to the concerns raised as early as 1988 by the Ad Hoc Working Group of Experts

[550] Ibid, IUCN (2015) 61.
[551] CBD, Article 20(3).
[552] Ibid, Article 20(5).
[553] Glowka supports the interpretation that the resources are to be provided "over and above those which [developed countries] are obligated to provide under paragraph 2." See Lyle Glowka and others, 'A Guide to the Convention on Biological Diversity' (IUCN, Gland and Cambridge 1994), 100; IUCN, *Draft International Covenant on Environment and Development — Implementing Sustainability (Fifth Edition: Updated Text)* (IUCN Environmental Policy and Law Paper No 31 Rev 4 2015), 105.
[554] Figures from UNDP estimate the global annual needs at US$150-440 billion, when global annual funding contributes only US$52 billion. See UNDP, 'The Biodiversity Finance Initiative' (BIOFIN Workbook, 2018) 6.

on Biological Diversity, that contributions from contracting parties might not be sufficient and that fund-raising mechanisms would need to be examined.[555]

2.5. Obligation to prioritise certain categories of states in the provision of financial resources

Articles 20(5), 20(6), and 20(7) recognise the heterogeneity of developing country Parties in terms of economic development, geographical specificities, and vulnerability to climate change. In particular, the least developed countries are singled out as a category requiring special attention for funding.[556] Other categories such as small island states,[557] developing countries with a dependence on biological resources[558], and those vulnerable to climate change and natural disasters[559] are acknowledged as having special needs but do not require any specific action from Parties with regard to funding. Arguably, these Paragraphs create a prioritisation in the allocation of financial resources on the basis of economic development, even among developing country Parties.

2.6. Obligation to provide financial resources through the financial mechanism

Article 21(1) establishes the financial mechanism of the CBD, through which the contributions of developed countries are channelled to developing countries. It should be read in conjunction with Article 39, which designates the GEF as the interim institutional structure for the period between the CBD 's entry into force and either the decision of the first meeting of the COP or until the COP decides otherwise. This is the result of a compromise between the main negotiating blocks in the lead up to the Convention's adoption.[560] The proposal of developed countries to establish the GEF as a financial mechanism was met with harsh criticism from the G77 and China. This proposal was eventually endorsed under the three conditions that the GEF be a) fully restructured to enable the mechanism to operate

[555] Ibid.
[556] CBD, Article 20(5).
[557] Ibid, Article 20(6).
[558] Ibid, Article 20(6).
[559] Ibid, Article 20(7).
[560] Fiona McConnell, *The Biodiversity Convention – A Negotiating History* (Kluwer Law International, 1996).

democratically and transparently, b) established under the authority and guidance of the COP, and c) accountable to it. [561]

This paragraph echoes and complements the operational aspects of the provision of financial resources under Article 20(2) and enhances its normative strength. While Article 20(2) refers to the general implementation of financial commitments by developed countries, Article 21(1) uses the more specific terms "contributions" and "timely flow of funds." The reiteration of the operational modalities, which are described here in a more assertive tone, provides a clear indication that the predictability, adequacy, and timely flow of funds are considered essential attributes of the financial mechanism and are non-optional. The Paragraph, however, stops short of committing developed countries to providing specific amounts regularly.

The normative value of the reference to burden sharing among developed countries is difficult to assess. A proposal made during the negotiations that burden sharing among donors could be assessed either as a percentage of GNP, related to the industrial or commercial exploitation of genetic resources, or the amount of trade in these resources was rejected.[562] Therefore, burden sharing appears to serve more as a guiding implementing principle than a legal obligation. In addition, this reference provides additional flexibility to donors, allowing them some leeway to navigate international financial commitments on the basis of fluctuating national priorities. It also allows them to discuss commitments and agree among themselves, possibly within other fora such as the OECD's DAC. However, in its report on the responsibility of international organisations, the ILC expressed the opinion that there is an obligation for members of an organisation to finance this organisation as part of the general duty to cooperate.[563] This is because, as pointed out by Judge Gerald Fitzmaurice, without finance, the organisation could not perform its duties.[564]

2.7. Centrality of CBD's financial mechanism

[561] CBD, Article 39.
[562] UNEP, 'Report of the Ad hoc Working Group of Legal and Technical Experts on Biological Diversity on the Work of Its Second Session' (7 March 1991) UN Doc UNEP/Bio. Div.3/5, Para. 14.
[563] ILC, *Draft Articles on the Responsibility of International Organizations* (Yearbook of the International Law Commission, vol II, 2011), Article 40.
[564] *Certain Expenses of the United Nations (Advisory Opinion),* (1962) ICJ Reports 151, Separate Opinion of Judge Sir Gerald Fitzmaurice, 208.

The financial mechanism has been described as the "linchpin" of the Convention[565] because of its critical role in ensuring developing countries' compliance with the CBD regime. More specifically, however, for the GEF to be effective, developed countries must comply with their obligation to provide new and additional financial resources through the financial mechanism. This is because the extent to which developing country Parties effectively implement their obligations under the Convention depends on the effective implementation by developed country Parties of their obligations related to financial resources.[566] CBD Article 20(4) establishes a legal connexion between the obligation of developed countries to provide financial assistance under Article 20(2) and the obligation to comply of developing countries. The obligation of developing countries to comply with the CBD measures is tied to the obligation of developed countries to provide new and additional resources. Consequently, compliance by developed countries with Paragraph 2 is a prerequisite to compliance by developing countries with the measures contained in the CBD to conserve and sustainably use biological resources. Arguably, the frequent references to the provision of financial resources to developing countries in the implementation of *in situ*[567] and *ex situ*[568] conservation measures serve as a reminder of this legal connection between the financial obligation of developed countries and the compliance obligation of developing countries. Some have argued that financial assistance creates a reliance on funding, which may contribute to the binding nature of the provision.[569] However, this interpretation goes against the spirit of both the Stockholm Declaration[570] and the Paris Declaration on Aid Effectiveness, which commits developing countries to strengthen their public financial management capacity through the mobilisation of domestic resources and the strengthening of fiscal sustainability.[571]

Despite the pivotal role of financial assistance in the effectiveness of the CBD regime, most commentators agree that the failure of developed countries to provide new and additional resources does not exonerate developing countries from their obligation not to defeat the

[565] Robert Lake, 'Finance for the Global Environment: The Effectiveness of the GEF as the Financial Mechanism to the Convention on Biological Diversity' (1998) 7(1) Review of European Community & International Environmental Law, 68, 68.
[566] CBD, Article 20(4).
[567] Ibid, Article 8(m).
[568] Ibid, Article 9(e).
[569] Among those who share this opinion, see Rudiger Wolfrum and Juenger Friedrich, 'The Framework Convention on Climate Change and the Kyoto Protocol' in Ulrich Beyerlin, and others (eds), *Ensuring Compliance with Multilateral Environmental Agreements: a dialogue between Practitioners and Academia (2006)* 53-68, 56.
[570] Principle 9 refers to the provision of financial resources as a supplement to the domestic effort of developing countries.
[571] OECD, 'Paris Declaration on Aid Effectiveness' (OECD Publishing 2005) para 25.

purpose of the Convention and not to harm the environment of other states.[572] In addition, developing countries are bound by Article 20(1) to mobilise national resources to fund the implementation of the Convention. Nonetheless, the financial mechanism acts as a vital enabler for developing countries in fulfilling their obligations under the CBD. Without such a mechanism, these countries would likely abstain from participating in the CBD framework or fail to meet their commitments in their entirety. As the Convention acknowledges, developing countries' domestic resources should primarily address pressing national objectives such as economic growth, social development, and poverty alleviation.[573]

This Part highlighted the financial obligations of developed and developing countries under the CBD. It showed that while all states parties have the obligation to mobilise domestic resources for the implementation of the Convention, it is largely an obligation of best effort. To meet the cost of implementing measures that fulfil the Convention's objectives, developed country Parties have the obligation to provide financial assistance to developing country Parties primarily through the financial mechanism. As a result, the effectiveness of the CBD regime is contingent upon developed country Parties complying with their obligation to provide financial resources.

3. International legal foundations for the CBD's financial mechanism

The introduction of financial incentives in the international environmental law-making process is a response to the global challenges posed by environmental threats and the multilateral efforts needed to achieve results. The CBD's financial mechanism reflects the focus on capacity-building in developing countries that permeated the 1992 UN Conference on Environment and Development (UNCED). This section examines how the duty to cooperate in international law (Section 3.1) has led to the emergence of differential treatment in financial obligations (Section 3.2) and how these intersect with the international human rights framework (Section 3.3).

3.1. Duty to cooperate in international law

[572] Lavanya Rajamani, *Differential Treatment in International Law* (Oxford University Press 2006).
[573] CBD, Article 20(4).

Despite being a recurring feature in international law-making, the concept of cooperation has never been defined in international law. However, the works of Rudiger Wolfrum on cooperation have expanded our understanding of the concept. Wolfrum interprets it to mean the coordinated action of two or more States, which occurs under a legal regime and serves an agreed, specific objective. An objective is accomplished through joint action, where the activity of a single State cannot or may not achieve the same result.[574] It represents a fundamental shift in the purpose of international law, from enabling coexistence between States to the development of cooperation rules and processes that seek to address collective problems and enhance the overall social welfare of States.[575] It finds an anchor in the Charter of the United Nations (UN Charter), which affirms that international cooperation is needed in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms for all.[576] UN Member States are required to take joint and separate actions in cooperation with the UN.[577]

The Declaration on principles of international law, friendly relations, and co-operation among States affirms that the duty of States to cooperate with one another in accordance with the Charter is a basic principle of international law,[578] and supports the progressive development and codification of this principle as a way to secure its more effective application within the international community and to promote the realisation of the UN's objectives.[579] It includes the duty to promote universal respect for and observance of human rights and fundamental freedoms in accordance with Articles 55 and 56 of the Charter through joint and separate action.[580]

The duty to cooperate in relation to environmental law was first enshrined in Principle 24 of the Stockholm Declaration, before being reformulated in Principles 7 and 27 of the Rio Declaration. It features prominently in a range of multilateral environmental agreements[581] and has been recognised as a 'fundamental principle' of international environmental law by

[574] Rudiger Wolfrum, 'Cooperation, International Law of' (2010) Max Planck Encyclopedia of Public International Law.
[575] See Alastair Neil Craik, 'The Duty to Cooperate in International Environmental Law: Constraining State Discretion Through Due Respect' (2020).
[576] UN Charter, Article 1(3).
[577] Ibid, Article 56.
[578] UNGA, 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations' (1970) UN Doc A/RES/2625(XXV), para 3.
[579] Ibid, Preamble.
[580] Ibid, para 1.
[581] See further below.

international jurisprudence.[582] In her separate opinion on the Whaling in the Antarctic case,[583] Judge *ad hoc* Charlesworth described the duty to cooperate in the environmental context as "the foundation of legal regimes dealing (inter alia) with shared resources and with the environment. It derives from the principle that the conservation and management of shared resources and the environment must be based on shared interests, rather than the interests of one party."[584]

The duty to cooperate in IEL has been studied extensively from the perspective of water resources[585] and transboundary watercourses,[586] fisheries management,[587] and more recently in aspects of health related to the response to the COVID-19 pandemic.[588] Recent research on the contours of the obligation to cooperate points to the "instrumental nature" of the obligation, which manifests itself in the context of law creation and dispute avoidance.[589] Importantly, it entails a general obligation to secure a common goal, which often appears within treaties as the basis for further rule formation and implementation.[590] Therefore, the duty to cooperate provides the legal basis for the creation of new legal mechanisms that enable the creation of multilateral agreements in the furtherance of a common goal. The creation of innovative mechanisms, such as the provision of financial resources, is one such arrangement that broadens participation in global environmental agreements and aims to maximise the effectiveness of environmental treaty regimes.

3.2. Emergence of differential treatment of financial obligations

---

[582] *MOX Plant (Ireland v United Kingdom)* (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001, 95. See also *France v Spain (Lac Lanoux Arbitration)* [1957] 24 ILR 101; *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgement) [2010] ICJ Rep 14 77; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica) (Merits)* [2015] ICJ Rep 665 106.

[583] *Australia v Japan (New Zealand intervening) (Whaling in the Antarctic)* [2014] ICJ Rep 226.

[584] *Australia v Japan (*Separate opinion of Judge ad hoc Charlesworth) [2014] ICJ Rep, para 13.

[585] Tamar Meshel, 'Unmasking the Substance Behind the Process: Why the Duty to Cooperate in International Water Law is Really a Substantive Principle' (2018) 47(1) Denver Journal of International Law and Policy 29.

[586] Christina Leb, *Cooperation in the Law of Transboundary Water Resources* (Cambridge Studies in International and Comparative Law, Cambridge University Press 2013); and Christina Leb, 'Significance of the Duty to Cooperate for Transboundary Water Resource Management under International Water Law' in Alistair Rieu-Clarke and others (eds), *Routledge Handbook of Water Law and Policy* (1st edn, Routledge 2017) 247-259.

[587] Elise Clark, 'Strengthening Regional Fisheries Management - An Analysis of the Duty to Cooperate' (2011) 9(2) New Zealand Journal of Public & International Law 223.

[588] Antonio Coco and Talita De Souza Dias, 'Prevent, Respond, Cooperate' (2020) 11(2) Journal of International Humanitarian Legal Studies 1-19.

[589] Alastair Neil Craik, 'The Duty to Cooperate in International Environmental Law: Constraining State Discretion Through Due Respect' (2020) 4.

[590] Ibid.

Traditionally, the international legal order brought about by the Peace of Westphalia of 1648 was based on sovereign, independent, and territorially defined States, with individual nations free to pursue their own interests.[591] This system enabled the gradual development of legally binding instruments for States to address specific problems. Importantly, this system was based on the principle of sovereign equality of States with equal obligations for all parties.[592] The emergence of problems of global concern, such as climate change, the ozone layer, desertification, and biodiversity loss, has pushed States to look for new ways to achieve collective results. The introduction of differential treatment in international environmental treaty making is a striking development that pushes aside the principle of reciprocity in pursuit of common benefits. Differential treatment establishes a new kind of cooperation between States, one built around the acknowledgement that equality of rights does not necessarily bring about equality in practise due to disparities between States in resources and capabilities.[593]

The 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) was the first to establish a financial mechanism known as the World Heritage Fund.[594] Several years later, all three Rio Conventions introduced financial mechanisms, alongside an obligation for developed country Parties to provide new and additional financial resources to enable developing country Parties to meet the cost of implementing the measures under these instruments.[595] During the CBD negotiations between 1990 and1992, the discussions at PrepCom stonewalled over the question of the funding mechanism under the CBD. In 1990, the London amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer[596] replaced Article 10 on technical assistance to introduce a financial mechanism under which developed country Parties would provide contributions in addition to other financial transfers to enable developing countries to comply with the control measures under the Protocol.[597] This new provision organised the transfer of additional resources through a Multilateral Fund to "meet on a grant or concessional basis as appropriate, and according to criteria to be decided upon by the Parties, the agreed incremental

---

[591] See Leo Gross, 'The Peace of Westphalia, 1648–1948' (1948) 42(1) The American Journal of International Law 20-41.
[592] See Philippe Cullet, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations' (1999) 10(3) European Journal of International Law 549.
[593] Ibid, 554.
[594] UN Educational, Scientific and Cultural Organisation (UNESCO), *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972, Article 15.
[595] CBD, Preamble and Article 20(1); UNCCD, Preamble and Article 6(c); UNFCC, Article 4(3).
[596] Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 29 June 1990, entered into force 7 March 1991) 1598 UNTS 469.
[597] Ibid, p. 10.

costs".[598] The Multilateral Fund operates under the authority of the Parties, who decide on its overall policies.[599] This mechanism was presented and discussed during the final leg of the CBD negotiations[600] and may have been a source of inspiration for the drafting of CBD Articles 20 and 21. The requirement that the financial resources provided by developed countries be "additional"[601] and the decision to place the financial mechanism under the authority and guidance of the COP[602] are reminiscent of the language used in the London amendment to the Montreal Protocol. However, the Montreal Protocol does not channel resources through the GEF but through its own multilateral fund.

The popularity of financial mechanisms in international environmental law-making remains strong. The recent adoption of the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ) solidifies the role of financial mechanisms in the realisation of treaty objectives.[603] They serve the dual purpose of assisting compliance (Section 3.2.1) and providing reparation for damage (Section 3.2.2).

3.2.1. Compliance assistance through financial mechanisms

The shift from enforcement through confrontation to a more conciliatory approach characterised by the delivery of technical and financial assistance is an important incentive for countries to participate in global environmental efforts. Financial incentives motivate developing States to join a legal regime without having to shoulder the entire cost of complying with new treaty obligations.[604] In addition, economic incentives offer a more tailored response to the unique needs and capabilities of developing States, facilitating compliance while acknowledging their weaker economic capabilities.[605] Funding mechanisms offer a contemporary non-compliance procedure that prioritises prevention over punishment. This

[598] Ibid, Article 10(3)(a).
[599] Ibid, Article 10(4).
[600] Fiona McConnell, *The Biodiversity Convention – A Negotiating History* (Kluwer Law International 1996) 66.
[601] CBD, Article 20(2).
[602] Ibid, Article 21(1).
[603] UNGA, 'Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' (2023) UN Doc A/CONF.232/2023/4, Article 52.
[604] Edith Brown Weiss, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths' (1998) 32 University of Richmond Law Review 1555, 1559.
[605] Nele Matz, 'Environmental Financing: Function and Coherence of Financial Mechanisms in International Environmental Agreements' (2002) 6 Max Planck Yearbook of United Nations Law 473, 478. See also Rudiger Wolfrum, 'Enforcement by Non-Confrontational Means' in also Rudiger Wolfrum *Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law* (Brill | Nijhoff 2021).

approach is useful when parties' non-compliance is more likely to result from a lack of capacity and resource scarcity than from a lack of will or diligence.[606] As a corollary to financial assistance, compliance with substantive obligations is monitored through reporting. This requirement in itself entails a huge administrative and financial burden on developing countries, which may not fully comply without financial assistance.[607]

3.2.2. Compensatory elements of financial mechanisms

Originally, differential treatment served to remediate developing countries' lack of capacity to comply with treaty obligations. Later in Rio, the principle of common but differentiated responsibilities found a new justification for differential treatment considering the different contributions of States to global environmental degradation.[608] Although States have common responsibilities, developed countries have a special responsibility in the international objective of sustainable development in view of the pressures their societies place on the global environment and the technologies and financial resources that they command.[609]

Financial reparation within international law derives from the principle of common but differentiated responsibilities that emerged from the legal concept of equity, which itself is "directly applicable as law."[610] The importance attached to equity in international law is obvious in the Continental Shelf case, in which the ICJ refers to it as the "direct emanation of the idea of justice".[611] It finds a practical application in the work of international courts and tribunals where it is used to "balance up" the various considerations presented to them "in order to produce an equitable result".[612] Many environmental treaties refer to equitable principles in their preambles[613] or in their operative parts.[614] Environmental treaties often contain direct or inferred references to the principle of common but differentiated responsibilies, as evidenced by the CBD and its incorporation of two elements: a) the common responsibility of States for

[606] Edith Brown Weiss, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths' (1998) 32 University of Richmond Law Review 1555.
[607] Nele Matz, 'Environmental Financing: Function and Coherence of Financial Mechanisms in International Environmental Agreements' (2002) 6 Max Planck Yearbook of United Nations Law 473, 478–479.
[608] Principle 7 of the Rio Declaration on Environment and Development. See also Philippe Sands, 'The "Greening" of International Law: Emerging Principles and Rules' (1994) 1(2) Indiana Journal of Global Legal Studies 293-323.
[609] Principle 7 of the Rio Declaration on Environment and Development.
[610] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya),* Judgment, I.C.J. Reports 1982, 18, para 71.
[611] Ibid.
[612] Ibid.
[613] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79, [hereinafter "Paris Agreement"] Preamble.
[614] UNFCCC, Article 3(1); Paris Agreement, Articles 2(2), 4(1), and 14(1).

the conservation of biological diversity derived from its status as a common concern of humankind[615] and b) the need to establish differentiated obligations on the basis of factors such as the contribution to the collapse of biodiversity and the ability of States to prevent, reduce, and control the threat to biodiversity.[616]

The inclusion of equitable principles in treaties has sometimes been criticised for not being supported by a working definition, leaving it to States, international organisations, courts and tribunals to refer back to the definition of the ICJ.[617] This criticism is certainly justified from an interpretative standpoint. However, the facilitative approach favoured by the biodiversity regime means that many matters that pertain to the interpretation and application of the CBD may never be referred to arbitration or the ICJ. Instead, equity finds practical application within the financial mechanism created by Articles 20 and 21. This is conceptually supported by UNGA Resolution 44/228, which provides a mandate for the preparation of the Rio Conference. The goal of the Resolution is to further the development of IEL, considering the Declaration of the United Nations Conference on the Human Environment. Importantly, it establishes that the responsibility for containing, reducing, and eliminating global environmental damage is to be borne by the countries causing the damage, in accordance with their respective capabilities and responsibilities.[618] Consequently, international cooperation in the preparation of new regimes for environmental management was guided by the need to identify new ways and means of providing *new* and *additional* financial resources, particularly to developing countries and in accordance with national development objectives.[619] This resolution provides clear evidence of the links between the legal principle of equity and its practical application in the implementation of the principle of common but differentiated responsibilities through the financial provisions of the CBD. The CBDR, therefore, includes an obligation to cooperate in the negotiation of new instruments, setting parameters within which responsibilities are to be allocated between developed and developing countries, and importantly, an obligation for developed countries to provide new and additional financial resources through the financial mechanism to cover the full incremental costs. Incremental costs refer to the additional costs incurred by ratifying States due to the implementation,

[615] CBD, Preamble.

[616] Lavanya Rajamani, *Differential Treatment in International Law* (Oxford University Press 2006). See also IUCN, 'Draft International Covenant on Environment and Development — Implementing Sustainability' (Fifth Edition: Updated Text) (IUCN Environmental Policy and Law Paper No 31 Rev 4 2015) 60.

[617] Peter H Sand, 'International Environment Agreements' in International Environmental Agreements (Edward Elgar Publishing Limited, 2019) 119.

[618] UNGA, 'United Nations Conference on Environment and Development' (1989), UN Doc A/RES/44/228, Preamble.

[619] Ibid, Para 8.

compliance, and enforcement of new treaty obligations.[620] The costs associated with new measures and restrictions are an additional burden on countries, particularly those that lack the necessary financial and technological capacities to meet these new requirements. The financial provisions under the CBD do not provide a definition of "full incremental costs" which makes it challenging to establish a baseline that could be used to quantify the financial resources needed to facilitate compliance. To manage potential disagreements on this issue, the Convention delegates the responsibility for determining agreed full incremental costs to the COP.

3.3. Human rights

As we have seen, the duty to cooperate is intrinsically linked with the achievement of the UN Charter's objectives, which include the realisation of human rights. In addition, the human rights dimension of the CBDR principle itself is gradually being fleshed out in the work of the Independent Expert on Human Rights and International Solidarity and the Intergovernmental Open-ended Working Group on the Right to Development.[621] The CBDR principle features prominently in a draft Declaration on the rights of people and individuals to international solidarity[622] and in a draft Convention on the Right to Development (DRTD).[623] These documents share striking similarities in their approach, and they echo each other with references to international solidarity as a general principle of the right to development in the DRTD[624] and a recognition that international solidarity is "an indispensable component" of the right to development.[625]

Both have been prepared with the objective of incorporating references to language and concepts already agreed upon in established international legal documents to anchor them in and further develop the existing legal frameworks that support them. The draft Declaration on

[620] Nele Matz, 'Environmental Financing: Function and Coherence of Financial Mechanisms in International Environmental Agreements' (2002) 6 Max Planck Yearbook of United Nations Law 473, 482.
[621] Established by the Commission on Human Rights (CHR) in CHR, 'The right to development' (1998), UN Doc E/CN.4/1998/72.
[622] HRC, 'Report of the Independent Expert on human rights and international solidarity, Virginia Dandan, Preliminary text of a draft declaration on the right of peoples and individuals to international solidarity' (2015), UN Doc A/HRC/26/34/Add.1.
[623] HRC, 'Draft Convention on the Right to Development, with commentaries' (2020) UN Doc A/HRC/WG.2/21/2/Add.1.
[624] Ibid, Article 3(g).
[625] HRC, 'Report of the Independent Expert on human rights and international solidarity, Virginia Dandan, Preliminary text of a draft declaration on the right of peoples and individuals to international solidarity' (2015), UN Doc A/HRC/26/34/Add.1, Preamble.

Solidarity builds on the UN Charter, the Universal Declaration of Human Rights (UDHR), and the UNFCCC. In addition, the DRTD includes specific references to human rights instruments[626] and the Paris Agreement.[627] Second, both anchor the concepts firmly into the duty to cooperate. This is very clear from their preambular paragraphs[628], and it shows an intention to emphasise the relationship between the duty to cooperate and the principle of equity and fairness in international law. Third, both countries embrace the more flexible and dynamic approach to CBDR in the Paris Agreement. The DRTD makes a deliberate decision not to "rigidly compartmentalise or define the States that ought to be called as developing or vulnerable".[629] The draft Declaration on Solidarity is equally flexible, encouraging States "in a position to do so" to provide international assistance, separately and jointly.[630]

Both these initiatives clarify, update, and complement the existing framework on the right to development and international solidarity. In so doing, they build linkages with MEAs, primarily in the field of climate change. Consequently, an important value of developing and recognising these rights lies in their "integrative value, which can be instrumental in promoting and achieving development as a holistic and comprehensive process."[631] Although these are not expressly formulated, these new instruments have many crossovers with the biodiversity regime that should be further explored. As will be discussed in Chapter 4, the CBD COP provides an ideal forum for cross-fertilisation, with many recent developments including the adoption of the Voluntary Guidelines on safeguards in biodiversity finance mechanism[632] and

[626] Namely, the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58; the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (Pact of San José), the Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) Doc ST/HR/]CHR/NONE/2004/40/Rev.1; and the Abu Dhabi Declaration of the Organization of Islamic Cooperation (Adopted 1-2 March 2019) Doc OIC/-CFM-46/2019/DECLARATION/FINAL <https://www.oic-oci.org/docdown/?docID=4443&refID=1250> Accessed 27 November 2023.
[627] HRC, 'Draft Convention on the Right to Development, with commentaries' (2020), UN Doc A/HRC/WG.2/21/2/Add.1.
[628] HRC, 'Report of the Independent Expert on human rights and international solidarity, Virginia Dandan, Preliminary text of a draft declaration on the right of peoples and individuals to international solidarity' (2015), UN Doc A/HRC/26/34/Add.1, Preamble and HRC, 'Draft Convention on the Right to Development, with commentaries' (2020), UN Doc A/HRC/WG.2/21/2/Add.1, Preamble.
[629] Ibid, HRC (2020), para 61.
[630] Ibid, Article 8(2).
[631] Nico Schrijver, 'A New Convention on the Human Right to Development: Putting the Cart Before the Horse?' (2020) 38(2) Netherlands Quarterly of Human Rights 84, 92. However, as he points out, efforts may be better focussed on embedding and integrating them into existing human rights treaties, which could be done by asking States to address them in their periodic State reports to allow monitoring bodies to oversee their implementation within the scope of their respective mandates.
[632] Conference of the Parties to CBD Decision XII/3 (17 October 2014), UN Doc UNEP/CBD/COP/DEC/XII/3, para 15.

the Kunming-Montreal GBF, which commits Parties to apply a human rights-based approach to its implementation.[633]

4. Legal nature of the obligation to provide new and additional financial resources

The open-textured language of the CBD's financial provisions requires a deeper investigation into their foundations in general international law to understand the normative strength of the obligation to provide new and additional financial resources that developed country Parties must comply with. This obligation should be understood in the context of Articles 18 and 26 of the VCLT (Section 4.1) and from the perspective of general principles of law (Section 4.2).

4.1. The provision of new and additional financial resources as an obligation derived from the VCLT

This subsection examines the foundations of the obligation to provide new and additional financial resources in the VCLT, highlighting the good faith obligation of developed country Parties to perform their obligations under the CBD (Section 4.1.1) and clarifying its nature as an obligation of conduct (Section 4.1.2).

4.1.1. The principle of good faith

Given the centrality of the funding mechanism to the achievement of the CBD's objectives, developed country Parties that do not meet their obligation to provide new and additional financial resources under Article 20(2) could be in breach of their obligations under Articles 18 and 26 of the VCLT. Article 18 of the VCLT contains a legal obligation for States to refrain from acts that would defeat the object and purpose of a treaty.[634] Although some scholars refer to Article 18 as an "interim obligation"[635] before the treaty's entry into force,

[633] Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4, Annex, para 7(g).
[634] VCLT, Article 18.
[635] See David Jonas and Thomas Saunders, 'The Object and Purpose of a Treaty: Three Interpretive Methods' (2010) 43 Vanderbilt Journal of Transnational Law 565, 572, citing Joni Charme, 'The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma' (1991) 25 Georgetown

others consider it a codification of customary international law, making it a permanent obligation for Parties.[636]

In addition, under Article 26 of the VCLT, Parties to a treaty must perform their obligations in good faith. The principle of good faith assumes that Parties accept the legal effects of the measures that they willingly commit to by expressing their consent to be bound. In this line, Michel Virally argues that good faith is a principle of international law that all actors in the international legal order are subject to, as it serves to determine both the legal effects of their declaration and behaviour and the extent of their duties.[637] In 1953, Bin Cheng noted that good faith underpins every aspect of treaty relations and "governs treaties from the time of their formation to the time of their extinction".[638] Moreover, as affirmed by the Permanent Court of Arbitration in the *North Atlantic Coast Fisheries Case*, States have to execute the obligations incurred by treaty *bona fide.*[639] Consequently, treaty obligations "should be carried out according to the common and real intention of the parties at the time the treaty was concluded, that is to say, the spirit of the treaty and not its mere literal meaning".[640] The failure to comply with the obligations derived from a treaty constitutes a failure to perform an obligation and a fault that entails responsibility, unless it is the result of *vis major* (also known as force majeure).[641] However, for States to claim force majeure, there must be a causal link between force majeure and the failure to fulfil the obligation. Second, the alleged *force majeure* must not be self-induced.[642] Developed country Parties to the CBD therefore have an obligation not to defeat the purpose of the Convention, which entails an obligation to provide new and additional resources. They must perform this obligation *bona fide*, and a failure to comply with this obligation constitutes a fault capable of triggering responsibility.

Washington Journal of International Law and Economics 71, 114; and Jan Klabbers, 'How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent' (2001) 34 Vanderbilt Journal of Transnational Law 283, 283.

[636] Lavanya Rajamani, *Differential Treatment in International Law* (Oxford University Press 2006).

[637] Michel Virally, 'Good Faith in Public International Law' (1983) 77(1) The American Journal of International Law 130, 133.

[638] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Grotius Publications, Cambridge University Press 1953) 106.

[639] *North Atlantic Coast Fisheries Case (Great Britain v United States)* (1910) XI Reports of International Arbitral Awards 167, 186.

[640] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Grotius Publications, Cambridge University Press 1953) 128.

[641] Ibid, 226.

[642] Ibid, 128.

4.1.2. The obligation to provide new and additional resources as an obligation of conduct

In the Draft Articles on State Responsibility, the ILC clarified that "[t]here is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation."[643] According to the Commission, there are two types of international obligations: obligations of conduct or of means and obligations of results.[644] Obligations of means are limited to "specifically determined means". A breach of such an obligation requires that States' conduct be assessed against the actions specifically required by this obligation.[645] Any disputes linked to interpretation are to be settled by international law tribunals.[646] Obligations of results are the focus of Article 21, according to which "[t]here is a breach by a State of an international obligation requiring it to achieve, with its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation."[647] This type of obligation gives flexibility to States in the means chosen to achieve the required result.[648] Obligations of results include international obligations that require the States bound by them to take "all appropriate measures" to achieve a given result without giving any indication of what the appropriate measures may be.[649] To determine the breach of an international obligation of conduct, it is necessary to compare the result required by the international obligation with the result finally attained in practice through the course or courses of conduct adopted by the State.[650] If the two coincide, the obligation has been fulfilled, if not, the obligation has been breached. The Commission admits that this comparison between the result required and the result attained constitutes a "general and basic criterion" for establishing whether an obligation of result has been breached.[651] This interpretation has been criticised for being too simplified in its description of how and to what extent international law restrains the activities of States.[652] Rudiger Wolfrum points out that international obligations vary widely in

---

[643] ILC, 'Draft Articles on State Responsibility' (1998) 37 ILM 440, 133.
[644] Ibid.
[645] Ibid, 134
[646] Ibid,
[647] Ibid, 139.
[648] Ibid, 140.
[649] Ibid, 141.
[650] Ibid, 144.
[651] Ibid, 150.
[652] Rudiger Wolfrum, 'Means of Ensuring Compliance with and Enforcement of International Environmental Law' in *Collected Courses of the Hague Academy of International Law* (1998) Vol 272.

terms of the scope that they leave to States parties in the interpretation of such obligations. While some obligations are expressed as standards that leave little room for interpretation and can neatly fall within this classification, many MEAs, including the CBD, contain "goal-oriented" obligations that rely on the COP for future development and clarification.[653]

Using the ILC's parameters, the CBD's financial provisions use both types of obligations. While the obligation to provide new and additional financial resources appears to be an obligation of conduct, the obligation under Article 20(1) to mobilise resources nationally is more likely to be an obligation of results.

4.2. The obligation to provide new and additional financial resources as a general principle of international law

This subsection will first explain the role of general principles of international law as "gap fillers" in conventional and customary international law (Section 4.2.1) before establishing the obligation to provide financial resources as derived from the principle of common but differentiated responsibilities (Section 4.2.2). It then shows that the principle of common but differentiated responsibilities is widely incorporated into international instruments (Section 4.2.3), and how it underlies the financial mechanism of the CBD (Section 4.2.4) thus arguably establishing it as a general principle of international law. Such status would greatly strengthen the normative strength of the obligation of CBD developed country Parties to provide new and additional financial resources.

4.2.1. What are general principles of international law?

Unlike rules that are of a practical nature and binding on States,[654] principles "embody legal standards, but the standards they contain are more general than commitments and do not specify particular actions".[655] Scholarly works suggest that principles are abstract legal rules underpinning a legal regime that may be applied to a variety of specific situations, either to

[653] Jutta Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15(1) Leiden Journal of International Law 1.
[654] Philippe Sands and others (eds), *Principles of International Environmental Law* (4th edn, Cambridge University Press, 2018) 189.
[655] Daniel Bodansky, The United Nations Framework Convention on Climate Change: A Commentary' (1993) 18(2) Yale Journal of International Law 451, 501.

regulate them or to solve some of the difficulties that they give rise to.[656] According to Alan Boyle and Christine Chinkin, mediating principles do not need to impose obligations or regulate conduct, they do not depend on State practice, and they do not need the same level of clarity or precision as norms or rules.[657] They derive their authority and legitimacy from the endorsement of States (*opinio juris*). As such, general principles are intended to fill gaps in conventional and customary international law.[658] This interpretation is in line with the conclusions of the Study Group on the fragmentation of international law, which suggests that general principles of law are of particular relevance to the interpretation of a treaty, especially where the treaty rule is unclear or open-textured.[659]

4.2.2. The provision of financial resources as an obligation derived from the principle of common but differentiated responsibility

The issue of whether or not the principle of common but differentiated responsibilities has the status of a general principle of international law is still open for debate in the literature.[660] Some authors firmly oppose the suggestion that the CBDR principle constitutes a general principle of international law[661] and have sometimes referred to it as a "slogan".[662] Others are more willing to concede it some degree of normative significance. Patricia Birnie and Alan Boyle consider it "a framework principle […] that is far from being merely soft law".[663] Edith Brown Weiss even goes as far as to state that it constitutes an "emerging principle of international environmental law."[664] According to Lavanya Rajamani, the "CBDR principle would be more authoritative than 'soft law' but not yet custom. It is at a particular

[656] UNGA, 'First report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (2019) UN Doc
A/CN.4/732 citing M Virally, 'Le rôle des « principes » dans le développement du droit international' in *Recueil d'études de droit international en hommage à Paul Guggenheim* (IUHEI, 1968) 531, 533-534.
[657] Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, Oxford and New York 2007) 224.
[658] Michael Wood, 'Customary International Law and the General Principles of Law Recognized by Civilized Nations' (2019) 21(3-4) International Community Law Review 307, 322.
[659] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law Report of the Study Group' (2006) 23.
[660] See generally Lavanya Rajamani, *Differential Treatment in International Law* (Oxford University Press 2006).
[661] Christopher Stone, 'Common But Differentiated Responsibilities in International Law' (2004) 98(2) The American Journal of International Law 276, 300.
[662] Tullio Treves, 'The Expansion of International Law' in *Collected Courses of the Hague Academy of International Law* (Brill Reference Online 2019) vol 398.
[663] Patricia Birnie and Alan Boyle, *International Law and the Environment* (2nd edn, Oxford University Press, Oxford and New York 2002).
[664] Edith Brown Weiss, 'The Rise or the Fall of International Law?' (2000) 69(2) Fordham Law Review 345, 350.

stage of its evolution. It is more than a political principle or an aspirational goal but far too and disputed to be properly characterized as custom."[665] The ambiguity regarding its status lies primarily in the fact that it is unclear whether the principles referred to in Article 38 of the ICJ Statute are merely intended to ensure a fair and equitable legal process or whether they include principles recognised in international law.[666] Some writers consider Article 38(1)(c) to refer only to general principles accepted by all nations in *foro domestic*.[667] They argue that the reference to "general principles of law recognized by civilized nations" in the preparatory works for the establishment of the Permanent Court of International Justice[668] was motivated not by the intention of creating a new source of international law, but by codifying an already existing one.[669] Other writers consider that Article 38(1)(c) establishes a new secondary source alongside international conventions, international customs, and judicial decisions, which mandates the ICJ to use general principles of international law as a way to fill gaps in the law.[670]

This raises the question of the general principles found in international treaties on the environment and soft law instruments such as the Stockholm Declaration, the Rio Declaration, and the resolutions of international bodies such as the UNGA and the HCR. According to Patricia Birnie and Alan Boyle, the main influence of these principles lies in the development, application, and interpretation of treaties.[671] They lay down parameters that guide the work of the courts, but they do not themselves create legal obligations.[672] This opinion is shared by Lavanya Rajamani, who states that the principle "is of sufficient legal weight to form the legal and philosophical basis for the interpretation of existing obligations and the elaboration of future international legal obligations within the context of the existing instruments in the on-going regime-building process."[673] Michael Wood is wary of the risk that general

---

[665] Lavanya Rajamani, *Differential Treatment in International Law* (Oxford University Press 2006) 160.

[666] Patricia Birnie, Alan Boyle, and C Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press, Oxford and New York 2009).

[667] League of Nations Advisory Committee of Jurists, '*Procès –verbal* of the proceedings of the Committee, June 16th – July 24th, 1920, with Annexes' (The Hague, Van Langenhuysen, 1920), Annex No. 3.
This point is also extensively discussed in ILC, 'Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (2020) UN Doc A/CN.4/741.

[668] Ibid, League of Nations (1920), Annex No. 3.

[669] UNGA, 'First report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (2019) UN Doc A/CN.4/732, paras 108-109 and Malgosia Fitzmaurice, 'The History of Article 38 of the Statute of the International Court of Justice: The Journey from the Past to the Present' in Jean d'Aspremont, Samantha Besson (eds), Oxford Handbook of the Sources of International Law (Oxford University Press 2017).

[670] Antonio Cassese, *International Law in a Divided World* (Paperback ed, Clarendon Press; Oxford University Press, Oxford and New York 1986).

[671] Patricia Birnie, Alan Boyle, and C Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press, Oxford and New York 2009) 28.

[672] Ibid.

[673] Lavanya Rajamani, *Differential Treatment in International Law* (Oxford University Press 2006).

principles of law may be too easily invoked where no applicable rule of customary international law can be identified.[674]

In this context and in the absence of consensus in scholarship, the recent works undertaken by the ILC on the legal nature, functions, and identification of general principles of law provide some valuable parameters to advance the debate.[675] In December 2021, the UN General Assembly noted the facilitative role of the ILC in furthering the progressive development and codification of international law as a means to support the implementation of the UN Charter and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.[676] The ILC points to two types of general principles of law: (*a*) general principles derived from national legal systems; and (*b*) general principles formed within the international legal system.[677] The first type is reflected in the individual practice of States, and the second in the international legal system. In the latter case, the recognition of general principles can occur "by deduction or abstraction from existing rules of conventional and customary international law, or through acts of international organisations such as resolutions of the General Assembly, showing the consensus of States on specific matters."[678] The ILC identifies three ways in which a general principle of law may be formed in the international legal system: when it is widely incorporated into treaties and other international instruments, such as General Assembly resolutions;[679] when it underlies general rules of conventional or customary international law;[680] or when it is inherent in the basic features and fundamental requirements of the international legal system.[681]

4.2.3. Wide incorporation of CBDR into international instruments

[674] Michael Wood, 'Customary International Law and the General Principles of Law Recognized by Civilized Nations' (2019) 21(3-4) International Community Law Review 307, 308. This view was also shared in ILC, 'Provisional summary record of the 3490th meeting, statement by Mr Tladi' (2009) UN Doc A/CN.4/SR.3490, 5.
[675] ILC, 'Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (2021) UN Doc A/CN.4/741. See also Marcelo Vázquez-Bermúdez and Alfredo Crosato, 'General Principles of Law: The First Debate within the International Law Commission and the Sixth Committee' (2020) 19(1) Chinese Journal of International Law 157.
[676] UNGA, 'Report of the International Law Commission on the work of its seventy-second session' (2021 UN Doc) A/RES/76/111.
[677] ILC, 'General principles of law, Text of the draft conclusions provisionally adopted by the Drafting Committee on first reading' (2023) UN Doc A/CN.4/L.982, draft Conclusion 3.
[678] ILC, 'Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (2021) UN Doc A/CN.4/741, 234.
[679] Ibid, para 122.
[680] Ibid, para 138.
[681] Ibid, 146.

The principle of common but differentiated responsibilities has been a recurring feature of IEL since the Stockholm Declaration.[682] Under Principle 7 of the Rio Declaration on Environment and Development, countries pledged to cooperate in a spirit of global partnership to conserve, protect, and restore the health and integrity of the Earth's ecosystem. They recognised that considering the different contributions to global environmental degradation, States have common but differentiated responsibilities and that developed countries have a responsibility in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and the technologies and financial resources they command.[683] The principle of common but differentiated responsibilities appears in the UNFCCC[684] and the Kyoto Protocol,[685] and it is also embodied in the CBD's financial mechanism, which is intended to meet the specific financial needs of developing countries[686] and the UNCCD.[687] The financial mechanisms created under the World Heritage Convention[688] and the Montreal Protocol[689] also demonstrate the widespread incorporation of CBDR into treaties. The principle of common but differentiated responsibilities also appears regularly in General Assembly resolutions[690] and in the decisions of human rights bodies.[691]

4.2.4. CBDR underlying the general rules of conventional or customary international law

A second way to identify general principles of law is to establish whether they underlie treaty norms or customary international law. The general principle is separate from these rules, but they are closely correlated and can be applied independently [692] Differential treatment in

[682] Stockholm Declaration of the United Nations Conference on the Human Environment (1972) UN Doc A/CONF.48/14/REV1 [hereinafter "Stockholm Declaration"], Principle 12.
[683] Rio Declaration (199) UN Doc A/CONF.151/26/vol I , Principle 7.
[684] UNFCCC, Article 3(1).
[685] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 6 February 2005) 2303 UNTS 162 [hereinafter "Kyoto Protocol"], Article 10.
[686] CBD, Preamble and Articles 20 and 21.
[687] UNCCD, Articles 6(c) and 20.
[688] Convention Concerning the Protection of World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151, [hereinafter "World Heritage Convention], Part IV.
[689] London Protocol, Article 10.
[690] UNGA, 'United Nations Conference on Environment and Development' (1989), UN Doc A/RES/44/228 and UNGA, 'Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)' (2015), UN Doc A/RES/69/313, para 59.
[691] HRC, 'Report of the Independent Expert on human rights and international solidarity, Virginia Dandan, Preliminary text of a draft declaration on the right of peoples and individuals to international solidarity' (2015), UN Doc A/HRC/26/34/Add.1.
[692] ILC, 'Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (2020) UN Doc A/CN.4/741, para 138.

IEL emerged from the gradual consolidation of the principle of common but differentiated responsibility, which started with the Stockholm Declaration, followed by the UNGA resolution[693] and the Rio Declaration. [694] The principle appears in the UNFCCC[695], the Kyoto Protocol,[696] and the Paris Agreement.[697] In addition, as discussed above, the obligation to provide financial resources is an emanation of the principle of common but differentiated responsibilities, which has been widely incorporated into international legal instruments, including the World Heritage Convention, the Montreal Protocol, and the CBD. The provision of financial resources to support developing countries' efforts to meet the obligations of the BBNJ is also enshrined in the treaty, albeit in softer language.[698]

4.2.5. The CBDR principle underlies the financial mechanism of the CBD

The ILC also considers that general principles of law may be identified by determining that they are inherent in the basic features and fundamental requirements of the international legal system, which is a creation of the community of nations.[699] It is unlikely that the principle of common but differentiated responsibilities has achieved a "fundamental character" intricately linked to the structure of that law.[700] Nonetheless, it may be argued that the wide incorporation of the principle into MEAs and the intrinsic relationship between the financial provisions of these agreements and common but differentiated responsibility are sufficient to establish it among the general principles of law. The principle of common but differentiated responsibilities underlies the financial mechanism of the CBD, which is central to the implementation of CBD obligations by developed countries. As such, the principle of common but differentiated responsibilities forms part of the conceptual apparatus of the CBD in the sense that it forms the basis for the interpretation of existing obligations and the elaboration of future international legal obligations within the biodiversity regime and across treaty regimes.

---

[693] UNGA, 'United Nations Conference on Environment and Development' (1989), UN Doc A/RES/44/228, paras 7 and 15(j).
[694] Rio Declaration, Principle 7.
[695] Preamble, Articles 3(1), 4(1), 7(2),
[696] Kyoto Protocol, Article 10.
[697] Paris Agreement, Preamble and Articles 2(2), 4(3), 4(19),
[698] Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (adopted 19 June 2023, opening for signature) C.N.203.2023.TREATIES-XXI.10, [hereinafter "BBNJ Agreement"], Article 52(3).
[699] ILC, 'Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (2021) UN Doc A/CN.4/741, para 146.
[700] Ibid, para 148.

As such, the CBDR principle may be regarded as an autonomous source capable of creating rights and obligations in the same capacity as conventions and customary international law.[701]

However, there are also some drawbacks to the codification of the principle of common but differentiated responsibilities and respective capabilities. Some have raised concerns that it could undermine the dynamic aspect of the principle[702] and warned "that any clarification of principles has to avoid digression, regression back-tracking ('without prejudice') from the legal developments already achieved in the issue-specific context of various MEAs."[703] It is important to note however, that countries have expressed some concerns regarding the criteria used by the ILC to determine the existence of general principles of law[704], and the special rapporteur will continue to examine the issue to achieve consensus in the Commission.[705] Nonetheless, the obligation of developed country Parties to provide new and additional financial resources under Article 20(2) is a hard obligation of conduct capable of triggering state responsibility.

5. The CBD paradox: a hard legal obligation to provide voluntary contributions to the GEF

The binding nature of the obligation to provide new and additional financial resources exists within the broader architecture for ODA delivery, which operates on the basis of donors' voluntary contributions. This voluntary approach is reflected in the GEF's founding instrument, creating a situation where developed country Parties have complete flexibility with regards to how much they contribute to the realisation of the CBD's objectives. This part first looks at the voluntary nature of ODA contributions generally (Section 5.1) before looking at the voluntary nature of GEF contributions specifically (Section 5.2).

5.1. Voluntary nature of ODA contributions

[701] Michael Wood, 'Customary International Law and the General Principles of Law Recognized by Civilized Nations' (2019) 21(3-4) International Community Law Review 307, 321.
[702] Christina Voigt, 'How a 'Global Pact for the Environment' Could Add Value to International Environmental Law' (2019) 28(1) Review of European, Comparative & International Environmental Law 13, 17-18.
[703] Ibid,18.
[704] UNGA, 'Report of the International Law Commission' (2021) UN Doc A/76/10, paras 211-213.
[705] Ibid, para 235.

Over the years, the definition of ODA and its criteria have been refined to affirm its concessional nature and its objective of supporting economic development and welfare in developing countries.[706] ODA was institutionalised as a mechanism to alleviate poverty, promote sustainable development and redress economic imbalances between developed and developing countries. The establishment of multilateral institutions such as the World Bank and regional development banks further consolidated the role of ODA in the global economic system. The scope of ODA has also evolved and broadened to include technical assistance and capacity-building activities.[707] This shift reflects a growing understanding of the challenges that developing countries face – including in relation to the implementation of international legal obligations – which requires not just the provision of financial resources but also transfers of technology and technical support that may be lacking in developing countries.

The provision of ODA has been integrated into the foreign policy, international commitments, and national legal frameworks of many developed countries.[708] Official pledges shape the amount and direction of ODA contributions. This ongoing practice by developed countries of providing ODA raises the question of its possible status as a norm of customary international law. Customary international law originates from the consistent, widespread behaviour of States acting out of a sense of legal obligation, commonly referred to as *opinio juris*.[709] The formation of customary international law, however, depends on the explicit or implicit consent of the States bound by the rule.[710] In the context of ODA, such widespread consent is difficult to establish. Although donor countries have included ODA contributions in their budgets for several decades, many regularly object to suggestions that they are legally bound to do so.[711] This suggests that the practice has not yet crystallised into a rule of customary international law. However, over time, the growing number of treaties incorporating provisions on financial resources and organising their allocation through financial mechanisms could help

---

[706] William Hynes and others, 'The evolution of aid statistics: a complex and continuing challenge' in Bracho and others, *Origins, Evolution and Future of Global Development Cooperation: The Role of the Development Assistance Committee (DAC)* (Deutsches Institut für Entwicklungspolitik gGmbH, 2021) 104.
[707] See Gerardo Bracho, 'Tipping point: environmental protection and sustainable development' in Bracho and others, *Origins, Evolution and Future of Global Development Cooperation: The Role of the Development Assistance Committee (DAC)* (Deutsches Institut für Entwicklungspolitik gGmbH, 2021) 480.
[708] See OECD, 'Better Aid - Managing Aid Practices of DAC Member Countries' (OECD Publishing, 2009).
[709] Roozbeh Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates' (2010) 21(1) European Journal of International Law 173, 174.
[710] Ibid, 176.
[711] See for example, The Expert Group for Aid Studies (EBA), 'Who makes the decisions on Swedish Aid funding? An Overview' Report 2018:05 (2018) 24.

crystallise the legal consequences arising from their ratification, thereby contributing to the development of customary international law.[712]

The inclusion of financial provisions in some treaty regimes changes the situation, albeit on a sectoral basis. Within the confines of each treaty regime, they crystallise the status of aid as a legal obligation. However, this obligation to provide ODA is not supported by a legally binding obligation to provide a minimum amount or to achieve a certain target. While the UNGA encourages developed countries to allocate 0.7 percent of their GNI to ODA,[713] this is not a legally binding obligation. Even when national legislatures consolidate it into a binding obligation through implementation in national law, they have the freedom to reduce, pause, or eliminate this obligation through national political and legislative processes. The United Kingdom enshrined the 0.7 percent target in national law in 2015,[714] but in 2021, the target was lowered to 0.5 percent without any legislative amendment.[715] Contributions are made at the discretion of each donor country's government and are influenced by a mixture of domestic and geopolitical considerations.[716] In 1968, the former Director of the South-Asia and Middle East Department of the World Bank expressed the thought that donor governments' increasing reluctance to allocate financial resources to poor countries was largely driven by the behaviour of the poor countries themselves, and that the onus was on them to reverse the trend of decreasing support for aid.[717] In his view poor countries "must be more willing to do things sensible in themselves which would make it easier for these politicians to find a way around their political difficulties. They must make it easier for the leaders of rich countries to convince their legislatures and their peoples that the countries which they are aiding are not wasting the resources that are given them and that they are wasting their own domestic resources. They must realize that the rich countries are not likely to increase greatly the quantity and the quality of their aid unless they can feel reasonably certain that those they are aiding are moving at a reasonable pace to improve their economic, financial, development policies, programmes."[718] Although this view has been somewhat nuanced over the years, Sarah Champion, the Chair of the United Kingdom's House of Commons' International Development Committee, said in

[712] Pierre-Marie Dupuy, 'Formation of Customary International Law and General Principle' in Jutta Brunnée and others (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 449.
[713] UNGA, 'International Development Strategy for the Second United Nations Development Decade' (1970) UN Doc A/RES/2626(XXV) para 43.
[714] United Kingdom International Development (Official Development Assistance Target) Act 2015, Section 1.
[715] Philip Loft and Philip Brien, 'The 0.7% Aid Target' (House of Commons Library, 29 November 2022) < https://commonslibrary.parliament.uk/research-briefings/sn03714/> Accessed 27 November 2023.
[716] OECD, 'Development Co-operation Report 2023: Debating the Aid System' (OECD Publishing, 2023).
[717] Escott Reid, 'The Crisis in Foreign Aid' (1966) 22(8) World Today 315, 320-321.
[718] Ibid.

answer to the question of whether aid is racist, that the aid sector is "beset by a fundamental power imbalance" with a "prevalent idea that higher income countries are both best placed to assist people in lower income countries and less likely to mismanage financial resources."[719] With such an ideology permeating the sector and a reliance on donors' voluntary contributions, the CBD's financial mechanism is vulnerable to national and geopolitical dynamics. In the absence of a legally binding framework, countries can adjust their ODA levels depending on national objectives and constraints or shifting geopolitical priorities. In theory, they could also discontinue their contributions altogether.

5.2. Voluntary nature of GEF contributions

The sustainability of GEF funding depends on replenishment cycles and funding pledges made by donor countries. The GEF Secretariat engages in a resource mobilisation process to secure funding for its operations and projects, which involves discussions with donor countries to determine their level of financial contributions for the upcoming replenishment cycle. Every four years, replenishment discussions take place at the GEF to raise adequate funding to implement the programming priorities for the next cycle.[720] GEF replenishment negotiations are usually carried out over four meetings to negotiate the programming priorities and strategic directions for the GEF and to agree on the overall target size of the replenishment at the third meeting of the replenishment negotiations. The fourth replenishment meeting consists of a pledging session during which contributing participants confirm their intended financial commitments and pledges.[721]

This information is then used to draw up a table of contributions for contributing participants' which is then reviewed and approved by the participants.[722] Depending on the feedback of participants, adjustments to the contribution may be made to the table in the final replenishment resolution. The replenishment package, the table of contributions, and the summary of negotiations are then approved by the GEF Council and adopted by the World

---

[719] OECD, *Development Co-operation Report 2023: Debating the Aid System* (OECD Publishing, Paris 2023) Section 5.
[720] GEF, 'GEF-8 Replenishment: Financial Structure, Second Meeting for the Eighth Replenishment of the GEF Trust Fund' (GEF/R.8/09, 8 September 2021).
[721] Ibid, para 8.
[722] GEF, 'Draft GEF-8 Replenishment Resolution, Fourth Meeting for the Eighth Replenishment of the GEF Trust Fund' (GEF/R.08/34, 28 March 2022). This space was left blank in the draft resolution.

Bank's Board of Executive Directors.[723] The timing of contributions depends on the replenishment cycle and the agreement reached among the donor countries.[724] The actual disbursement of funds may occur progressively over the replenishment period.[725]

In line with the OECD DAC practice, the GEF Instrument suggests that contributions are voluntary and can be terminated at any time. The instrument does not differentiate between contributions from developed and developing countries. Any Member State of the United Nations or any of its specialised agencies can become a participant in the Global GEF by depositing an instrument of participation with the Secretariat.[726] Similarly, any Participant can withdraw from the GEF by submitting an instrument of termination of participation to the Secretariat.[727] Participants make voluntary financial contributions to the GEF on the basis of their own assessment and commitment to supporting global environmental priorities. The amount is pledged under an instrument of commitment deposited with the Secretariat.[728] Any Participant can submit an instrument of commitment. China, for example, is both the largest recipient of GEF-funded biodiversity projects and a donor.[729] According to the GEF, pledges made through an instrument of commitment constitute a legally binding obligation on the part of the participant to pay the total amount specified to the GEF Trust Fund.[730] However, failure to provide contributions does not entail strict legal consequences. The GEF Instrument commits contributing Participants to apply their "best efforts" to obtain legislative approval to unqualify a sufficient amount of their contribution to meet the payment dates.[731] Failure to make payment simply requires the Contributing Party to provide a written communication to the GEF's CEO stating the reasons for the delay and the measures being taken to address it.[732]

This situation leads the GEF to run in arrears, with some contributing participants being unable to pay the full number of their replenishment pledges. The GEF Instrument does not foresee the possibility of GEF participants accruing arrears. The practice in the GEF replenishment cycle has been to include these arrears and carryovers from previous

[723] GEF, 'GEF-8 Replenishment: Financial Structure, Second Meeting for the Eighth Replenishment of the GEF Trust Fund' (GEF/R.8/09, 8 September 2021), para 8.
[724] GEF, 'Draft GEF-8 Replenishment Resolution, Fourth Meeting for the Eighth Replenishment of the GEF Trust Fund' (GEF/R.08/34, 28 March 2022). This space was left blank in the draft resolution, para 3.
[725] Ibid.
[726] GEF, 'Instrument for the Establishment of the Restructured Global Environment Facility' (2019), para 7.
[727] Ibid.
[728] Ibid, Annex C – Attachment 1.
[729] GEF, 'Projects' (GEF Database, 2023) <https://www.thegef.org/projects-operations/database?f%5B0%5D=focal_areas%3A2205> Accessed 27 November 2023.
[730] GEF, 'Instrument for the Establishment of the Restructured Global Environment Facility' (2019), para 2(b).
[731] Ibid
[732] GEF, 'Draft GEF-8 Replenishment Resolution, Fourth Meeting for the Eighth Replenishment of the GEF Trust Fund' (GEF/R.08/34, 28 March 2022). This space was left blank in the draft resolution, para 4(a).

replenishments as part of the target programming amount for allocation to countries.[733] However, this may cause the GEF Trust Fund to be over-programmed, potentially resulting in a funding shortfall at the end of the replenishment period.[734] In contrast, including arrears in the programming envelope serves as an incentive for participants to fulfil their pledges to meet the target funding agreed during negotiations.[735] During the final six months of a GEF Replenishment Period, the CEO can make any unused resources under the System for Transparent Allocation Resources (STAR) available to eligible projects and programmes from any country within the Focal Area to which those unused resources were initially allocated.[736] In addition, the Council may reallocate any unused STAR resources across focal areas.[737] Net funding decisions include an amount of USD 152 million resulting from unused balances of 48 programmes from previous replenishments that were cancelled during the GEF-7 period until September 30, 2021.[738]

6. Can the CBD COP address this antagonism?

The antagonism between the CBD's financial obligations and the voluntary mechanisms to channel resources dilutes the effect of the obligation to provide new and additional financial resources. The CBD COP has a role to play in advancing cooperation to facilitate the implementation of the Convention. This is due to its facilitative function (Section 6.1), and its oversight of the financial mechanism (Section 6.2). However, the COP lacks the ability to influence developed Parties' contribution to the GEF (Section 6.3) and would likely not have the power to initiate a change of the GEF's founding instrument (Section 6.4). The normative developments under the climate change regime offer some insights into how the CBD COP could help mobilise new resources (Section 6.4).

6.1. The facilitative function of the COP

[733] GEF, 'GEF-8 Replenishment: Financial Structure, Second Meeting for the Eighth Replenishment of the GEF Trust Fund' (GEF/R.8/09, 8 September 2021), para 20.
[734] Ibid, para. 21.
[735] Ibid.
[736] GEF, 'Policy & Guidelines on System for Transparent Allocation of Resources (STAR)' (GA/PL/01, 26 June 2018), para 19.
[737] Ibid, para 20.
[738] GEF, 'GEF Trust Fund Financial Report, Summary of Financial Information as of September 30, 2021' (GEF/C.61/Inf.06, 16 November 2021) 12.

Article 23 establishes the Convention's plenary organ, the Conference of the Parties, whose main responsibility is to keep under review the implementation of the Convention.[739] Among its functions are the consideration and adoption of protocols and annexes, as well as their amendment. Crucially, it is also mandated to consider and undertake any additional action that may be required for the achievement of the purposes of the Convention considering experience gained in its operation.[740] Thomas Gehring noted that the less detailed the substantive obligations of the treaty the more room there is for secondary decision-making within the COP.[741] This secondary form of decision making derives its normative strength from the treaty itself through the establishment of the COP. Under the function of managing and supporting the implementation of the Convention, the COP produces a secondary body of law with some normative strength. Among its responsibilities, the COP considers the reports submitted by the Parties, reviews the status of implementation of the Convention through its thematic areas[742], and creates thematic working groups.[743] These decision-making powers of the COP play a significant role in the clarification and development of the CBD's provisions. It provides Parties with the flexibility to use this forum as a catalyst for decision-making in support of the implementation of the Convention's text. Through the broad interpretation of the COP's mandate, the Parties can meet to clarify, complement, and expand the scope of the convention.[744] Through the COP, Parties can engage in a semi-permanent law-making process to further the objectives of the Convention, in what Jutta Brunnée describes as an ongoing, interactional process that goes beyond formal procedures to permanently influence State conduct.[745] The catch-all provision of Article 23(4)(i) gives considerable room for the COP to define and expand its mandate.

The law-making process under the COP raises the question of the legal status of COP decisions. As we have seen, for treaties to be binding on countries, State Parties must express

[739] CBD, Article 23(4).
[740] Ibid, Article 23(4)(i).
[741] Thomas Gehring, 'Treaty-Making and Treaty Evolution' in Jutta Brunnée, Daniel Bodansky, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, Oxford 2007) 467-497, 481.
[742] See for example, Conference of the Parties to CBD Decision II/9 (30 November 1995), UN Doc UNEP/CBD/COP/2/19.
[743] A working group on article 8(j) and related provisions was established in 1998 by Conference of the Parties to CBD Decision IV/9 (15 June 1998), UN Doc UNEP/CBD/COP/DEC/IV/9. At its fifth meeting in 2000, the COP adopted a work programme to implement the commitments of Article 8 (j) of the Convention and to enhance the role and involvement of indigenous and local communities in the achievement of the Convention's objectives. Significant work has been accomplished as part of the work programme on Article 8(j).
[744] See Lyle Glowka and others, *A Guide to the Convention on Biological Diversity* (IUCN, Gland and Cambridge 1994) 112.
[745] Jutta Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15(1) Leiden Journal of International Law 1, 6.

consent to be bound by the Convention's text. This consent does not automatically extend to decisions taken by subsidiary bodies established by the treaty. Neither the CBD nor the VCLT provide any clear indication as to the nature of COP decisions. Article 23 of the CBD merely mandates the COP to adopt consensus rules of procedure for itself and for any body that it establishes.[746] The Rules of Procedure for Meetings of the COP, adopted at the first meeting of the COP and supplemented in 2000,[747] set out the rules for voting. Rule 40(1) requires parties to "make every effort to reach agreement on all matters of substance by consensus". Only as a last resort can a decision on matters of substance be taken by a two-thirds majority vote of the Parties present and voting. Consensus, however, does not imply consent to be bound. Conversely, the gradation in the decision-making quorums to be reached for certain decisions cannot be overlooked. The two-thirds majority voting procedure does not extend to decisions under paragraph 1 or 2 of Article 21 of the Convention, which are always taken by consensus. These pertain to the financial mechanism of the CBD, presumably to ensure that developed countries who bear the brunt of the financial obligations under the Convention can block the adoption of decisions if they find themselves outnumbered.[748] Arguably, Article 12 provides some binding force to the COP decisions taken in consequence of recommendations of the Subsidiary Body on Scientific, Technical and Technological Advice, by requiring Parties to promote and encourage research that contributes to the conservation and sustainable use of biological diversity in accordance with decisions of the COP on these matters.[749]

With the notable exception of Saliem Henne and Gudrun Fakir, who consider that "[e]very decision of the COP is a legally binding interpretation of the Convention",[750] most scholars seem to agree that COP decisions are generally not binding on Parties. It has been suggested that a clarification of this legal status could 'jeopardise the successful reliance on decisions as a means of governance'[751] as Parties would become accountable and thus more reluctant to agree to further commitments. Therefore, the question of the legal status of COP decisions cannot be limited to the dichotomy between binding and non-binding. In the absence of a clear recognition of the legally binding nature of COP decisions in the Convention's text,

[746] CBD, Article 23(3).
[747] Conference of the Parties to CBD Decision V/20 (22 June 2000), UN Doc UNEP/CBD/COP/DEC/V/20.
[748] It is noteworthy that this rule has retained its bracketed form, indicating a persisting lack of consensus among the Parties on this point.
[749] CBD, Article 12(b).
[750] Saliem Fakir and Gudrun Henne, 'The Regime Building of the Convention on Biological Diversity on the Road to Nairobi' (1999) 3 Max Planck Yearbook of United Nations Law 315, 319.
[751] Thomas Gehring, 'Treaty-Making and Treaty Evolution' in Jutta Brunnée and others (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, Oxford 2007) 467, 493.

it is unlikely that they would be enforceable.[752] However, countries do appear to recognise some legal significance to COP decisions, including in relation to the CBD's financial mechanism. COP decisions provide more flexibility to Parties than regular treaty law, while at the same time maintaining momentum on their implementation. They enable Parties to respond to new challenges and priorities within the treaty regime.

6.2. The COP and financial resources under the Convention

The CBD's financial provisions have been a consistent feature among the agenda items of COP meetings. COP decisions on financial provisions serve an interpretative, elaborative, and guiding function under the COP's overall mandate of facilitating the implementation of the Convention. Up until COP 7 in 2004, the practice had been for decisions to operate a distinction between the resources provided through the financial mechanism of Articles 20 and 21 and those provided through other means, which are generally referred to as "additional financial resources". However, since COP 10 and the adoption of the Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets,[753] the practice has shifted towards resource mobilisation under Target 20.[754] Under the Kunming-Montreal GBF, the practice will likely carry over to Target 19 on financial resources.[755] The COP now focuses its attention on general resource mobilisation for the "effective implementation of the Convention through a strategic approach".[756] These decisions are important because they are addressed to all actors that provide financial resources under the Convention, including States Parties, international financial institutions and philanthropy, the private sector, and the GEF.[757] In addition to providing guidance to these actors, the COP provides additional guidance to the GEF in separate decisions. As will be discussed in Chapter 4, this guidance is both direct and indirect in supporting the implementation of COP decisions.

Article 21(1) endows the COP with a broad mandate to oversee the financial mechanism of the Convention. This is a crucial role for the COP, who must facilitate discussions among

---

[752] Jutta Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15(1) Leiden Journal of International Law 1, 32.
[753] Conference of the Parties to CBD Decision X/2 (29 October 2010), UN Doc UNEP/CBD/COP/DEC/X/2.
[754] Ibid, Annex, Para. 13.
[755] Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4, Section H.
[756] Conference of the Parties to CBD Decision X/2 (29 October 2010), UN Doc UNEP/CBD/COP/DEC/X/2, Annex, para 1.
[757] Conference of the Parties to CBD Decision 15/7 (19 December 2022), UN Doc CBD/COP/DEC/15/7, Annex I, para 1(a).

Parties to bridge the divisions left open during the negotiations and which remained after the adoption of the Convention.[758] In particular, it is the COP's responsibility to ensure that the operating framework for the financial mechanism abides by a democratic system of governance, where decisions are taken either by consensus or by a two-thirds majority. Under this mandate, the COP has the responsibility to determine the policy, strategy, and programme priorities, as well as the criteria and guidelines for eligibility to receive funding under the financial mechanism. COP 1 clarified that only developing countries that are Parties to the Convention would be eligible to receive funding and only for projects that seek to meet the objectives of conservation of biological diversity and sustainable use of its components.[759]

Crucially, Article 21(2) also gives the COP a mandate to oversee the utilisation of financial resources. The monitoring and evaluation functions of the COP appear to be limited to the operational modalities of the financial mechanism. It allows developed countries to verify the efficient use of their contributions by the GEF, and developing countries can raise potential concerns regarding the transparency of the operational modalities of the Facility. This function is complemented by the COP's responsibility to review the effectiveness of the financial mechanism regularly.[760] This function includes reviewing the eligibility criteria and guidelines for funding. It gives it a mandate to "take appropriate action" to improve the effectiveness of the mechanism. This lack of clear delineation of the powers of the COP gives the Parties considerable elbowroom to expand or reduce the scope and operational modalities of the GEF.

The MoU signed between the Conference of the Parties to the CBD and the Council of the GEF regarding the institutional structure operating the financial mechanism of the Convention[761] clarified the relationship between the COP and the Council to give effect to the provisions of Article 21(1) and Paragraph 26 of the GEF Instrument.[762] It reiterates the role of the COP under CBD Article 21, whereby the COP determines the policy, strategy, programme priorities, and eligibility criteria for access to and utilisation of financial resources available through the financial mechanism, including monitoring and evaluation of such utilisation on a regular basis. The GEF operates the financial mechanism under the Convention and finances activities that are in "full conformity" with the guidance provided by the COP. For this purpose,

[758] Fiona McConnell, *The Biodiversity Convention – A Negotiating History* (Kluwer Law International 1996).
[759] Conference of the Parties to CBD Decision I/9 (28 February 1995), UN Doc UNEP/CBD/COP/DEC/I/2, Annex 1.
[760] CBD, Article 21(3).
[761] Conference of the Parties to CBD Decision III/8 (11 February 1997), UN Doc UNEP/CBD/COP/DEC/III/8, Annex.
[762] Ibid, para 1.1.

the COP communicates its guidance and any revisions to it.[763] Under the MoU, the GEF Council agrees to communicate to the COP all relevant information[764] and to submit reports on how the GEF Council, its Secretariat, and its Implementing and Executing Agencies have applied the guidance provided by the COP.[765] This is a key commitment as it forms the basis for the monitoring and evaluation function of the COP. Through these reports, the COP can verify whether its guidance has been incorporated into the GEF's operational strategy and programmes. At COP 14, the Parties invited the GEF to provide information on how it is considering the Convention's voluntary guidelines on safeguards in biodiversity financing mechanisms.[766] The COP can also verify whether the GEF's work programmes conform with its guidance and review the financial report on how financial resources are allocated to projects. In 2006, following concerns regarding the impact of the (then) Resource Allocation Framework (RAF) on developing countries,[767] the COP requested the GEF to conduct an impact assessment of how the resource allocation strategy would likely affect funding available to developing countries and countries with economies in transition for the implementation of their commitments under the Convention.[768]

The COP periodically reviews the effectiveness of the financial mechanism in implementing the Convention and communicates decisions to improve its effectiveness in assisting developing countries [769] Ahead of the next replenishment cycle, and in accordance with Articles 20(2) and 21(1), the COP assesses the amount of resources needed and endorses ToRs to that effect.

6.3. Could the COP help determine the contributions of developed country Parties?

The functions of the COP listed under Article 23 are primarily procedural and are aimed at facilitating the implementation of the Convention. Among these procedural functions are

---

[763] Ibid, para 2.1. The COP guidance covers the following matters : (a) Policy and strategy; (b) Programme priorities; (c) Eligibility criteria; (d) An indicative list of incremental costs; (e) A list of developed country Parties and other Parties that voluntarily assume the obligations of developed country Parties; (f) Any other matter relating to Article 21, including periodic determination of the amount of resources needed as detailed in paragraph 5 of this Memorandum.

[764] Ibid, para 2.2.

[765] Ibid, para. 3.

[766] Conference of the Parties to CBD Decision 14/23 (30 November 2018), UN Doc CBD/COP/DEC/14/23, para 3.

[767] Glenn M. Wiser, 'Legal Analysis of the GEF Resource Allocation Framework' (CIEL, 2007).

[768] Conference of the Parties to CBD Decision VIII/18 (5 June 2006), UN Doc UNEP/CBD/COP/DEC/VIII/18, para 2(b).

[769] Conference of the Parties to CBD Decision III/8 (11 February 1997), UN Doc UNEP/CBD/COP/DEC/III/8, Annex, para 4.3.

inter alia the adoption of Rules of Procedures for the Meeting of the COPs,[770] the preparation of guidance for the submission of reports by the Parties,[771] the review of scientific information,[772] the creation of subsidiary bodies,[773] and the co-operation with other biodiversity-related conventions.[774] The financial provisions of Articles 20 and 21 place great emphasis on the procedural functions of the COP.

First, the COP is tasked with establishing a list of developed country Parties and other Parties that voluntarily assume the obligations of the developed country Parties, *i.e., providing* new and additional financial resources to developing country Parties.[775] This is a fundamental first step in the allocation of responsibilities among Parties, especially considering that the obligation of developing countries to comply with their obligations under the Convention is largely conditional upon developed countries meeting their obligation to provide new and additional resources. This list can be reviewed and regularly updated by the Parties within the COP.[776]

Second, it is responsible for establishing an indicative list of full incremental costs that are agreed upon between a developing country Party and the financial mechanism of Article 21. Linked to this is the responsibility for determining the policy, strategy, programme priorities, and eligibility criteria for the allocation of funding under the financial mechanism.[777] Every four years, the GEF replenishment cycle coincides with the adoption by the COP of the Terms of Reference (ToRs) for a full assessment of the amount of funds needed for the implementation of the convention and its protocols.[778] This assessment is carried out on the basis of Article 20(2), which provides that the full incremental costs of implementing measures to fulfil the obligations of the Convention are agreed upon between a developing country Party and the GEF, and Article 21(1), which requires the flow of contributions to the GEF from developed countries to be predictable, adequate and timely. Currently, however, the role of the COP falls short of determining the amount of financial resources to be disbursed by developed country Parties. Upon ratification of the Convention, most developed country Parties stated

---

[770] CBD, Article 23(1). The Rules of Procedure are contained in the Annex to Conference of the Parties to CBD Decision I/1 (28 February 1995), UN Doc UNEP/CBD/COP/DEC/I/1 and Conference of the Parties to CBD Decision V/20 (22 June 2000), UN Doc UNEP/CBD/COP/DEC/V/20.
[771] CBD, Article 23(4)(a).
[772] Ibid, Article 23(4)(b).
[773] Ibid, Article 23(4)(g).
[774] Ibid, Article 23(4)(h).
[775] Ibid, Article 20(2).
[776] Ibid, Article 20(2).
[777] Ibid, Article 20(2).
[778] Conference of the Parties to CBD Decision 14/23 (30 November 2018), UN Doc CBD/COP/DEC/14/23, Annex.

their understanding that the decision to be taken by the COP under Article 21(1) refers to the "amount of resources needed" by the financial mechanism, not to the extent or nature and form of the contributions of the Contracting Parties.[779] It is very unlikely that developed country Parties will withdraw their declaration. As such, it will not be within the COP's functions to help determine the contributions of developed country Parties for the foreseeable future.

6.4. Could the COP initiate a revision of the GEF's founding instrument?

In accordance with the CBD, the GEF acts under the supervision of the COP. However, the GEF is not a body created specifically by the Convention for channelling CBD-related resources. The creation of the GEF predates the adoption of the CBD, and it operates within the confines of its founding instrument and the 1997 MoU between the CBD COP and the GEF Council.[780] The GEF Assembly approves amendments to the GEF instrument on the basis of recommendations by the Council and by consensus.[781] The Assembly regularly approves such amendments, having done so at the Second, Third, Fourth, and Sixth Assemblies.[782] New amendments were also adopted at the Seventh GEF Assembly in 2023.[783] Such amendments may be made following recommendations from the GEF's Independent Evaluation Office[784] and the creation of an Ad Hoc Working Group on Governance.[785] These changes allow the Instrument to keep up to date with new developments, such as the incorporation of the Sustainable Development Goals, but also reflect deeper governance changes. The latest amendment includes the creation of a self-standing paragraph 22 in the Instrument that relates to the Independent Evaluation Office to underline its independence.[786] Amendments are then adopted by the implementing agencies in accordance with their own rules and procedural requirements.[787] The instrument does not foresee a role for the Secretariats of the Conventions

[779] CBD Secretariat, 'CBD Handbook' (3rd edn, 2005), Declarations. Supported by Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Italy, Japan, Malta, Netherlands, New Zealand, Portugal, Spain, Switzerland, the United Kingdom, and the United States.
[780] Conference of the Parties to CBD Decision III/8 (11 February 1997), UN Doc UNEP/CBD/COP/DEC/III/8, Annex.
[781] GEF, 'Instrument for the Establishment of the Restructured Global Environment Facility' (2019), para 14(d).
[782] Ibid, Introduction.
[783] GEF, 'Amendments to Instrument for the Establishment of a Restructured Global Environment Facility' (GEF/A.7/08, 24 August 2023).
[784] GEF, 'Amendments to the Instrument for the Establishment of the Restructured Global Environment Facility' (GEF/C.63/11, 4 November 2022) para 1.
[785] GEF, 'Report of the ad hoc Working Group on Governance' (GEF/C.62/09/Rev.01, 20 June 2022) para 22.
[786] GEF, 'Amendments to Instrument for the Establishment of a Restructured Global Environment Facility' (GEF/A.7/08, 24 August 2023).
[787] GEF, 'Instrument for the Establishment of the Restructured Global Environment Facility' (2019) para 1.

for which it acts as a financial mechanism. However, the CBD COP could, in theory, raise matters with the GEF Secretariat through its regular guidance on the financial mechanism. Unlike the CBD negotiations that saw Parties make declarations against the COP determining the amount of their contributions, GEF participants have not made similar reservations to the GEF Instrument. However, amendments are submitted by the GEF Council in which donor countries have the upper hand. It is unlikely that they would support such an amendment.

6.5. The most likely scenario: a soft alignment with the climate change regime

The evolution of CBDR in the climate change regime offers some valuable insights to advance the discussion. In the UNFCCC regime, differentiation between the parties is based on the principle of common but differentiated responsibilities and respective capabilities (CBDRRC). This has been described as positive discrimination in favour of developing countries[788], which, similar to the CBD regime, creates a system of "bifurcated" obligations and processes for financial assistance and technology transfers. The traditional binary approach to differentiation based on economic and social development, as established by the UNFCCC[789] and the Kyoto Protocol, has seen a dramatic shift in the wake of the Paris Agreement. The rigid and static dichotomy of obligations between Annex I (developed) countries and non-Annex I (developing) countries entails economic costs for developed countries that are politically sensitive, as it exempts competitors such as China, India, and Brazil from financial obligations.[790] This is one of the reasons cited to explain why the United States did not ratify the Kyoto Protocol,[791] and it may explain why States failed to reach an agreement in Copenhagen.[792] To put an end to the stalemate, negotiating Parties to the Paris Agreement have had to devise new ways of attracting universal participation[793] that would be in keeping with

[788] Christina Voigt and Felipe Ferreira, ''Dynamic Differentiation': The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) 5(2) Transnational Environmental Law 285, 289.
[789] UNFCCC, Preamble and Articles 3(1), 4(1), and 4(2).
[790] Jorge E. Viñuales, 'Balancing Effectiveness and Fairness in the Redesign of the Climate Change Regime' (2011) 24(1), Leiden Journal of International Law 223, 228.
[791] Sandrine Maljean-Dubois, 'Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime' (2016) 25(2) Review of European, Comparative & International Environmental Law 151.
[792] Lavanya Rajamani, 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law' (2012) 88(3) International Affairs (London) 605, 615; Christina Voigt and Felipe Ferreira, ''Dynamic Differentiation': The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) 5(2) Transnational Environmental Law 285, 291.
[793] Ibid, Christina Voigt and Felipe Ferreira (2016) 291.

the regime's roots in the principles of equity and effectiveness, while at the same time creating mechanisms to enhance flexibility and dynamism.[794]

The decision in Lima[795] to introduce the qualifier "in light of different national circumstances" allowed to break of the gridlock between China and the US and the introduction of "modulators" in the Paris Agreement, which broadened the parameters for differentiation. The criteria used for differentiation now include financial and technical capabilities, human capacity, population size and other demographic criteria, abatement costs, opportunity costs, and skills. [796] Such an approach allows for a more accurate and dynamic reflection of the diversity among States, which acknowledges the Parties' constantly changing responsibilities alongside their social and economic circumstances.[797] It has been welcomed as a major step forward in the climate change regime.[798]

Importantly, the Paris Agreement breaks away from the UNFCCC's articulation of financial obligations around the notion that developing countries' actions are dependent on developed countries meeting their obligations in relation to international cooperation and financial assistance.[799] The differentiation is still clearly present in the Paris Agreement, as evidenced by the requirement that developed country Parties provide financial resources to assist developing country Parties with respect to both mitigation and adaptation,[800] while other Parties are simply encouraged to provide or continue to provide such support voluntarily.[801] Christina Voigt and Felipe Ferrera argue that Article 4.3 of the Paris Agreement establishes a "standard of conduct – or duty of care – to strive to attain its highest possible ambition in a manner that reflects its common responsibilities, respective capabilities, and national circumstances. It is reminiscent of a due diligence standard that requires governments to act in proportion to the risk at stake and to their individual capacity."[802] However, in practice many Nationally Determined Contributions (NDCs) – the national climate pledges that UNFCCC

---

[794] Sandrine Maljean-Dubois, 'Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime' (2016) 25(2) Review of European, Comparative & International Environmental Law 151, 152.
[795] Conference of the Parties to UNFCCC Decision 1/CP.20 (2 February 2015) UN Doc FCCC/CP/2014/10/Add.1.
[796] Christina Voigt and Felipe Ferreira, ''Dynamic Differentiation': The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) 5(2) Transnational Environmental Law 285, 293.
[797] Christina Voigt and Felipe Ferreira, 'Differentiation in the Paris Agreement' (2016) 6(1-2) Climate Law 58, 66.
[798] Sandrine Maljean-Dubois, 'Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime' (2016) 25(2) Review of European, Comparative & International Environmental Law 151, 155.
[799] UNFCCC, Article 4(7).
[800] Paris Agreement, Article 9(1).
[801] Ibid, Article 9(2).
[802] Christina Voigt and Felipe Ferreira, 'Differentiation in the Paris Agreement' (2016) 6(1-2) Climate Law 58, 72.

Parties are required to submit to lay out how they will contribute to reducing greenhouse gas (GHG) emissions and adapting to impacts – outline national targets that are dependent on external financial support.[803]

The CBD COP has been active in engaging with climate change-related developments, incorporating them into the CBD's agenda, supporting the development of technical initiatives to advance knowledge around the interconnections between biodiversity and climate change,[804] and enhancing coordination among secretariats. However, there are two main considerations to explore.

First, unlike the UNFCCC, the CBD does not spell out the CBDR principle in its Preamble or in its main text. As such, the introduction of a modulator such as "in light of national circumstances" would require extensive rewording of Articles 20 and 21. The revision could also remove the qualifier that developing Parties' implementation of the Convention depends on developed Parties' provision of financial resources.

Second, the introduction of new language under the climate regime was the outcome of negotiations for developing a new agreement. In the CBD context, this issue may be raised during the negotiation of a future legally binding instrument under the Convention. Alternatively, Parties could propose an amendment to Articles 20 and 21 for discussion at the COP in accordance with the procedure laid out in Article 29. While the preference is to reach consensus on a proposed amendment, if none can be found, it may be adopted by a two-thirds majority vote.[805] Such an amendment of the financial provisions would not solve the antagonism between the legal obligation to provide financial resources and the voluntary nature of ODA channels. However, it would soften the distinction between developed and developing countries, which could have the effect of mobilising additional resources for the implementation of the convention. It would also be more aligned with the commitments made under the Paris Declaration on Aid Effectiveness.

7. Conclusions

This study of the CBD's financial provisions allows us to draw several conclusions. First, the obligation to provide new and additional financial resources is an obligation derived

[803] Sandra Greiner and others, 'NDC Conditionality and Article 6 - An Analysis of African Countries' Updated NDCs' (Climate Finance Innovators, 2021).
[804] See Conference of the Parties to CBD Decision IX/16 (9 October 2008), UN Doc UNEP/CBD/COP/DEC/IX/16, Section B, para 12(b).
[805] CBD, Article 29(3).

from the duty to cooperate, which entails a general obligation for economically advanced countries to provide compliance assistance in the form of financial resources to secure a common goal, in this case the conservation and sustainable use of biological diversity. In addition, the ongoing normative work by human rights monitoring bodies on the right to development[806] and international solidarity[807] builds linkages with MEAs and promotes an understanding of the duty to cooperate that incorporates human rights.[808]

Second, the obligation of developed country Parties to provide new and additional financial obligations is a hard obligation, rooted in general international law. These Parties have to perform this obligation in good faith and in a timely, predictable, and adequate manner. Whilst these parameters were made deliberately flexible at the time of drafting the Convention, the evidence is clear that overall, the funding mechanism of the CBD requires more resources to fulfil the objectives of the Convention. Aid providers that are Parties to the CBD should consider their obligation to provide new and additional resources as a binding obligation, not as an altruistic gesture towards developing country Parties. This is reinforced by the recent work undertaken by the ILC on general principles of law, which provides some welcome new clarity with regards to the legal nature of the principle of common but differentiated responsibilities.[809] The application in this Chapter of the criteria retained by the ILC for the identification of general principles of law suggests that the principle of common but differentiated responsibilities is a source of international law that generates rights and obligations for States. This clarification further establishes the obligation to provide new and additional financial resources under the CBD as a hard, legally binding obligation.

Third, this obligation is currently not supported by an obligation to provide a minimum amount of resources to the GEF. This paradox blunts the strength of the obligation in practice.

Fourth, the CBD COP in its facilitative and oversight functions can steer Parties towards a more flexible approach to the mobilisation of financial resources. The Paris Agreement provides a useful case study to learn from, with the introduction of new parameters for determining the financial obligations of Parties, which move away from the dichotomy

[806] HRC, 'The right to development' (2018) UN Doc A/HRC/RES/39/9, para 17 (e) and (f).
[807] HRC, 'Report of the Independent Expert on human rights and international solidarity' (2017) UN Doc A/HRC/35/35.
[808] Nico Schrijver, 'A New Convention on the Human Right to Development: Putting the Cart Before the Horse?' (2020) 38(2) Netherlands Quarterly of Human Rights 84, 92. However, as he points out, efforts may be better focussed on embedding and integrating them into existing human rights treaties, which could be done by asking States to address them in their periodic State reports to allow monitoring bodies to oversee their implementation within the scope of their respective mandates.
[809] ILC, 'Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (2020) UN Doc A/CN.4/741.

between developed and developing countries.[810] While it still relies on self-determination, it provides a new pathway for equitable effort sharing,[811] which accounts for the Parties' ever evolving social and economic circumstances and changing responsibilities. While under the CBD, developed country Parties still carry the brunt of the responsibility for providing the funding mechanism with adequate resources, developing country Parties still have the obligation to mobilise resources domestically.[812] The developments in the interpretation of States' obligations in the climate regime show that a more flexible approach is possible and more closely aligned with the cooperation efforts under the OECD's Paris Declaration on Aid Effectiveness. It remains to be seen whether these developments can be emulated under the CBD regime. This is certainly an avenue that the COP could explore to facilitate the implementation of the Convention.

[810] Paris Agreement, Article 2(2).
[811] Christina Voigt and Felipe Ferreira, ''Dynamic Differentiation': The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) 5(2) Transnational Environmental Law 285, 295.
[812] CBD, Article 20(1).

Chapter 4. The human rights obligations of States in biodiversity-related ODA

"Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms…"

The Universal Declaration of Human Rights, Preamble

1. Introduction

Over the years, the CBD COP has been instrumental in ensuring that biodiversity-related human rights are better identified, recognised, protected and fulfilled by States Parties in relation to the sustainable use of biological resources,[813] free, prior and informed consent,[814] impact assessments,[815] and biodiversity financing mechanisms.[816] The adoption of the new Kunming-Montreal GBF crystallises some of these developments and provides some very welcome commitments in the context of resource mobilisation.

The relationship between biodiversity and IHRL has been the object of much development and consolidation in recent years.[817] The understanding that the full enjoyment of human rights, including the rights to life, health, food and water depends on biodiversity, and that the degradation and loss of biodiversity undermine the ability of people to enjoy their

---

[813] Secretariat of the Convention on Biological Diversity, 'Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity' (2004), [hereinafter "Addis Ababa Principles and Guidelines"], Principle 12.
[814] Mo'otz Kuxtal Voluntary Guidelines.
[815] Akwé: Kon guidelines.
[816] Conference of the Parties to CBD Decision XII/3 (17 October 2014), UN Doc UNEP/CBD/COP/DEC/XII/3, Annex III.
[817] See Elisa Morgera, 'Dawn of a New Day? The Evolving Relationship Between the Convention on Biological Diversity and International Human Rights Law' (2018) 53(4) *Wake Forest Law Review,* 691*;* United Nations Human Rights Committee (HRC), 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2017) UN Doc. A/HRC/34/49; HRC, 'Right to a healthy environment: good practices, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd' (2019) UN Doc A/HRC/43/53.

human rights[818] has broken the bounds of scholarship and now finds strong support in national legal frameworks.[819] On the one hand, IHRL provides a useful framework for delineating the contours of State discretion in relation to the implementation of the CBD. In particular, IHRL provides a baseline for understanding the minimum substantive and procedural human rights obligations of States and GEF implementing agencies in relation to the implementation of the CBD. On the other hand, CBD COP decisions provide practical guidance on how to implement human rights standards in national processes.[820]

The question of how this relationship trickles down into the delivery of biodiversity-related financial assistance, is only just emerging. Whilst the extraterritorial obligations of States in relation to the realisation of human rights have been studied extensively, the question of the human rights responsibility of international organisations in the implementation and monitoring of development projects has only recently been brought to light, primarily through the works of UN special rapporteurs. These works have confirmed the responsibility of non-State providers of development assistance to protect and respect human rights in the implementation of projects. This Chapter contends that the implementing agencies that make up the GEF partnership also have the responsibility to fulfil human rights in the delivery of development assistance derived from their Member States' human rights obligations and general international law. The commitment of Parties to apply a human rights-based approach to the implementation of the Kunming-Montreal GBF confirms this responsibility and provides a unique opportunity to consider what this means in practice.

Part 2 of this Chapter delves into the nature of the human rights obligations of States in relation to the conservation and sustainable use of biodiversity. It examines the treaty-based human rights obligations of States in relation to financial assistance and shows that donor States have the obligation to take steps – to the maximum of their available resources – to achieve the realisation of economic, social and cultural rights in other States. The recognition of the human right to a healthy environment by the UN General Assembly crystallises the interdependence between the conservation and sustainable use of the environment, and the protection and realisation of human rights. Importantly, this recognition provides an unequivocal obligation

---

[818] Ibid, HRC (2017) para. 5; and HRC, 'Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox' (2013) UN Doc A/HRC/25/53, paras 17-25.

[819] HRC, 'Right to a healthy environment: good practices, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd' (2019) UN Doc A/HRC/43/53, Annex II.

[820] Elisa Morgera, 'Dawn of a New Day? The Evolving Relationship Between the Convention on Biological Diversity and International Human Rights Law' (2018) 53(4) Wake Forest Law Review 691.

for States to achieve the progressive realisation of biodiversity-related human rights, including through financial assistance. Part 3 considers the human rights responsibility of the GEF and its implementing agencies. It shows that this responsibility includes a duty to respect, protect and fulfil biodiversity-related human rights. Finally, Part 4 contextualises the obligation of CBD States Parties and the responsibility of GEF implementing agencies to respect, protect and fulfil the human rights of Indigenous peoples and local communities, women, children, persons with disabilities and human rights defenders.

2. Human rights obligation to cooperate for the realisation of the right to a clean, healthy and sustainable environment

As was discussed in Chapter 2, while most DAC members who provide biodiversity-related ODA operate within the parameters set by domestic human rights agenda, the practice of ensuring that financial assistance is delivered in accordance with human rights isn't standard across all donors. This Part posits that CBD Parties have a clear legally binding obligation to provide financial assistance for the realisation of the human right to a clean, healthy and sustainable environment, which is derived from human rights treaty provisions and general international law. Section 2.1. examines the biodiversity-related substantive and procedural human rights obligations of States. Section 2.2. then turns to their obligations to cooperate for the realisation of the human right to a clean, healthy and sustainable environment.

2.1.Substantive and procedural human rights obligations related to biodiversity

Scholarship has made a considerable contribution to our understanding of the relationship of interdependence between biodiversity and human rights.[821] In particular, this relationship generates substantive and procedural human rights obligations for States in relation to the conservation and sustainable use of biological diversity. It has led to the recognition by the UN General Assembly of the human right to a clean, healthy and sustainable environment. Conceptually, this human right encapsulates both substantive and procedural

[821] Elisa Morgera and others, 'The 2010 Nagoya Protocol on Access and Benefit-Sharing in Perspective: Implications for International Law and Implementation Challenges' (Legal Studies on Access and Benefit-Sharing; v. 1) (Martinus Nijhoff 2013); Elisa Morgera, 'Dawn of a New Day? The Evolving Relationship Between the Convention on Biological Diversity and International Human Rights Law' (2018) 53(4) Wake Forest Law Review 691; Claudia Ituarte-Lima and others, 'Incorporating International Biodiversity Law Principles and Rights Perspective into the European Union Timber Regulation' (2019) 19(3) International Environmental Agreements: Politics, Law and Economics 255.

human rights obligations in the conservation and sustainable use of biodiversity.[822] In particular, it entails three procedural obligations, namely: (a) the duty to assess impacts and make environmental information public; (b) the duty to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) the duty to provide access to remedies for harm.[823] These obligations derive from civil and political rights whose interpretation has been expanded to the environmental context to address the risks posed by environmental threats to human rights.

It also entails several substantive obligations, derived from the body of general international law and international instruments of a universal or quasi-universal character.[824] Importantly, the human rights obligations of a State towards the international community as a whole are obligations *erga omnes*. As such, all States have a legal interest in their protection.[825] The substantive obligations include: a) the obligation to adopt legal and institutional frameworks that effectively protect against environmental harm that interferes with the enjoyment of human rights;[826] b) the duty to protect places or components of biodiversity that are especially necessary for the enjoyment of rights of the members of particular communities, including the vulnerable communities;[827] c) the duty to cooperate with other States in accordance with Articles 55 and 56 of the UN Charter and Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);[828] d) the duty to follow the steps identified under the CBD to protect the human rights dependent upon biodiversity;[829] and e) a duty to act in accordance with IHRL.[830]

---

[822] United Nations Human Rights Committee (HRC), 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2017) UN Doc A/HRC/34/49.
[823] Ibid, para 27.
[824] Ibid, para 34.
[825] *Barcelona Traction, Light & Power Company, Ltd*, 1970 I.C.J. 4, at para 33. Speaking in relation to the obligations derived from international humanitarian law, the ICJ reminded the parties that "All the States parties "have a legal interest" in the protection of the rights involved […]. These obligations may be defined as "obligations *erga omnes partes*" in the sense that each State party has an interest in compliance with them in any given case." *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal),* Judgment, I.C.J. Reports 2012, 422, para 68.
[826] United Nations Human Rights Committee (HRC), 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2017) UN Doc. A/HRC/34/49, para 33.
[827] Ibid, para 35.
[828] Ibid, para 36.
[829] Ibid, para 39.
[830] Ibid, para 49-64.

The International Covenant on Civil and Political Rights (ICCPR)[831] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[832] both preclude State Parties from engaging in any activity or perform any act that could result in the destruction or limitation of any of the rights and freedoms recognized by their provisions. This special status of human rights means that in the context of sustainable development, economic or environmental goals should not be pursued at the expense of human rights. Importantly, even in time of public emergency which threatens the life of the nation, States Parties to the ICCPR cannot derogate from their obligation to protect the right to life.[833]

In its General comment No. 6, the Human Rights Committee supports a broader interpretation of the right to life, noting that it cannot properly be understood in a restrictive manner, and that the protection of this right requires that States adopt positive measures.[834] In particular the Committee favours an interpretation that would include broader development goals such as the adoption of measures to eliminate malnutrition and epidemics.[835] On this point, there is fresh evidence that reducing anthropogenic global environmental change may reduce the risk of pandemics.[836] The majority of pandemics and emerging infectious diseases are attributable to pathogens originating from wildlife. As a result, regions characterised by high levels of wildlife diversity, which are vital for the conservation of biodiversity, are potential foyers for outbreaks.[837] In addition, 16 out of the world's 36 biodiversity hotspots are located in areas where the human population faces malnutrition and hunger,[838] which puts pressure on biodiversity as a source of food. In the context of aquatic ecosystems, the overharvesting of fish and other marine species poses a considerable risk to both biodiversity and the long-term sustainability of fisheries and their ability to feed human populations.[839]

Arguably, in this context a broader interpretation of the right to life requires States to take into account the drivers, detection and prevention of disease[840] and malnutrition. As such,

---

[831] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, [hereinafter "ICCPR"], Article 5.
[832] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, [hereinafter "CESCR"], Article 5.
[833] ICCPR, Article 4(1).
[834] HRC, *General Comment No.6: Article 6 (right to Life)* (1982) UN Doc HRI/GEN/1/Rev.9 (Vol. I), para 5.
[835] Ibid.
[836] IPBES, 'Workshop Report on Biodiversity and Pandemics of the Intergovernmental Platform on Biodiversity and Ecosystem Services' (IPBES Secretariat, 2020) 2.
[837] Ibid, 9.
[838] Julie Bélanger and Dafydd Pilling (eds) 'The State of the World's Biodiversity for Food and Agriculture' (FAO Commission on Genetic Resources for Food and Agriculture Assessments, 2019) 3.
[839] Ibid.
[840] World Health Organization and Secretariat of the Convention on Biological Diversity, 'Biodiversity and Human Health - A State of Knowledge Review' (World Health Organization, 2015) 41.

for States Parties to meet their obligation to protect the right to life they must take measures for the conservation and sustainable use biodiversity.

2.2. The obligation to cooperate under Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

The recognition of a human right to a clean, healthy and sustainable environment crystallises the relationship that exists between MEAs and the substantive and procedural human rights obligations under IHRL.[841] The right to a clean, healthy and sustainable environment entails an obligation for States to cooperate in accordance with Articles 55 and 56 of the UN Charter and Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Having already discussed the implications of Articles 55 and 56 of the UN Charter for CBD developed Parties in Chapter 3, this Section considers the implications of Article 2 of the ICESCR on these Parties.

The primary legal basis for the realisation of human rights through financial assistance can be found in Article 2(1) of the ICESCR. It provides that "[e]ach State Party to the […] Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the […] Covenant by all appropriate means, including particularly the adoption of legislative measures." This Article was the first of the core human rights instruments to establish a legal obligation for parties to achieve human rights through financial assistance. This obligation was subsequently recalled in the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,[842] and is a key feature in the protection of the rights of the child.[843] The Convention on the Rights of Persons with Disabilities also contains a provision that reminds States Parties of their general obligation to provide financial assistance to achieve the full realisation of economic, social and cultural rights for all persons with disabilities.[844]

---

[841] UNGA, 'The Human Right to a Clean, Healthy and Sustainable Environment' (2022) UN Doc A/76/L.75, paras 2–3.
[842] Ibid, Preamble.
[843] Convention on the Rights of the Child, Article 4; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222, Article 7; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227, Article 10.
[844] Convention on the Rights of Persons with Disabilities, Article 4(2).

The ILC's Draft Articles on State Responsibility[845] provide a useful framework against which to examine the nature of the obligations contained in Article 2(1) of the ICESCR. When broken down, this article contains two primary obligations of results:

1. the individual obligation of States parties to take steps at the national level to achieve economic, social and cultural rights;
2. the collective obligation to take steps to achieve economic, social and cultural rights through, *inter alia*, economic assistance and cooperation.

Obligations of results may be open ended, such as to allow States Parties the flexibility to determine the kind of measures that are most appropriate.[846] According to the ILC, the way to assess compliance by a State Party with an obligation of result is to compare the result required by the international obligation with the result finally attained in practice through the course or courses of conduct adopted by the State.[847] If the two coincide, the obligation has been fulfilled, if not the obligation has been breached. In the case of Article 2(1), the result required by the ICESCR is the full realisation of the economic, social and cultural rights contained in the Covenant. To achieve this result, States Parties must take steps, and these steps include the provision of financial assistance.

These two obligations of result are supported by a third obligation, an obligation of means. Indeed, the Covenant provides guidance to States Parties on how to achieve their obligations of result. In the language of the ILC, these are "specifically determined means" through which states parties are required to achieve their obligations of result. In particular, States Parties are required to take steps "to the maximum of [their] available resources". To determine compliance with an obligation of means, the conduct of States Parties must be assessed against the actions specifically required by this obligation.[848] Any disputes linked to the interpretation of what constitutes "maximum of its available resources" may be settled by international law tribunals.[849]

The scope and content of these obligations have been the object of separate General Comments by the Committee on Economic, Social and Cultural Rights (CESCR), established under United Nations Economic and Social Council (ECOSOC) Resolution 1985/17 to carry

[845] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) UN Doc A/56/10, chp IV.E.1.
[846] Ibid, 141.
[847] Ibid, 144.
[848] Ibid, 134.
[849] Ibid.

out the monitoring functions assigned to ECOSOC in Part IV of the Covenant.[850] These functions include the review of national reports submitted by the parties on the measures which they have adopted and the progress made in achieving the observance of the rights.[851] The reports are shared with specialised agencies.[852] On the basis of the guidance issued by the Committee, the most economically advanced States Parties have an obligation to take steps, to the maximum of their available resource and in a non-retrogressive manner, to achieve the realisation of economic, social and cultural rights. The next Subsections examine the scope of this obligation.

2.2.1. Obligation to take steps

While Article 2(1) acknowledges that the realisation of economic, social and cultural rights may be achieved progressively, steps towards that goal must be taken "within a reasonably short time" after the Covenant's entry into force for the States concerned. The Committee clarified that such steps should be "deliberate, concrete and targeted as clearly as possible".[853] Acceptable measures may be of a legislative,[854] administrative, financial, educational and/or social nature,[855] but the Committee also acknowledges the provision of judicial remedies as an important contributor to the realisation of human rights.[856] In the context of the rights of persons with disabilities, it also includes allocating funding to ensure consultations with organizations of persons with disabilities, to guarantee their involvement in decision-making processes.[857] This entails an obligation for States Parties to establish financial mechanisms such as trust funds at the national and international levels to ensure appropriate funding for organisations of persons with disabilities.[858]

[850] United Nations Economic and Social Council (ECOSOC), 'Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (28 May 1985) UN Doc E/RES/1985/17.
[851] CESCR, Article 16.
[852] Ibid, Article 17.
[853] Committee on Economic, Social and Cultural Rights (ESCR Committee), *General Comment No.3: The Nature of States Parties' Obligations (Art.2, Para. 1, of the Covenant)* (14 December 1990) UN Doc E/1991/23, para 2.
[854] Ibid, 3.
[855] Ibid, para 7.
[856] Ibid, para 5.
[857] Committee on the Rights of Persons with Disabilities (CRPD), *General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention* (9 November 2018) UN Doc CRPD/C/GC/7, para 9.
[858] Ibid, para 63.

In addition, the CESCR regularly reminds States Parties of their obligation to respect, protect and fulfil human rights in its General Recommendations.[859] Speaking in the context of Article 14 on the right to the highest attainable standard of health, the CESCR clarified that all human rights, impose three types or levels of obligations on States Parties. These are these obligations to respect, protect and fulfil. The obligation to respect contains obligations to facilitate, provide and promote. The obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right. The obligation to protect requires States to take measures that prevent third parties from interfering with the guarantees contained in the Covenant. Finally, the obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realisation of the right.[860]

This is also supported in Communication No 155/96 by the African Commission on Human and Peoples' Rights which fleshes out the scope and content of the obligation to respect, protect and fulfil human rights. According to the Commission, the obligation to respect entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect rights-holders, their freedoms, autonomy, resources, and liberty of their action.[861] The obligation to promote includes making sure that that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.[862] Finally, the Commission clarified that the obligation to fulfil entails an obligation to fulfil the rights and freedoms the States committed to under the various human rights regimes. It is a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights.[863] In order to comply with the obligation to achieve the progressive realisation of economic, social and cultural rights, States Parties are required to monitor the realisation of these rights and to take the appropriate national legislative measures, administrative rules and procedures and practices in an effort to ensure the fullest possible conformity with the Covenant.[864]

---

[859] See for example CESCR, 'General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (10 August 2017) UN Doc E/C.12/GC/24, paras 10-24; CESCR, 'General comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights)' (30 April 2020) UN Doc E/C.12/GC/25, paras 41-47.
[860] ESCR Committee, *General Comment No.14: The Right to the Highest Attainable Standard of Health (Art. 12)* (11 August 2000) UN Doc E/C.12/2000/4, para 33.
[861] The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, Communication No 155/96 [2001] AfrHRLR Rep 60, 45.
[862] Ibid, at 46.
[863] Ibid, at 47.
[864] ESCR Committee, *General Comment No. 1: Reporting by States Parties*, (27 July 1981) UN Doc E/1989/22.

2.2.2. Obligation to take steps to the maximum of its available resources

The CESCR clarified that the reference "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance. Article 23 also specifically identifies "the furnishing of technical assistance" as well as other activities, as being among the means of "international action for the achievement of the rights".[865] States have limited discretion in this regard as any deliberately retrogressive measure must be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[866] The Committee on the Rights of the Child stretched its guidance, specifying that the obligation of States Parties to undertake measures to the maximum extent of their available resources means that they are expected to demonstrate that they have made "every effort to mobilize, allocate and spend budget resources to fulfil the economic, social and cultural rights of all children."[867]

2.2.3. Non retrogression

In General Comment No. 14 on the Right to the Highest Attainable Standard of Health the CESCR stated that "there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible."[868] Furthermore, if any deliberately retrogressive measures are taken, the State Party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State Party's maximum available resources.[869] The Committee on the Rights of the Child also takes the view that the obligation imposed on States Parties by article 4 to realise children's economic, social and cultural rights "to the maximum extent" also means that they should not take deliberate retrogressive measures in relation to economic, social and cultural

---

[865] Ibid, para 13.

[866] ESCR Committee, *General Comment No.3: The Nature of States Parties' Obligations (Art.2, Para. 1, of the Covenant)* (14 December 1990) UN Doc E/1991/23, para 9.

[867] CRC Committee, *General comment No. 19 (2016) on public budgeting for the realization of children's rights (art. 4)* (20 July 2016), UN Doc CRC/C/GC/19, para 30.

[868] ESCR Committee, *General Comment No.14: The Right to the Highest Attainable Standard of Health (Art. 12)* (11 August 2000) UN Doc E/C.12/2000/4, para 32.

[869] Ibid.

rights.[870] Importantly, this obligation is tied to the evolving situation of the rights of children, as "States parties should not allow the existing level of enjoyment of children's rights to deteriorate."[871] This suggests that States Parties have the obligation to increase their financial assistance in situations that threaten the rights of children. The recognition of a right to a clean, healthy and sustainable environment has built an important bridge between the obligations of States under human rights instruments and those under the biodiversity regime.[872] Indeed, the recognition of the interdependence between a healthy environment and the protection and achievement of human rights extends the principle of non-retrogression to the adoption of environmental standards for the enjoyment of clean, healthy and sustainable environment.[873]

Whilst General Comments and reports by Special Rapporteurs are not in themselves legally binding, they serve an important interpretative function that can clarify and expand the contours of State obligations, and influence State practice.[874] The obligation under Article 2(1) on cooperation to the maximum of a country's available resources has been discussed by the Inter-American Court on Human Rights. Citing General Recommendation No. 3, the Court acknowledges that "the progressive nature that most international instruments confer on State obligations related to economic, social, and cultural rights imposes on States, with immediate effect, the general obligation to constantly seek to attain the rights enshrined in the instruments, without any backsliding."[875] This interpretation compels States to a) take steps, including financial steps to achieve the full realisation of the rights protected by the Covenant and b) to not take regressive actions that would impede on this progressive realisation. Importantly, no state has ever made a reservation or declaration in respect of Article 2(1).

Writing in 1987 on the nature and scope of States Parties' obligations under the ICESCR, Philip Alston and Gerard Quinn noted the "inevitably contingent nature of State obligations".[876] Indeed, three decades later, the stringency of the obligation of States to provide financial

---

[870] CRC Committee, *General comment No. 19 (2016) on public budgeting for the realization of children's rights (art. 4)* (20 July 2016), UN Doc CRC/C/GC/19, para 30.
[871] Ibid.
[872] United Nations General Assembly (UNGA), 'The Human Right to a Clean, Healthy and Sustainable Environment' (2022) UN Doc A/76/L.75, paras 2-3.
[873] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2018) UN Doc A/HRC/37/59, paras 31-33.
[874] See Luigi Crema, 'The Interpretive Work of Treaty Bodies: How They Look at Evolutionary Interpretation, and How Other Courts Look at Them' in Georges Abi-Saab and others (eds), *Evolutionary Interpretation and International Law* (Hart Publishing, Oxford 2019) 77.
[875] Inter-American Commission on Human Rights (IACmHR), 'Second Report on the Situation of Human Rights in Peru' (2 June 2000) IACmHR Doc OEA/Ser.L/V/II.106/, Doc 59 rev, ch VI, para 11.
[876] Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 172.

assistance is still widely denied by developed States.[877] This is in clear departure from the position of human rights bodies who have taken the view that the human rights responsibility of international assistance and cooperation is underpinned by a legal obligation.[878] As we have seen, they trace this legal obligation back to the UN Charter, the UNDHR and binding human rights treaties, such as the ICESCR, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.[879] The UN Special rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health noted in 2008 that "if there is no legal obligation underpinning the human rights responsibility of international assistance and cooperation, inescapably all international assistance and cooperation fundamentally rests upon charity" and that "[w]hile such a position might have been tenable in years gone by, it is unacceptable in the twenty-first century".[880] This position was reaffirmed by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) who in preparation for the development of the Addis Ababa Action Agenda on financing for development stated that under "core human rights treaties, States acting individually and collectively, are obligated to mobilize and allocate the maximum available resources for the progressive realization of economic, social and cultural rights, as well as the advancement of civil and political rights and the right to development."[881] The "long-standing failure" of economically advanced States to fulfil their commitments to provide development assistance is an obstacle to the realisation of the human right to a clean, healthy and sustainable environment.[882] To meet this obligation, they should commit to achieve the targets of 0.7 percent of GNI to developing countries, and 0.15 to 0.20 per cent of GNI to least developed countries.[883]

2.3.Human rights obligations derived from *pacta sunt servanda*

[877] Sarah Joseph and Adam McBeth, *Research Handbook on International Human Rights Law* (1st edn, Edward Elgar Publishing 2010) 60. See also HRC, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, Addendum' (2008) UN Doc A/HRC/7/11/Add.2, para 132 in relation to Sweden's position on the matter.
[878] HRC, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, Addendum' (2008) UN Doc A/HRC/7/11/Add.2, para 131.
[879] Ibid.
[880] Ibid, para 133.
[881] Office for the Coordination of Humanitarian Affairs (OCHA), 'Key messages on Human Rights and Financing for Development' (Preparatory documents for the Third International Conference on Financing for Development, 2015).
[882] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd (2022), UN Doc A/77/284, para 58.
[883] Ibid, para 76.

In addition to the direct obligation to provide financial assistance derived from these core human rights instruments, States Parties to the CBD may also be bound by the international law principle of *pacta sunt servanda*. Under Article 26 of the VCLT "every treaty in force is binding upon the parties to it and must be performed by them in good faith." As such, parties have a good faith obligation to carry out the obligations derived from the ratification of treaties. Good faith underpins the principles of *pacta sunt servanda*, as expressed by the ICJ in its Nuclear Tests judgment:

"One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration."[884]

To understand the scope of Article 26 on *pacta sunt servanda*, it should be read in conjunction with other articles of the VCLT that address the invalidity, termination and suspension of the operation of treaties. In particular, the principle does not apply if a treaty has been terminated or if it is suspended, due to the conclusion of a subsequent agreement, as a result of its violation, or due to an impossibility of performance, a fundamental change of circumstances or a new norm of *jus cogens*.[885] Additionally, *pacta sunt servanda* does not apply if the treaty is invalid as a result of a violation of the domestic rules concerning the capacity to conclude treaties, error, fraud, corruption, coercion or conflict with a peremptory norm at the time of the treaty's conclusion. [886] Finally, *pacta sunt servanda* only applies to States who through ratification, acceptance, approval and accession, establish consent to be bound by a treaty,[887] thereby becoming party to this treaty.[888] This condition de facto excludes non-parties from *the pacta sunt servanda* principle.[889] States Parties who fail to comply with their obligations in accordance with Article 26 of the VCLT may be found in breach of their international obligations and trigger State responsibility.[890]

---

[884] *Nuclear Tests (New Zealand v France)*, Judgement, [1974] ICJ Rep 457, para 49.
[885] VCLT, Part V.
[886] Ibid, Articles 46-53
[887] Ibid, Article 2(1)(b).
[888] Ibid, Article 2(1)(g).
[889] Freya Baetens, 'II.44 Pacta Sunt Servanda in *Elgar Encyclopedia of International Economic Law* (Edward Elgar Publishing, Cheltenham, UK 2017).
[890] Ibid.

Consequently, the principle of *pacta sunt servanda* does not in and of itself entail a standard obligation for CBD parties to comply with human rights instruments. CBD parties are only bound by the human rights treaties that they have ratified, that are in force and that are valid. However, core human rights instruments have acquired near universal ratification and almost all CBD parties are bound to comply with their provisions in good faith, in accordance with Article 26 of the VCLT. When it comes to regional instruments, *pacta sunt servanda* only binds CBD parties that are also parties to instruments such as *inter alia* the American Convention on Human Rights, the European Convention on Human Rights or the African Charter on Human and Peoples' Rights. Similarly, specific human rights instruments such as ILO Convention 69 will only bind CBD parties if they have ratified them. These conditions limit the scope of the *pacta sunt servanda* doctrine and require a case-by case assessment of each county's international human rights obligations to determine whether CBD parties are bound by it or not. As such, the doctrine of *pacta sunt servanda* provides a useful framework to understand the obligations of CBD parties in relation to core human rights, but falls short of establishing a standard duty of conduct applicable across all human rights instruments regardless of their ratification status.

2.4.Human rights obligations of States in the delivery of financial assistance

Human rights obligations rest on States and are derived directly from IHRL. As we have seen, these consist in a negative duty to avoid infringing rights (duty to respect), and two positive obligations, one to protect from infringements (duty to protect) and one to ensure that rights holders are able to enjoy and exercise their rights (duty to fulfil). The duty to protect entails an obligation for States to protect against human rights abuse within their territory or jurisdiction by third parties, including business enterprises[891] and international organisations.[892] There is a growing understanding of the human rights responsibility of private actors in the design and implementation of development projects, particularly thanks to the work spearheaded by John Ruggie, with the endorsement in 2011 of the Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework, which clarify the corporate responsibility to respect human rights in their

[891] Office of the High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc HR/PUB/11/4, 4.
[892] See Samantha Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)Evolution?' (2015) 32(1) Social Philosophy and Policy 244, 251.

activities. The 2018 Framework Principles make reference to the Guiding Principles and confirm that businesses "should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships", including through "meaningful consultation with potentially affected groups and other relevant stakeholders".[893] This responsibility extends (*inter alia*) to children.[894] Business enterprises have a duty to protect children's rights from environmental harm arising from their activities.[895] They can do so by *inter alia*, carrying out environmental and human rights impact assessments that examine the effects of proposed actions on children, and by ensuring compliance with the Guiding Principles.[896]

Finally, the duty to fulfil requires States to provide the enabling conditions for rights holders to exercise and enjoy their rights. In the context of climate change, the OHCHR has supported the extraterritorial application of the obligation to fulfil human rights, reminding States of their obligations under ICESCR to take steps through international assistance and cooperation, to the maximum of their available resources, to progressively achieve (*ie*. fulfil), human rights outside of their jurisdiction.[897] However, the scope of this obligation is limited by the fact that States do not "ordinarily exercise authority in the territory of another State, there is no obligation upon it to act to ensure respect for rights there whether by the government of the state or by private individuals".[898]

States also have human rights obligations that arise from their membership of international organisations. These may be indirect obligations that arise a) from the acts committed by international organisations to States and b) the obligations to protect from human rights infringements by international organisations. States are responsible for the acts or omissions of international organisations when they control the agents acting for the organisation. Samantha Besson argues that this requires States to exercise due diligence to ensure that the international organisations that they are members of provide a degree of protection of human rights equivalent to that that befalls States.[899] However, in the case of

[893] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H Knox' (2018) UN Doc A/HRC/37/58, para 79.
[894] Ibid.
[895] Ibid.
[896] Ibid.
[897] ICESCR, Article 2.
[898] Siobhán McInerney-Lankford, 'Climate Change, Human Rights and Migration: A Legal Analysis of Challenges and Opportunities' in *Research Handbook on Climate Change, Migration and the Law* (Research Handbooks in Climate Law series, Edward Elgar Publishing 2017) 131-168, 516.
[899] Samantha Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)Evolution?' (2015) 32(1) Social Philosophy and Policy 244, 256.

international organisations these are only liable if they anticipated human rights infringements or set up safeguards to avoid infringements.[900] Consequently, the Member States of the implementing agencies that make up the GEF partnership must ensure that they have the adequate safeguards in place to provide adequate protection to human rights.

3. Human rights responsibility of GEF implementing agencies

Legal scholarship has long emphasised the distinction between human rights obligations and human rights responsibilities. This distinction is important to understand the extent to which the implementing agencies that make up the GEF partnership are liable for a) infringements to human rights and b) the protection and fulfilment of human rights through the projects that they fund, design and implement. To begin with, Section 3.1. clarifies the legal status of the GEF and its implementing agencies. It establishes that the World Bank has a legal personality derived from its founding treaty, whereas both UNDP and UNEP derive their legal personality from the UN. As such, Section 3.2. examines the scope of their responsibility towards human rights.

3.1.Legal status of the GEF and its implementing agencies

To understand the human rights responsibility of the GEF and of the organisations that make up the GEF partnership, it is important to first clarify their legal status under international law. Three criteria can be used to determine the status of an international organisation. These include: a) its international juridical or legal personality; b) its legal capacity; and c) its privileges and immunities. Some international organisations are endowed with all three elements while others may only have one or none at all. Legal personality is a key determinant of an international organisation's obligations and responsibility under international law.[901] It is often laid out in an organisation's founding agreements, or may be inferred from those same documents. While the landscape is arguably still evolving, fundamentally the acquisition of international legal personality by international organisations remains determined by States.[902]

---

[900] Ibid.

[901] Jan Klabbers, 'The Concept of Legal Personality' (2005) 11 Ius Gentium 35.

[902] See Carla Ferstman, 'International Organizations' Obligations under Human Rights and International Humanitarian Law' in *International Organizations and the Fight for Accountability* (Oxford University Press 2017).

The main criteria to determine international legal personality are (a) a permanent association of States;[903] (b) legal powers and purposes that are separate between the organisation and its Member States;[904] and (c) the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more States.[905] Such legal personality may confer the right to negotiate and conclude international agreements or treaties; the right to bring international claims and appear before international courts and international tribunals;[906] the right to entertain bilateral diplomatic relations with States and other international actors; and privileges and immunities.[907]

As discussed in Chapter 2 of this thesis, the GEF's founding instrument does not confer it an autonomous legal personality or legal capacity, and it relies on the World Bank for its legal and administrative needs. The World Bank's Articles of Agreement gives it full juridical personality.[908] In addition, the Bank became a specialised agency of the UN in 1947, following an agreement between the two organisations.[909]

As for the legal status of the UN, the ICJ provided some useful clarifications. In the Reparation for Injuries case the court determined that the UN is a subject of international law capable of possessing international rights and duties and with the capacity to bring international claims.[910] But what about the legal status of the two programmes that make up the GEF partnership? Although UNDP and UNEP do not have the status of specialised agency, they nonetheless derive their legal personality from the UN.

3.2.Legal responsibility of GEF implementing agencies towards human rights

The legal personality of GEF implementing agencies confers upon them a legal responsibility towards human rights. The next Subsections establish that this responsibility includes a duty to respect and protect human rights but also, critically, a duty to fulfil human rights in the implementation of projects.

---

[903] Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 648-650.
[904] Ibid.
[905] Ibid.
[906] See Yuen-Li Liang, 'Reparation for Injuries Suffered in the Service of the United Nations' (1949) 43(3) The American Journal of International Law 460.
[907] Jan Klabbers, 'Privileges and Immunities' in *An Introduction to International Institutional Law* (Cambridge University Press 2002).
[908] *Articles of Agreement of the International Bank for Reconstruction and Development* (adopted 27 December 1945, entered into force 27 December 1945) 2 UNTS 134, Article VII, Section 2.
[909] Agreement Between the United Nations and the International Bank for Reconstruction and Development (1947) 16 UNTS 346, Article I(2).
[910] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179.

3.2.1. Responsibility to respect and protect human rights

International case law has provided some clarity as to the legal responsibility of international organisations, stating that "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in adequate form."[911] The issue of the responsibility of international organisations has been discussed extensively in the context of internationally wrongful acts, which entail legal consequences and trigger an obligation for the international organisation to make full reparation for the injury caused.[912] There is an internationally wrongful act of an international organisation when conduct consisting of an action or omission (*a*) is attributable to that organisation under international law; and (*b*) constitutes a breach of an international obligation of that organisation.[913] International organisations are not bound by international human rights treaties, as they usually do not have the powers to ratify them. As a result, they are not automatically bound to respect, protect and fulfil human rights. As explained above, this obligation rests first and foremost on their Member States. For it to extend to an organisation, it must be explicitly required in its founding treaty or instrument.

However, as subjects of international law, international organisations are "bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[914] Léo Heller, former UN Special Rapporteur on the human right to safe drinking water and sanitation, makes the argument that since 164 States are parties to ICESR and other international human rights instruments, IFIs, regional banks and regional development organisations, should respect, protect and facilitate human rights.[915] As a result, when international organisations implement development cooperation initiatives supported by multilateral funders, those funders may also be held accountable for complying with human rights obligations.[916] In addition, he clarified that international organisations are bound by all human rights that are part of international

[911] *Germany v Poland (Factory at Chorzow)* [1927] PCIJ (ser A) No 9, at 55.
[912] ILC, *Draft Articles on the Responsibility of International Organizations* (Yearbook of the International Law Commission, vol II, Part II 2011), Articles 28 and 31.
[913] Ibid, Article 4.
[914] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] IC.J. Rep 226. Para 37.
[915] UNGA, 'Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Léo Heller' (2016) UN Doc A/71/302, para 13.
[916] Ibid.

customary law, general principles of law and the human rights-related provisions in their constitutions.[917] It may be argued that international organisations have an obligation to protect human rights derived from general principles of international law. As discussed in Chapter 3, the ILC clarified that general principles of law may be derived from national legal systems or formed within the international legal system.[918] References to human rights are widely incorporated into treaties and other international instruments, such as General Assembly resolutions. As such the obligation to respect human rights may be considered a general principle of law that would apply to international organisations.[919]

The lack of clear accountability within international development organisations has been an issue of concern since the 1970s.[920] In particular, the violation of human rights in the funding of development projects paved the way for the systematic use of environmental and social safeguards in the disbursement of funds by the World Bank, and over time across most development organisations and multilateral development banks.[921] Many of these organisations have developed their own quasi-judicial dispute resolution system,[922] as a way to provide compensation to those who are adversely impacted by development projects, when non-State actors cannot bring their claim before national courts due to their immunity.[923]

Importantly, the ILC clarified that the conduct of an organ or "agent" of an international organisation in the performance of functions of that organ or agent is considered an act of that organisation under international law, whatever position the organ or agent holds in respect of the organisation. The definition of "agent" is of particular relevance to the question of attribution of conduct to an international organisation. The ILC defines the term "agent of an international organization" as "an official or other person, or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts."[924] The ICJ has clarified that the term agent

[917] Ibid.
[918] ILC, 'Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (2020) UN Doc A/CN.4/741, para 22.
[919] Ibid, para 122.
[920] See Mark Buntaine, 'Accountability in Global Governance: Civil Society Claims for Environmental Performance at the World Bank' (2015) 59(1) International Studies Quarterly 99; Ved Nanda, 'Accountability of International Organizations: Some Observations' (2005) 33(3) Denver Journal of International Law and Policy 379.
[921] Philippe Dann and Michael Riegner, 'The World Bank's Environmental and Social Safeguards and the Evolution of Global Order' (2019) 32(3) Leiden Journal of International Law 537, 541.
[922] See Kelebogile Zvobgo K and Benjamin Graham, 'The World Bank as an Enforcer of Human Rights' (2020) 19(4) Journal of Human Rights 425.
[923] Alexander Orakhelashvili, 'The World Bank Inspection Panel in Context: Institutional Aspects of the Accountability of International Organizations' (2005) 2(1) International Organizations Law Review 57, 59.
[924] ILC, *Draft Articles on the Responsibility of International Organizations* (Yearbook of the International Law Commission, vol II, 2011), Articles 6, Commentary.

includes any person who, whether a paid official or not, and whether permanently employed or not, who has been charged by an organ of the organisation with carrying out, or helping to carry out, one of its functions.[925] The ICJ also noted that the UN may be required to bear responsibility for the damage incurred as a result of acts performed by the UN or by its agents acting in their official capacity.[926] This may also apply to international organisations generally, including the World Bank.[927] This means that the GEF's implementing agencies can be held responsible for their agent's conduct, which could apply to project developers.

At present, there is no universal institutional or procedural framework to frame and organise the responsibility of international organisations when it comes to the protection of human rights. As a result, the way in which international organisations manage this responsibility is for them to decide, and such decision is likely to be determined by their members' individual and strategic positioning, and how much weight they give to the legitimacy concerns of human rights audiences.[928] In the absence of universal standards, international organisations have resorted to operational solutions to balance legitimacy concerns in relation to human rights. This may explain the wide adoption of social and environmental safeguards and grievance mechanisms by international organisations, including those that make up the GEF partnership. On this point, the UN Special Rapporteur on human rights and the environment stressed that providers of financial assistance should act in a manner consistent with human rights,[929] and adopt and implement environmental and social safeguards that are consistent with human rights obligations, including by: (a) requiring the environmental and social assessment of every proposed project and programme; (b) providing for effective public participation; (c) providing for effective grievance mechanisms to provide remedies to those who may be harmed as a result of the implementation of projects and programmes; (d) requiring legal and institutional protections against environmental and social risks; and (e) including specific protections for Indigenous peoples and those in vulnerable situations.[930]

[925] *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 177.
[926] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* [1999] I.C.J. Rep 62, para 66.
[927] See Alexander Orakhelashvili, 'The World Bank Inspection Panel in Context: Institutional Aspects of the Accountability of International Organizations' (2005) 2(1) International Organizations Law Review 57, 59.
[928] See Maria Cabrera Ormaza and Franz Ebert, 'The World Bank, Human Rights, and Organizational Legitimacy Strategies: The Case of the 2016 Environmental and Social Framework' (2019) 32(3) Leiden Journal of International Law 488.
[929] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2018) UN Doc A/HRC/37/59, Annex, para 39.
[930] Ibid.

3.2.2. Responsibility to fulfil human rights

In addition to the responsibility of GEF implementing agencies to respect and protect human rights, human rights monitoring bodies are gradually fleshing out the responsibility of international organisations to fulfil human rights. Article 22 of the ICESCR affords the CESCR an advisory role in relation to technical assistance. More specifically, to facilitate the implementation of the Covenant, the CESCR can provide assistance to the UN, its subsidiary organs and the specialised agencies in deciding which technical assistance measures to take within their respective field of competence.[931]

In its General Comment No. 2, the CESCR notes that not all development activities necessarily contribute to the promotion of respect for economic, social and cultural rights. It clarifies that the UN, their subsidiary organs and specialised agencies have a responsibility to cultivate the "intimate relationship" that exists between "development activities and efforts to promote respect for human rights in general, and economic, social and cultural rights in particular". Importantly, the CESCR calls for the range of human rights protected by the Covenant to be "carefully considered".[932] In particular, every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenants are "duly taken into account." This applies to the initial assessment of the priority needs of countries, in the identification of projects, in project design, in the implementation of the project, and in its final evaluation.[933] Admittedly the language used is ambiguous and does not provide a clear indication of how far the UN and its specialised agencies should go to align their projects with human rights. The Committee on the Rights of the Child (CRC) however, recently provided some useful insights into the role of development assistance. In General Comment No. 26 the CRC emphasised the duty of States to ensure that the environmental measures supported by international organisations respect, protect and proactively seek to fulfil children's rights.[934] It further recommends that development assistance should put the best interests of the child at the heart any environmental decision, as these may have a significant impact on children.[935] An essential determinant of the child's best interest is the ability of environmental measures to

[931] ESCR Committee, 'General Comment No.2: International technical assistance measures (art. 22 of the Covenant)' (2 February 1990) UN Doc E/1990/23, paras 1-3.
[932] Ibid, para 7.
[933] Ibid, para 8(d)
[934] CRC Committee, 'General comment No. 26 on children's rights and the environment, with a special focus on climate change' (22 August 2023), UN Doc CRC/C/GC/26, para 93.
[935] Ibid, para 16.

ensure the full and effective enjoyment of all rights, including the right to a clean, healthy and sustainable environment.[936] As such, the approval and execution of projects should be subject to a child rights impact assessment to prevent and address the financing of measures that could lead to the violation of children's rights.[937] This is consistent with the UN General Assembly's call that international organisations should scale up efforts to ensure a clean, healthy and sustainable environment for all.[938]

In an attempt to harmonise donor practices in relation to human rights-based approaches,[939] in 2003 the UN developed a Human Rights-Based Approach to Development Cooperation – Towards a Common Understanding Among the United Nations Agencies. This approach is guided by six equally-weighted human rights principles which include (i) Universality and inalienability; (ii) Indivisibility; (iii) Inter-dependence and inter-relatedness; (iv) Accountability and the rule of law; (v) Participation and inclusion; (vi) Equality and non-discrimination.[940] Importantly, it establishes that all programmes of development co-operation, policies and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments. In addition, development cooperation and programming in all sectors and in all phases of the programming process, should follow the standards of the Universal Declaration of Human Rights and other international human rights instruments.[941] Whilst this human rights-based approach specifically addresses development co-operation and development programming by UN agencies,[942] a wide range of civil society organisations such as Oxfam, Save the Children and Care, as well as a number of development agencies in the United Kingdom, Sweden and Germany have drawn inspiration from it to develop their own human rights based approach to development co-operation.[943] Under Article VI of the Agreement between the UN and the IBRD, the World Bank must take note of the obligations assumed by members of the UN under

[936] Ibid, para 17.
[937] Ibid, para 114.
[938] UNGA, 'The Human Right to a Clean, Healthy and Sustainable Environment' (2022) UN Doc A/76/L.75, para 4.
[939] Morten Broberg and Sano Hans-Otto, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – An Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22(5) The International Journal of Human Rights 664, 3.
[940] United Nations Development Group, 'The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies' (2003).
[941] Ibid.
[942] Ibid.
[943] Morten Broberg and Sano Hans-Otto, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – An Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22(5) The International Journal of Human Rights 664, 4.

Article 48(2) of the UN Charter.[944] Article II provides a cooperation mechanism between the UN and the World Bank whereby UN representatives are invited to attend meetings called by the World Bank "on matters of concern to the United Nations"[945] and representatives of the World Bank can attend, and participate in meetings of the committees of the General Assembly and meetings of the Economic and Social Council.[946] This arrangement for reciprocal representation provides an avenue for the World Bank to incorporate human rights into its lending activities.[947] It has been argued that the World Bank has the implied power to consider human rights factors in its lending decisions, just like any domestic bank when it considers the risk factors of a particular borrower.[948]

This Part argued that the implementing agencies that make up the GEF partnership have a responsibility to respect, protect and fulfil human rights, including the substantive and procedural obligations under the human right to a healthy environment. The next Part considers the responsibility of GEF implementing agencies to respect, protect and fulfil human rights generally, and the specific human right of Indigenous peoples and local communities in the context of CBD Article 8(j).

4. Human rights in CBD COP decisions

To better understand the scope of the human rights responsibility of GEF implementing agencies to respect, protect and fulfil biodiversity-related human rights, this Part examines the specific commitments of CBD Parties in relation to the human rights of Indigenous peoples and local communities, women and children, persons with disabilities and human rights defenders within COP decisions. Section 4.1. begins by highlighting the progressive permeation of human rights language into COP decisions in relation to the rights of Indigenous peoples and local communities. Section 4.2 then shows a growing commitment by CBD Parties to human rights generally, as evidenced by the Kunming-Montreal GBF. Finally, Section 4.3. brings out the responsibility of the GEF to comply with CBD COP guidance, including on human rights.

---

[944] Agreement Between the United Nations and the International Bank for Reconstruction and Development (1947) 16 UNTS 346, Article IV(1).
[945] Ibid, Article II(1).
[946] Ibid, Article II(3).
[947] Halim Moris, 'The World Bank and Human Rights: Indispensable Partnership or Mismatched Alliance?' (1997) 4(1) ILSA Journal of International & Comparative Law 192.
[948] Ibid.

4.1. Indigenous peoples and local communities

This Section shows that the CBD COP has had an ambiguous relationship with the concepts of Indigenous peoples and local communities, with various attempts at framing the scope of these terms. Subsection 4.1.2. then highlights that the relationship of a community to the land, and its reliance on it for physical and cultural subsistence is an important factor in IHRL to determine entitlement to special rights and protection. Subsection 4.1.3. then fleshes out some key recommendations by the CBD COP to States, international organisations and other stakeholders for the purpose of facilitating the implementation of Article 8(j).

4.1.1. The ambivalent relationship between the CBD COP and human rights

While the text of the CBD makes no explicit reference to human rights, it contains several references to "indigenous and local communities".[949] The Permanent Forum on Indigenous Issues advocates for the affirmation of the status of Indigenous peoples as "peoples" as an important factor in fully respecting and protecting their human rights. It calls upon CBD parties to adopt the terminology "indigenous peoples and local communities" as an "accurate reflection of the distinct identities developed by those entities since the adoption of the Convention".[950] This has led the CBD COP to reflect on the use of this terminology, and to shut the door to any blanket use of the terms "indigenous peoples and local communities". The COP insists that any change to the legal meaning of the CBD terminology "indigenous and local communities" should be done using the amendment procedure under Article 29 of the Convention, and that the use of the terms "indigenous peoples and local communities" in future decisions and secondary documents should be made on an exceptional basis.[951] Furthermore, it clarifies that the use of the terminology "indigenous peoples and local communities" in future decisions and secondary documents does not constitute a context for the purpose of interpretation of the CBD as provided for in article 31(2), of the VCLT. This however, is

[949] See CBD, Preamble, Article 8(j), Article 17(2), Article 18(4).
[950] United Nations, 'Permanent Forum on Indigenous Issues Report on the tenth session' (2011) UN Doc E/2011/43-E/C.19/2011/14, para 26.
[951] Conference of the Parties to CBD Decision XII/12F (13 October 2014) UN Doc UNEP/CBD/COP/DEC/XII/12, Preamble.

without prejudice to the interpretation or application of the Convention in accordance with Article 31(3)(c) of the VCLT.[952]

Nevertheless, the Nagoya Protocol on Access and Benefit-sharing refers to the United Nations Declaration on the Rights of Indigenous Peoples in its Preamble, and several COP decisions,[953] guidelines[954] and tools include similar references, as well as the terms "indigenous peoples and local communities". And in an apparent rebuke to its own previously agreed position, COP decision 15/4 which adopts the new Kunming-Montreal GBF consistently refers to "indigenous peoples and local communities" throughout the text and the new Targets. This is a very welcome development which shows how instrumental the CBD COP has been in fleshing out the rights of Indigenous peoples and local communities.

4.1.2. Conceptual differences and importance of the relationship to land

The CBD does not define the terms "indigenous and local communities" or "indigenous peoples and local communities", and there is currently no internationally agreed definition of either terms. Moreover, the CBD's Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions concluded that a definition of the terms was not recommended.[955] Whilst there is some concern that a definition may be too restrictive,[956] this decision is also illustrative of the tensions that persist around the issue of indigenous peoples' rights in CBD negotiations.

The African Commission through its Working Group of Experts on Indigenous Populations/Communities has set out four criteria for identifying indigenous peoples. These are based on those identified in 1996 by Erica-Irene Daes, the former chairperson of the United Nations Working Group on Indigenous Populations[957] and include the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or discrimination. The Working Group also

[952] Ibid, para 3.
[953] Conference of the Parties to CBD Decision 14/17 (30 November 2018) UN Doc CBD/COP/DEC/14/17.
[954] Conference of the Parties to CBD Decision 14/12 (30 November 2018) UN Doc CBD/COP/DEC/14/12 [hereinafter "Rutzolijirisaxik Voluntary Guidelines"].
[955] Secretariat of the Convention on Biological Diversity, 'Glossary of Relevant Key Terms and Concepts within the Context of Article 8(j) and Related Provisions' (CBD Guidelines Series, 2019), Section 1.
[956] See African Commission on Human and Peoples' Rights (ACHPR) and International Work Group for Indigenous Affairs, 'Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities' (2005) 87.
[957] ECOSOC, 'Standard-Setting Activities: Evolution of Standards Concerning The Rights Of Indigenous People Working Paper by Erica-Irene A. Daes on the concept of "indigenous people"' (1996) UN Doc E/CN.4/Sub.2/AC.4/1996/2, para 69.

identified some additional characteristics of African indigenous groups: they are "first and foremost (but not exclusively) different groups of hunter-gatherers or former hunter-gatherers and certain groups of pastoralists"[958] and "the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon".[959]

The Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) provided some clarifications on the identification of local communities.[960] These include inter alia, self-identification as a local community, lifestyles that are linked to the use of and dependence on biological resources and linked to the sustainable use of nature and biodiversity, occupation of a "definable territory" traditionally occupied and/or used, permanently or periodically, traditional knowledge, and vulnerability to outsiders and little concept of intellectual property rights. While these characteristics are not cumulative and do not constitute legally established criteria for the identification of local communities, they provide useful guidance to CBD Parties and the broader international communities including providers of ODA on how to identify these communities and how to protect and respect their rights in the implementation of the CBD. In particular, it sheds some light in the context of the Parties' obligation to recognise and respect the right to free, prior and informed consent of local communities with regard to decisions related to biodiversity, including protected areas, to demarcate protected areas on lands and waters traditionally occupied or used by them, and to involve them in their management.[961] The donor community is requested to provide legal assistance and make trainings available for local communities on their legal status, including the right to self-identify, and human rights.[962]

While the CBD focuses on the terms "indigenous peoples and local communities", human rights bodies are progressively expanding and refining the criteria that can be used for determining who is entitled to the human rights protections afforded by IHRL to communities who depend on their environment for their survival. The 2018 Framework Principles refer to traditional communities to describe "communities that do not self-identify as indigenous but may also have close relationships to their ancestral territories and depend directly on nature for

---

[958] See African Commission on Human and Peoples' Rights (ACHPR) and International Work Group for Indigenous Affairs, 'Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities' (2005) 89.
[959] Ibid.
[960] CBD, 'Report of the Expert Group Meeting of Local Community Representatives Within the Context of Article 8(J) and Related Provisions of the Convention on Biological Diversity' (4 September 2011) UN Doc UNEP/CBD/WG8J/7/8/Add.1, Annex (I).
[961] Ibid, para III(q).
[962] Ibid, para V(i).

their material needs and cultural life."[963] It acknowledges that the obligations owed to these traditional communities are not always identical to those owed to indigenous peoples[964] but that these include at a minimum:

"(a) Recognizing and protecting their rights to the lands, territories and resources that they have traditionally owned, occupied or used;

(b) Consulting with them and obtaining their free, prior and informed consent before relocating them or taking or approving any other measures that may affect their lands, territories or resources;

(c) Respecting and protecting their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories and resources;

(d) Ensuring that they fairly and equitably share the benefits from activities relating to their lands, territories or resources."[965]

The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) captures "any person who engages or who seeks to engage alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market, and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetized ways of organizing labour, and who has a special dependency on and attachment to the land."[966] This attachment to the land what an important factor in the Inter-American Court of Human Rights' case of *Saramaka People v. Suriname*, in which the court highlighted that the unique relationship of communities with their ancestral lands from which they derive both their means of subsistence and their cultural identity[967] is a key factor for determining the obligation of States to protect the property rights of communities who are not indigenous to the region they inhabit,[968] in this case Afro-descendant tribal communities.[969]

4.1.3. CBD States Parties' obligations under Article 8(j)

[963] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2018) UN Doc A/HRC/37/59, para 48.

[964] Ibid.

[965] Ibid, Framework Principle 15.

[966] HRC, 'United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas' (2018) UN Doc A/HRC/RES/39/12, Article 1.

[967] *Saramaka People v Suriname* (Preliminary Objections, Merits, Reparations, and Costs) [2007] Inter-Am Ct HR, para 82.

[968] Ibid, para 79.

[969] Ibid, para 84.

The CBD regime has seen a dynamic evolution that has built important linkages with the human rights of Indigenous peoples and local communities, particularly through the activities of the working group on Article 8(j). This working group was established to promote the implementation of Article 8(j) and its related provisions, providing guidance to Parties in relation to their obligation to respect, preserve and maintain the knowledge, innovations and practices of Indigenous peoples and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. The relationship between the CBD and IHRL has progressively become more evident and plain-spoken, starting with Decision V/16 on the Programme of Work on the Implementation of Article 8(j) which takes note of the existing declarations and international conventions relevant to Indigenous peoples and local communities to the extent that they relate to the conservation and sustainable use of biodiversity.[970] The COP has played an instrumental role in guiding the practice of States in relation to the recognition and protection of their rights to the lands, territories and resources that they have traditionally owned, occupied or used,[971] their consultation and FPIC;[972] the protection of their traditional knowledge;[973] and cultural, environmental and social impact assessments.[974]

4.1.3.1.The Voluntary guidelines on safeguards in biodiversity financing mechanisms

The voluntary guidelines on safeguards in biodiversity financing mechanisms were developed pursuant to Goal 4 of the CBD's 2011-2020 strategy for resource mobilisation, which committed parties to "[e]xplore new and innovative financial mechanisms at all levels with a view to increasing funding to support the three objectives of the Convention".[975] The growing awareness of the negative impacts of biodiversity finance accelerated the need for parties to identify solutions to address them. They take inspiration from the safeguards already developed under the UNFCCC, particularly those introduced under REDD+ to avoid

[970] Conference of the Parties to CBD Decision V/16 (22 June 2000), UN Doc UNEP/CBD/COP/DEC/V/16.
[971] Conference of the Parties to CBD Decision XII/3 (17 October 2014), UN Doc UNEP/CBD/COP/DEC/XII/3, Annex III.
[972] Mo'otz Kuxtal Voluntary Guidelines (2019).
[973] Akwé: Kon guidelines (2004).
[974] Ibid.
[975] CBD, 'Discussion Paper: Safeguards for Scaling-Up Biodiversity Finance and Possible Guiding Principles' (7 October 2012) UN Doc UNEP/CBD/COP/11/INF/7, 4. See also Annalisa Savaresi, 'REDD and Human Rights' (2013) 18(3) Ecology and Society 5; Melanie Raftopoulos, 'REDD and human rights: Addressing the urgent need for a full community-based human rights impact assessment' (2016) 20(4) The International Journal of Human Rights 509.

detrimental effects for the environment or the local population.[976] Since its first introduction by the World Bank in the 1970s, the concept of "safeguard" has been consistently associated with social-environmental concerns, which have a clear connection with issues of rights of Indigenous peoples, property rights, cultural rights and rights over natural resources generally.[977]

The Guidelines were adopted at COP 12 in 2014 under the topic of resource mobilisation,[978] which is evidence of at least two major developments within the COP. First, these guidelines are the latest of a series of CBD guidelines that show an increasing understanding and recognition of the interdependency between biodiversity and human rights. Indeed, they consolidate some of the progress made in previous guidelines, developed in the context of Article 8(j). In particular, they reaffirm the need for impact assessments and safeguards to not only avoid or mitigate unintended impacts on the rights and livelihoods of Indigenous peoples and local communities but also to maximise the opportunities to support them.[979] They also reiterate the need to respect the free prior informed consent, prior informed consent or approval and involvement of Indigenous peoples and local communities, in line with the Mo'otz Kuxtal Voluntary Guidelines.[980] These new Guidelines however, go a step further in consolidating the integration of human rights into safeguard mechanisms, by encouraging the incorporation of CBD decisions, guidance and principles in the design of biodiversity safeguard mechanisms. Crucially, they also explicitly refer to the need for these mechanisms to be in line with the United Nations Declaration on the Rights of Indigenous Peoples[981] and other human rights instruments,[982] including the Convention on the Elimination of All Forms of Discrimination against Women.[983] Finally, the Guidelines also stress the need for safeguards to include enforcement, evaluation and compliance mechanisms to ensure transparency and accountability.[984]

Second, the fact that these Guidelines were included under the thematic topic of resource mobilisation shows an intention to systematise their use in the design of all biodiversity-related safeguard mechanisms, including those of the GEF. In fact, in 2018 the

---

[976] Ibid, (CBD, 2012) 4.
[977] Ibid, 7.
[978] Conference of the Parties to CBD Decision XII/3 (17 October 2014), UN Doc UNEP/CBD/COP/DEC/XII/3.
[979] Conference of the Parties to CBD Decision 14/15 (30 November 2018), UN Doc CBD/COP/DEC/14/15, Annex.
[980] Ibid, Guideline B.
[981] Ibid, Guideline B1.
[982] Ibid, Guideline C.
[983] Ibid, Guideline C3.
[984] Ibid, Guideline D.

COP explicitly requested the GEF to inform the COP about how it is taking into account the voluntary guidelines on safeguards in biodiversity financing mechanism into the review and upgrading of its social and environmental safeguards.[985]

At COP 14 in 2018, the COP highlighted the convergence that is emerging between the existing processes for developing and/or improving safeguard systems of the financing mechanisms and the Convention's voluntary guidelines on safeguards in biodiversity financing mechanisms. It further encouraged all similar processes to refer to the guidelines in order to create an even greater convergence.[986] However, as will be discussed in Chapter 5, whilst the GEF and its implementing agencies have undertaken reforms to update their social and environmental safeguards, they continue to fall short of meeting the basic requirements of the voluntary guidelines on safeguards in biodiversity financing mechanisms.

The COP requested the CBD Executive Secretary to consider the inclusion of specific safeguards frameworks for Indigenous peoples and local communities, based on principles, standards and guidelines adopted under the Convention within the post-2020 biodiversity framework. [987] These should also address any additional gaps identified, including gender equality considerations.[988] However, neither the Report of the Open-Ended Working Group of the Post-2020 Global Biodiversity Framework on its Third Meeting[989] nor the First draft of the post-2020 global biodiversity framework[990] made any reference to the voluntary guidelines on safeguards in biodiversity financing mechanisms. The Kunming-Montreal GBF still does not contain any reference to the guidelines. These documents however, do show a growing convergence between the CBD regime and human rights.

4.1.3.2.Mo'otz Kuxtal Voluntary Guidelines

The *Voluntary guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the "prior and informed consent", "free, prior and informed consent" or "approval and involvement", depending on national circumstances, of indigenous peoples and local communities for accessing their knowledge, innovations and practices, for*

---

[985] Conference of the Parties to CBD Decision 14/23 (30 November 2018), UN Doc CBD/COP/DEC/14/23, para 3.
[986] Conference of the Parties to CBD Decision 14/15 (30 November 2018), UN Doc CBD/COP/DEC/14/15, para 1.
[987] Ibid, para 10.
[988] Ibid.
[989] CBD, 'Report of the Open-Ended Working Group on the Post-2020 Global Biodiversity Framework on its Third Meeting (Part II)' (29 March 2022) UN Doc CBD/WG2020/3/7.
[990] CBS, 'First Draft of the Post-2020 Global Biodiversity Framework' (5 July 2021) UN Doc CBD/WG2020/3/3.

fair and equitable sharing of benefits arising from the use of their knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing unlawful appropriation of traditional knowledge, were adopted by the COP in December 2016. These guidelines were developed pursuant to decision XII/12 D to contribute to the work under the CBD and the Nagoya Protocol.[991] While the title itself reflects the political tensions around the use of UNDRIP language,[992] they nonetheless seek to establish safeguards for the protection of Indigenous peoples' and local communities' right to give or withhold consent or approval to potential users of traditional knowledge.

Under the guidelines, consent or approval is defined as the agreement of the Indigenous peoples and local communities who are holders of traditional knowledge – or the competent authorities of those Indigenous peoples and local communities, as appropriate – to grant access to their traditional knowledge to a potential user. It includes the right not to grant consent or approval.[993] Importantly, the guidelines clarify that the process of seeking FPIC or approval by Indigenous peoples and local communities is "a continual process of building mutually beneficial, ongoing arrangements between users and holders of traditional knowledge of Indigenous peoples and local communities, in order to build trust, good relations, mutual understanding, intercultural spaces, knowledge exchanges, create new knowledge and reconciliation and includes the full and effective participation of Indigenous peoples and local communities, taking into account national legislation and customary laws, community protocols and practices of Indigenous peoples and local communities and should underpin and be an integral part of developing a relationship between users and providers of traditional knowledge."[994] This suggests that the consent or approval process should extend beyond the point of agreement, should the affected community choose to give consent to a project going ahead. The guidelines however, do not clarify whether this collaborative process should apply retroactively to past consent or approval seeking procedures in projects that have been approved and are still running. This point would need to be further clarified by the COP, or by country Parties in their national legislation governing free, prior and informed consent, and by development agencies and multilateral organisations that provide biodiversity-related ODA, in

[991] Mo'otz Kuxtal Voluntary Guidelines (2019) para. 2.
[992] See Elisa Morgera, 'Reflections on 2016 UN Biodiversity Conference (Part II): assessing the Mo'otz kuxtal guidelines on benefit-sharing from the use of traditional knowledge' (BeneLex Blog, 1 March 2017) <https://benelexblog.wordpress.com/2017/03/01/reflections-on-2016-un-biodiversity-conference-part-ii-assessing-the-mootz-kuxtal-guidelines-on-benefit-sharing-from-the-use-of-traditional-knowledge/> Accessed 27 November 2023.
[993] Mo' otz Kuxtal Voluntary Guidelines (2019) para 7(d).
[994] Ibid, para 8.

their risk assessment frameworks. While it is perhaps unlikely that such an interpretation would be retained, it would nonetheless strengthen the bargaining power of communities after the approval process, and allow for adjustments to take place as the project evolves.

4.1.3.3. The Akwé: Kon guidelines

The Akwé: Kon Guidelines were endorsed by the COP in 2004[995] and represent an important step forward in recognising the interdependency between biodiversity and human rights. They bring out the dangers of applying the biodiversity regime without any regard for the human rights of Indigenous peoples, while at the same time emphasising the positive impacts of applying a mutually supportive approach between the two regimes through impact assessment procedures and methodologies.[996] Their development was brought about by violations of the human rights of Indigenous peoples across the world. These violations are broad and include the expropriation of land, the forced displacement of people, the denial of self-governance, a lack of access to livelihoods and the loss of culture and spiritual sites, as well as the non-recognition of their own authorities and the denial of access to justice and reparation, including restitution and compensation.[997] In Decision VII/16 F, the COP acknowledged the potentially negative long-term impacts of development projects on Indigenous and local communities,[998] and stressed that developments should be implemented in a manner that is consistent with international law and with other international obligations.[999] Notably, the COP recognised that the conduct of impact assessments within an integrated process increases the effectiveness of the involvement of Indigenous and local communities,[1000] thus indirectly recognising the role of impact assessments in supporting the implementation of human rights instruments.

The guidelines set out procedural guidance to ensure that conservation activities do not interfere with any of the core aspects protected by international human rights instruments, including *inter alia* access to land and natural resources by Indigenous peoples, women's rights, health and livelihoods.[1001] Just like other CBD guidance documents, the guidelines are

[995] Akwé: Kon guidelines (2004) para 1.
[996] Ibid, Preamble.
[997] See UNGA, 'Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, Victoria Tauli-Corpuz' (2016) UN. Doc A/71/229, para 9.
[998] Akwé: Kon guidelines (2004) Preamble.
[999] Ibid.
[1000] Ibid.
[1001] Ibid, para 43.

voluntary and were developed to serve as guidance for Parties and Governments, subject to their national legislation, in the development and implementation of their impact assessment regimes.[1002] However, in Decision VII/16 F the COP clarified that they are addressed to Parties,[1003] NGOs and IGOs,[1004] and international funding and development agencies,[1005] which includes the GEF.

The guidelines mark a very important shift from a traditional risk management approach to a more proactive approach through the concept of benefit sharing. They show that impact assessment methodologies should not only minimise the negative impacts of development projects on Indigenous peoples and local communities, but also help identify ways to ensure that these communities benefit from these development projects.[1006] Whilst assessment procedures should continue to identify negative changes on *inter alia*, access to biological resources for livelihoods, traditional systems of land tenure and other uses, local economic aspects, gender equality, health, social cohesion, and traditional lifestyles,[1007] they should also identify tangible benefits to Indigenous peoples and local communities. These include the creation of non-hazardous jobs, the provision of viable revenue from the levying of appropriate fees from beneficiaries of such developments, access to markets and diversification of income opportunities.[1008]

Providers of ODA, including GEF implementing agencies have an important role to play in facilitating the implementation of the Guidelines. In particular, they should facilitate the clarification of legal responsibilities, particularly with regard to matters that may arise during the conduct of cultural, environmental and social impact assessments, including enforcement, liability and redress measures,[1009] and provide financial, technical and legal support to Indigenous peoples and local communities and relevant national organisations to enable them to participate fully in all aspects of national impact assessments.[1010] In so doing, they should take into account the rights of Indigenous peoples and local communities over lands and waters traditionally occupied or used by them and the associated biological diversity.[1011] They should also make sure that Indigenous peoples and local communities have

[1002] Ibid, para 1.
[1003] Ibid, para 2.
[1004] Ibid, para 6.
[1005] Ibid, para 8.
[1006] Ibid, para 40.
[1007] Ibid, para 43.
[1008] Ibid, para 40.
[1009] Ibid, para 58.
[1010] Ibid, para 70.
[1011] Ibid, para 57.

the necessary support and capacity to formulate their own community development plans. This includes the development of mechanisms for strategic environmental assessment that are in line with their development plans.[1012] Of course, providers of ODA should respect these plans in the design and implementation of the projects they finance.

4.1.3.4. The Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity

These guidelines were requested by the COP in order to operationalise the concept of sustainable use of the components of biological diversity. They contain practical principles and operational guidelines to advise CBD Parties in their efforts to achieve the sustainable use of biological diversity, within the framework of the ecosystem approach.[1013] The guidelines clarify that these principles are interdependent and should be read together.[1014] These guidelines contribute to the realisation of IHRL in the context of CBD implementation by recognising the need for a governing framework consistent with international and national laws. Local users of biodiversity components should be sufficiently empowered and supported by rights to be responsible and accountable for use of the resources concerned. It stems from the recognition that sustainability is "generally enhanced" if Governments recognise and respect the "rights" or "stewardship" authority, responsibility and accountability to the people who use and manage the resource, which may include Indigenous peoples and local communities, private landowners, conservation organisations and the business sector. They also recognise the need for resource users to participate in decision making about the resource use and have the authority to carry out any actions arising from those decisions.[1015] Another important contribution of these guidelines to the relationship between human rights and biodiversity is the recognition that natural resource management regimes are enhanced when they benefit local communities. As such, they encourage Parties and "other stakeholders" to adopt policies and regulations that ensure that Indigenous peoples and local communities and local stakeholders who are engaged in the management of a resource for sustainable use receive an equitable share of any benefits derived from that use, taking into account monetary and non-monetary benefits.[1016] As implementing agencies of the GEF, the World Bank, UNDP and

[1012] Ibid, para 55.
[1013] Addis Ababa Principles and Guidelines, Preamble.
[1014] Ibid, Annex II, para 1.
[1015] Ibid, Principle 2.
[1016] Ibid, Principle 12.

UNEP are important stakeholders who should ensure their projects are consistent with the guidelines.

4.2. Human rights in the Kunming-Montreal Global Biodiversity Framework

In addition to clarifying the nature of State obligations under Article 8(j), the CBD COP made some important strides in acknowledging their obligation to respect, protect and fulfil the human rights of women, children, persons with disabilities and human rights defenders. This Subsection starts by reflecting on the preparatory process in the lead up to the recognition of a human rights-based approach in the Kunming-Montreal GBF before delving into the recognition by the COP of the rights of specific groups.

4.2.1. The rights of Indigenous peoples and local communities

In a major breakthrough, the new Framework openly acknowledges that the implementation "must ensure that the rights, knowledge, including traditional knowledge associated with biodiversity, innovations, worldviews, values and practices of Indigenous peoples and local communities are respected, and documented and preserved with their free, prior and informed consent, including through their full and effective participation in decision-making, in accordance with relevant national legislation, international instruments, including the United Nations Declaration on the Rights of Indigenous Peoples, and human rights law."[1017]

This recognition is the latest step in the gradual permeation of human rights law into biodiversity processes. An effort was made to integrate the respect for the rights of Indigenous peoples and local communities across targets. This includes *inter alia*, Target 1 halting the loss of areas of high biodiversity importance,[1018] Target 3 on protected areas,[1019] Target 5 on the use, harvesting and trade of wild species,[1020] and Target 22 on representation and participation in decision-making, access to justice and information and the protection of environmental human rights defenders.[1021] Target 21 also recognises the need to apply FPIC in access to traditional knowledge, innovations, practices and technologies.[1022]

[1017] Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4, Annex, Section C(7)(a).
[1018] Ibid, Section H(1).
[1019] Ibid.
[1020] Ibid.
[1021] Ibid, Section H(3).
[1022] Ibid.

4.2.2. Recognition of the human rights-based approach

The preparatory process leading to the adoption of the new Framework was heavily influenced by the work of the Working Group on Article 8(j)[1023] and reflects the growing consensus on the human rights dimensions of the conservation and sustainable use of biological diversity.[1024] The Human Rights Council Resolution 46/7 on human rights and the environment adopted in March 2021 encouraged the parties to the CBD to take into consideration a human rights-based approach in the context of conserving, restoring and sustainably using biodiversity in the post-2020 global biodiversity framework.[1025] This recommendation was taken up in the preparatory documents which express the need for the new framework to be aligned, consistent and avoid duplication with other relevant processes, including the 2030 Agenda for Sustainable Development, the Rio conventions and the various other biodiversity-related multilateral environmental agreements.[1026] Importantly, they also stress the need for the new Framework to be aligned with human rights instruments such as the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the United Nations Declaration on the Rights of Indigenous Peoples and the United Nations Human Rights Council's Framework Principles on Human Rights and the Environment. [1027]

In its initial version, the draft of the new framework contained a politically ambitious target to ensure by 2030 "the respect, protection and fulfilment of the (human) right to a healthy, clean, safe and sustainable environment and its ecosystems for present and future generations, through effective laws, policies and institutions implementing the three CBD objectives, including full and meaningful participation in decision-making and access to information and justice, in compliance with IHRL and standards."[1028]

However, the zero draft of the Post-2020 GBF from August 2020 did not retain this proposal. Instead, it outlined a theory of change which acknowledged the need for appropriate recognition of human rights standards such as gender equality and the full and effective participation of Indigenous peoples and local communities. Importantly, the implementation

[1023] CBD, 'Second Synthesis of Views of Parties and Observers on the Scope and Content of the Post-2020 Global Biodiversity Framework' (23 May 2019), UN Doc CBD/POST2020/PREP/1/INF/2, para 73.
[1024] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2018) UN Doc A/HRC/37/59.
[1025] HRC, 'Human rights and the environment' (2021) UN Doc A/HRC/RES/46/7, Preamble.
[1026] CBD, 'Second Synthesis of Views of Parties and Observers on the Scope and Content of the Post-2020 Global Biodiversity Framework' (23 May 2019), UN Doc CBD/POST2020/PREP/1/INF/2, para 73.
[1027] Ibid.
[1028] Ibid, Annex, para 17.

of the framework was to be carried out taking a rights-based approach.[1029] The Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd, noted in his 2020 report that the post-2020 GBF should explicitly endorse a rights-based approach in order to achieve rapid and ambitious progress in the protection, conservation and sustainable use of biodiversity.[1030] In addition, it recommended that all persons should have the right to a safe, clean, healthy and sustainable environment, prioritise actions that achieve multiple benefits for human rights concurrently, such as ecological restoration initiatives that reduce poverty, improve food security, protect nature and address climate change. [1031] Importantly the report stressed the need for the Post-2020 GBF to require a rights-based approach to implementing and developing National Biodiversity Strategy and Action Plans.[1032]

4.2.3. The rights of women

The global environmental crisis has a disproportionate impact on women and girls owing to the persistence of gender-based stereotypes, biases, inequalities and discrimination which "profoundly restrict" women and girls' enjoyment of the right to a clean, healthy and sustainable environment.[1033] This situation has a cascading effect on their rights to life, health, adequate housing, food, water, sanitation, education and an adequate standard of living, cultural rights and children's rights.[1034] In addition, these effects are felt even more strongly by women and girls who may be vulnerable and marginalised as a result of their race, age, sexual orientation, migrant or refugee status or disability.[1035] The UN Special Rapporteur David Boyd, noted that States have an obligation to implement rights-based approach to addressing the impacts of the biodiversity crisis and to accelerate gender equality related to environmental decision-making and benefit-sharing processes and outcomes.[1036] Drawing from previous work

[1029] CBD, 'Update of the Zero Draft of the Post-2020 Global Biodiversity Framework' (17 August 2020) UN Doc CBD/POST2020/PREP/2/1, para 7.
[1030] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd, Human rights depend on a healthy biosphere' (2020) UN Doc A/75/161, para 86.
[1031] Ibid, para 88.
[1032] Ibid, para 88(e).
[1033] HRC, 'Women, girls and the right to a clean, healthy and sustainable environment, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd' (2022) UN Doc A/HRC/52/33, para 13.
[1034] Ibid.
[1035] Ibid.
[1036] Ibid, para 64.

on the right to a clean, healthy and sustainable environment, the UN Special Rapporteur confirmed that the obligation of States to mobilise the maximum available financial resources in their gender-transformative actions to respect, protect and fulfil the right to a clean, healthy and sustainable environment.[1037]

In line with this recommendation, the new Framework now contains a Target focusing specifically on the need to implement a gender-responsive approach to the implementation of the new Framework, in order to achieve gender equality, the recognition of their equal rights and access to land and natural resources, and their full, equitable, meaningful and informed participation and leadership at all levels of action, engagement, policy and decision-making related to biodiversity.[1038] COP 15 also saw the adoption of a Gender Plan of Action,[1039] which recognises the synergies between gender equality and the conservation, sustainable use and the fair and equitable sharing of benefits arising from the utilisation of genetic resources.[1040] Importantly, the action plan is expected to be implemented through a human rights-based approach, using international human rights instruments and mechanisms, including the Convention for the Elimination of All Forms of Discrimination Against Women as "guidance".[1041] Whilst this is a welcome step forward, the choice of the word "guidance" may be an indication of the Parties' lack of consensus on the issue of recognising the binding nature of human rights obligations in relation to gender equality.

4.2.4. The rights of children, persons with disabilities and environmental human rights defenders

Environmental harm has been shown to interfere with the full enjoyment of a vast range of the rights of children, including their rights to life, health, development, an adequate standard of living, play and recreation.[1042] Due to their particular vulnerability to environmental degradation,[1043] States have heightened obligations to take effective substantive measures to protect children from environmental harm, including by ensuring that their best interests are a primary consideration with respect to all decision-making that may cause them environmental

[1037] Ibid.
[1038] Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4, Annex, Section H(3).
[1039] Conference of the Parties to CBD Decision 15/11 (19 December 2022), UN Doc CBD/COP/DEC/15/11.
[1040] Ibid, para 2(a).
[1041] Ibid, para 2(c).
[1042] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H Knox' (2018) UN Doc A/HRC/37/58, para 31.
[1043] Ibid, para 15.

harm.[1044] States have procedural obligations that relate to children's access to information, participation and remedy, and substantive obligations, including the obligation to ensure that the best interests of children are a primary consideration; and obligations of non-discrimination.[1045] In addition, States should never take retrogressive measures.[1046]

Persons with disabilities face barriers in accessing emergency information, transport, shelter and relief. [1047] States have the obligation to prevent discrimination and to provide equal access to environmental benefits.[1048] When it comes to protecting human rights defenders, States should adopt and implement laws that protect human rights defenders in accordance with the international human rights standards set out in international and regional instruments.[1049] These include the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms and the Escazú Agreement[1050] in Latin America and the Caribbean.

Target 2022 of the Kunming-Montreal GBF commits Parties to "[e]nsure the full, equitable, inclusive, effective and gender-responsive representation and participation in decision-making, and access to justice and information related to biodiversity by indigenous peoples and local communities, respecting their cultures and their rights over lands, territories, resources, and traditional knowledge, as well as by women and girls, children and youth, and persons with disabilities and ensure the full protection of environmental human rights defenders." The recognition of the rights of these groups has direct implications for resource mobilisation and the provision of biodiversity-related ODA. While the discussions acknowledged the need for financial resources to support the work of indigenous peoples and local communities directly,[1051] this point was not discussed substantively and the new resource mobilisation strategy fails to integrate these issues.

4.3.GEF obligation to comply CBD COP guidance

[1044] Ibid, para 72.
[1045] Ibid, para 38.
[1046] Ibid, para 72.
[1047] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2018) UN Doc A/HRC/37/59, para 41(f).
[1048] Ibid, para 7.
[1049] Ibid, para 11.
[1050] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, UNTS 3398. Adopted 04/03/2018, entered into force 22 April 2021.
[1051] Conference of the Parties to CBD Decision X/2 (29 October 2010), UN Doc UNEP/CBD/COP/DEC/X/2, Annex, para 20.

As was discussed in Chapter 2, the GEF operates under the authority and guidance of the CBD COP[1052] and is regularly requested to take action and integrate some of the normative work developed under the aegis of Article 8(j) and beyond. These soft law instruments developed to facilitate the implementation of the Convention reflect the gradual permeation of human rights considerations into the CBD regime. These developments extend to the financial mechanism, particularly since the commitment of CBD Parties to implement the Kunming-Montreal GBF through a human rights-based approach.[1053] As such, the GEF's policies, safeguards and operational modalities should reflect this gradual shift and ensure that the Implementing and Accredited Agencies that make up the GEF partnership apply this guidance too.

COP guidance to the financial mechanism is provided through different means, either directly through targeted requests to introduce specific points into the GEF's operational modalities, or indirectly. Compliance with this guidance is regularly assessed by the COP and corrective actions may be taken to improve the effectiveness of the financial mechanism. This entails an obligation for the GEF to apply the guidance developed through the normative process of the COP, including the voluntary guidelines developed under CBD Article 8(j). This Section first examines the nature of the direct guidance provided by the CBD COP to the GEF before turning to the more indirect type of guidance which includes the guidelines issued under Article 8(j) and the guidance on the human rights of specific groups.

4.3.1. Direct guidance to the GEF

The MoU between the CBD COP and the GEF Council clarifies that the COP determines the policy, strategy, programme priorities and eligibility criteria for access to and utilisation of financial resources available through the financial mechanism, including the monitoring and evaluation on a regular basis of how these resources are spent.[1054] As such, CBD COP decisions regularly request the GEF to incorporate new measures and guidance documents adopted during Conferences. These instructions are provided with a varying degree of flexibility, ranging from clear new operational parameters, to requests to consider how to implement new guidance and to report to the COP on progress.

[1052] CBD, Article 21(1).
[1053] Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4, Annex, para 7(g).
[1054] Conference of the Parties to CBD Decision III/8 (11 February 1997), UN Doc UNEP/CBD/COP/DEC/III/8, para 2.1.

In 2004, the COP provided guidance to the GEF in the form of an instruction to "provide financial resources to developing country Parties, taking into account the special needs of the least developed countries and the small island developing States amongst them, for country-driven activities and programmes, consistent with national priorities and objectives and in accordance with the mandate of the Global Environment Facility, recognizing that economic and social development and poverty eradication are the first and overriding priorities of developing countries".[1055] The COP regularly reminds the GEF that the provision of financial resources under the financial mechanism is to be for country-driven activities and programmes that are consistent with national priorities and objectives.[1056] This would include the implementation of CBD's provisions as well as CBD COP decisions.

In addition, the COP requires the GEF to strengthen cooperation and coordination among funding partners at the regional and subregional levels, taking into account the Paris Declaration on Aid Effectiveness.[1057] In other important direct instructions, the COP requested the GEF to consider how to integrate the Voluntary Guidelines on Safeguards for Biodiversity Financing Mechanisms into the review and upgrading process of its social and environmental standards.[1058] At COP 15, the Parties consolidated their guidance to the GEF, highlighting certain priorities and retiring previous decisions.[1059] This has become a regular practice since COP 10 and it occurs every four years.[1060] Concomitantly to its direct guidance, the GEF must also incorporate COP indirect guidance from various sources.

4.3.2. Indirect guidance

In accordance with the Memorandum of Understanding, the GEF must finance activities that are "in full conformity" with the guidance provided to it by the COP.[1061] This includes "any other matter relating to Article 21".[1062] This should be read in

[1055] Conference of the Parties to CBD Decision VII/20 (13 April 2004), UN Doc UNEP/CBD/COP/DEC/VII/20, para 2.
[1056] Ibid, para 22.
[1057] Conference of the Parties to CBD Decision IX/11 (9 October 2008), UN Doc UNEP/CBD/COP/DEC/IX/11, Annex, Goal 5.
[1058] Conference of the Parties to CBD Decision 14/15 (30 November 2018), UN Doc CBD/COP/DEC/14/15, para 6.
[1059] Conference of the Parties to CBD Decision 15/15 (19 December 2022), UN Doc CBD/COP/DEC/15/15, para 9.
[1060] Conference of the Parties to CBD Decision 15/10 (19 December 2022), UN Doc CBD/COP/DEC/15/10, para 11.
[1061] Conference of the Parties to CBD Decision III/8 (11 February 1997), UN Doc UNEP/CBD/COP/DEC/III/8, Annex, para 2.1.
[1062] Ibid, para 2.1(f).

conjunction with Article 23(a)(i) which mandates the COP to "consider and undertake any additional action that may be required for the achievement of the purposes of this Convention in the light of experience gained in its operation". In pursuance of this function, the COP adopts decisions on aspects linked to the implementation of the Convention, including decisions on resource mobilisation[1063] and guidance issued on the basis of specific articles such as Article 8(j).

Whilst direct instructions provide a clear legal basis for the GEF to take action, other forms of COP guidance do not target the GEF specifically and have a broader intended audience. This guidance typically applies to CBD Parties, civil society, the private sector, multilateral agencies and donors. COP decisions endorsing voluntary guidelines include the Mo'otz Kuxtal Voluntary Guidelines, the Akwé: Kon guidelines and the Voluntary guidelines on safeguards in biodiversity financing mechanisms. In addition, the CBD COP provides regular guidance on gender mainstreaming,[1064] children and the youth,[1065] persons with disabilities[1066] and human rights defenders.[1067] This guidance should be incorporated into GEF policies, guidelines and operational modalities as part of the GEF's obligation to incorporate guidance from the COP fully, and on an on-going basis to ensure that the objectives of the Convention are addressed.[1068]

5. Conclusions

This Chapter demonstrated that CBD Parties have procedural and substantive biodiversity-related human rights obligations in the provision of financial assistance which translate into a responsibility for GEF implementing agencies to respect, protect and fulfil these

[1063] See Conference of the Parties to CBD Decision X/3 (29 October 2010), UN Doc UNEP/CBD/COP/DEC/X/3. See also CBD, 'Recommendation adopted by the Subsidiary Body on Implementation on resource mobilization' (28 March 2022) UN Doc CBD/SBI/REC/3/6.

[1064] See Conference of the Parties to CBD Decision X/19 (29 October 2010), UN Doc UNEP/CBD/COP/DEC/X/19; Conference of the Parties to CBD Decision XI/9 (5 December 2012), UN Doc UNEP/CBD/COP/DEC/XI/9; Conference of the Parties to CBD Decision XII/7 (17 October 2014), UN Doc UNEP/CBD/COP/DEC/XII/7; Conference of the Parties to CBD Decision 14/18 (30 November 2018), UN Doc UNEP/CBD/COP/DEC/14/18; Conference of the Parties to CBD Decision 15/11 (19 December 2022), UN Doc UNEP/CBD/COP/DEC/15/11.

[1065] See Conference of the Parties to CBD Decision XI/8 (5 December 2012), UN Doc UNEP/CBD/COP/DEC/XI/8, Part B; Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4, Target 22.

[1066] Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4, Target 22.

[1067] Ibid.

[1068] Conference of the Parties to CBD Decision II/6 (30 November 1995), UN Doc UNEP/CBD/COP/DEC/II/6, para 6.

rights through the implementation of a human rights-based approach. More specifically, this Chapter provides an original contribution to the emerging body of evidence gathered by the successive Special Rapporteurs on the issue of human right obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. While these works provide a remarkable framework to understand the obligations of States in relation to the delivery of financial assistance, the implications of these human right obligations in the context of the delivery of financial assistance through the CBD's financial mechanism had yet to be addressed in academic literature.

As a first conclusion, the human right to a clean, healthy and sustainable environment builds a bridge between the biodiversity and human rights regime which carries over into the CBD's financial mechanism. Indeed, the obligation for developed country Parties to provide new and additional financial resources to developing countries includes an obligation to mobilise the maximum available financial resources to respect, protect and fulfil the right to a clean, healthy and sustainable environment in a non-retrogressive manner.

Second, the clarification by the Human Rights Committee that the protection of the right to life includes an obligation to take measures for the achievement of broader development goals such as the elimination of malnutrition and epidemics entails an obligation for States to take measures for the conservation and sustainable use biodiversity for the purpose of complying with their obligation to protect the right to life.

Third, while the responsibility of international organisations to respect and protect human rights from violations in the implementation of their activities is well established in international law, the issue of their responsibility to fulfil human rights remains poorly understood. This Chapter contributes to the existing literature by clarifying that GEF implementing agencies have a responsibility to fulfil human rights in the implementation of their activities which is derived from the UN Charter and the human rights obligations of their Member States. Indeed, States have a duty to ensure that the organisations that they are members of have adequate frameworks and methodologies in place to fulfil the human rights of individuals and communities that their project affect. It follows that the implementing agencies that make up the GEF partnership have a responsibility to ensure that they have adequate safeguards and frameworks in place to respect, protect and fulfil the human rights of the individuals and communities affected by their projects and programmes.

Fourth, the CBD COP has been instrumental in clarifying the obligations of States in the context of the implementation of Article 8(j) and IHRL. The guidance produced by the COP draws from and contextualises the obligations of States in relation to the recognition and

protection of lands and territories traditionally occupied by Indigenous Peoples, their consultation, participation and FPIC, the design and implementation of cultural, environmental and social impact assessments and the protection of traditional knowledge. In addition, the Kunming-Montreal GBF recognises the rights of women, children, persons with disabilities and human rights defenders. Crucially, it commits Parties to applying a human rights-based approach to the implementation of the Framework. This commitment has important implications for the GEF and its implementing agencies who will need to ensure that they have the adequate safeguards and frameworks in place to respect, protect and fulfil these human rights, and that these are in line with the CBD COP guidance in relation to the implementation of Article 8(j) and IHRL.

Chapter 5: Human rights and the GEF

1. Introduction

As set out in previous chapters, States have an obligation to provide financial assistance to less economically advanced countries, to progressively achieve the full realisation of human rights and the objectives of the CBD. To meet this obligation, States provide financial assistance in the form of ODA which is channelled to the GEF and its implementing agencies.[1069] In addition, GEF implementing agencies have a responsibility to respect, protect and fulfil human rights. Currently however, these agencies have yet to acknowledge their responsibility to fulfil biodiversity-related human rights and rely on the use of social and environmental safeguards and grievance mechanisms to avoid and mitigate social and environmental impacts in the implementation of development projects.

As the largest multilateral trust fund for the generation of global environmental benefits, the GEF provides funding for the implementation of projects in five key focus areas, including biological diversity, climate change mitigation, land degradation, international waters, chemicals and waste.[1070] Its organisational structure is unusual, with UNDP, UNEP, and the World Bank acting as its core implementing agencies, with the support of an ever growing base of partner agencies hailing from the UN, MDBs, and civil society. The GEF recently updated its Policy on Environmental and Social Safeguards for the purpose of "anticipating, and then avoiding, preventing, minimizing, mitigating, managing, offsetting or compensating any adverse impacts that GEF-financed projects and programs may have on people or the environment throughout the project or program cycle". By doing so, it aims to enhance "the environmental and social outcomes of such projects and programmes".[1071] It sets out mandatory requirements for identifying and addressing environmental and social risks and impacts in GEF-financed projects and programmes.[1072]

This policy is part of a wave of reforms that is sweeping across development finance. It follows in the footsteps of UNDP's Social and Environmental Standards adopted in 2015,

---

[1069] See Antonio Morelli, 'International Financial Institutions and their Human Rights Silent Agenda: A Forward-Looking View on the "Protect, Respect and Remedy" Model in Development Finance' (2021) 36(1) American University International Law Review 51-103, 64.
[1070] GEF, 'Instrument for the Establishment of the Restructured Global Environment Facility' (2019), para 2.
[1071] GEF, 'Updated Policy on Environmental and Social Safeguards' (GEF/C.55/07/Rev.01, 2018).
[1072] Ibid, para 5.

the World Bank's new Environment and Social Framework that came into application in October 2018, and UNEP's Environmental, Social and Sustainability Framework of 2020. These instruments show a marked difference in their approach to human rights, which is evidence of the tensions between institutional frameworks and demands for increased legitimacy.[1073]

This Chapter contends that the current GEF architecture of policies and safeguards is inconsistent with CBD COP guidance on human rights and should be reviewed to provide appropriate support to CBD Parties in meeting their commitment to apply a human rights-based approach to the implementation of the Kunming-Montreal GBF.[1074]

Part 2 examines the GEF's relationship with human rights. It shows that the Facility's policies and operational modalities are geared towards the prevention of infringements to human rights, through the use of social and environmental safeguards and redress mechanisms. The use of safeguards and redress mechanisms alone does not provide a suitable approach to ensure that GEF implementing agencies meet their responsibility to fulfil the rights of affected stakeholders in the implementation of biodiversity-related projects. Part 3 examines the scope and content of the human rights-related CBD COP guidance to the GEF. In particular, it highlights some key requirements for the implementation of Article 8(j), the Gender Plan of Action and Target 22 for persons with disabilities and human rights defenders. It delves into the GEF's social and environmental standards to find out to what extent these are compatible with CBD COP guidance. It shows that these instruments fall short of complying with CBD guidance in several areas. Part 4 provides some insights as to the degree of compatibility between the implementing agencies' social and environmental safeguards and the COP's guidance. Importantly, it shows that the varying degree of commitment to human rights in the agencies' frameworks creates disparities in the levels of human rights protections afforded to individuals and communities under biodiversity projects. Finally, Part 5 considers the steps that the GEF must take to operationalise the commitment of CBD Parties to applying a human rights-based approach to the implementation of the Kunming-Montreal GBF.

2. GEF's approach to human rights

[1073] See Maria Cabrera Ormaza and Franz Ebert, 'The World Bank, Human Rights, and Organizational Legitimacy Strategies: The Case of the 2016 Environmental and Social Framework' (2019) 32(3) Leiden Journal of International Law 483.

[1074] Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4, para 7(g).

The extent to which biodiversity finance mechanisms acknowledge or address the human rights risks and obligations associated with project development, implementation and monitoring varies greatly.[1075] Unlike UN agencies, the GEF does not actively promote the realisation of human rights. Instead, it uses traditional tools and mechanisms to address social and environmental risks in the implementation of projects. These include a number of policies and safeguards and a reliance on grievance mechanisms to avoid and redress harm. Subsections 2.1. and 2.2. first consider how the reliance of international organisations on social and environmental safeguards and grievance mechanisms to avoid and mitigate risks to human rights are an emanation of their well-established responsibility not to violate human rights. Subsection 2.3. then turns to the GEF policies and safeguards and highlights the dissonance between this risk avoidance approach and the consolidation in international law of the interdependence between the realisation of human rights and the protection of the environment.

2.1.Safeguards and the responsibility not to cause harm

Environmental and social safeguards (ESS) have become a hallmark of development practice and are now widely used by international organisations and development agencies to provide assurances to donors and national constituents that the resources used to fund development activities meet certain social and environmental standards. They are policies and procedures designed to prevent or minimise negative impacts on the environment and on people as a result of development projects. They typically require project developers to comply with a set of minimum standards for environmental and social sustainability.

Safeguards were first introduced at the World Bank, following a series of controversial projects in the 1970s and 1980s that led to the forced resettlement of people, land conflicts and deforestation.[1076] The safeguards were couched in a series of policies, including one on involuntary resettlement[1077] and one on Indigenous people[1078] that laid the foundations for a more comprehensive set of tools and criteria to assess the impact of projects prior to their

[1075] See HRC, 'Promoting rights-based climate finance for people and planet' (2018) UN Doc A/HRC/WG.2/19/CRP.4, para 111.

[1076] Kirk Herbertson, 'Will Safeguards Survive the Next Generation of Development Finance?' (2012) International Rivers 8. See also Forest Peoples Programme, 'Indigenous Peoples and the World Bank: Experiences with Participation' (2005).

[1077] World Bank, 'Operational Manual Statement 2.33 "Social Issues Associated with Involuntary Resettlement in Bank-financed Projects"' (1982).

[1078] World Bank, 'Operational Manual Statement 2.34 "Tribal People in Bank-financed Projects"' (1982).

approval and funding.[1079] With every new endorsement and implementation of projects, the awareness of specific risks to people and the environment grew, leading the Bank to embark on a "legalisation process", at a time when Western powers – and the United States in particular – dominated international relations in a unipolar form of multilateralism.[1080] The economic and geopolitical context at the time enabled Western legal systems and ideas to assert dominance and influence in international law-making and bilateral law reform projects around the world.[1081] Philipp Dann and Michael Riegner explain that the context facilitated the emergence of normative assumptions, including the belief that international authority could extend beyond the State in furtherance of a common good, thus offering a normative justification for the increased exercise of public authority by international institutions.[1082]

The United States Congress played a key role in institutionalising the use of safeguards and environmental impact assessments in development practice, with the adoption of the "Pelosi Amendment" which made contributions to the World Bank's International Development Association (IDA) dependent on the introduction of environmental impact assessments (EIAs) into the Bank's procedures.[1083] In addition, for the United States to support a project, the EIA had to be made available to the board of directors, World Bank staff, civil society organisations, and affected communities. This acted as an incentive for the World Bank to adopt stricter criteria for the disbursement of funds to borrowers.[1084] These largely followed the model provided by the American National Environmental Policy Act (NEPA)[1085] of 1969.[1086]

In development finance, safeguards require governments that seek international financing to follow a specific set of procedures to identify impacts, in order to assess and avoid or mitigate environmental and social risks. Such procedures include, *inter alia,* carrying out consultations with potentially affected communities, providing access to information, and identifying ways to restore people's livelihoods and reduce damage to the environment. However, the traditional approach to safeguards is changing from a top-down approach to a

---

1079 Kirk Herbertson, 'Will Safeguards Survive the Next Generation of Development Finance?' (2012) International Rivers 8.
1080 Philippe Dann and Michael Riegner, 'The World Bank's Environmental and Social Safeguards and the Evolution of Global Order' (2019) 32(3) Leiden Journal of International Law 537, 539.
1081 Ibid.
1082 Ibid.
1083 Ibid, 541.
1084 Kirk Herbertson, 'Will Safeguards Survive the Next Generation of Development Finance?' (2012) International Rivers 8.
1085 National Environmental Policy Act of 1969, 42 U.S.C. §4321 et seq. (1969).
1086 See Philippe Dann and Michael Riegner, 'The World Bank's Environmental and Social Safeguards and the Evolution of Global Order' (2019) 32(3) Leiden Journal of International Law 537, 541.

bottom-up one, with an increased respect for borrowers' sovereignty and project ownership.[1087] Rather than apply the set of procedures provided to them, the onus in on the governments to demonstrate that their national safeguard systems are sufficiently robust to manage the environmental and social risks of the development project.[1088] This change is indicative of the growing pressures from large borrower countries, such as China, India, and Brazil, which are voicing legitimacy demands.[1089]

Although commonly used by development agencies to address legitimacy concerns and avoid human rights violations, ESS lack the universality and legitimacy of international legal instruments. Although some ESS frameworks involve multi-stakeholder consultations as part of their development process,[1090] most frameworks emerge out of an internal policy agenda that may or may not be in line with IHRL. The World Bank's original policies for instance did not meet international law standards in relation to free, prior and informed consent or the CBD requirement that benefit sharing be implemented whenever Indigenous peoples' lands, territories, natural, or cultural resources are affected.[1091] The new Environmental and Social Framework now requires consent but only in certain circumstances, such as when a project has adverse impacts on land and natural resources subject to traditional ownership or under customary use or occupation, when it causes the relocation of Indigenous Peoples/ Sub-Saharan African Historically Underserved Traditional Local Communities, or when it has significant impacts on their cultural heritage.[1092]

The use of environmental and social safeguards is widely considered a good practice. To prevent damage caused by lawful operational activities, international organisations should assess the potential damage which these activities may cause prior to engaging in operational activities, and keep it under review as the activity proceeds.[1093] The ILA recommends that international organisations should not undertake operational activities that risk causing significant harm to the environment unless an impact assessment has been carried out.[1094] In

Kirk Herbertson, 'Will Safeguards Survive the Next Generation of Development Finance?' (2012) International Rivers 8, 38.

[1088] Ibid, 7.

[1089] Maria Cabrera Ormaza and Franz Ebert, 'The World Bank, Human Rights, and Organizational Legitimacy Strategies: The Case of the 2016 Environmental and Social Framework' (2019) 32(3) Leiden Journal of International Law 483, 484. See also Kirk Herbertson, 'Will Safeguards Survive the Next Generation of Development Finance?' (2012) International Rivers 8, 30.

[1090] See Corinne Lewis and Carl Söderbergh, 'The World Bank's New Environmental and Social Framework: Some Progress but Many Gaps Regarding the Rights of Indigenous Peoples' (2019) 23:1-2 The International Journal of Human Rights 64.

[1091] Elisa Morgera, 'Indigenous Peoples' (2014) 24(1) Yearbook of International Environmental Law 214, 217.

[1092] World Bank, 'World Bank Environmental and Social Framework' (2016) 79-80.

[1093] ILA, 'Reports of Conferences' (2004) 71 ILA Reports 164, 191(1).

[1094] Ibid, 191(4)(a).

addition, the organisation should consult with those affected to identify solutions and measures to be adopted in order to prevent significant harm or minimise the risks, while the operational activity is being carried out.[1095]

The 2018 Framework Principles on Human Rights and the Environment encourage international financial institutions and State agencies that provide international assistance to adopt and implement environmental and social safeguards that are consistent with human rights obligations.[1096] These principles build on several decades of well-established research and practice and restate the need for a systematic assessment of the environmental and social impact of every proposed project and programme. Framework Principle 13 reminds countries and institutions to ensure effective public participation in the identification of risks, and to provide effective procedures to enable those who may be harmed to pursue remedies. In addition, safeguard mechanisms should provide legal and institutional protections against environmental and social risks. They should also outline specific protections for Indigenous peoples and those in vulnerable situations.[1097]

The inclusion of a paragraph on environmental and social safeguards under Framework Principle 13 on cooperation to prevent, reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights is significant from at least three perspectives. First, it establishes a normative linkage between the use of social and environmental safeguards and the "enjoyment" of human rights. This is significant, considering that social safeguards had previously only been understood as a tool to avoid liability for the violation of human rights by international organisations. With this paragraph, the Human Rights Council acknowledges the role of social and environmental safeguards as a tool to fulfil human rights. Second, the paragraph does not operate any distinction between the human rights obligations of States and the human rights responsibility of international organisations, which blurs the line between this traditionally strict allocation of responsibility for human rights. Third the Principle clarifies the minimum requirements for the design of social and environmental safeguards. They should require the environmental and social assessment of every proposed project and programme; provide for effective public participation; provide for effective procedures to enable those who may be harmed to pursue remedies; require legal and institutional protections against environmental and social risks;

[1095] Ibid, 191(4)(c).
[1096] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2018) UN Doc A/HRC/37/59, Annex, para 39.
[1097] Ibid, 39.

and include specific protections for Indigenous peoples and those in vulnerable situations.[1098] It is regrettable however, that this Principle lacks the necessary methodological and procedural guidance that would enable international organisations to develop effective operational standards to ensure that human rights impacts are adequately identified and that the human rights of affected stakeholders are respected, protected and fulfilled. The literature is divided on the use of checklists as a methodology for the identification of impacts, citing the risk that it could easily backslide into a box-ticking exercise, when it is so critical to a project and its stakeholders that the approach taken follows a comprehensive, in-depth scoping process that can bring to light the complex causal mechanisms that produce social impacts. However, there is some evidence that checklists can lead to improved assessments by raising awareness of impacts generally.[1099]

This absence of procedural guidance under Framework Principle 13 may be indicative of a much wider debate that is only just beginning to emerge in scholarship, and that reveals a tension between the protection against human rights violations in development activities, and the fulfilment of human rights as recognised under IHRL. As will be discussed further below, safeguard frameworks and impact assessments should apply a human rights-based approach, to give effect to the obligation to "fulfil" human rights.

The question of the legal nature of social and environmental safeguards is important for at least two reasons. First, it determines who – if anyone – has a legal obligation to respect these safeguards. Second, it sheds some light on what course of action may be followed in the event of non-compliance with these standards. As was discussed earlier, safeguards emerged out of the World Bank's grappling with harmful environmental and social impacts of projects in the 1980s. They now serve as a benchmark in the development of social and environmental safeguards at other IFIs and at the UN. Understanding the legal nature of the World Bank's ESF can therefore help elucidate the legal nature of safeguards generally.

First, while the World Bank's ESF evidently does not fall within the sources of international law laid out under Article 38 of the ICJ Statute, it does, however, influence State practice in international development cooperation, which could eventually lead to the crystallisation of a new international customary norm.[1100] Second, as Giedre Jokubauskaite

[1098] Ibid.
[1099] Frank Vanclay, 'Conceptualising Social Impacts' (2002) 22(3) Environmental Impact Assessment Review 183, 184.
[1100] Giedre Jokubauskaite, 'The Legal Nature of the World Bank Safeguards' (2018) 51(1) Verfassung in Recht und Übersee 78, 80.

pointed out,[1101] the classification of the World Bank's safeguards as "internal law" of international organisations fails to acknowledge the fact that under the World Bank's Articles of Agreement, the adoption of rules and regulations necessary or appropriate to conduct the business of the Bank is the responsibility of the Board of Governors, and of the Executive Directors but only "to the extent authorized".[1102] The ESF was approved by the Board of Directors only, without prior authorisation from the Board of Governors.[1103] As such, the ESF adoption process did not follow the requirements for rule-making at the Bank, which suggests that the ESF was never intended to be internal law. Third, although Borrowers are required to meet the Bank's social and environmental standards to qualify for funding, a breach of these standards during the project's implementation may lead to a review by the inspection panel following a complaint by an individual or a community affected by the project, or as of 2021, to a request for review by the new Dispute Resolution Service (DRS). The DRS is intended "to facilitate a voluntary and independent dispute resolution option for Requesters and borrowers in the context of Requests for Inspection to the Inspection Panel". These mechanisms do not have the legal authority to enforce decisions either on the Bank or the Borrowers. With these in mind, the ESF is a hybrid document that isn't in itself legally-binding other than on the Bank's staff, but which has an important normative significance, first due to the possibility for affected stakeholders to file complaints for alleged breaches, and second due to the influence of these standards in development practice.

2.2.Grievance mechanisms

Before discussing the nature of the grievance mechanisms available to those affected by development projects it is important to distinguish between international organisations' accountability, responsibility, and legal liability.[1104] As was established in Chapter 4, the implementing agencies that make up the GEF partnership have a responsibility to respect human rights and are legally responsible for their activities and for those of their agents when

[1101] Ibid, 85-86.
[1102] *Articles of Agreement of the International Bank for Reconstruction and Development* (adopted 27 December 1945, entered into force 27 December 1945) 2 UNTS 134, Article V s. 2 (f).
[1103] World Bank, 'World Bank Board Approves New Environmental and Social Framework' (press release, 4 August 2016) https://www.worldbank.org/en/news/press-release/2016/08/04/world-bank-board-approves-new-environmental-and-social-framework> Accessed 27 November 2023.
[1104] Ved P. Nanda, 'Accountability of International Organizations: Some Observations' (2005) 33(3) Denver Journal of International Law and Policy 379.

these are contrary to international law.[1105] International organisations have a duty to provide remedial action for violations through either judicial, non-judicial or quasi-judicial channels.[1106] The jurisprudence of the European Court of Human Rights (ECHR) recognised that "where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights".[1107] The ECHR also clarified that either a "judicial or equivalent review could be obtained, albeit in procedures adapted to the special features of an international organisation and therefore different from the remedies available under domestic law".[1108] However, in both cases the ECHR decided on the basis of obligations arising from international law that are covered by a convention, in this case the Convention for the Protection of Human Rights and Fundamental Freedoms.[1109] This leaves out international organisations that are not covered by a convention signed by the organisation or provided for in a contract under which the international finance institution is a borrower.[1110] Consequently, individuals whose fundamental rights are affected by development finance operations may have no remedy available to them before domestic or international courts.[1111] However, as the International Law Association (ILA) reminds us, the right to an adequate means of redress, in case of violation of rights, is a basic international human rights standard,[1112] which should always prevail over the functional needs of an international organisation.[1113]

This raises the question of whether and how international organisations should be made accountable for their acts and omissions. The ILA considers that "no situation should arise where an [international organisation] would not be accountable to some authority for an act that might be deemed illegal."[1114] However, unlike responsibility and liability, accountability

[1105] ILC, 'Draft Articles on the Responsibility of International Organizations' Yearbook of the International Law Commission, vol II (2011).
[1106] ILA, 'Reports of Conferences' (2004) 71 ILA Reports 164.
[1107] Beer and Regan v Germany App no 28934/95 (ECHR, 18 February 1999) para 57.
[1108] Waite and Kennedy v Germany App no 26083/94 (ECHR, 18 February 1999) para 50.
[1109] Council of Europe, 'Convention for the Protection of Human Rights and Fundamental Freedoms' (1950) Council of Europe Treaty Series No 5.
[1110] Antonio Morelli, 'International Financial Institutions and their Human Rights Silent Agenda: A Forward-Looking View on the "Protect, Respect and Remedy" Model in Development Finance' (2021) 36(1) American University International Law Review 51, 99.
[1111] Ibid.
[1112] UN Human Rights Committee (HRC), 'CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) UN Doc A/44/40, para 15.
[1113] ILA, 'Reports of Conferences' (2004) 71 ILA Reports 164, para 209.
[1114] Ibid, para 198.

does not have a clear definition in international law.[1115] Accountability has received a lot of attention in political science and international relations but comparatively very little in international law. It may be conceptualised around the notions of answerability and enforceability, which themselves have been disaggregated to include the concepts of relations, standards, judgments, sanctions, and redress.[1116] Relations means agreeing on who is to be held to account, Standards means agreeing on standards of performance against which to be held to account, Judgments means agreeing on a process by which to assess if standards are being met, Sanctions means agreeing on (legal, reputational, financial) penalties if standards are not met; and finally Redress means agreeing on the scope and modalities of liability and compensation for harm inflicted as a result of standards not being met. [1117]

In the context of international organisations, accountability has been framed around the principle of good governance – or good administration – which includes *inter alia* the following elements: transparency in both the decision-making process and the implementation of the ensuing institutional and operational decisions, access to information by all potentially concerned and/or affected by the decisions, the well-functioning of the international civil service sound, and appropriate reporting and evaluation mechanisms.[1118] In addition, accountability also entails for the organisation a duty to state the reasons for the decisions or particular course of action that it takes, and to act in accordance with the principle of objectivity and impartiality and the principle of due diligence.[1119]

It is these principles that have led the ILA to identify general features of remedies against international organisations. Starting from the premise that the right to a remedy is a general principle of law and a basic international human rights standard that should apply to both States and non-State parties in their dealings with international organisations, the ILA considers – in line with international jurisprudence – that remedies should include, "as appropriate", both legal and non-legal remedies. These should be "adequate, effective, and, in the case of legal remedies, enforceable." Moreover, the ILA considers that "a total lack of remedies would amount to a denial of justice, giving rise to a separate ground for responsibility on the part of the [international organisation]". Very importantly, it considers that it is the duty of the international organisation to establish the institutional framework that will enable it to

[1115] Nadia Bernaz, 'Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty' (2021) 22 Human Rights Review 45.
[1116] Aarti Gupta and Harro van Asselt, 'Transparency in Multilateral Climate Politics: Furthering (or Distracting from) Accountability?' (2019) 13 Regulation & Governance 18, 20.
[1117] Ibid, 20.
[1118] ILA, 'Reports of Conferences' (2004) 71 ILA Reports 164, para 172.
[1119] Ibid.

respect and to guarantee the right to a remedy for States and non-State parties who are affected in their interests or rights by actions or omissions by one of its organs or agents. [1120]

As a result, international organisations have an implied power to establish appropriate accountability mechanisms, either on an *ad hoc* or on a structural basis. Such mechanisms are used to provide State and non-State parties access to some form of remedy, and international organisations rely on them to prevent infringements from happening. These may be effective if the remedy is proportional and dissuasive, and if the mechanism takes into account the inherent imbalance of power between the international organisation and non-State claimants.[1121]

The GEF's policies on environmental and social safeguards, Indigenous peoples and gender mainstreaming do not require the GEF itself to address or remediate human rights violations. Instead, it delegates the primary responsibility for accountability for its safeguards and redress of grievances to its implementing and accredited agencies.[1122] It requires that these entities provide an independent, transparent, effective and accessible mechanism to address potential breaches of their own policies and procedures.[1123] The GEF set up a facilitative mechanism, the Conflict Resolution Commissioner to receive complaints related to GEF-financed projects, programmes and other issues of importance to GEF operations. The Commissioner facilitates actions among relevant parties, including complainants, agencies, recipient countries and other stakeholders.[1124]

All GEF implementing agencies have set up some form of grievance mechanism, to hear complaints from non-State parties affected by the implementation of the projects that they fund. The World Bank set up an Inspection Panel in 1993 "to promote accountability at the World Bank, give affected people a greater voice in activities supported by the World Bank that affect their rights and interests, and foster redress when warranted."[1125] The Panel submits its report to the Executive Directors and the President that consider all relevant facts, and the findings on whether the Bank has complied with all relevant Bank policies and procedures.[1126]

[1120] Ibid, para 207.
[1121] Ibid, para 224.
[1122] GEF, 'Policy on Environmental and Social Safeguards' (SD/PL/03, 2019), Minimum Standard 2: Accountability, Grievance and Conflict Resolution.
[1123] Ibid, para 5(b).
[1124] Ibid, para 18.
[1125] World Bank, 'About the Inspection Panel' <https://www.inspectionpanel.org/about-us/about-inspection-panel> Accessed 27 November 2023.
[1126] International Bank for Reconstruction and Development and International Development Association, 'Resolution Establishing the World Bank Inspection Panel', 22nd September 1993 (IBRD Res No 93-10, IDA Res No 93-6), OXIO 184, para 22.

Investigations by the Inspection Panel have led to several changes in World Bank policies and the implementation of measures to address harm caused by Bank-funded projects. The revised Environmental and Social Framework of 2016 includes stronger protections for vulnerable groups and more robust requirements for community engagement and participation. Investigations have also led to improvements in project design and implementation, including the implementation of measures to mitigate negative impacts on affected communities and the incorporation of community feedback into project planning.[1127] The Panel's reports are publicly available, and the Bank is required to respond to the Panel's findings and recommendations which has increased the accountability and transparency of Bank-funded projects. In 2020, the World Bank introduced a new Accountability Mechanism Resolution which creates a Dispute Resolution Service (DRS) alongside the Inspection Panel.[1128] The DRS offers an alternative to the formal investigative process, favouring mediation between the affected parties and the project implementers. This service allows parties to reach an agreement without assessing compliance with World Bank policies.

In 2015, UNDP established a Social and Environmental Compliance Unit (SECU) to address concerns about UNDP's compliance with its Social and Environmental Standards, policies and procedures. It is based within the Office of Audit and Investigations (OAI), so it builds on existing in-house expertise in conducting investigations and developing evidence on which to base decisions. OAI operates independently from the rest of UNDP operations.[1129] It received its first complaint in that same year, leading to an advisory review into allegations of non-compliance with the Social and Environmental Standards and other relevant policies relating to the India High Range Landscape Project in the Western Ghats of Kerala.[1130] The complaint was lodged regarding a GEF project in which the complainants believed that the project information was incomplete and inaccurate, and consultations and support for the project inadequate.[1131] Although SECU noted that the complaint involved a project that was approved before adoption of UNDP's Social and Environmental Standards it nonetheless identified several important shortcomings, including (1) an unclear description of decision-making processes and the role of potentially-impacted individuals and communities in

---

[1127] World Bank, 'The Inspection Panel at 25: Accountability at the World Bank' (World Bank 2018) 11.

[1128] World Bank, 'Resolution No. IBRD 2020-0005 and Resolution No. IDA 2020-0004' (8 September 2020), para 2.

[1129] UNDP, 'Stakeholder Response Mechanism: Overview and Guidance' (2014) 2.

[1130] UNDP Social and Environmental Compliance Unit, 'Advisory Review India High Range Landscape Project, Case No. SECU0001' (21 November 2016).

[1131] Ibid, para 7.

identifying and agreeing to measures to protect biodiversity, (2) a confused picture of decisions that have been made to date and by whom, how, and when future decisions will be made, (3) an incomplete application of UNDP's social and environmental screening and assessment tools - leading to an inadequate description of risks to individuals potentially impacted by the project, the significance of these risks, and how they will be further reviewed and assessed, (4) an incomplete picture of the context within which the project is occurring – including an unclear description of pertinent resource-related conflicts, relevant legal actions, and conservation efforts and their relationship to the project, (5) consultations that inadequately informed and engaged all key stakeholders, and (6) insufficient community support for the project.[1132] The recommendations from SECU's investigation into the complaint are expected to guide UNDP and strengthen its compliance with the safeguards.[1133] However, despite the clear deficiencies in the project's design and implementation, the complainants received no remedy because the project was approved before the adoption of the standards.

UNEP established a Stakeholder Response Mechanism (SRM) which allows people who believe they have been adversely affected by activities that are implemented or executed as part of UNEP-funded projects and programmes to submit complaints directly to UNEP.[1134] The mechanism receives and addresses complaints relating to potential breaches of the Environmental and Social Sustainability Framework policies and procedures in UNEP-funded projects and programmes.[1135] It consists in a "compliance review process" to respond to claims by stakeholders alleging that UNEP activities implemented or executed as part of its projects and programmes are not in compliance with UNEP's own ESS Framework and a "grievance redress process" that provides people allegedly affected by UNEP activities implemented or executed as part of its projects and programmes, access to appropriate dispute resolution mechanisms for hearing and addressing project-related disputes.[1136]

It is unclear however, how these two processes differ and how they operate in practice. This mechanism was established in 2015 and has not issued any reviews yet. Between 1998-2009 five cases regarding GEF projects were filed with the World Bank's Inspection Panel but no complaints regarding GEF-supported operations have been filed at the World Bank since the GEF's new Safeguards came into force.[1137]

[1132] Ibid, para 9.
[1133] Ibid, para 10.
[1134] UNEP, 'UNEP's Stakeholder Response Mechanism' (2021) 2.
[1135] Ibid.
[1136] Ibid.
[1137] GEF, 'Review of the GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards' GEF/ME/C.52/inf. 08 (2017), para 67.

2.3.Overview of the GEF's policies

GEF operations are managed and coordinated through a number of policies, procedures and guidelines that set certain parameters for the design and implementation of GEF-funded activities that apply to the GEF Secretariat and to all implemented agencies and accredited agencies within the GEF partnership. A GEF Policy is a "statement of principles that mandates or constrains activities undertaken to achieve the institutional goals of the GEF". GEF Procedures are a "set of instructions or process that must be followed to adhere to GEF Policy. Finally, a GEF guideline provides additional information to explain or help implement a GEF Policy.[1138] The GEF's social and environmental safeguards are primarily located in the Policy on Environmental and Social Safeguards of 2019[1139] and its Guidelines,[1140] but they must be applied in conjunction with other policy documents[1141] including the Policy on Gender Equality[1142] and Guidelines,[1143] the Policy on Stakeholder Engagement[1144] and Guidelines,[1145] the Principles and Guidelines for Engagement with Indigenous Peoples[1146] and other documents relating to monitoring.[1147]

The current policy on Environmental and Social Safeguards updates and replaces its old Policy on Agency Minimum Standards.[1148] During the review process, the GEF pointed out that the "[e]ffective implementation of safeguards can help avoid the emergence of social and environmental risks that could delay projects and undermine project/programme outcomes.[1149] It further noted that "[t]he benefits provided by safeguards have been found, at least in limited studies to date, to outweigh the costs of their implementation."[1150] This assessment is supported by a an evaluation by the World Bank's Independent Evaluation Group

[1138] GEF, 'Principles and Guidelines for Engagement with Indigenous Peoples' (GEF/C.42/Inf.03/Rev.1, 2012), para 29.
[1139] GEF, 'Policy on Environmental and Social Safeguards' (SD/PL/03, 2019).
[1140] GEF, 'Guidelines on GEF's Policy on Environmental and Social Safeguards' (SD/GN/03, 2019).
[1141] GEF, 'Policy on Environmental and Social Safeguards' (SD/PL/03, 2019) para 3.
[1142] GEF, 'Policy on Gender Equality' (SD/PL/02, 2017).
[1143] SD/GN/02 (2017), Guidelines on Gender Equality.
[1144] GEF, 'Policy on Stakeholder Engagement' (SD/PL/01, 2017).
[1145] GEF, 'Guidelines on the Implementation of the Policy on Stakeholder Engagement' (SD/GN/01, 2018).
[1146] GEF, 'Principles and Guidelines for Engagement with Indigenous Peoples' (GEF/C.42/Inf.03/Rev.1, 2012).
[1147] GEF, Policy on Monitoring' (GEF/C.56/03, 2019).
[1148] GEF, 'Policy on Environmental and Social Safeguards' (GEF/C.41/10/Rev.1, 2011).
[1149] GEF, 'Review of the GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards' GEF/ME/C.52/inf. 08 (2017) para 7. See also GEF, 'Monitoring Agency Compliance with GEF Policies on Environmental and Social Safeguards, Gender, and Fiduciary Standards: Implementation Modalities' (ME/PL/02, 2016).
[1150] GEF, 'Review of the GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards' GEF/ME/C.52/inf. 08 (2017) para 7.

(IEG) which found that “the [World Bank Group] safeguards framework generates significant benefits for the mitigation of environmental and social risks of projects.” [1151] These assessments show that the approach to social and environmental risk management at the GEF is first and foremost informed by and tied to the OECD DAC’s agenda on aid effectiveness.

The new policy comes on top of several reforms, initiated by the GEF’s implementing agencies. The GEF’s policy is firmly rooted in a risk-avoidance strategy (or do-no-harm approach). Curiously, it claims that the environmental and social outcomes of projects and programmes “will be enhanced” by anticipating, and then avoiding, preventing, minimising, mitigating, managing, offsetting or compensating any adverse impacts that GEF-financed projects and programs may have on people or the environment throughout the project or program cycle.[1152] It ignores the role of social and environmental safeguards in ensuring the enjoyment of human rights and in delivering positive environmental outcomes.

This is particularly striking considering that the new policy builds on the findings of a review of the GEF’s Policy on Agency Minimum Standards on Environmental and Social Safeguards prepared by the Independent Evaluation Office (IEO) in 2017. This review highlighted a number of gaps that should have been addressed in the updated GEF safeguards.[1153] Human rights, non-discrimination and equity came out on top of the priority concerns, but these are only covered in the Policy from a do-no-harm perspective.[1154] The IEO highlights the adverse impacts that could fall disproportionately on disadvantaged or vulnerable groups, including women, youth, elderly, and recommends ensuring non-discrimination in access to development resources and project benefits.[1155] While the new standards require agencies to demonstrate that those who fall under the category of “disadvantaged”, “vulnerable groups” or “individuals that are or may be affected by a project or program” are identified as early as possible, and have measures in place to ensure that they do not face discrimination,[1156] they do not go as far as to incorporate an explicit commitment not to finance projects that may infringe on human rights. This was a key recommendation from the review.[1157] It is worthy of note that despite this recommendation on human rights, the

[1151] World Bank Independent Evaluation Group, ‘Safeguards and Sustainability Policies in a Changing World: An Independent Evaluation of World Bank Group Experience’ (2010) 63.
[1152] GEF, ‘Policy on Environmental and Social Safeguards’ (SD/PL/03, 2019).
[1153] GEF, ‘Review of the GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards’ GEF/ME/C.52/inf. 08 (2017) para 104.
[1154] Ibid, para 104(a).
[1155] Ibid.
[1156] GEF, ‘Policy on Environmental and Social Safeguards’ (SD/PL/03, 2019), para 4(j).
[1157] GEF, ‘Review of the GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards’ GEF/ME/C.52/inf. 08 (2017) para 104(a).

new safeguards do not make any explicit reference to human rights, referring instead to environmental and social impact. This continued reluctance to explicitly acknowledge the responsibility of the GEF and its implementing agencies to fulfil human rights is at odds with the important normative developments under the human right to a clean, healthy and sustainable environment outlined in Chapter 4.

The policy defines environmental and social impacts as "any change, potential or actual, to the physical, natural, or cultural environment, and related impacts on surrounding communities and workers, resulting from a project or program, including direct, indirect, cumulative and transboundary impacts and the impacts of Associated Facilities, and including both adverse and beneficial impacts". The first part of this definition mirrors that of the World Bank, but it introduces a number of innovative aspects that deserve a mention. First, it builds on the literature on impact assessments to broaden the scope of impacts considered, and includes cumulative impacts and transboundary impacts.[1158] Second, the inclusion of beneficial impacts in the definition follows in the footsteps of other policy reforms at UNDP and UNEP which have introduced the generation of social and environmental benefits as an essential requirement of their internal monitoring process. Unfortunately, this core message isn't reflected in the policy's main body which is still very much focused on risk avoidance and mitigation. Indeed, the document contains only one reference to the generation of social benefits, which applies in the context of projects and programmes involving forest restoration. For these projects and programmes, GEF agencies must demonstrate that they have in place the necessary policies, procedures, systems and capabilities to ensure that they "enhance biodiversity and ecosystem functionality, and are environmentally appropriate, socially beneficial and economically viable".[1159]

Other aspects of the policy, such as those that relate to restrictions on land use and involuntary resettlement draw heavily from the World Bank's new ESF Standard 5 on land acquisition, restrictions on land use and involuntary resettlement.[1160] In cases where an involuntary resettlement occurs GEF agencies are required to demonstrate that they have in place the necessary policies, procedures, systems and capabilities to ensure that a Resettlement Action Plan or equivalent is developed that identifies "people without formal legal rights, but with a claim to land or assets that is recognized or recognizable under national law; and people

[1158] See Frank Vanclay, 'International Principles for Social Impact Assessment' (2003) 21(1) Impact Assessment and Project Appraisal 5.
[1159] GEF, 'Policy on Environmental and Social Safeguards' (SD/PL/03, 2019) para 8(e).
[1160] World Bank, 'Environmental and Social Framework' (World Bank, 2017) pp 53-64.

who have no recognizable legal right or claim to the land or assets they occupy or use, but who are occupying or using the land prior to a project-specific cut-off date." This acknowledgement of informal rights to land goes a long way towards the consolidation of emerging international standards on land tenure, including those contained in FAO's Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT).[1161] These guidelines encourage Member States to recognise and respect all legitimate tenure right holders and their rights and to take reasonable measures to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not.[1162] It is worthy of note that the CBD COP acknowledged the relevance of the VGGT as a means of eradicating hunger and poverty, supporting sustainable development and enhancing the environment.[1163] More generally, the VGGTs are an important tool in the realisation of the human right to a clean, healthy and sustainable environment.

The GEF's standards state that in case of physical or economic displacement, persons without formal legal rights to land resettlement assistance must be provided "resettlement assistance" which must "help improve or at least restore their livelihoods in another location".[1164] In cases of physical resettlement, arrangements must be made "to allow them to obtain adequate housing with security of tenure, and compensation for assets other than land (such as dwellings), where feasible".[1165] However, as will be discussed in the next Section, these policies fall short of complying with CBD guidance on a number of points.

Having established that the GEF's approach to human rights is firmly anchored in a risk avoidance strategy that does not adequately meet the responsibility of GEF implementing agencies to fulfil human rights, the next Part considers the extent to which the GEF's policies and guidelines are aligned with CBD COP guidance.

3. Extent of GEF's alignment with COP guidance on human rights

This Part demonstrates that on the whole the GEF's policies and guidelines fall short of complying with key aspects of CBD guidance, including in relation to the respect for

[1161] FAO, 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security' (FAO, 2012).
[1162] Ibid, para 3.1.
[1163] Conference of the Parties to CBD Decision XII/5 (17 October 2014), UN Doc UNEP/CBD/COP/DEC/XII/5, Annex, Section 2(b).
[1164] GEF, 'Policy on Environmental and Social Safeguards' (SD/PL/03, 2019) para 9(h).
[1165] Ibid.

human rights (Section 3.1.) ; the respect for biodiversity-related international instruments and CBD guidance (Section 3.2.); the respect for prior informed consent and/or approval and involvement (Section 3.3.); enabling the participation of Indigenous peoples and local communities (Section 3.4.); conducting cultural, environmental and social impact assessments (Section 3.5.); ensuring the fair and equitable sharing of benefits arising from the use of genetic resources (Section 3.6.); preventing involuntary resettlement and providing compensation in cases of voluntary resettlement (Section 3.7.); and the provision of accountability, evaluation and compliance mechanisms (Section 3.8.).

3.1.The respect for human rights, including the rights of women, children, persons with disabilities and environmental human rights defenders

The requirement for the GEF to respect human rights is derived from a number of soft-law instruments developed under the aegis of CBD Article 8(j) and adopted by the COP, as well as general international law. One such instrument is the Tkarihwaié:ri Code of Ethical Conduct which clearly states in its introduction that the implementation of the Code should take into account the full range of international human rights instruments and implement them in a manner that supports harmonisation, complementarity and effective implementation.[1166] Such instruments include the Convention on the Elimination of all Forms of Racial Discrimination, ILO's Convention No.169 on Indigenous and Tribal Peoples, the CBD, the Convention for the Safeguarding of the Intangible Cultural Heritage, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights. The 2014 Voluntary guidelines on safeguards in biodiversity financing mechanisms added the Convention on the Elimination of All Forms of Discrimination against Women to the list of human rights instruments.[1167]

In addition to international human rights instruments, the GEF is also required to support the implementation of guidance documents and good practices produced as part of the United Nations Second International Decade of the World's Indigenous Peoples (2005-2014), the Universal Declaration on Cultural Diversity, the Universal Declaration on Bioethics and

[1166] CBD, 'Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biological Diversity (2011), [hereinafter "Tkarihwaié:ri Code"]

[1167] Conference of the Parties to CBD Decision 14/15 (30 November 2018), UN Doc CBD/COP/DEC/14/15, Guideline C3.

Human Rights, the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, the Akwé: Kon Guidelines, the United Nations Declaration on the Rights of Indigenous Peoples,[1168] as well as Mo'otz Kuxtal Voluntary Guidelines and the Voluntary guidelines on safeguards in biodiversity financing mechanisms.

The Gender Plan of Action requires that biodiversity programming address human rights, and those of women and girls in particular.[1169] This includes i*nter alia* integrating human rights and gender equality considerations into NBSAPs; providing capacity-building and development opportunities on gender responsive development, planning, implementation, budgeting, monitoring, evaluation and reporting of NBSAPs; and engaging women's groups, gender institutions and gender experts, and indigenous peoples and local communities, in the process of developing and updating NBSAPs and related biodiversity policies, plans, and strategies at all levels.

As was discussed in Chapter 4, Target 22 of the Kunming-Montreal GBF commits Parties to ensure the full, equitable, inclusive, effective and gender-responsive representation and participation in decision-making, access to justice and information related to biodiversity by women and girls, children and youth, and persons with disabilities. They also commit to ensuring the full protection of environmental human rights defenders. Target 22 will be monitored against a number of existing indicators drawn from various international initiatives, including Agenda 2030.[1170] Environmental human rights defenders are entitled to the specific rights and protections set out in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders).[1171] Article 16 of the Declaration recalls the role of "relevant institutions […] in contributing to making the public more aware of questions relating to all human rights and fundamental freedoms through activities such as education, training and research […]." As such, the implementation of biodiversity-related projects by GEF's implementing agencies should raise awareness of biodiversity-related human rights, including the right to a clean, healthy and sustainable environment. They should also engage with environmental human rights defenders as

[1168]Tkarihwaié:ri Code, Introduction.
[1169] Conference of the Parties to CBD Decision 15/11 (19 December 2022), UN Doc CBD/COP/DEC/15/11, Expected Outcome 2.
[1170] UNGA, 'Transforming our world: the 2030 Agenda for Sustainable Development' (2015) UN Doc A/RES/70/1.
[1171] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2018) UN Doc A/HRC/37/59, para 11.

stakeholders and important contributors to the protection and promotion of human rights related to the environment.[1172]

In addition, Target 23 commits States Parties to give all women and girls an equal opportunity and capacity to contribute to the three objectives of the Convention, to recognise their equal rights and access to land and natural resources; and to recognise their full, equitable, meaningful and informed participation and leadership at all levels of action, engagement, policy and decision-making related to biodiversity.[1173] Target 23 is supported by a Gender Plan of Action which includes a table of objectives, actions and deliverables. These centre around 3 key objectives: strengthening national capacities for the collection gender-disaggregated data; ensuring the participation of women and women's group; and ensuring financial resources to support a rights-based and gender-responsive implementation of the Framework, including through gender-responsive budgeting.

Currently, none of the GEF's policies contain an explicit commitment to complying with any human rights instruments. The Policy on Gender Equality makes no reference to CEDAW despite the "recognition of related international and national commitments to gender equality and human rights".[1174]

The Guidelines for Engagement with Indigenous Peoples partially comply with CBD guidance by adopting a process of free, prior and informed consent for GEF-financed projects, but only for countries that have ratified ILO Convention 169.[1175] For projects in countries that have not ratified the Convention, the GEF and its Partner agencies rely on their systems for consultation with Indigenous Peoples to "ensure that such consultations result in broad community support for the GEF-financed operations being proposed.[1176] This is clearly insufficient, as it does not meet the requirements of the Mo'otz Kuxtal Voluntary Guidelines and Akwe: Kon Guidelines that Indigenous peoples and local communities are able to grant or not to grant consent or approval in relation to the use of traditional knowledge[1177] and in the context of assessing the impacts of development projects.[1178]

[1172] Ibid, paras 10-11.
[1173] Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4, Annex, Section H.
[1174] GEF, 'Policy on Gender Equality' (SD/PL/02, 2017), para 8(a).
[1175] GEF, 'Principles and Guidelines for Engagement with Indigenous Peoples' (2012), para 30(e).
[1176] Ibid.
[1177] Mo'otz Kuxtal Voluntary Guidelines, paras 7 and 8.
[1178] Akwé: Kon guidelines, para 52(a).

3.2.Respect for biodiversity-related international instruments and CBD guidance

There is also no explicit commitment to ensuring alignment with biodiversity-related international instruments and CBD guidance. Indeed, GEF policies only require that implementing agencies do not propose or implement projects or programmes that would contravene applicable international environmental treaties or agreements.[1179] This is a far cry from fully supporting the implementation of the CBD or other MEAs such as the UNFCCC.

When it comes to COP guidance on the implementation of Article 8(j), the Guidelines for Engagement with Indigenous Peoples contain a commitment to respecting the Tkarihwaie: ri Code and the Akwe: Kon Guidelines,[1180] but these Guidelines were adopted in 2012 and need to be updated to include more recent CBD guidance instruments such as the Mo'otz Kuxtal Voluntary Guidelines and the Voluntary guidelines on safeguards in biodiversity financing mechanisms.

3.3.Definitions

Although definitions in GEF policies do not contain any mandatory requirements for the GEF and its implementing agencies, they provide useful information to help frame the context within which GEF policies are to be interpreted and applied. As such, it is important to understand how closely aligned the GEF's definitions are with the guidance provided by the CBD COP. Key definitions include Indigenous peoples, local communities, cultural impact assessments, environmental impact assessment, social impact assessment and "prior and informed consent" or "free, prior and informed consent" or "approval and involvement".

The Policy on Environmental and Social Safeguards provides a definition that is in line with the ILO's focus on geography, preservation of social, economic, cultural and political institutions and self-identification as key markers of Indigenous peoples.[1181] Although the CBD and the CBD COP do not officially recognise any definition of Indigenous peoples, the Voluntary guidelines on safeguards in biodiversity financing mechanisms do encourage

[1179] GEF, 'Policy on Environmental and Social Safeguards' (SD/PL/03, 2019) para 7(b).
[1180] GEF, 'Principles and Guidelines for Engagement with Indigenous Peoples' (GEF/C.42/Inf.03/Rev.1, 2012) para 36(e).
[1181] International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention*, C169 (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383, Article 1.

compliance with human rights treaties,[1182] and the GEF was requested to integrate these guidelines into the review and upgrading process of its social and environmental safeguards.[1183]

In addition, the Tkarihwaié:ri Code of Ethical Conduct recommends compliance with the ILO Convention 169.[1184] It can therefore be assumed that the GEF definition of Indigenous Peoples complies with CBD guidance. Similarly, although none of the GEF policies provide any definition of "local communities", they are captured under the definition of "stakeholder" which "means an individual or group that has an interest in the outcome of a GEF project or program or is likely to be affected by it, such as local communities, Indigenous Peoples, civil society organizations, and private sector entities, comprising women, men, girls and boys."[1185]

Regrettably however, none of the other definitions are aligned with CBD guidance. GEF policies do not define cultural impact assessments, although aspects related to cultural heritage are considered throughout the Policy on Environmental and Social Safeguards. In addition, the Policy proposes a definition of "Environmental and Social Risk and Impact Assessment" which focuses only on risks and do not consider beneficial impacts, as required by the Akwé: Kon guidelines.[1186] Importantly the GEF definition also does not include the impact of proposed projects on the economic, social, cultural, civic and political rights of Indigenous peoples and local communities.[1187]

Finally, although the Guidelines for Engagement with Indigenous Peoples recognise FPIC in countries that have ratified ILO Convention 169, the definition provided in the Policy on Environmental and Social Safeguards does not match the definition of "Prior and informed consent" or "free, prior and informed consent" or "approval and involvement" of the Mo'otz Kuxtal Voluntary Guidelines.[1188] Crucially, the GEF policy does not require consent or approval, preferring instead the terms "collective support".[1189] The definition further dilutes the requirement for FPIC by including a qualifier that "FPIC does not require unanimity and may be achieved even when individuals or groups within the community explicitly

[1182] Conference of the Parties to CBD Decision 14/15 (30 November 2018), UN Doc CBD/COP/DEC/14/15, Annex, Guideline C.
[1183] Conference of the Parties to CBD Decision 15/15 (19 December 2022), UN Doc CBD/COP/DEC/15/15, Annex II A, para 109.
[1184] Tkarihwaié:ri Code, Introduction.
[1185] GEF, 'Policy on Environmental and Social Safeguards' (SD/PL/03, 2019), Definitions.
[1186] Akwé: Kon guidelines, para 6(d).
[1187] Akwé: Kon guidelines, para 6(g).
[1188] See Mo'otz Kuxtal Voluntary Guidelines, paras 7 and 8.
[1189] GEF, 'Policy on Environmental and Social Safeguards' (SD/PL/03, 2019), Definitions.

disagree."[1190] It does not set a threshold or a percentage for the number of members whose support is needed to achieve "collective support".

3.4.The respect for prior informed consent and/or approval and involvement

This responsibility stems from a number of CBD guidance instruments, including the Mo'otz Kuxtal Voluntary Guidelines and the Akwé: Kon guidelines. In addition, to protect the bio-cultural and intellectual heritage of Indigenous peoples and local communities, the Tkarihwaié:ri Code of Ethical Conduct requires that any activities and interactions related to traditional knowledge occurring on or likely to impact on sacred sites and on lands and waters traditionally occupied or used by Indigenous peoples and local communities and impacting upon specific groups, be carried out with the prior informed consent and/or approval and involvement of Indigenous peoples and local communities. Such consent or approval should not be coerced, forced or manipulated.[1191] These CBD guidelines are in line with IHRL as evidenced by Principle 15 of the Framework Principles on human Rights and the Environment.[1192]

As was discussed in the previous Chapter, the Mo'otz Kuxtal Voluntary Guidelines fleshed out the concept of "prior and informed consent", "free, prior and informed consent" or "approval and involvement" and clarified that it entails a continual process that goes beyond the Western understanding of consent as devoid of intimidation, pressure and coercion.[1193] The views and concerns of the affected Indigenous peoples or local communities should be properly recorded either through written statements, or on video or audio tape, or any other appropriate way, subject to the consent of the communities.[1194]

In accordance with CBD guidance, GEF policies and guidelines should provide for the participation of Indigenous peoples and local communities in consultations[1195] and ensure that

---

[1190] Ibid.

[1191] Tkarihwaié:ri Code, para 11.

[1192] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2018) UN Doc A/HRC/37/59, paras 47-53.

[1193] Elisa Morgera, 'Under the Radar: The Role of Fair and Equitable Benefit-Sharing in Protecting and Realising Human Rights Connected to Natural Resources' (2019) 23(7) The International Journal of Human Rights 1098, 1112.

[1194] Conference of the Parties to CBD Decision VII/16 (13 April 2004), UN Doc UNEP/CBD/COP/DEC/VII/16, Annex, Section F, para 17.

[1195] Tkarihwaié:ri Code, para 11 and Mo'otz Kuxtal Voluntary Guidelines, para 7(e).

they have the ability to give or withhold consent to a project.[1196] In addition, FPIC should be implemented as a continuous process.[1197]

The Guidelines for Engagement with Indigenous Peoples state that the GEF and its agencies must ensure the full and effective participation of Indigenous peoples in GEF policies, processes, programmes and projects that may positively or negatively impact them, or infringe upon their rights and ability to sustain their way of life. This should include the timely identification of Indigenous peoples and their participation in environmental, cultural and social impact assessments. Representatives of Indigenous peoples should also participate in the identification, development, implementation, monitoring and evaluation of relevant projects.[1198] However, these requirements are not supported by any implementing guidelines to clarify how the GEF and its implementing agencies should put these recommendations into practice. The Policy on Stakeholder Engagement fills some of the gap and extends these protections to local communities.[1199] Currently however, none of the GEF policies and guidelines require the consent of Indigenous peoples and local communities for a project to go ahead.

CBD COP guidance further requires that the GEF puts in place mechanisms to ensure the participation of women and vulnerable groups,[1200] the respect for local decision-making processes[1201] and the recording of views.[1202] The GEF's Policy on Gender Equality and its implementing guidelines require that Agencies have in place the necessary policies, procedures and capabilities needed to ensure that women and men are provided equal opportunities in terms of participation and decision-making throughout the identification, design, implementation, monitoring and evaluation of activities.[1203] To comply with this requirement, they should conduct participatory stakeholder analyses and consultations to determine rights, roles, priorities, and capabilities of women and men on aspects that as health, livelihood, and income, resources and issues at stake, as well as the gender-differentiated impact of a project on women and men's concerns, needs, capabilities, and opportunity to contribute to the project.[1204] On this basis, they must determine how to involve and engage with different groups

[1196] Mo'otz Kuxtal Voluntary Guidelines, para 7(d).
[1197] Mo'otz Kuxtal Voluntary Guidelines, para 8.
[1198] GEF, 'Principles and Guidelines for Engagement with Indigenous Peoples' ((GEF/C.42/Inf.03/Rev.1, 2012), para 36.
[1199] GEF, 'Policy on Stakeholder Engagement' (SD/PL/01, 2017), para 16.
[1200] Tkarihwaié:ri Code, para 29 and Akwé: Kon guidelines, para 54.
[1201] Tkarihwaié:ri Code, para 30.
[1202] Akwé: Kon guidelines, para 17.
[1203] GEF, 'Policy on Gender Equality' (SD/PL/02, 2017), para 19(d).
[1204] GEF, 'Guidelines on Gender Equality' (SD/GN/02, 2017), Annex, para 2(ii).

of stakeholders.[1205] Additionally, the Policy on Stakeholder Engagement requires that Agencies are responsive to the needs and interests of disadvantaged and vulnerable groups.[1206]

Whilst the Guidelines for Engagement with Indigenous peoples require that the GEF and its agencies ensure the representation and participation of Indigenous peoples in relevant GEF projects, processes, programmes and projects through processes chosen by Indigenous people in accordance with their own procedures, this requirement was not included in the Policy on Stakeholder Engagement. This means that it does not extend to local communities. Agencies however, must keep a public record of stakeholder engagement throughout the project cycle which complies with the requirement to keep a record of views.[1207] FPIC under the GEF policies is not in itself treated as a continuous process. Only consultations and efforts to ensure participation are required to be carried out throughout the project's life cycle, and it does not extend beyond the end of the project.[1208]

3.5. Enabling the participation of Indigenous peoples and local communities in development projects

In the development of its CBD-related project activities, the GEF must ensure that all decisions regarding interactions with Indigenous peoples and local communities are developed in such a way as to ensure their empowerment and effective participation, in accordance with their decision-making structures.[1209] This includes developing methodologies to ensure the full and effective participation of women in decision-making and implementation.[1210]

The GEF should ensure the full and effective participation of Indigenous peoples and local communities in activities and interactions related to biological diversity and conservation that may impact on them.[1211] In addition, it should respect their decision-making processes and time frames for such decision-making.[1212] In particular, they should be given the opportunity to actively participate in research that affects them or which makes use of their traditional knowledge related to the objectives of the Convention, and decide on their own research

[1205] Ibid.
[1206] GEF, 'Policy on Stakeholder Engagement' (SD/PL/01, 2017), para 16(c).
[1207] Ibid, para 16(d).
[1208] Ibid, para 16(a).
[1209] Tkarihwaié:ri Code, para 27.
[1210] Tkarihwaié:ri Code, para 29; Akwé: Kon guidelines, para 54.
[1211] Tkarihwaié:ri Code, para 30.
[1212] Ibid.

initiatives and priorities, conduct their own research, including building their own research institutions and promoting the building of cooperation, capacity and competence.[1213]

The GEF should provide financial, technical and legal support to ensure the participation of Indigenous peoples and local communities and relevant national organisations in all aspects of national impact assessments.[1214] This support should be commensurate with the size of the development project, considering that the larger the proposed development, the greater and more widespread the potential impacts.[1215]

The GEF's policies and guidelines do not fully meet the requirements of the CBD COP in relation to the participation of Indigenous peoples and local communities in development projects. Indeed, whilst the Policy on Stakeholder Engagement requires Agencies to allocate adequate resources to promote effective stakeholder engagement throughout the programme and project cycles,[1216] they do not need to provide technical or legal support to ensure that they have the capacity to participate.[1217] In addition, the policies are largely focused on risk-reduction, not on building collaborative partnerships with project stakeholders. As a result, they do not provide opportunities for Indigenous peoples and local communities to participate in research or project outcomes.[1218] They also do not provide for their involvement in the financial auditing processes of development projects.[1219]

3.6. The prevention of involuntary resettlements and the provision of compensation in cases of voluntary resettlement

The COP guidance is clear that Indigenous peoples and local communities must not be removed and relocated from the lands and waters that they own, or traditionally occupy and use, through the use of force, coercion and without their consent.[1220] If consent to removal is granted, they should be compensated.[1221] This compensation should be based on mutually agreed terms between Indigenous peoples and local communities and those undertaking

[1213] Ibid, para 25.
[1214] Akwé: Kon guidelines, paras 8(f), 18 and 70.
[1215] Akwé: Kon guidelines, para 18.
[1216] GEF, 'Policy on Stakeholder Engagement' (SD/PL/01, 2017), para 12.
[1217] Akwé: Kon guidelines, paras 8(f), 18 and 70.
[1218] See Tkarihwaié:ri Code of Ethical Conduct, para 25.
[1219] See Akwé: Kon guidelines, para 46.
[1220] Tkarihwaié:ri Code, para 19.
[1221] Ibid, para 19.

activities related to biological diversity and the objectives of the Convention, such as conservation.[1222]

GEF policies however, show a clear discrepancy between the Policy on Environmental and Social Safeguards which allows involuntary resettlements under certain conditions[1223] and the Guidelines for Engagement with Indigenous Peoples, which commits the GEF not to finance involuntary resettlements.[1224] This suggests that involuntary resettlements are allowed to be funded for local communities, provided that all viable alternatives are assessed to avoid economic displacement or physical displacement from restrictions on land use and involuntary resettlement. Where alternatives do not exist, adverse impacts from restrictions on land use and involuntary resettlement should be minimised, managed or compensated, based on meaningful consultations, and with particular attention to any affected disadvantaged or vulnerable individuals or groups, so that affected peoples' standards of living and livelihoods are improved, or at least restored.[1225]

3.7. Conducting cultural, environmental and social impact assessments

The Voluntary guidelines on safeguards in biodiversity financing mechanisms break new grounds by enabling the transition from a do-no harm approach to the more proactive purpose of contributing to the realisation of human rights and the provision of benefits to Indigenous peoples and local communities. As such, the GEF's safeguard system should serve the dual purpose of a) effectively avoiding or mitigating unintended impacts on the rights and livelihoods of Indigenous peoples and local communities in accordance with national legislation, and b) maximising opportunities to support these rights.[1226]

The primary legal basis for conducting impact assessments are Articles 7 and 14 of the CBD which require Parties to identify processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and to monitor their effects.[1227] In addition, Parties are required to introduce appropriate procedures for an environmental impact assessment of proposed projects that are

[1222] Ibid, para 22.
[1223] GEF, 'Policy on Environmental and Social Safeguards' (SD/PL/03, 2019), para 9.
[1224] GEF, 'Principles and Guidelines for Engagement with Indigenous Peoples' (GEF/C.42/Inf.03/Rev.1, 2012), para 39.
[1225] GEF, 'Policy on Environmental and Social Safeguards' (SD/PL/03, 2019), para 9.
[1226] Conference of the Parties to CBD Decision 14/15 (30 November 2018), UN Doc CBD/COP/DEC/14/15, Annex.
[1227] CBD, Article 7(c).

likely to have significant adverse effects on biological diversity to avoid or minimise such effects. These assessments should allow for public participation in such procedures[1228] and in line with Article 8(j), they should respect, preserve and maintain the knowledge, innovations and practices of Indigenous peoples and local communities.

The GEF should ensure that its procedures for the conduct of cultural, environmental and social impact assessments are in alignment with the Akwe: Kon guidelines. First, cultural, environmental and social impact assessments should be carried out under a single assessment process.[1229] This is because of the inextricable connection members of Indigenous peoples and tribal peoples have with their territory, which makes the protection of their rights over such territory necessary to guarantee their very survival.[1230] In the view of the Inter-American Court of Human Rights, the protection of the lands and resources they have traditionally used is essential to prevent their extinction as a people. Special measures are required "to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States."[1231] Second, impact assessments should involve the following stages: a preparatory stage with a screening and scoping phase, a main stage that comprises the impact analysis and assessment on the basis of which mitigation measures should be developed. Such measures should include not going ahead with the development, finding alternatives that successfully avoid the impacts, or providing monetary and/or nonmonetary compensation for adverse impacts.[1232] Following on from the assessment, there should be a reporting and decision-making stage which includes reporting on and reviewing the impact assessment study to reach a decision and come up with management and monitoring plans. These should carefully delineate roles and responsibilities, and outline alternative proposals and mitigation requirements and conditions.[1233]

Examples of impacts highlighted by the guidelines include impacts on customary use of biological resources, impacts on the respect, preservation, protection and maintenance of traditional knowledge, innovations and practices, impacts on sacred sites and associated ritual or ceremonial activities, impacts on privacy and impacts on the exercise of customary laws.[1234]

[1228] CBD, Article 14(1)(a).
[1229] Akwé: Kon guidelines, para 7.
[1230] *Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Series C No 172 (2007) para 122. See also Akwé: Kon guidelines, para 23.
[1231] *Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Series C No 172 (2007) para 121.
[1232] Akwé: Kon guidelines, para 7(b)(ii).
[1233] Ibid, para 7.
[1234] Ibid, para 27.

On this point, UNDRIP recognises the right of Indigenous peoples to "maintain, protect, and have access in privacy to their religious and cultural sites."[1235] In addition, the World Intellectual Property Organization (WIPO)'s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore defines secret traditional knowledge as "traditional knowledge that is held and regarded as secret by applicable indigenous [peoples] and local communities [beneficiaries] in accordance with their customary laws, protocols, practices under the understanding that the use or application of the traditional knowledge is constrained within a framework of secrecy." It is "not generally known or readily accessible to the public; has commercial value because it is secret; and has been subject to measures to maintain secrecy of the knowledge."[1236] The work of the Committee has led to the development of draft provisions which aim to consolidate the understanding of State obligations in relation the protection of traditional knowledge. These recognise the exclusive collective rights of Indigenous peoples and local communities (i) to maintain, control, use, develop, authorise or prevent access to and use/utilization of their traditional knowledge; (ii) to receive a fair and equitable share of benefits arising from their use; (iii) to exclusive collective rights of attribution; and (iv) to the use of their traditional knowledge in a manner that respects the integrity of such traditional knowledge.[1237] These requirements should all be adequately captured in the GEF's policies and guidelines.

Additionally, the GEF should set up effective mechanisms to notify and organise public consultations, identify Indigenous peoples and local communities as well as relevant stakeholders that are likely to be affected by the project.[1238] These mechanisms should uphold the rights of women, the youth, the elderly and other vulnerable groups to participate in the consultation and impact assessment process, including through the provision of sufficient human, financial, technical and legal resources.[1239] The views and concerns of the members should be recorded, and local and Indigenous communities should have the option to accept or oppose a project that may impact their community.[1240] The impact assessment process should consider the rights, knowledge, innovations and practices of Indigenous and local communities; the use of appropriate language and process; the allocation of sufficient time and

[1235] UNGA, 'United Nations Declaration on the Rights of Indigenous Peoples' (2007) UN Doc A/RES/61/295, Article 12(1).
[1236] WIPO, 'The Protection of Traditional Knowledge: Draft Articles' WIPO/GRTKF/IC/47/4 (2023) Annex, Article 1.
[1237] Ibid, Article 5(a).
[1238] Akwé: Kon guidelines, paras 8(a) and (b).
[1239] Ibid, paras 8(c) and (f).
[1240] Ibid, paras 8(d) and (e).

the provision of accurate, factual and legally correct information.[1241] Finally, the process should lead to the preparation and finalisation of agreements on mutually-agreed terms for the implementation of measures to prevent or mitigate any negative impacts of the project.[1242] It should be supported by a robust review and appeals process that clearly identifies actors responsible for liability, redress, insurance and compensation.[1243]

This process is important not only to the identification and appropriate handling of impacts by the GEF as part of its operational modalities, but also to allow Indigenous and local communities to have an active part in the decision-making process. Indeed, the impact assessment procedure should help them make an informed decision about whether or not to give consent as part of the "prior and informed consent", "free, prior and informed consent" or "approval and involvement" process outlined in the Mo'otz Kuxtal Voluntary Guidelines.[1244] This process should establish an impartial baseline laying out the likely economic, social, cultural and environmental impacts, as well as the nature of the benefits that they can expect.[1245]

In accordance with CBD guidance, cultural, environmental and social impact assessments are carried out under a single assessment process.[1246] Aspects related to cultural heritage and biological resources are treated under Minimum Standard 6 and Minimum Standard 3 respectively but they also form part of the general assessment process under Minimum Standard 1. However, GEF policies do not cover in great detail the types of impacts that should be considered as part of its Agencies impact assessment procedures. Impacts on the respect, preservation, protection and maintenance of traditional knowledge, innovations and practices are not considered under the general Policy on Environmental and Social Safeguards so they do not apply to local communities, but impacts on traditional knowledge must be documented under an "appropriate plan".[1247] Similarly, the requirement to identify impacts on sacred sites and associated ritual or ceremonial activities apply only to Indigenous Peoples in the context of FPIC.[1248]

Impacts on privacy are partially considered under the Stakeholder Engagement Policy which states that "in cases where confidentiality is necessary to protect stakeholders from harm,

---

[1241] Conference of the Parties to CBD Decision VII/16 (13 April 2004), UN Doc UNEP/CBD/COP/DEC/VII/16, Annex, Section F, para 53.
[1242] Akwé: Kon guidelines, para 8(i).
[1243] Ibid, paras 8(h) and (j).
[1244] Mo'otz Kuxtal Voluntary Guidelines, para 7(c).
[1245] Ibid, paras 7(c) and 17(c)(ii).
[1246] GEF, 'Policy on Environmental and Social Safeguards' (SD/PL/03, 2019), para 4(b)(ii).
[1247]GEF, 'Principles and Guidelines for Engagement with Indigenous Peoples' (GEF/C.42/Inf.03/Rev.1, 2012), para 35.
[1248] GEF, 'Policy on Environmental and Social Safeguards' (SD/PL/03, 2019), para 10(c).

statistical information is recorded and made publicly available."[1249] However, the communication of sensitive information through statistical data may not be sufficient to guarantee confidentiality when only small groups of people are involved. In addition, the protection of personal data should not be limited to cases where disclosure could cause harm, but should be addressed fully, perhaps under a separate policy on data protection. Similarly, the guidelines do not have any safeguards in place to ensure the protection of secret traditional knowledge.

Finally, impacts on the ability of Indigenous peoples and local communities' ability to exercise customary laws are not explicitly captured by the policies. The Policy on Environmental and Social Safeguards requires that Agencies demonstrate that they have considered impacts on applicable national and local laws as well as directly relevant provisions of international treaties and agreements,[1250] but they do not specify whether customary laws are covered under national law when these are not formally recognised under national legal systems.

Under the policies, mitigation measures partially comply with the CBD COP guidance that these should include: not going ahead with the development; finding alternatives that successfully avoid the impacts; or providing monetary and/or nonmonetary compensation for adverse impacts. Indeed, projects and programmes must be assessed, designed and implemented in accordance with the mitigation hierarchy which include: avoiding or preventing environmental and social risks and potential adverse environmental and social impacts "where feasible"; minimising; mitigating and managing; and as a last resort, offsetting or compensating residual impacts where avoidance or prevention, minimisation, mitigation, and management are not feasible.[1251] The Guidelines for Engagement with Indigenous Peoples do, however, require that projects that can negatively impact Indigenous peoples' traditional ownership and user rights on lands, territories, resources, livelihoods or cultures be avoided, but with the added qualifier that avoidance may not be possible.[1252]

3.8. Ensure the fair and equitable sharing of benefits

[1249] GEF, 'Policy on Stakeholder Engagement' (SD/PL/01, 2017), para 16(d).
[1250] GEF, 'Policy on Environmental and Social Safeguards' (SD/PL/03, 2019), para 4(b)(iii).
[1251] Ibid, para 4(c).
[1252] GEF, 'Principles and Guidelines for Engagement with Indigenous Peoples' (GEF/C.42/Inf.03/Rev.1, 2012), para 36(d).

In 2017, the GEF IEO recommended that the GEF policies be updated to include standards for the fair and equitable sharing of benefits arising from the use of genetic resources.[1253] The 2019 Policy however, only contains minimal requirements in relation to fair and equitable benefit sharing. Implementing and accredited agencies must only demonstrate that project activities conform with applicable frameworks and measures related to access and benefit sharing in the utilisation of genetic resources.[1254] As such, Indigenous peoples must be entitled to benefit sharing under national law for GEF agencies to implement it.[1255]

To comply with CBD COP guidance, the GEF should ensure that Indigenous peoples and local communities receive fair and equitable benefits based on mutually agreed terms from the use of the traditional knowledge that they hold; provide a definition of fair and equitable benefit sharing; provide guidance on how to obtain "prior and informed consent", "free, prior and informed consent" or "approval and involvement", depending on national circumstances, to access traditional knowledge; and lay out a process for establishing mutually agreed terms and community protocols

3.9.The provision of accountability, evaluation and compliance mechanisms

The GEF's policies should include accountability, evaluation and compliance mechanisms to ensure transparency and accountability.[1256] Accountability should be facilitated by ensuring the involvement of Indigenous peoples and local communities in the financial auditing processes of the development projects in which they participate to ensure that the resources invested are used effectively.[1257]

Under the Policy on Environmental and Social Safeguards, Agencies must demonstrate that they have in place grievance and conflict resolution systems. These systems must *inter alia*, receive and address complaints related to the implementation of projects and programmes in a timely and culturally appropriate manner; work proactively with complainants and other parties to resolve the complaints or disputes determined to have standing. They must also

[1253] GEF, 'Review of the GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards' GEF/ME/C.52/inf. 08 (2017) paras 104(g) and (m).
[1254] GEF, 'Policy on Environmental and Social Safeguards' (SD/PL/03, 2019), para 8(f).
[1255] Ibid, para 11(h).
[1256] Conference of the Parties to CBD Decision 14/15 (30 November 2018), UN Doc CBD/COP/DEC/14/15, Annex, Guideline D.
[1257] Akwé: Kon guidelines, para 46.
[1257] Conference of the Parties to CBD Decision VII/16 (13 April 2004), UN Doc UNEP/CBD/COP/DEC/VII/16, Annex, Section F, para 46.

operate independently from project teams, be transparent, and effective as neutral third parties. They must minimise the risks of retaliation to complainants and be available locally.[1258] Under the Guidelines for Engagement with Indigenous Peoples, the GEF and its agencies must facilitate access by Indigenous peoples to local or country level grievance and dispute resolution systems as a first step in addressing project concerns. GEF Partner Agencies are required to have accountability and grievance systems in place, at the project and/or institution level, to respond to and address complaints brought forward by indigenous peoples.[1259]

The screening of GEF policies and guidelines against CBD COP guidance shows that the GEF has made an effort to align its safeguards framework with the requirements of the CBD COP when it comes to avoiding harm. However, there are clear areas where the GEF should strengthen its policies to better reflect the gradual shift towards a more proactive role for cultural, social and environmental safeguards frameworks. The rapprochement between human rights and the biodiversity regime that is emerging from COP decisions recognises the importance of working collaboratively with Indigenous peoples and local communities, and strengthening their economic, social, political and cultural rights to achieve long-term benefits for these communities. Importantly, the varying degree of commitment to human rights among the GEF implementing agencies means that some are more ahead than others. This means that rights holders may be treated differently depending on which Agency is designing, implementing and monitoring a project.

This Part established that the GEF has a responsibility to ensure compliance with key human rights requirements derived from CBD COP guidance. It showed that in their current form, GEF policies and guidelines do not adequately incorporate this guidance into their standards. As will be discussed in the next Part, this lack of commitment to human rights translates into an uneven approach to human rights across implementing agencies.

4. Social and environmental frameworks of the GEF's implementing agencies

Having established that the GEF's policies and guidelines a) do not adequately meet the responsibility of GEF implementing agencies to fulfil human rights and b) are not in line with CBD COP guidance on human rights, this Part demonstrates that currently, the GEF

[1258] GEF, 'Policy on Environmental and Social Safeguards' (SD/PL/03, 2019), para 6.
[1259] GEF, 'Principles and Guidelines for Engagement with Indigenous Peoples' (GEF/C.42/Inf.03/Rev.1, 2012), para 42.

Safeguards represent the lowest common denominator across all three implementing agencies (Subsection 4.1.). Subsections 4.2., 4.3. and 4.4. provide an overview of the safeguards frameworks of GEF implementing agencies and show that these agencies exhibit varying levels of commitment to the realisation of human rights through the implementation of projects. It follows that the GEF is currently unable to ensure the uniform implementation of CBD COP guidance on human rights which creates discrepancies in the treatment of project stakeholders.

4.1.GEF's overarching framework

As explained in Chapter 2, the composite nature of the GEF partnership requires to look separately at each set of tools and policies developed by the GEF's implementing agencies. Although all three agencies are either UN programmes or UN specialised agencies, there is a striking difference between the World Bank's engagement with human rights and that of the UN. UNDP's and UNEP's social and environmental frameworks reflect the UN's continued adherence to its human rights-based approach framework of 2003, while the World Bank's ESF shows an internal conflict between the legitimacy demands of human rights groups and its political prohibition to interfere in the political affairs of any member.[1260]

The GEF Policies on Environmental and Social Safeguards,[1261] Gender Equality,[1262] and Stakeholder Engagement[1263] call on the Secretariat to facilitate compliance with their standards, by carrying out regular assessments of GEF Agencies' compliance with these standards.[1264] In 2020 however, the GEF's Compliance Assessment Report concluded that only four Agencies were in full compliance at the time of the 2019 assessment. These included the European Bank for Reconstruction and Development (EBRD), the Foreign Economic Cooperation Office in the Ministry of Environmental Protection of China (FECO), UNDP and the World Bank.[1265]

If an Agency is found to be no longer compliant with GEF policies on environmental and social safeguards, gender, or fiduciary standards, a facilitative process the GEF Secretariat

[1260] UNEP, 'Environmental and Social Sustainability Framework' (UNEP, 2020) para 4; UNDP, 'Social and Environmental Standards' (UNDP, 2019), para 1.
[1261]GEF, 'Updated Policy on Environmental and Social Safeguards' (GEF/C.55/07/Rev.01, 2018).
[1262] GEF, 'Policy on Gender Equality' (SD/PL/02, 2017).
[1263] GEF, 'Policy on Stakeholder Engagement' (SD/PL/01, 2017).
[1264] GEF, 'Progress Report on Agencies' Compliance with Minimum Standards in the GEF Policies on: Environmental and Social Safeguards; Gender Equality; and Stakeholder Engagement' (GEF/C.59/Inf.16, 9 November 2020), para 1.
[1265] Ibid, para 8.

and the agency to develop an action plan with a view to achieving compliance. Importantly, non-compliance does not prevent an agency from receiving GEF financing.[1266]

4.2.The World Bank's Environmental and Social Framework

4.2.1. Is the World Bank a "human rights-free zone"?

In a scathing report detailing the World Bank's legal policy, public relations, policy analysis, operations and safeguards, the UN Special Rapporteur on extreme poverty and human rights, described the World Bank as "a human rights-free zone" pointing the finger at its operational policies, which "treats human rights more like an infectious disease than universal values and obligations." In this report from 2015, Philip Alston attributes the Bank's inability to engage meaningfully with the international human rights framework, or to assist its member countries in complying with their own human rights obligations to the "political prohibition" contained in its Articles of Agreement.[1267] According to him, this inherent barrier inhibits the Bank's ability to engage with human rights, and undermines the consistent recognition by the international community of the integral relationship between human rights and development.[1268]

However, as the OHCHR points out, these provisions were intended to prevent national circumstances (such as a country's political system or strategic relationship with donors) influencing lending decisions. Besides, they predate the emergence of IHRL and IEL and should be interpreted in the context of these new bodies of law. [1269]

Despite this inherent weakness, the Bank regularly voices its preoccupation with human rights, to reassure certain audiences that human rights are progressively becoming an explicit

[1266] GEF, 'Monitoring Agency Compliance with GEF Policies on Environmental and Social Safeguards, Gender, and Fiduciary Standards: Implementation Modalities' (ME/PL/02, 27 October 2016), para 16.

[1267] *Articles of Agreement of the International Bank for Reconstruction and Development* (adopted 27 December 1945, entered into force 27 December 1945) 2 UNTS 134. Section 10 is entitled "Political Activity Prohibited" and reads "The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I."

[1268] UNGA, 'Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston' (2015) UN Doc A/70/274 (2015) para 68.

[1269] OHCHR, 'Frequently Asked Questions on Human Rights and Multilateral Development Banks', <https://www.ohchr.org/Documents/Issues/Development/DFI/FAQonMultilateralDevelopmentBanksandHumanRights.pdf> Accessed 27 November 2023.

and integral part of the World Bank's work.[1270] Critics however, continue to point out that the Bank's strategy towards human rights is characterised by a "decoupling" between the core messages on human rights and the actual substance of its social and environmental safeguards.[1271]

It is true that the World Bank continues to be at odds with the human rights agenda of the UN, which is all the more disturbing considering its status as a UN specialised agency.[1272] Despite the recent review of its standards, the World Bank's approach to enhancing the capacity of borrowers' environmental and social frameworks still does not offer a framework for the assessment of human rights impacts. The Bank defines environmental and social risks as "a combination of the probability of certain hazard occurrences and the severity of impacts resulting from such an occurrence". Environmental and social impacts on the other hand are taken to mean "any change, potential or actual, to: (i) the physical, natural, or cultural environment, and (ii) impacts on surrounding community and workers, resulting from the project activity to be supported."[1273]

Traditionally, the World Bank's safeguards have always focused on the avoidance and – where this is not possible – on the minimisation of social and environmental impacts. This approach has been followed despite a lack of conceptual definition of the terms. This is further complexified by the notion of "residual impacts" which the Bank defines as "the impact that is predicted to remain once mitigation measures have been designed into the intended activity".[1274] This indicates a tolerance for the persistence of some level of impact after mitigation.

Additionally, the Bank may allow projects to go ahead even in cases when it is not technically or financially feasible to compensate for or offset the risks.[1275] This is in contradiction with the OHCHR's Guiding Principles on Business and Human rights which put a strong focus on the avoidance of adverse human rights impacts. This concept brings to light

---

[1270] Roberto Dañino, 'The Legal Aspects of the World Bank's Work on Human Rights' (2007) 41(1) The International Lawyer 21, 21.
[1271] Maria Cabrera Ormaza and Franz Ebert, 'The World Bank, Human Rights, and Organizational Legitimacy Strategies: The Case of the 2016 Environmental and Social Framework' (2019) 32(3) Leiden Journal of International Law 483, 487.
[1272] Agreement Between the United Nations and the International Bank for Reconstruction and Development (1947) 16 UNTS 346, Article I(2).
[1273] World Bank, 'World Bank Environmental and Social Policy for Investment Project Financing' in *Environmental and Social Framework* (2017), footnote 6.
[1274] Radu Mares, 'Securing human rights through risk-management methods: Breakthrough or misalignment?' (2019) 32(3) Leiden Journal of International Law 32, 517.
[1275] World Bank, 'Borrower Requirements – Environmental and Social Standards 1-10' in Environmental and Social Framework (World Bank, 2017), footnote 26.

the responsibility of business enterprises to prevent or mitigate all actual and potential risks to human rights, when these could have the effect of removing or reducing the ability of an individual to enjoy his or her human rights.[1276] An actual impact is one that has occurred or is occurring. A potential impact is one that may occur but has not yet done so.[1277] Potential impacts require businesses to take action to prevent them from either materialising, or if that's not possible to mitigate these impacts as far as possible.[1278] Potential impact include risks that may lead to one or more adverse human rights impacts. According to the Guiding Principles, if some residual impact on human rights is unavoidable, this requires remediation to reduce the likelihood of a certain adverse impact occurring.

Although the Bank deliberately avoids the use of human rights language, references to community, workers and cultural environment are reminiscent of the IHRL provisions, and particularly those of the International Labour Organisation and the World Heritage Convention. Similarly, the references to the physical and natural environment bring to mind the body of international norms that regulate the environment. This approach places the World Bank at odds with the normative developments taking place under the auspices of the OHCHR,[1279] and through the implementation mechanisms of the CBD COP which is gradually fleshing out the human rights responsibility of States and non-State actors.[1280]

4.2.2. The "gold standard" of safeguards frameworks

In 2016, the World Bank adopted a new set of environment and social policies known as the Environmental and Social Framework (ESF). In October 2018, the ESF became applicable to all new World Bank investment project financing, meaning that it applies across a wide range of activities including *inter alia* agricultural development, service delivery, credit

[1276] OHCHR, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide' (OHCHR, 2012) 15.
[1277] Ibid, 5.
[1278] Ibid, 7.
[1279] See for example HRC, 'Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox' (2013) UN Doc A/HRC/25/53; United Nations Human Rights Committee (HRC), 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2017) UN Doc. A/HRC/34/49; HRC, 'Right to a healthy environment: good practices' (2019) UN Doc A/HRC/43/53; UNGA, 'The right to food' (2021) UN doc A/76/237.
[1280] See for example Conference of the Parties to CBD Decision XII/3 (17 October 2014), UN Doc UNEP/CBD/COP/DEC/XII/3 endorsing the voluntary guidelines on safeguards in biodiversity financing mechanisms. More generally, see Elisa Morgera, 'Dawn of a New Day? The Evolving Relationship Between the Convention on Biological Diversity and International Human Rights Law' (2018) 53(4) Wake Forest Law Review, 691.

and grant delivery (including micro-credit), community-based development, and institution building.[1281] Existing projects however, continue to apply the old Safeguard Policies until their end date. Therefore, the Bank is currently in an interim period where the old and the new policies will be applied in parallel for an estimated seven years.[1282] The new ESF is made up of a Vision for Sustainable Development, the Environmental and Social Policy for Investment Project Financing which sets out the requirements that apply to the Bank, and ten Environmental and Social Standards, which set out the requirements that apply to borrowers.

The updating of the Bank's Environmental and Social Safeguard Policies is of great significance to the governance of natural resources, and to the conservation and sustainable use of biological diversity. The early adoption by the World Bank of environmental and social safeguards widely contributed to building its reputation for legal expertise in these fields and the Bank continues to exert great influence in the development of safeguards by other institutions.

In 2010, an independent evaluation of World Bank Group noted that "the main benefit of the sustainability framework is [the] recognition of its leadership role in setting and promoting benchmarks for environmentally and socially sustainable projects, and management of reputational risks", leading some clients of the World Bank to describe these standards as the "gold standard" in development finance.[1283] These early policies have diffused broadly across the laws and policies of other international financial institutions and into national legal frameworks.[1284]

Indeed, the Bank has had an influence unlike any other international organisation in shaping project design and implementation, by using these policies as a procedural framework for the social and environmental risk management of the project.[1285] Some scholars see these policies as evidence of an emerging norm of global administrative law, or a step towards the constitutionalisation of international law. [1286]

[1281] World Bank, 'Investment Project Financing' <https://www.worldbank.org/en/what-we-do/products-and-services/financing-instruments/investment-project-financing> Accessed 27 November 2023.

[1282] World Bank, 'Environmental and Social Policies' <https://www.worldbank.org/en/projects-operations/environmental-and-social-policies> Accessed 27 November 2023.

[1283] IEG, Safeguards and Sustainability Policies in a Changing World – An Independent Evaluation of World Bank Group Experience (World Bank Group, 2010) 74.

[1284] Philippe Dann and Michael Riegner, 'The World Bank's Environmental and Social Safeguards and the Evolution of Global Order' (2019) 32(3) Leiden Journal of International Law 537-559, 545. See also Giedre Jokubauskaite, 'The World Bank Environmental and Social Framework in a Wider Realm of Public International Law' (2019) 32(3) Leiden Journal of International Law 457, 458.

[1285] Margherita Brunori, 'Protecting Access to Land for Indigenous and Non-Indigenous Communities: A New Page for the World Bank?' (2019) 32(3) Leiden Journal of International Law 501, 502.

[1286] Ibid.

The ESF reportedly involved "the most extensive consultation ever conducted by the World Bank", totalling the contributions of 2,000 stakeholders from more than 60 countries on the first draft of the ESF, and from 3,000 participants from around 90 countries on the second draft.[1287] This exercise brought together representatives from civil society, trade unions, indigenous organisations and academia, and led to discussions around the Bank's approach to human rights considerations.[1288]

As a result, in updating the ESF the World Bank has had to juggle difficult demands for increased legitimacy coming from borrowing States, with the concerns for human rights from non-State actors. Ormaza and Ebert point out that to address these demands, the Bank followed a strategy of "decoupling" the core messages of the ESF from its actual content, thus allowing the Bank to manage this tension by aligning formal Bank structures with the required legitimacy demands on the surface, while not significantly affecting the organisation's core activities and social impact.[1289]

Under the new ESF, all projects supported by the Bank through Investment Project Financing are required to meet the ten Environmental and Social Standards. These cover: the Assessment and Management of Environmental and Social Risks and Impacts; Labor and Working Conditions; Resource Efficiency and Pollution Prevention and Management; Community Health and Safety; Land Acquisition, Restrictions on Land Use and Involuntary Resettlement; Biodiversity Conservation and Sustainable Management of Living Natural Resources; Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities; Cultural Heritage; Financial Intermediaries; and Stakeholder Engagement and Information Disclosure.[1290]

The objective of the Bank's new ESF is to "identify, evaluate and manage the environment and social risks and impacts" of project, in a manner consistent with the environmental and social safeguards. To this end, it applies a mitigation hierarchy approach to: (a) anticipate and avoid risks and impacts, (b) where avoidance is not possible, minimise or reduce risks and impacts to acceptable levels, (c) once risks and impacts have been minimised

[1287] Maria Cabrera Ormaza and Franz Ebert, 'The World Bank, Human Rights, and Organizational Legitimacy Strategies: The Case of the 2016 Environmental and Social Framework' (2019) 32(3) Leiden Journal of International Law 488.
[1288] Ibid.
[1289] Ibid, 487.
[1290] World Bank, 'World Bank Environmental and Social Policy for Investment Project Financing' in *Environmental and Social Framework* (2017) 4.

or reduced, mitigate; and (d) where significant residual impacts remain, compensate for or offset them, where technically and financially feasible.[1291]

This approach presents a number of conceptual challenges. First, in its identification of risks and impacts, the Bank adopts a checklist approach which, as highlighted above, presents a number of limitations. Second, the policy operates a somewhat artificial distinction between environmental risks and social risks which is at odds with the increasingly recognised conceptual and normative linkages between the environmental, social and economic dimensions of sustainable development. The Bank itself appears to struggle with this distinction, as the environmental risks listed in the policy seem to respond to institutional concerns rather than present a clear matrix for risk management. Without stating it, the Bank's classification of environmental risks presents a number of social considerations such as those that relate to community safety, including those that are derived from the construction of dams and the use of pesticides for example.[1292]

Similarly, the classification of social risks has many implications for the environment. Examples include the identification of negative economic and social impacts relating to the involuntary taking of land or restrictions on land use, "risks or impacts associated with land and natural resource tenure and use, including (as relevant) potential project impacts on local land use patterns and tenurial arrangements, land access and availability, food security and land values, and any corresponding risks related to conflict or contestation over land and natural resources".[1293] The classification and formulation of these risks may have been left deliberately open-ended to allow more flexibility in the implementation of risk assessments to cater to national circumstances. However, as critics have pointed out, this approach carries the risk of diluting the normative strength of the Bank's social and environmental standards.[1294]

4.3.UNDP's Social and Environmental Standards

UNDP's Social and Environmental Standards (SES) were adopted in June 2014 and became effective across all UNDP-financed projects and programmes in January 2015. The

---

[1291] World Bank, 'Borrower Requirements – Environmental and Social Standards 1-10' in *Environmental and Social Framework* (World Bank, 2017), para 6(d).
[1292] World Bank, 'World Bank Environmental and Social Policy for Investment Project Financing' in *Environmental and Social Framework* (2017), para 4(a).
[1293] Ibid, para 4(b).
[1294] Maria Cabrera Ormaza and Franz Ebert, 'The World Bank, Human Rights, and Organizational Legitimacy Strategies: The Case of the 2016 Environmental and Social Framework' (2019) 32(3) Leiden Journal of International Law 495.

SES were updated in July 2019 to "enhance positive social and environmental opportunities and benefits as well as ensure that adverse social and environmental risks and impacts are avoided, minimized, and mitigated."[1295] This updated version of the safeguards reflects a noticeable shift in UNDP's response to legitimacy concerns, from a purely risk avoidance and mitigation perspective to a "quality enhancement" approach.[1296] This shift has received little attention in literature. Upon close examination of the updated standards, UNDP puts a strong focus on human rights, using explicit human rights language and referring to specific human rights instruments. The policy aims to balance risk-mitigation and benefit enhancement through a combination of checklist of risks and a requirement that project developers fill out a questionnaire to identify the benefits that the project is expected to bring to the project's stakeholders. Importantly, it provides comprehensive guidance to project developers on the type of risks to identify, how to mitigate them and how to ensure that the project's stakeholders will see their human rights protected and fulfilled as a result of the project.

UNDP's strategy for risk management proposes an optional "pre-screen" stage to determine the preliminary risk categorisation, consult with stakeholders, including people potentially affected by the project, on risk identification/rating and to incorporate social and environmental screening, assessment and management measures/plans in Initiation Plan and budget. The second stage is mandatory, and consists in a full Screening for Project Appraisal Committee (PAC) Appraisal. This stage consists in the verification of screening results with stakeholders, including people potentially affected by the project and the classification of risks between Moderate/Substantial/High in a project risk register. On the basis of the screening results, the PAC makes recommendations and signs the screening report. The final stage applies throughout the project implementation and is intended to track any changes in circumstances that may require the revision of stage 1, in case new information becomes available through a social and environmental assessment, or where there are substantive changes to the project (e.g. changes in design, additional components), or where changes in the project context might alter the project's risk profile.

To help identify and document how a project can further the two objectives of the SES (*ie.* do-no-harm and quality enhancement), the screening procedure requires that the project developer answers a series of questions. Question 1 requires the project developer to explain how the project integrates the programming principles to strengthen social and environmental

[1295] UNDP, 'Social and Environmental Screening Procedure' (Guidance note, 2019), para 1.
[1296] Ibid, paras 33 – 35.

sustainability. The guidance note helps the project developer clarify how the project proposal ensures that opportunities for promoting social and environmental sustainability have been appropriately considered during project development. It lists a number of examples of measures that may serve as a justification. These include measures designed to assist government efforts to enhance the realisation of human rights, gender equality, resilience, sustainability, and accountability, or additional measures that will be identified during the screening process.[1297]

In answering this question, the project developer is required to explain how the project applies a human rights-based approach, and in particular, whether the project is informed by human rights analyses, including from UN human rights mechanisms (human rights treaty bodies, Universal Periodic Reviews, Special Procedures). Importantly, the project developer must include measures under the project that will either assist the government to comply with its obligation to respect, protect and fulfil under international law and to implement human rights-related standards in national law. This questionnaire contains special requirements to ensure that the project benefits specific groups of people, such as Indigenous peoples, women and people with disabilities. The project developer must explain how the project enhances the availability, accessibility and quality of benefits and services for potentially marginalised individuals and groups, and will increase their inclusion in decision-making processes that may impact them. These processes must be consistent with the human right principle of non-discrimination and equality. The realisation of gender equality and women's empowerment is a primary concern in UNDP's project design. The project developer is required to explain the methodology used to identify gender inequalities and to demonstrate how the project will address them. The guidance note lists common sources of inequality such as cultural, social, religious constraints on women's potential participation and project developers must provide strategies to overcome them.[1298]

UNDP's approach also differs from the World Bank's when it comes to the format used for the identification of risks. Through the application of its Social and Environmental Risk Screening Checklist, UNDP manages to navigate the challenging exercise of raising awareness of the specific risks faced by categories of people and the environment, while at the same time, mainstreaming human rights standards into these categories. As a result, the checklist raises awareness of the substantive human rights of women, Indigenous peoples and workers, while

[1297] Ibid, para 34.
[1298] Ibid.

at the same time incorporating aspects of human rights of a procedural nature in the identification of risks to biodiversity and climate change. The checklist is built around one overarching category of risks to human rights, gender equality, and accountability, and eight sub-categories of risks which include: biodiversity conservation and sustainable natural resource management, climate change and disaster risks, community health, safety and security, cultural heritage, displacement and resettlement, Indigenous peoples, labour and working conditions, pollution prevention and resource efficiency.[1299]

From a human rights perspective, it is interesting that the risks to gender equality are part of a stand-alone category that is separate from other risks to human rights, despite the classification of CEDAW as a core human rights treaty. This is likely to be as a result of a deliberate institutional positioning in favour of gender equality, as evidenced by UNDP's Gender Equality Strategy (2022–2025).[1300] Similarly, the rights of Indigenous peoples are covered separately, which may be a deliberate institutional decision to give more visibility to UNDP's policy on Indigenous peoples, which acknowledges that they have a distinct legal status and rights derived from human rights instruments.[1301]

The checklist contains a number of criteria to determine the risks of a project to biodiversity. Importantly, it makes a noticeable effort to identify the human rights dimensions of biodiversity-related risks. Indeed, it builds linkages between the risks related to habitat loss, conversion or degradation, fragmentation, hydrological changes and the risks to livelihoods and food security. Whilst the section on biodiversity-related risk does not in itself reflect the risks to the right to health and cultural rights, these are the object of separate categories of risks which themselves build linkages with biodiversity and the environment.[1302] In addition, it gives a platform for Indigenous peoples and local communities to point out what they consider to be critical habitats or environmentally sensitive areas. It considers changes to the use of lands and resources that may have adverse impacts on habitats, ecosystems, and/or livelihoods.

4.4.UNEP's Environmental, Social and Sustainability Framework

UNEP's Environmental, Social and Sustainable Framework (ESSF) of 2020 replaces the Environmental, Social and Economic Sustainability Framework (ESESF) of 2014. The

[1299] Ibid, paras 27 – 31.
[1300] UNDP, 'Gender Equality Strategy 2022–2025' (2022).
[1301] UNDP, 'UNDP and Indigenous Peoples: A Policy of Engagement' (UNDP, 2015), para 13.
[1302] See UNDP, 'Social and Environmental Screening Procedure' (Guidance note, 2019), Standard 3 on Community Health, Safety and Security and Standard 4 on Cultural Heritage.

stated objective of the reform was to bring it in line with international standards and with the 2030 Agenda.[1303] Importantly, the reform is intended to go beyond a "do no harm" approach by seeking to realise rights and to enhance programme and project outcomes,[1304] in what it calls "a risk-informed approach to addressing environmental and social risks and impacts".[1305] The Framework applies to all UNEP-funded programmes and projects, UNEP-administered MEAs, as well as implementing partners, executing agencies and contractors.[1306]

In an effort to improve policy coherence, the ESSF clarifies that it is to be read in conjunction with and applied together in a manner that is consistent with other cross-cutting policies, management practices, and standard operating procedures of UNEP and of UNEP-administered MEAs.[1307] These include a range of sectoral policies on access to information,[1308] Gender Equality and the Environment,[1309] Indigenous Peoples,[1310] the protection of environmental defenders,[1311] UN Environment partnership policy and procedures,[1312] and stakeholder engagement.[1313] The framework also requires UNEP-funded project to be implemented in manner consistent with *inter alia* the CBD, CITES, CMS and a range of conventions on waste, chemicals and pollutants.[1314]

Despite this commitment to international normative processes, UNEP continues to grapple with aspects of human rights that are controversial among its Member States. Whilst UNEP's ESSF commits the institution to inclusive stakeholder engagement,[1315] UNEP Member States have so far not been able to agree on a new Stakeholder Engagement Policy Document. On the surface, UNEP's safeguards show a commitment to implementing a human rights-based approach to stakeholder engagement and public participation which "should" be based on the principles of equality and non-discrimination, participation and inclusion, and

---

[1303] UNEP, 'Environmental and Social Sustainability Framework' (2020), para 2.
[1304] Ibid, para 4.
[1305] Ibid.
[1306] Ibid, para 6.
[1307] Ibid, para 7.
[1308] United Nations Environment Assembly of the United Nations Environment Programme, 'United Nations Environment Programme access-to-information policy' (2014) UN doc UNEP/EA.1/INF/23.
[1309] UNEP, 'Gender Equality and the Environment Policy and Strategy' (UNEP, 2015).
[1310] UNEP, 'UNEP and Indigenous Peoples: A Partnership in Caring for the Environment Policy Guidance' (UNEP, 2012).
[1311] UNEP, 'Promoting Greater Protection for Environmental Defenders Policy' (UNEP, 2018)
[1312] UNEP, 'UNEP Partnership Policy and Procedures' (UNEP, 2011).
[1313] While the Member States were so far not able to agree on a new Stakeholder Engagement Policy Document, UN Environment has put in place various new approaches towards Stakeholder Engagement that respond to the intentions of "The Future We Want".
[1314] For a full list of MEAs under UNDP's administration or secretarial function see UNEP, 'Secretariats and Conventions'<https://www.unep.org/about-un-environment/why-does-un-environment-matter/secretariats-and-conventions> Accessed 27 November 2023.
[1315] UNEP, 'Environmental and Social Sustainability Framework' (2020), para 5.

accountability and rule of Law. This means that the stakeholder engagement mechanism should be applied without discrimination of any kind, such as race, colour, sex, age, language, religion, political or other opinion, national or social origin, disability, property, birth or other status. It also commits UNEP to ensure that every person is entitled to "active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be realized", and the guarantee of an effective, accessible and independent mechanism and procedure of redress.[1316] However, in its current form the framework lacks clear standards to operationalise the commitment to a human rights-based approach and the fulfilment of human rights in UNEP's projects.

4.5.Disparities in human rights protections

This lack of harmonisation between implementing agencies' social and environmental safeguards creates inconsistencies in the standards applied by these different mechanisms. In the area of climate change, the implementation of the UN-REDD+ mechanism under the UNFCCC has shown that the divergence in safeguards adopted under the Forest Carbon Partnership Facility (FCPF) and the UN-REDD Programme could lead to situations where the same activities carried out in the same countries could be subjected to different standards, depending on which institution is handling the funding.[1317] Criterion 10 of the UNREDD Social and Environmental Principles aims to ensure that there is no involuntary resettlement as a result of REDD+.[1318] This however, conflicts with the World Bank's and the Inter-American Development Bank (ADB)'s policies on resettlement which allow involuntary resettlement albeit as a last resort and under certain conditions.[1319] The Forest Carbon Partnership Facility (FCPF) is a World Bank Trust Fund which applies the World Bank's policy on involuntary resettlement.[1320] As such, in the implementation of REDD+ activities financing mechanisms

[1316] Ibid, para 23.
[1317] Annalisa Savaresi, 'REDD+ and Human Rights: Addressing Synergies between International Regimes' (2013) 18(3) Ecology and Society, 5.
[1318] UN-REDD Programme, 'Social and Environmental Principles and Criteria' (2012), UN Doc UNREDD/PB8/2012/V/1, Criterion 10.
[1319] World Bank, 'Land Acquisition, Restrictions on Land Use and Involuntary Resettlement' in Environmental and Social Framework (2017); Inter-American Development Bank (IDB), 'Land Acquisition and Involuntary Resettlement' in *Environmental and Social Policy Framework* (2020).
[1320] Forest Carbon Partnership Facility (FCPF), 'Forest Carbon Partnership Facility (FCPF) Readiness Fund Common Approach to Environmental and Social Safeguards for Multiple Delivery Partners' (FCPF, 2012), para 14(d).

may apply different standards depending on whether they are funded through the UN or through the World Bank. Considering the many crossovers between biodiversity and climate change activities, these discrepancies between agency standards affect biodiversity projects in a similar way. These discrepancies need to be addressed if the CBD COP guidance to the GEF in the application of the Kunming-Montreal GBF is to be followed.

This Part has shown that current GEF policies and guidelines are ill-equipped to ensure the consistent application of CBD COP guidance across GEF implementing agencies. The degree of commitment of each agency to human rights influences the way that GEF projects are formulated and implemented. Among the three implementing agencies, UNDP shows the clearest commitment to the realisation of human rights in its projects. As a result, stakeholders under UNDP projects are more likely to see their rights identified, respected, protected and fulfilled than stakeholders under World Bank or UNEP-implemented projects. In this context, the commitment of CBD Parties to apply a human rights-based approach to the implementation of the Kunming-Montreal GBF will require GEF policies and guidelines to be reviewed to ensure that all implementing agencies have adequate safeguards and operational policies in place to adequately identify, respect, protect and fulfil the rights of their biodiversity-related project stakeholders. The next Part considers what steps the GEF should take to operationalise the Kunming-Montreal GBF through a human rights-based approach.

5. Operationalising the Kunming-Montreal Global Biodiversity Framework through a human rights-based approach

This Part argues that the implementation of a human rights-based approach to GEF-funded projects requires a number of operational changes including a commitment to support projects that actively advance the realisation of human rights, a shift in programmatic terminology from “affected stakeholder” to “right holder”, strengthening policies and safeguard to bring them in line with IHRL and requiring implementing and accredited agencies to carry out human rights impact assessments.

5.1. Advancing the realisation of human rights

The recognition of a human rights-based approach to biodiversity conservation and sustainable use in the new Kunming-Montreal GBF provides an official acknowledgment by

the Parties of the need to respect, protect and fulfil human rights in the implementation of the CBD. This recognition extends to the implementation of GEF-funded projects and programmes related to biodiversity conservation and sustainable use and includes ensuring that the rights of Indigenous peoples, local communities, women, children, persons with disabilities and environmental human rights defenders are identified, respected, protected and fulfilled throughout the project cycle, from planning and design to implementation and evaluation.
A human rights-based approach to programming requires planning and implementing development projects and programmes in which human rights are a key feature in the initial design of activities. This includes an assessment of applicable legal frameworks within the project's geographical area to identify gaps in relation to substantive and procedural biodiversity-related human rights; the identification of duty bearers and rights holders; and the ongoing monitoring and evaluation of projects and programmes for their adherence to the respect, protection and fulfilment of substantive and procedural human rights.[1321]

As such, a first step for the GEF would be to recognise its role in actively supporting the realisation of biodiversity-related substantive and procedural human rights. The explicit recognition of human rights in ESS frameworks and the commitment to implementing the guidance from human rights bodies is important for several reasons. First, it helps to ensure that safeguards requirements keep pace with international standards, as they evolve over time. It also creates the foundation for developing specific safeguards for specific groups. Monitoring bodies may highlight the particular challenges faced by women, children, migrants, persons with disabilities and other groups in the context of a particular investment or type of investment, and may reveal constraints to participation, access to livelihood rights, effective grievance mechanisms and other issues covered by safeguards.[1322]

To better understand how the GEF can contribute to the realisation of human rights, the design of projects should include a systematic analysis of the relationship between people and the environment, and how the project can contribute to the realisation of the rights to life and health; the right to an adequate standard of living, including the rights to food and housing, and the rights to safe and clean water and sanitation; and to non-discrimination and the rights of

[1321] UNDP, 'Indicators for Human Rights Based Approaches to Development in UNDP Programming: A Users' Guide' (UNDP, 2006).

[1322] OHCHR, 'Frequently Asked Questions on Human Rights and Multilateral Development Banks' <https://www.ohchr.org/sites/default/files/Documents/Issues/Development/DFI/FAQonMultilateralDevelopmentBanksandHumanRights.pdf> Accessed 27 November 2023.

those most vulnerable to the loss of biodiversity.[1323] Additionally, the analysis should include an assessment of how the project will contribute to the procedural rights of those located in the project's area, including participation and consultation, access to information and access to justice.[1324]

5.2.Shifting the narrative from "affected stakeholder" to "rights holder"

The concept of "affected people" is used to refer to individuals and local communities with whom a development project is likely to engage and who may be either "beneficiaries" or "at risk" from the project. This concept is rooted in project development practice, and has no grounding in international law. Affected people are identified during the project's development stage, often through an impact assessment. It is only after the impact assessment, that a stakeholder engagement plan is developed, laying out the consultation process with affected people throughout the planning and implementation stages of the project. This is problematic because the decision to consult affected people is made on the basis of an analytical finding that is carried out at the project developer's discretion, rather than being driven by a normative requirement. As a result, the decision to include or exclude certain people is left to the project developer on the basis of their own programmatic criteria.[1325] This is often driven by spatial considerations. The smaller the territory, the more likely a group is to be recognised as affected. *A contrario*, the larger the territory and the more scattered the groups are, the less likely they are to be included.[1326]

A human rights-based approach shifts the narrative from "affected stakeholder" to "rights holder". This creates a much more coherent normative category, built around entitlements and obligations. However, such a shift requires development actors – including the GEF – to acknowledge their human rights responsibilities as subjects of international law. Furthermore, it requires a fundamental shift away from the current practice, to place human rights and legal mechanisms at the centre of development assistance and development

[1323] See United Nations Human Rights Committee (HRC), 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2017) UN Doc. A/HRC/34/49.
[1324] Ibid, para 27.
[1325] See Giedre Jokubauskaite, 'The Concept of Affectedness in International Development' (2020) 126 World Development 104700, 3.
[1326] Ibid, 10.

policy.[1327] Such a shift requires the GEF to develop human-rights based policies, that allow for the systematic consultation of the individuals and communities located within and beyond a project's intended area of implementation, and for their rights to be respected, protected and fulfilled. Consultation procedures should ensure the full and effective participation of Indigenous peoples and traditional communities in decision-making on all matters that affect their lives. This includes carrying out consultations in the design of projects and programmes that are likely to impact resources pertaining to their lands or territories.[1328] In addition, consultations with Indigenous peoples and traditional communities should be in accordance with their customs and traditions, and occur early in the decision-making process.[1329]

5.3. Incorporating international human rights standards into GEF policies and safeguards

The decision at CBD COP 15 to create a new Global Biodiversity Framework Fund (GBFF)[1330] provides an important avenue for aligning GEF policies with CBD guidance. The purpose of the GBF is to support the implementation of the new Kunming-Montreal GBF,[1331] improve coherence, complementarity and cooperation between the CBD and its Protocols, other biodiversity-related conventions, other relevant multilateral agreements and international institutions[1332] and support the human rights-based approach and gender-responsive implementation of the Global Biodiversity Framework.[1333] This new Fund will be established under the GEF and the GEF Council will meet as the Council for the GBFF. Importantly, it will apply existing GEF policies, "in accordance with the guidance of the COP, unless the GBF Fund Council decides it is necessary to modify such policies and procedures to be responsive to the guidance of the COP."[1334]

[1327] See Morten Broberg and Sano Hans-Otto, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – An Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22(5) The International Journal of Human Rights 664.

[1328] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2018) UN Doc A/HRC/37/59, para 50.

[1329] Ibid.

[1330] Conference of the Parties to CBD Decision 15/7 (19 December 2022), UN Doc CBD/COP/DEC/15/7, para 30.

[1331] GEF, 'Ratification of the Global Biodiversity Framework Fund, Seventh GEF Assembly' (GEF/A.7/09, 2023), para 12.

[1332] Ibid, para 12.

[1333] Ibid, para 13.

[1334] Ibid, para 56.

In light of the findings from the compliance assessment in Part 2 above, to bring the GEF policies and safeguards in line with CBD guidance and a human rights-based approach, the GEF framework should:

- Require the GEF and its agencies to ensure compliance with all human rights instruments and soft law instruments from human rights bodies, including reports from UN special rapporteurs on women[1335] and children;[1336]
- Require the GEF and its agencies to ensure compliance with the CBD, the UNFCCC and other MEAs and their COP decisions;
- Be updated to reflect more recent CBD guidance documents endorsed by the COP, including the Mo'otz Kuxtal Voluntary Guidelines and the Voluntary guidelines on safeguards in biodiversity financing mechanisms;
- Ensure the consultation of women and women's group in the development and implementation of projects and their involvement in capacity development activities;
- Recognise, protect and fulfil the rights of children, persons with disabilities and environmental human rights defenders;
- Update the definition of Environmental and Social Risk and Impact Assessment to include cultural impact assessments. The definition should also broaden its focus from risk management to the identification of project benefits on the rights of the Indigenous peoples and local communities;
- Update the definition of FPIC to replace the reference to "collective support" with a clear statement that Indigenous peoples and local communities have the right to grant or not to grant consent to a project. In addition, the definition should include a clarification that FPIC is a continuous process and that a collaborative relationship should continue to be sought beyond the project's end date. The policies and guidelines should be harmonised to ensure respect for local and traditional decision-making processes;
- Provide a definition of fair and equitable benefit sharing and detailed guidance for its implementation;
- Make GEF funding unavailable for projects that allow for the involuntary resettlements of Indigenous peoples and local communities, regardless of any

[1335] HRC, 'Women, girls and the right to a clean, healthy and sustainable environment, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd' (2022) UN Doc A/HRC/52/33.

[1336] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H Knox' (2018) UN Doc A/HRC/37/58.

safeguards and mitigating measures to minimise impacts. In cases of voluntary resettlements, communities should be compensated;

- Broaden the categories of impacts covered to include impacts to traditional knowledge, innovations and practices – including customary laws and institutions – as well as impacts on privacy;
- Mitigation measures should include the option not to go ahead with a project.

5.4. Incorporating human rights impact assessments in the design, implementation and monitoring of projects

Human rights impact assessments (HRIAs) have emerged out of the practice around other types of impact assessments, most notably environmental impact assessments (EIA) and social impact assessments (SIA). Social impact assessments have emerged as a field of research and practice – with its own theory and methods[1337] – making considerable conceptual and normative contributions to the understanding of how projects impact on individuals and the ways in which people and communities interact with their socio-cultural, economic and biophysical surroundings.[1338] Researchers in this field have long argued that identifying impacts in advance can lead to better decisions about which development interventions should proceed, how they should proceed, and what mitigation measures should be taken to minimise or avoid harm to people and the environment, while maximising benefits.[1339] These works have expanded our understanding of the normative contours of due diligence in the context of States' duty to protect human rights, and business responsibility to respect human rights.[1340] But it is this more recent focus on the need for development interventions to generate positive impacts that has brought to light the important linkages between human rights and impact assessments. This follows from the growing realisation that project planning and implementation shouldn't be limited to avoiding harm but should also generate benefits for local communities and stakeholders affected by the project.[1341]

[1337] Ana Maria Esteves, Daniel Franks, Frank Vanclay, 'Social impact assessment: The state of the art' (2012) 30(1) Impact Assessment and Project Appraisal 34, 34.

[1338] See Frank Vanclay, 'Principles for social impact assessment: A critical comparison between the international and US documents' (2006) 26(1) Environmental Impact Assessment Review 3.
[1339] Ibid, 7.
[1340] OHCHR, 'UN Guiding Principles on Business and Human Rights' (OHCHR, 2011).
[1341] Frank Vanclay, 'Reflections on Social Impact Assessment in the 21st Century' (2020) 38(2) Impact Assessment and Project Appraisal 126, 127.

While EIAs have tended to focus on avoiding or minimising negative impacts on the environment,[1342] SIAs have slowly developed a definition that goes beyond mitigation and "includes the processes of analysing, monitoring and managing the intended and unintended social consequences, both positive and negative, of planned interventions (policies, programmes, plans, projects) and any social change processes invoked by those interventions. Their primary purpose is to bring about a more sustainable and equitable biophysical and human environment."[1343] Social impacts covered by SIAs are quite broad and includes "all issues that affect people, directly or indirectly" such as any changes to people's way of life, their culture, their community, their political systems, their environment – such as the quality of the water and air the availability and quality of the food they – their health and well-being, their personal and property rights, their fears and aspirations.[1344] By extension, it includes any changes to their access to and control over resources.

Whilst all impact assessments are used "to predict future expected consequences of possible decisions",[1345] the focus has tended to be on the identification of measurable impacts without sufficient attention being put on anticipating the long-term effects of a project on communities, and existing social impact frameworks have generally fallen short of providing a comprehensive analysis of the current and future impacts of projects.[1346]

In recent years however, new frameworks have been developed in an attempt to operationalise the concept. In particular, Eddie Smyth's and Frank Vanclay's Social Framework for Projects uses an approach that not only aims to identify and mitigate the negative impact of projects, but also draws on the literature on ecosystems and human well-being[1347] to identify ways in which projects can provide greater benefits to people and the environment.[1348] The methodology aims to give more weight to people's capacities, abilities

---

[1342] See International Association for Impact Assessment (IAIA), 'What Is Impact Assessment?' (IAIA, 2009), 1. The IAIA defines EIAs as "the process of identifying, predicting, evaluating and mitigating the bio-physical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made."

[1343] Frank Vanclay, 'International Principles for Social Impact Assessment' (2003) 21(1) Impact Assessment and Project Appraisal 5.

[1344] Frank Vanclay, 'Principles for social impact assessment: A critical comparison between the international and US documents' (2006) 26(1) Environmental Impact Assessment Review 3, 8.

[1345] IAIA), 'What Is Impact Assessment?' (IAIA, 2009), 1.

[1346] See Frank Vanclay, 'Reflections on Social Impact Assessment in the 21st Century' (2020) 38(2) Impact Assessment and Project Appraisal 126.

[1347] For example Rik Leemans, 'The Millennium Ecosystem Assessment: Securitising the interactions between ecosystems, the state and human beings from a human and environmental security perspective' in *Facing Global Environmental Change: Environmental, Human, Energy, Food, Health and Water Security Concepts* (Springer Verlag 2009).

[1348] Eddie Smyth and Frank Vanclay, 'The Social Framework for Projects: A conceptual but practical model to assist in assessing, planning and managing the social impacts of projects' (2017) 35(1) Impact Assessment and Project Appraisal 65.

and freedoms to achieve their goals, identify the degree of community and social support in a given political context, how a project is likely to affect people's livelihoods, assets and activities, their culture and religion, their access to infrastructure and services, their tenure rights over natural resources, and the living environment.[1349] Despite this increased focus on aspects of human rights, SIAs do not provide a consistent analysis of the risks to human rights and of the opportunities to fulfil them. Human rights impact assessments (HRIAs) have emerged as a useful tool to fill this gap.

HRIAs draw from EIAs and SIAs but are based on the normative framework of binding international human rights. This gives them an objective baseline against which to assess a project's risks and benefits to human rights and allows evaluation teams to measure the extent to which a project a) respects the substantive and procedural requirements of human rights law and b) supports the realisation of human rights. [1350] In addition, HRIAs require a cross-sectoral approach that considers impacts on civil, political, economic, social and cultural rights in a systematic way. Because of this HRIAs have been shown to address equality, participation, transparency and accountability more systematically and comprehensively than other types of assessments.[1351]

Human rights impacts can be both negative and positive, intended or unintended, and direct or indirect.[1352] Although HRIAs tend to be carried out *ex post* to evaluate the actual impact of actions on human rights, they should in fact be carried out *ex ante* to inform the development of a project and identify ways to maximise positive impacts on human rights. There are two main approaches to carrying out human rights impact assessments. The first approach is to carry out a stand-alone HRIA to address a specific human rights issue. This is typically done in cases where an institutional actor has a specific mandate and carries out an assessment to address this issue that falls within its mandate. A second approach is to combine a HRIA with other types of impact assessments such as EIAs or SIAs. Although this approach requires more time and resources, commentators agree that this approach provides a more

[1349] Ibid.
[1350] The Nordic Trust Fund and the World Bank, 'Study on Human Rights Impact Assessments - A Review of the Literature, Differences with other Forms of Assessments and Relevance for Development' (World Bank, 2013), 29.
[1351] Ibid, 8.
[1352] Gauthier de Beco, 'Human Rights Impact Assessments' (2009) 27(2) Netherlands Quarterly of Human Rights 139, pp 143-144.

comprehensive assessment and allows for the mainstreaming of human rights into a wider range of development policies.[1353]

As per CBD guidance, the GEF implementing agencies should be carrying out social, environmental and cultural impact assessments[1354] as part of their project design, implementation and monitoring of projects. As discussed above, the GEF's current policies and safeguards are insufficient to ensure that implementing and accredited agencies will apply a human right-based approach to the implementation of the new Global Biodiversity Framework that is consistent with CBD guidance. To ensure that these agencies respect, protect and fulfil human rights as part of their operational modalities, the GEF should require that they conduct HRIAs on top of their social, environmental and cultural impact assessments. However, to avoid the dilution of human rights standards in the consolidation of all types of impact assessments, agencies should develop their assessment framework using the normative framework provided by IHRL.[1355]

As per the CBD COP guidance highlighted above, an environmental, social and cultural impact assessment should identify impacts on the customary use of biological resources, impacts on the respect, preservation, protection and maintenance of traditional knowledge, innovations and practices, impacts on sacred sites and associated ritual or ceremonial activities, impacts on privacy and impacts on the exercise of customary laws.[1356]

6. Conclusions

This Chapter demonstrated that the current GEF architecture of policies and safeguards is inconsistent with CBD COP guidance on human rights and should be reviewed to provide appropriate support to CBD Parties in meeting their commitment to apply a human rights-based approach to the implementation of the Kunming-Montreal GBF. In so doing, this Chapter provides an original contribution to the literature in IEL and IHRL on the human rights responsibility of international organisations, and on the rise in quasi-judicial dispute resolution

[1353] The Nordic Trust Fund and the World Bank, 'Study on Human Rights Impact Assessments - A Review of the Literature, Differences with other Forms of Assessments and Relevance for Development' (World Bank, 2013), 33.
[1354] Akwé: Kon guidelines, para 6.
[1355] Gauthier de Beco, 'Human Rights Impact Assessments' (2009) 27(2) Netherlands Quarterly of Human Rights 139,149. See also HRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (2011) UN Doc A/HRC/17/31, para 18.
[1356] Akwé: Kon guidelines, para 27.

mechanisms and their implications for the protection of human rights in development assistance. In particular, this Chapter clarifies the scope and content of the human right responsibility of GEF agencies to fulfil biodiversity-related human rights in the implementation of GEF project. While Chapter 4 clarified that this responsibility is derived from general international law and State obligations, this Chapter demonstrated that GEF agencies have a responsibility to align their operational modalities with CBD COP guidance on human rights and under Article 8(j).

First, it clarified the nature, scope and content of the human rights-related CBD COP guidance to the GEF. In particular, it showed that the nature of this guidance is both direct and indirect, and includes the application of the guidelines developed under the aegis of Article 8(j) as well as guidance related to the rights of women, children, persons with disabilities human rights defenders in IHRL. The review of COP decisions brought to light some key aspects of CBD COP guidance to the GEF and its implementing agencies. These include, the respect for human rights and CBD guidance; the respect for biodiversity-related international instruments; the respect for prior informed consent and/or approval and involvement; enabling the participation of Indigenous peoples and local communities; conducting cultural, environmental and social impact assessments; preventing involuntary resettlement and providing compensation in cases of voluntary resettlement; and the provision of accountability, evaluation and compliance mechanisms.

Second, it highlighted the dissonance between the consolidation in international law of the understanding that the protection of the environment requires the full realisation of human rights, and the focus of the GEF and its implementing agencies on social and environmental safeguards and grievance mechanisms to avoid and mitigate risks to human rights.

Third, it demonstrated that on the whole the GEF's policies and guidelines fall short of complying with key aspects of CBD guidance. Moreover, the lack of uniform treatment of human rights across GEF implementing agencies means that the rights of project stakeholders may be treated differently depending on what agency implements the GEF project.

Finally, this Chapter showed that to fulfil the CBD Parties' commitment to apply a human rights-based approach to the implementation of the Kunming-Montreal GBF, the GEF and its implementing agencies must operate a radical shift in the way that they approach human rights. In particular, it will require an explicit commitment to the realisation of the full range of biodiversity-related human rights, a shift in the language from "affected stakeholder" to "rights holder" and the systematic application of ex ante human rights impact assessments. The

systematic implementation of *ex ante* human rights impact assessments could help these agencies align their practices with this requirement.

In addition to the clarification of these points in IEL and IHRL, this Chapter makes a practical and timely contribution to the discussions around the implementation of the Kunming-Montreal GBF. In particular, the recommendations highlighted in this Chapter can inform the review of the effectiveness of the CBD's financial mechanism at COP 16 and the review of GEF policies as it sets up the new GBFF.

Chapter 6: Conclusions

1. Inspiration for this thesis

The inspiration for this research came from a number of realisations. First, despite decades of development assistance in support of the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources, the rate of decline in biodiversity keeps accelerating. Second, the international architecture for the delivery of biodiversity-related ODA is complex and does not provide for the systematic integration of human rights into biodiversity-related development projects and programmes. Third, the interdependence between the protection of human rights and the protection of the environment means that development assistance must address these issues jointly to achieve effective results. Fourth, with the CBD's financial mechanism being so critical to the achievement of the CBD's objectives, it is imperative that the GEF and its implementing agencies have the right policies and operational modalities in place to ensure that the human rights of affected stakeholders are identified, respected, protected and fulfilled.

At the start of this PhD journey, it was unclear whether the repeated calls of the UN Special Rapporteurs on Human Rights and the Environment for CBD Parties to commit to applying a human rights-based approach to the implementation of the Kunming-Montreal GBF would be heeded. The decision at COP 15 to include such a commitment in the Framework confirmed the real-world relevance of this research topic and made it all the more exciting to contribute to the conceptualisation of the biodiversity-related human rights in the context of the CBD's financial mechanism. Similarly, the recognition by the HRC and the UN General Assembly of the human right to a clean, healthy and sustainable environment[1357] provided a clearer foundation in international law for the arguments laid out in this thesis.

2. Contribution of this thesis to legal scholarship

[1357] United Nations General Assembly (UNGA), 'The Human Right to a Clean, Healthy and Sustainable Environment' (2022) UN Doc A/76/L.75.

This thesis provides an original contribution to the understanding in legal scholarship of the complex intersections between the international biodiversity regime and its financial mechanism, human rights and aid effectiveness. Very little scholarship exists in IEL on the legal aspects of financial mechanisms, let alone on how these interact with other international treaty regimes. In the case of the CBD's financial mechanism, no literature in IEL or IHRL could be identified that specifically addressed regime interaction in the context of financial assistance, the human rights responsibility of the GEF and its implementing agencies in the implementation of biodiversity-related projects, nor indeed any literature that explored how the normative instruments of the CBD COP might affect the GEF. Using a mutually supportive interpretation of International Biodiversity Law and IHRL, this thesis pieced together fragments of existing scholarship in IEL and IHRL, and used elements of grey literature to provide an answer to the following question:

"Does the obligation for CBD developed country Parties to provide new and additional financial resources entail a responsibility for the GEF and its implementing agencies to respect, protect and fulfil human rights?"

Specifically, this thesis built on the growing body of academic literature which framed environmental protection as a human rights issue,[1358] and highlighted the increasing greening of existing human rights through case law.[1359] It also built on the works of the two successive UN Special Rapporteurs on Human Rights and the Environment who consolidated the understanding of the interconnections between IHRL and IEL developed primarily through treaty bodies and regional tribunals. These works fleshed out the substantive human rights obligations of States in relation to the environment, highlighting that human rights norms require States to take measures for the protection of *inter alia* the global climate, freshwater quality, protected areas, and biological diversity.[1360] Importantly, the obligations of States to respect, protect and fulfil human rights all apply in the environmental context.[1361] This includes an obligation for States to respect, protect and fulfil the human rights of special groups,

[1358] Dinah L. Shelton, 'What Happened in Rio to Human Rights?' (1992) 3 Y.B. OF Int'L ENV'L L. 75, 82; Gilbert J, *Natural Resources and Human Rights: An Appraisal* (Oxford University Press 2018); Morgera E, 'Dawn of a New Day? The Evolving Relationship Between the Convention on Biological Diversity and International Human Rights Law' (2018) 53 Wake Forest Law Review 691; Knox J, 'The Past, Present, and Future of Human Rights and the Environment' (2018) 53 Wake Forest Law Review 649.
[1359] Alan Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2007) 18(3) Fordham Environmental Law Review 471, 484; Patricia Birnie, Alan Boyle A and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009);
[1360] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2018) UN Doc A/HRC/37/59, para 31.
[1361] Ibid, para 5.

including women, children, Indigenous peoples, persons with disabilities[1362] and environmental human rights defenders.[1363] These works fleshed out the procedural human rights obligations of States such as access to information, participation in environmental decision making and access to justice.[1364] They also consolidated the emerging understanding of the nature, scope and content of State obligations in relation to development assistance, which are derived from IHRL and include an obligation to provide financial resources to the maximum of available resources in a non-retrogressive manner to achieve the full human realisation of human rights.[1365] While these works acknowledged the responsibility of international institutions working in development to respect human rights, they called for further research to be carried out to better understand the normative contours of this responsibility.[1366]

This thesis fills a gap in academic literature regarding the nature, scope and content of the responsibility to fulfil biodiversity-related human rights. More specifically, it contributes to the small body of academic literature in IEL which has studied the GEF from the perspective of normative coherence of environmental financing,[1367] its effectiveness and legitimacy,[1368] and State Party compliance with MEA obligations.[1369] This research adds to the literature at the intersection of IEL and IHRL by demonstrating that State obligations in relation to biodiversity-related development assistance entail a responsibility for GEF implementing agencies to respect, protect and fulfil human rights in the design and implementation of GEF

[1362] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2018) UN Doc A/73/188, para 22.

[1363] Ibid, para 26.

[1364] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2018) UN Doc A/HRC/37/59.

[1365] UNGA, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd - The human right to a clean, healthy and sustainable environment: a catalyst for accelerated action to achieve the Sustainable Development Goals' (2022) UN Doc A/77/284, para 33 and HRC, 'Progressive realization of the human rights to water and sanitation - Report of the Special Rapporteur on the human rights to safe drinking water and sanitation' (2020) UN Doc A/HRC/45/10.

[1366] HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2018) UN Doc A/HRC/37/59, para 19.

[1367] Nele Matz, 'Environmental Financing: Function and Coherence of Financial Mechanisms in International Environmental Agreements' (2002) 6 Max Planck Yearbook of United Nations Law 473-528, 478.

[1368] Nele Matz, 'Financial Institutions between Effectiveness and Legitimacy – A Legal Analysis of the World Bank, Global Environment Facility and Prototype Carbon Fund' (2005) 5 Int Environ Agreements 265; Laurence Boisson de Chazournes, 'The Global Environment Facility Galaxy: On Linkages among Institutions' (1999) 3 Max Planck Yearbook of United Nations Law 243; Laurence Boisson de Chazournes, 'The Global Environment Facility as a Pioneering Institution – Lessons Learned and Looking Ahead' (GEF Working Paper 19, 2003); Laurence Boisson de Chazournes, 'Technical and Financial Assistance' in *The Oxford handbook of international environmental law*, edited by Jutta Brunnée and others, (Oxford University Press, 2007) 947-973.

[1369] Nele Matz, 'Environmental Financing: Function and Coherence of Financial Mechanisms in International Environmental Agreements' (2002) 6 Max Planck Yearbook of United Nations Law 473-528, 478.

projects. It also clarifies the relationship between the CBD COP and the GEF in relation to the incorporation of CBD COP guidance and IHRL into GEF policies, guidelines and operational modalities.

3. Key findings of this thesis

Chapter 2 explored how IHRL and International Biodiversity Law are mutually supportive in strengthening the effectiveness of the CBD's financial mechanism, and demonstrated that the application of a human rights-based approach to the implementation of biodiversity projects is an essential aspect of CBD developed Parties' obligations to provide financial resources under Articles 20 and 21. The international legal literature on this issue is scant and fragmented and required a mutually supportive interpretation. In particular, while the literature does link financial assistance to the effectiveness of the CBD regime[1370] and brings out the linkages between human rights and the achievement of CBD objectives,[1371] the scholarship had yet to consider how these two aspects intersect within the obligation of developed country Parties to provide new and additional financial resources under CBD Articles 20 and 21. It was all the more pressing to fill this research gap that the CBD COP and GEF evaluation reports had highlighted that the fragmentation of aid negatively impacts the achievement of CBD objectives, and that the integration of human rights in financial assistance could accelerate progress.[1372] This Chapter argued that applying a human rights-based approach to biodiversity-related ODA would not only support the realisation of biodiversity-related human rights obligations but also promote a more coherent development cooperation in the field of International Biodiversity Law. Furthermore, the Kunming-Montreal GBF provides the enabling foundations for a mutually supportive approach to the implementation of human rights and biodiversity obligations through the financial mechanism.

[1370] Philippe LePrestre, 'The CBD at Ten: The Long Road to Effectiveness' (2002) 5(3) Journal of International Wildlife Law and Policy 269, 271.
[1371] Niak Sian Koh, Claudia Ituarte-Lima, and Thomas Hahn, 'Mind the Compliance Gap: How Insights from International Human Rights Mechanisms Can Help to Implement the Convention on Biological Diversity' (2022) 11(1) Transnational Environmental Law 39.
[1372] See GEF IEO, 'OPS6 Final Report: The GEF in the Changing Environmental Finance Landscape' (GEF IEO, Washington, DC 2018), Annex B, para 16 and Conference of the Parties to CBD Decision 14/1 (30 November 2018), UN Doc CBD/COP/DEC/14/1, Annex, para h).

Chapter 3 adds to the academic literature in IEL on the normative strength of MEAs and differential treatment in environmental treaty obligations[1373] by clarifying the legal nature, scope and content of the CBD's financial obligations. In particular, it demonstrated that the obligation for developed country Parties to provide new and additional financial resources is a hard legal obligation rooted in the duty to cooperate under general international law. It also highlighted that the voluntary nature of financial contributions to the GEF is at odds with this hard obligation and dilutes its strength in practice. Indeed, while this hard obligation is intended to help developing countries meet the cost of implementing measures in line with their obligations under the Convention, by giving developed country Parties full discretion over the amount of financial resources that they contribute to the GEF, in practice the Facility finds itself limited in its capacity to allocate resources to that effect. To remedy this situation, the developments on differential treatment under the climate change regime provide a useful case study for the introduction of more flexibility within the financial obligations of CBD States Parties. In particular, the introduction of "modulators" under the Paris Agreement broadened the parameters for differentiation and allows for a more accurate reflection of the Parties' changing responsibilities as their social and economic circumstances evolve. This Chapter argued that introducing such modulators in the CBD regime could have the effect of mobilising additional resources for the implementation of the CBD, and would bring the biodiversity regime more in line with the Paris Declaration on Aid Effectiveness.

Chapter 4 argued that the implementing agencies that make up the GEF partnership have a responsibility to fulfil human rights in the delivery of development assistance which is derived from their Member States' human rights obligations and general international law. It built on the work of the UN Special Rapporteurs on Human Rights and the Environment to offer new perspectives on how developed country Parties to the CBD and GEF implementing agencies have a responsibility under international law to respect, protect, and fulfil human rights in the delivery of biodiversity-related financial assistance. It provided conceptual clarifications to the mutually supportive relationship between International Biodiversity Law and IHRL in the context of the CBD's financial mechanism and delineated the scope of State and international organisation obligations in relation to financial assistance, thereby enriching the existing understanding of the human right to a clean, healthy and sustainable environment. In particular, it established that the obligation for developed country Parties to provide new

[1373] Lavanya Rajamani, *Differential Treatment in International Law* (Oxford University Press, 2006).

and additional financial resources to developing countries includes an obligation to mobilise the maximum of available financial resources to respect, protect and fulfil the right to a clean, healthy and sustainable environment in a non-retrogressive manner. All CBD Parties also have a duty to ensure that the organisations that they are members of have adequate frameworks and methodologies in place to fulfil the human rights of individuals and communities that their project affect. As such, GEF implementing agencies have a responsibility to fulfil human rights in the implementation of their activities which is derived both from the UN Charter and the human rights obligations of their Member States. This entails a responsibility for these agencies to ensure that they have adequate safeguards and frameworks in place to respect, protect and fulfil the human rights of the individuals and communities affected by their projects and programmes.

Finally, Chapter 5 built on the findings in Chapter 4 to offer a critical examination of the current architecture of policies and safeguards within the GEF, assessing the extent of its alignment with the guidance on human rights from the CBD COP. Key features of this guidance include the requirement to comply with international human rights instruments, including in relation to the rights of Indigenous peoples, women, children, persons with disabilities and environmental human rights defenders; the compliance with biodiversity-related international instruments and their COP decisions; the respect for free, prior informed consent; enabling the participation of Indigenous peoples and local communities; the responsibility to conduct cultural, environmental and social impact assessments; ensuring the fair and equitable sharing of benefits arising from the use of biological resources; the prevention of involuntary resettlements and the provision of compensation in cases of voluntary resettlements; and the requirement to provide accountability mechanisms. It demonstrated that the GEF's existing policies and guidelines diverge from CBD COP guidance in some crucial areas, particularly in relation to the respect, protection and fulfilment of human rights, impact assessments, FPIC and involuntary resettlements. In addition to not fully meeting the guidance of the COP, the degree of commitment to the protection and realisation of human rights varies greatly across the different agencies that make up the GEF partnership. As a result, the degree of protection of the human rights of affected stakeholders varies depending on the agency implementing the GEF project, with the World Bank currently offering the least and UNDP offering the most protections out of the three implementing agencies. This Chapter offered timely and practical recommendations for the review of GEF policies and guidelines, in light of the adoption of the Kunming-Montreal GBF. In particular, it showed that the implementation of a human rights-

based approach requires a fundamental shift from a "do-no-harm" approach to proactively supporting the realisation of biodiversity-related human rights. This includes incorporating international human rights standards into GEF policies and safeguards, shifting the language from "affected stakeholder" to "affected right holder", and applying *ex ante* human rights impact assessments that are in line with IHRL.

4. Impact of these findings and areas of future research

This thesis provides a timely contribution to the discussions surrounding the operational modalities of the newly created GBFF. It provides practical recommendations for the review of GEF policies and guidelines, in light of the adoption of the Kunming-Montreal GBF. In particular, it showed that the implementation of a human right-based approach requires a fundamental shift from a "do-no-harm" approach to proactively supporting the realisation of biodiversity-related human rights.

While this thesis makes important contributions to the legal scholarship, due to time and space constraints several areas were left out of its scope and require future research. First of all, in its assessment against CBD guidance this study has focused on the GEF's policy and operational framework, as they provide the lowest common denominator across all GEF implementing and accredited agencies. However, these agencies have all developed their own environmental and social safeguards and few were found to be in compliance with GEF standards in 2019.[1374] A detailed review of these agency safeguards against CBD COP guidance would help build a clearer understanding of the gaps and inform the review of these safeguards as they are progressively updated. This thesis identified key aspects of CBD guidance that can be used to guide the analysis of other agency safeguards. These include the respect for human rights; the respect for biodiversity-related international instruments and CBD guidance; the respect for prior informed consent and/or approval and involvement of Indigenous peoples and local communities; enabling the meaningful participation of Indigenous peoples and local communities; conducting cultural, environmental and social impact assessments; ensuring the fair and equitable sharing of benefits arising from the conservation and sustainable use of genetic resources;

[1374] GEF, 'Progress Report on Agencies' Compliance with Minimum Standards in the GEF Policies on: Environmental and Social Safeguards; Gender Equality; and Stakeholder Engagement' (GEF/C.59/Inf.16, 2020), para 8.

preventing involuntary resettlement and providing compensation in cases of voluntary resettlement; and the provision of accountability, evaluation and compliance mechanisms.

Second, this thesis has shown that the GEF has a responsibility to protect, respect and fulfil human rights which applies across all areas under its mandate. However, more research is needed to bring out the linkages between development finance and human rights under other MEAs that have designated the GEF as their financial mechanism. Two new IPBES assessments are planned for 2024 that will further document the interlinkages among biodiversity, water, food and health and identify the underlying causes of biodiversity loss, the determinants of transformative change, and some options for achieving the 2050 vision for biodiversity. For the first time, the IPBES and the Intergovernmental Panel on Climate Change (IPCC) will be coordinating their efforts to tackle the biodiversity and climate crises and their social impacts simultaneously.[1375] Previous international and national policies have largely tackled the problems of climate change and biodiversity loss independently, failing to properly address the synergies between mitigating biodiversity loss and climate change. The findings from these reports will likely feed the ongoing discussions within the biodiversity framework regarding the role of financial assistance for biodiversity in addressing the challenges caused by climate change and its effects on biodiversity.[1376] Importantly, the IPCC and IPBES warn that measures intended to facilitate adaptation to one aspect of climate change without considering other aspects of sustainability may in practice result in unforeseen detrimental consequences.[1377] Conversely, measures that narrowly focus on the protection and restoration of biodiversity may have knock-on benefits for climate change mitigation, but these may be sub-optimal compared to measures that consider both biodiversity and the climate.[1378]

The arguments made in this thesis provide some insights as to the responsibility of GEF implementing agencies to identify, respect, protect and fulfil human rights in the implementation of GEF climate-related projects. The recommendations in this thesis to better align GEF policies and safeguards with IHRL and CBD guidance is of direct relevance to the joint implementation of climate and biodiversity projects. Indeed, the human rights responsibility of GEF implementing agencies to respect, protect, and fulfil human rights

[1375] Hans-Otto Portner *et al.*, 'IPBES-IPCC Co-Sponsored Workshop Biodiversity and Climate Change Workshop Report IPBES and IPCC' (IPBES and IPCC, 2021).
[1376] Conference of the Parties to CBD Decision X/33 (29 October 2010), UN Doc UNEP/CBD/COP/DEC/X/33, paras 4-5.
[1377] Hans-Otto Portner *et al.*, 'IPBES-IPCC Co-Sponsored Workshop Biodiversity and Climate Change Workshop Report IPBES and IPCC' (IPBES and IPCC, 2021) 19.
[1378] Ibid, 20.

obligations in biodiversity projects may be extrapolated to the implementation of climate projects due to the universal nature of IHRL. However, this was beyond the scope of this thesis and additional international legal research in this area is needed to confirm this assumption.

Third, emerging technologies are providing new opportunities in development cooperation, and have the potential to support more efficient management of resources, new financing arrangements, better co-ordination, and improved services to affected populations.[1379] The potential of blockchain technology is currently being explored by a range of humanitarian actors, including UN agencies and international NGOs in areas as diverse as digital identity, education and women's rights. In the implementation of projects, blockchain technology has the potential to introduce innovative financing models to distribute resources, and to increase the efficiency and transparency of internal processes. This is a fascinating area that would complement the findings in this thesis around aid effectiveness well.

To close this thesis, the interdependence between human rights and a healthy environment is now generally accepted among States[1380] and the Kunming-Montreal GBF provides the foundations for the application of a human rights-based approach to the pursuit of biodiversity objectives. The coming decade is also projected to see a convergence in technological advances, from computing and artificial intelligence, renewable energy and blockchain.[1381] If properly harnessed these technological advances could help reduce the impact of our societies on the environment. In the words of Christiana Figueres, the former Executive Secretary of the UNFCCC and Tom Rivett-Carnac senior political strategist for the Paris Agreement, "[t]he evolution of humanity is a story of adaptive ingenuity to the challenges of the time. We face the greatest challenge of human history. We may be challenged beyond our currently visible capacities, but that only means that we are invited to rise to the next level of our abilities. And we can."[1382]

[1379] Theresia Thylin, Duarte Novelo, Fernanda Maria, 'Leveraging blockchain technology in humanitarian settings – opportunities and risks for women and girls' (2019) 27(2) Gender & Development 317, 318.

[1380] See United Nations, 'With 161 Votes in Favour, 8 Abstentions, General Assembly Adopts Landmark Resolution Recognizing Clean, Healthy, Sustainable Environment as Human Right' (Press release GA/12437, 28 July 2022 <https://press.un.org/en/2022/ga12437.doc.htm> Accessed 27 November 2023. Some countries are already stressing that that there is no common internationally agreed understanding on the content and scope of the right to a clean, healthy and sustainable environment, and that for a right to be legally established it must be enshrined in an international treaty

[1381] Azeem Azhar, *Exponential: How accelerating technology is leaving us behind and what to do about it* (2021).

[1382] Christiana Figueres and Tom Rivett-Carnac, *The future we choose: surviving the climate crisis.* 1st edition. (Alfred A. Knopf, New York, 2020), 64-65.

Table of Legal Instruments

International

Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (adopted 19 June 2023, opening for signature) C.N.203.2023.TREATIES-XXI.10.

United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, adopted 28 September 2018 (UN Doc A/HRC/RES/39/12).

Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79.

Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007) 2440 UNTS 311.

Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3.

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222.

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227.

Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 6 February 2005) 2303 UNTS 162.

United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (adopted 14 October 1994, entered into force 26 December 1996) 1954 UNTS.

Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 29 June 1990, entered into force 7 March 1991) 1598 UNTS 469.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3.

Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383.

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3.

United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.

Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

Convention for the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151.

Stockholm Declaration of the United Nations Conference on the Human Environment (1972) UN Doc A/CONF.48/14/REV1.

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

International Convention on the Elimination of all Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

Universal Declaration on Human Rights (adopted 10 December 1948) UN Doc A./

Statute of the International Court of Justice (adopted 18th April 1946) 33 UNTS 993.

Regional

Abu Dhabi Declaration of the Organization of Islamic Cooperation (Adopted 1-2 March 2019) Doc OIC/-CFM-46/2019/DECLARATION/FINAL.

Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, entered into force 22 April 2021) C.N.195.2018.TREATIES-XXVII.18.

Human Rights Declaration of the Association of Southeast Asian Nations (adopted 18 November 2012).

Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) Doc ST/HR/]CHR/NONE/2004/40/Rev.1.

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 445 (Aarhus Convention).

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58.

American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (Pact of San José).

National

United Kingdom: *International Development (Official Development Assistance Target) Act* (2015).

United States: *National Environmental Policy Act of 1969*, 42 U.S.C. §4321 et seq. (1969).

Table of cases

Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica) (Merits) [2015] ICJ Rep 665.

Australia v Japan (New Zealand intervening) (Whaling in the Antarctic) [2014] ICJ Rep 226.

Australia v Japan (Separate opinion of Judge ad hoc Charlesworth) [2014] ICJ Rep.

Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgement) [2010] ICJ Rep 14.

Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs) [2007] Inter-Am Ct HR.

MOX Plant (Ireland v United Kingdom) (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001.

The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, Communication No 155/96 [2001] AfrHRLR Rep 60.

Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion) [1999] I.C.J. Rep 62.

Beer and Regan v Germany App no 28934/95 (ECHR, 18 February 1999).

Waite and Kennedy v Germany App no 26083/94 (ECHR, 18 February 1999).

Nuclear Tests (New Zealand v France), Judgement, [1974] ICJ Rep 457.

Barcelona Traction, Light & Power Company, Ltd, 1970 I.C.J. 4.

Certain Expenses of the United Nations (Advisory Opinion), (1962) ICJ Reports 151, Separate Opinion of Judge Sir Gerald Fitzmaurice.

Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 174.

Germany v Poland (Factory at Chorzow) [1927] PCIJ (ser A) No 9.

France v Spain (Lac Lanoux Arbitration) [1957] 24 ILR 101.

Bibliography

Books

Azhar A, *Exponential: How accelerating technology is leaving us behind and what to do about it* (2021).

Birnie P, Boyle A and Redgwell C, *International Law and the Environment* (3rd edn Oxford University Press 2009).

Boyle A and Chinkin C, *The Making of International Law* (Oxford University Press Oxford and New York 2007).

Brownlie I, *Principles of Public International Law* (7th edn Oxford University Press 2008).

Figueres C and Rivett-Carnac T, *The future we choose: surviving the climate crisis* 1st edition (Alfred A. Knopf New York 2020).

Friedmann W, *The Changing Structure of International Law* (Columbia University Press New York 1964).

Gilbert J, *Natural Resources and Human Rights: An Appraisal* (Oxford University Press 2018).

Holmes OW Jr, *The Common Law* (Little Brown and Co. 1881) 219.

Joseph S and McBeth, A *Research Handbook on International Human Rights Law* (1st edn Edward Elgar Publishing 2010).

McConnell F, *The Biodiversity Convention – A Negotiating History* (Kluwer Law International 1996).

Morgera E, Tsioumani E and Buck M, *Unraveling the Nagoya Protocol* (Brill | Nijhoff, Leiden 2014)

Rajamani L, *Differential Treatment in International Law* (Oxford University Press 2006).

Book chapters

Atwood B and Manning R, 'DAC High Level Forums on aid effectiveness' in Bracho and others, *Origins, Evolution and Future of Global Development Cooperation: The Role of the Development Assistance Committee (DAC)* (Deutsches Institut für Entwicklungspolitik gGmbH 2021).

Baetens F, 'II.44 Pacta Sunt Servanda' in *Elgar Encyclopedia of International Economic Law* (Edward Elgar Publishing, Cheltenham, UK 2017).

Becker B, 'Colonial Legacies in International Aid: Policy Priorities and Actor Constellations' in Schmitt C (ed), *From Colonialism to International Aid. Global Dynamics of Social Policy* (Palgrave Macmillan 2020).

Boisson de Chazournes L and Mbengue M, 'A "Footnote as a Principle". Mutual Supportiveness and its Relevance in an Era of Fragmentation' in *Coexistence, Cooperation and Solidarity* (Brill | Nijhoff, Leiden 2012).

Bracho G, 'Diplomacy by stealth and pressure: the creation of the Development Assistance Group (and the OECD) in 51 days' in Bracho G and others, *Origins, Evolution and Future of Global Development Cooperation: The Role of the Development Assistance Committee (DAC)* (Deutsches Institut für Entwicklungspolitik gGmbH 2021).

Buscaglia D and Garg A, 'A Composite Index of Aid Fragmentation' in Klingebiel S and others (eds), *The Fragmentation of Aid* (Palgrave Macmillan, London 2016).

Cullet P, 'Common but Differentiated Responsibilities' in *Research Handbook on International Environmental Law* (Edward Elgar Publishing, Cheltenham 2021).

Dupuy P, 'Formation of Customary International Law and General Principle' in Brunnée J and others (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007).

Ericsson F and Steensen S, 'Measuring Fragmentation: The Financial Significance of Aid Relations' in Klingebiel S and others (eds), *The Fragmentation of Aid* (Palgrave Macmillan, London 2016).

Estes R, 'United Nations Development Programme' in Michalos AC (ed), *Encyclopedia of Quality of Life and Well-Being Research* (Springer, Dordrecht 2014).

Ferstman C, 'International Organizations' Obligations under Human Rights and International Humanitarian Law' in *International Organizations and the Fight for Accountability* (Oxford University Press 2017).

Klabbers, J ‘Privileges and Immunities’ in *An Introduction to International Institutional Law* (Cambridge University Press 2002).

Klingebiel S and others ‘Fragmentation: A Key Concept for Development Cooperation’ in *The Fragmentation of Aid* (Palgrave Macmillan 2016).

Lawrence P, ‘International Relations Theory’ in Rajamani L and Peel J (eds), *The Oxford Handbook of International Environmental Law* (2nd edn, Oxford Handbooks 2021).

Leemans R, ‘The Millennium Ecosystem Assessment: Securitising the interactions between ecosystems the state and human beings from a human and environmental security perspective’ in *Facing Global Environmental Change: Environmental Human Energy Food Health and Water Security Concepts* (Springer Verlag 2009).

Lundsgaarde E, ‘Bilateral Donor Bureaucracies and Development Cooperation Pluralism’ in Klingebiel S and others (eds), *The Fragmentation of Aid* (Palgrave Macmillan, London 2016).

McInerney-Lankford S, ‘Climate Change, Human Rights and Migration: A Legal Analysis of Challenges and Opportunities’ in *Research Handbook on Climate Change, Migration and the Law* (Research Handbooks in Climate Law series, Edward Elgar Publishing 2017).

Morgera E and Lennan M, ‘Ensuring mutual supportiveness of the Paris Agreement with other multilateral environmental agreements: a focus on ocean-based climate action’ in Alexander Zahar *Research Handbook on the Law of the Paris Agreement* (Edward Elgar, 2024).

Robinson M, ‘What Rights Can Add to Good Development Practice’ in Alston P and Robinson M (eds), *Human Rights and Development: Towards Mutual Reinforcement* (online edn, Oxford Academic 2012)

Romanin Jacur F, ‘Controlling and Assisting Compliance: Financial Aspect’ in Treves T and others (ed), *Non-compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (T.M.C. Asser Press, The Hague 2009; Cambridge University Press).

Sand PH, ‘International Environment Agreements’ in *International Environmental Agreements* (Edward Elgar Publishing Limited 2019).

Thalwitz M, ‘Fragmenting Aid or a Platform for Pluralism? The Case of ‘Vertical Funds’’ in Klingebiel S and others (eds), *The Fragmentation of Aid* (Palgrave Macmillan, London 2016).

Trzeciak-Duval A, 'Tipping point: environmental protection and sustainable development' in Bracho G and others, *Origins, Evolution and Future of Global Development Cooperation: The Role of the Development Assistance Committee (DAC)* (Deutsches Institut für Entwicklungspolitik gGmbH 2021).

Journal articles

Alston P and Quinn G, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 172.

Agrawal A, Miller D, and Roberts JT, 'Biodiversity, Governance, and the Allocation of International Aid for Conservation' (2013) 6 Conservation Letters 12, 17.

Bernaz N, 'Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty' (2021) 22 Human Rights Review 45.

Boisson de Chazournes L, 'The Global Environment Facility (GEF): A Unique and Crucial Institution' (2005) 14(3) Review of European Community & International Environmental Law 193, 197.

Boisson de Chazournes L. 'The Global Environment Facility Galaxy: On Linkages among Institutions' (1999) 3 Max Planck Yearbook of United Nations Law 243.

Broberg M and Sano HO, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – An Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22(5) The International Journal of Human Rights 664.

Brunori M, 'Protecting Access to Land for Indigenous and Non-Indigenous Communities: A New Page for the World Bank?' (2019) 32(3) Leiden Journal of International Law 501.

Brunnée J, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15(1) Leiden Journal of International Law 1.

Burhenne-Guilmin F and Casey-Lefkowitz S, 'The Convention on Biological Diversity: A Hard Won Global Achievement' (1992) 3 Yearbook of International Environmental Law 43.

Busse M and Gröning S, 'Does Foreign Aid Improve Governance?' (2009) 104(2) Economics Letters 76.

Cabrera Ormaza M and Ebert F, 'The World Bank, Human Rights, and Organizational Legitimacy Strategies: The Case of the 2016 Environmental and Social Framework' (2019) 32(3) Leiden Journal of International Law 483.

Cammack P, 'The UNDP, the World Bank and Human Development through the World Market' (2017) 35(1) Development Policy Review 3.

Churchill R.R and Ulfstein G, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2014) 94 American Journal of International Law 623.

Cole W, 'Human Rights as Myth and Ceremony? Reevaluating the Effectiveness of Human Rights Treaties, 1981-2007' (2012) 117(4) The American Journal of Sociology 1131.

Dann P and Riegner M, 'The World Bank's Environmental and Social Safeguards and the Evolution of Global Order' (2019) 32(3) Leiden Journal of International Law 537.

Dañino R, 'The Legal Aspects of the World Bank's Work on Human Rights' (2007) 41(1) The International Lawyer 21.

Dietrich S, 'Donor Political Economies and the Pursuit of Aid Effectiveness' (2016) 70(1) International Organization 65.

Dollar D, 'Is China's Development Finance a Challenge to the International Order?' (2018) 13(2) Asian Economic Policy Review 283.

Douch M, Edwards T, Landman T and Sushanta M, 'Aid effectiveness: Human rights as a conditionality measure' (2022) World Development 158.

Esteves A.M, Franks D and Vanclay F, 'Social impact assessment: The state of the art' (2012) 30(1) Impact Assessment and Project Appraisal 34.

Gupta A and Van Asselt H, 'Transparency in Multilateral Climate Politics: Furthering (or Distracting from) Accountability?' (2019) 13 Regulation & Governance 18.

Jenks C.W, 'The Conflict of Law-Making Treaties' (1953) 30 BYBIL 403.

Jokubauskaite G and Rossati D, 'A Tragedy of Juridification in International Development Finance' (2021) Canadian Journal of Development Studies / Revue canadienne d'études du développement.

Jokubauskaite G, 'The Concept of Affectedness in International Development' (2020) 126 World Development.

Jan Klabbers, ‘The Concept of Legal Personality’ (2005) 11 Ius Gentium 35.

Knack, S., ‘Aid Dependence and the Quality of Governance: Cross-Country Empirical Tests’ (2001) 68(2) Southern Economic Journal, 319.

Knox J, ‘The Past, Present, and Future of Human Rights and the Environment’ (2018) 53 Wake Forest Law Review 649.

Koester V, ‘The Nature of the Convention on Biological Diversity and Its Application of Components of the Concept of Sustainable Development’ (2006) 16(1) The Italian Yearbook of International Law Online 57.

Koh NS, Ituarte-Lima C and Hahn T, ‘Mind the Compliance Gap: How Insights from International Human Rights Mechanisms Can Help to Implement the Convention on Biological Diversity’ (2022) 11(1) Transnational Environmental Law 39.

Lake R, ‘Finance for the Global Environment: The Effectiveness of the GEF as the Financial Mechanism to the Convention on Biological Diversity’ (1998) 7(1) Review of European Community & International Environmental Law 68.

LePrestre P, ‘The CBD at Ten: The Long Road to Effectiveness’ (2002) 5(3) Journal of International Wildlife Law and Policy 269.

Lin J.Y, ‘A Modeling Framework for Enhancing Aid Effectiveness’ (2020) 23(2) Journal of Economic Policy Reform 138.

Matz N, ‘Environmental Financing: Function and Coherence of Financial Mechanisms in International Environmental Agreements’ (2002) 6 Max Planck Yearbook of United Nations Law 473.

Matz N, ‘Financial Institutions between Effectiveness and Legitimacy – A Legal Analysis of the World Bank, Global Environment Facility and Prototype Carbon Fund’ (2005) 5 Int Environ Agreements 265.

Radu Mares, ‘Securing human rights through risk-management methods: Breakthrough or misalignment?’ (2019) 32(3) Leiden Journal of International Law 517.

McInerney-Lankford S, ‘Human Rights and Development: a Comment on Challenges and Opportunities from a Legal Perspective’ (2009) 1 J Human Rights Practice 51.

Mee L, ‘The Role of UNEP and UNDP in Multilateral Environmental Agreements’ (2005) 5(3) International Environmental Agreements: Politics, Law and Economics 227.

Morgera E, ‘Dawn of a New Day? The Evolving Relationship Between the Convention on Biological Diversity and International Human Rights Law’ (2018) 53(4) Wake Forest Law Review 691.

Morgera E, ‘The Need for an International Legal Concept of Fair and Equitable Benefit-sharing’ (2016) 27 European Journal of International Law 353.

Morelli A, ‘International Financial Institutions and their Human Rights Silent Agenda: A Forward-Looking View on the “Protect, Respect and Remedy” Model in Development Finance’ (2021) 36(1) American University International Law Review 51.

Moris H, ‘The World Bank And Human Rights: Indispensable Partnership Or Mismatched Alliance?’ (1997) 4(1) ILSA Journal of International & Comparative Law 192.

Nanda V, ‘Accountability of International Organizations: Some Observations’ (2005) 33(3) Denver Journal of International Law and Policy 379.

Orakhelashvili A, ‘The World Bank Inspection Panel in Context: Institutional Aspects of the Accountability of International Organizations’ (2005) 2(1) International Organizations Law Review 57.

Palau-McDonald MJ, ‘Blockchains and Environmental Self-Determination for the Native Hawaiian People: Toward Restorative Stewardship of Indigenous Lands’ (2022) 57(1) Harvard civil rights-civil liberties law review 393.

Pavoni R, ‘Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the “WTO-and-Competing-Regimes” Debate?’ (2010) 21(3) European Journal of International Law 649.

Phang S and others, ‘Addressing the Implementation Challenge of the Global Biodiversity Framework’ (2020) 29 Biodivers Conserv 3061.

Raftopoulos M, ‘REDD and human rights: Addressing the urgent need for a full community-based human rights impact assessment’ (2016) 20(4) The International Journal of Human Rights 509.

Raustiala K, ‘Form and Substance in International Agreements’ (2005) 99(3) The American Journal of International Law 581’

Righettini M and Lizzi R, ‘How Scholars Break Down “Policy Coherence”: The Impact of Sustainable Development Global Agendas on Academic Literature’ (2022) 32(2) Environmental Policy and Governance 98.

Roe D, ‘Biodiversity Loss—More Than an Environmental Emergency’ (2019) 3 The Lancet Planetary Health 287.

Savaresi A, ‘REDD and Human Rights’ (2013) 18(3) Ecology and Society 5.

Shelton D.L, ‘What Happened in Rio to Human Rights?’ (1992) 3 Y.B. OF Int’L ENV’L L. 75.

Shongwe M, ‘The Fragmentation of International Law: Contemporary Debates and Responses’ (2020) 2016(1) The Palestine Yearbook of International Law 177.

Smyth E and Vanclay F, ‘The Social Framework for Projects: A conceptual but practical model to assist in assessing, planning and managing the social impacts of projects’ (2017) 35(1) Impact Assessment and Project Appraisal 65.

Taylor L and others, ‘Risk Factors for Human Disease Emergence’ (2001) 356 Philos Trans R Soc Lond B Biol Sci 983.

Thylin T, Novelo D and Maria F, ‘Leveraging blockchain technology in humanitarian settings – opportunities and risks for women and girls’ (2019) 27(2) Gender & Development 317.

Vanclay F, ‘Reflections on Social Impact Assessment in the 21st Century’ (2020) 38(2) Impact Assessment and Project Appraisal 126.

Vanclay F, ‘Principles for social impact assessment: A critical comparison between the international and US documents’ (2006) 26(1) Environmental Impact Assessment Review 3.

Weiss E.B, ‘Understanding Compliance with International Environmental Agreements: The Baker’s Dozen Myths’ (1998) 32 University of Richmond Law Review 1555.

Weiss E.B, ‘Strengthening National Compliance with International Environmental Agreements’ (1997) 27(4) Environmental Policy and Law 297.

Zvobgo, K. and B. Graham, ‘The World Bank as an Enforcer of Human Rights’ (2020) 19 Journal of Human Rights 4.

Official documents

CBD, ‘Report of the Open-Ended Working Group on the Post-2020 Global Biodiversity Framework on its Third Meeting (Part II)’ (29 March 2022) UN Doc CBD/WG2020/3/7.

CBD, ‘First Draft of the Post-2020 Global Biodiversity Framework’ (5 July 2021) UN Doc CBD/WG2020/3/3.

CBD, 'Update of the Zero Draft of the Post-2020 Global Biodiversity Framework' (17 August 2020) UN Doc CBD/POST2020/PREP/2/1.

CBD, 'Second Synthesis of Views of Parties and Observers on the Scope and Content of the Post-2020 Global Biodiversity Framework' (23 May 2019), UN Doc CBD/POST2020/PREP/1/INF/2.

CBD, 'Discussion Paper: Safeguards for Scaling-Up Biodiversity Finance and Possible Guiding Principles' (7 October 2012) UN Doc UNEP/CBD/COP/11/INF/7.

CBD, 'Report of the Expert Group Meeting of Local Community Representatives Within the Context of Article 8(J) and Related Provisions of the Convention on Biological Diversity' (4 September 2011) UN Doc UNEP/CBD/WG8J/7/8/Add.1.

Conference of the Parties to CBD Decision 15/15 (19 December 2022), UN Doc CBD/COP/DEC/15/15.

Conference of the Parties to CBD Decision 15/13 (19 December 2022), UN Doc CBD/COP/DEC/15/13.

Conference of the Parties to CBD Decision 15/11 (19 December 2022), UN Doc CBD/COP/DEC/15/11.

Conference of the Parties to CBD Decision 15/10 (19 December 2022), UN Doc CBD/COP/DEC/15/10.

Conference of the Parties to CBD Decision 15/9 (19 December 2022), UN Doc CBD/COP/DEC/15/9.

Conference of the Parties to CBD Decision 15/8 (19 December 2022), UN Doc CBD/COP/DEC/15/8.

Conference of the Parties to CBD Decision 15/7 (19 December 2022), UN Doc CBD/COP/DEC/15/7.

Conference of the Parties to CBD Decision 15/6 (19 December 2022), UN Doc CBD/COP/DEC/15/6.

Conference of the Parties to CBD Decision 15/4 (19 December 2022), UN Doc CBD/COP/DEC/15/4.

Conference of the Parties to CBD Decision 15/7 (19 December 2022), UN Doc CBD/COP/DEC/15/7.

Conference of the Parties to CBD Decision 15/15 (19 December 2022), UN Doc CBD/COP/DEC/15/15.

Conference of the Parties to CBD Decision 14/23 (30 November 2018), UN Doc CBD/COP/DEC/14/23.

Conference of the Parties to CBD Decision 14/17 (30 November 2018) UN Doc CBD/COP/DEC/14/17.

Conference of the Parties to CBD Decision 14/15 (30 November 2018), UN Doc CBD/COP/DEC/14/15.

Conference of the Parties to CBD Decision 14/15 (30 November 2018), UN Doc CBD/COP/DEC/14/15.

Conference of the Parties to CBD Decision XIV/13 (9 October 2008), UN Doc UNEP/CBD/COP/DEC/IX/13.

Conference of the Parties to CBD Decision XII/12F (13 October 2014) UN Doc UNEP/CBD/COP/DEC/XII/12.

Conference of the Parties to CBD Decision XII/5 (17 October 2014), UN Doc UNEP/CBD/COP/DEC/XII/5.

Conference of the Parties to CBD Decision XII/3 (17 October 2014), UN Doc UNEP/CBD/COP/DEC/XII/3.

Conference of the Parties to CBD Decision XI/8 (5 December 2012), UN Doc UNEP/CBD/COP/DEC/XI/8.

Conference of the Parties to CBD Decision X/33 (29 October 2010), UN Doc UNEP/CBD/COP/DEC/X/33.

Conference of the Parties to CBD Decision X/24 (29 October 2010), UN Doc UNEP/CBD/COP/DEC/X/24.

Conference of the Parties to CBD Decision X/19 (29 October 2010), UN Doc UNEP/CBD/COP/DEC/X/19

Conference of the Parties to CBD Decision X/3 (29 October 2010), UN Doc UNEP/CBD/COP/DEC/X/3.

Conference of the Parties to CBD Decision X/2 (29 October 2010), UN Doc UNEP/CBD/COP/DEC/X/2.

Conference of the Parties to CBD Decision VII/22 (13 April 2004), UN Doc UNEP/CBD/COP/DEC/VII/22.

Conference of the Parties to CBD Decision VII/20 (13 April 2004), UN Doc UNEP/CBD/COP/DEC/VII/20.

Conference of the Parties to CBD Decision VII/16 (13 April 2014), UN Doc UNEP/CBD/COP/DEC/VII/16.

Conference of the Parties to CBD Decision V/16 (22 June 2000), UN Doc UNEP/CBD/COP/DEC/V/16.

Conference of the Parties to CBD Decision III/8 (11 February 1997), UN Doc UNEP/CBD/COP/DEC/III/8.

Conference of the Parties to CBD Decision II/6 (30 November 1995), UN Doc UNEP/CBD/COP/DEC/II/6.

Conference of the Parties to CBD Decision I/4 (28 February 1995) UN Doc UNEP/CBD/COP/DEC/I/4.

Conference of the Parties to CBD (6 October 1994) UN Doc UNEP/CBD/COP/
/1/7.

Conference of the Parties to CBD Decision XIII/18 (17 December 2016), UN Doc UNEP/CBD/COP/DEC/XIII/18.

Conference of the Parties to CBD Decision 2/9 (21 September 1995), UN Doc UNEP/CBD/COP/2/9.

CRC Committee, General comment No. 26 on children's rights and the environment, with a special focus on climate change (22 August 2023), UN Doc CRC/C/GC/26.

CRC Committee, General comment No. 19 (2016) on public budgeting for the realization of children's rights (art. 4) (20 July 2016), UN Doc CRC/C/GC/19.

DCD DAC, 'Workshop On Development Effectiveness in Practice: Applying the Paris Declaration to Advancing Gender Equality, Environmental Sustainability and Human Rights' (DCD/DAC(2007)40, 2007).

ESCR Committee, General Comment No.14: The Right to the Highest Attainable Standard of Health (Art. 12) (11 August 2000) UN Doc E/C.12/2000/4.

ESCR Committee, General Comment No.3: The Nature of States Parties' Obligations (Art.2, Para. 1, of the Covenant) (14 December 1990) UN Doc E/1991/23.

ESCR Committee, 'General Comment No.2: International technical assistance measures (art. 22 of the Covenant)' (2 February 1990) UN Doc E/1990/23.

ESCR Committee, General Comment No. 1: Reporting by States Parties, (27 July 1981) UN Doc E/1989/22.

HRC, 'Women, girls and the right to a clean, healthy and sustainable environment, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd' (2022) UN Doc A/HRC/52/33.

HRC, 'Human rights and the environment' (2021) UN Doc A/HRC/RES/46/7.

HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd, Human rights depend on a healthy biosphere' (2020) UN Doc A/75/161.

HRC, 'Progressive realization of the human rights to water and sanitation - Report of the Special Rapporteur on the human rights to safe drinking water and sanitation' (2020) UN Doc A/HRC/45/10.

HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2018) UN Doc A/HRC/37/59.

HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2018) UN Doc A/73/188.

HRC, 'United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas' (2018) UN Doc A/HRC/RES/39/12.

HRC, 'Promoting rights-based climate finance for people and planet' (2018) UN Doc A/HRC/WG.2/19/CRP.4.

HRC, 'The right to development' (2018) UN Doc A/HRC/RES/39/9.

HRC, 'Report of the Independent Expert on human rights and international solidarity' (2017) UN Doc A/HRC/35/35.

HRC, 'Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox' (2013) UN Doc A/HRC/25/53.

United Nations Human Rights Committee (HRC), 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2017) UN Doc. A/HRC/34/49.

HRC, 'Right to a healthy environment: good practices' (2019) UN Doc A/HRC/43/53.

IBRD and IDA, 'Progress Report to the Board of Executive Directors on the Implementation of Management's Action Plan In Response to the Inspection Panel Investigation Report on the Kenya Natural Resource Management Project (IDA Credit No. 42770-KE)' (17 September 2015).

IBRD and IDA, 'Resolution Establishing the World Bank Inspection Panel', 22nd September 1993 (IBRD Res No 93-10, IDA Res No 93-6), OXIO 184.

ILA, 'Reports of Conferences' (2004) 71 ILA Reports 164.

ILC, Draft Articles on the Responsibility of International Organizations (Yearbook of the International Law Commission, vol II, 2011).

ILC, 'Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (2020) UN Doc A/CN.4/741.

OECD, 'Resolution of the Council Concerning The Mandate of the Development Assistance Committee' Doc number [C(2022)208].

OECD, 'Recommendation of the Council on Environmental Assessment of Development Assistance Projects and Programmes' (OECD/LEGAL/0458, 2020).

OHCHA, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc HR/PUB/11/4.

UN, 'Permanent Forum on Indigenous Issues Report on the tenth session' (2011) UN Doc E/2011/43-E/C.19/2011/14.

United Nations Conference on Environment and Development, 'Agenda 21' (Rio de Janeiro, 3-14 June 1992).

UNDG, ‘The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies’ (2003).

UNDP, ‘Final Investigation Report, Investigating allegations of non-compliance with UNDP social and environmental commitments relating to the following UNDP activities: Integrated and Transboundary Conservation of Biodiversity in the Basins of the Republic of Congo, TRIDOM II, Case No. SECU0009’ (Social and Environmental Compliance Unit, 4 June 2020).

UNDP, ‘Final Investigation Report, Final Investigation Report, Investigating allegations of non-compliance with UNDP social and environmental commitments relating to the following UNDP activities: Integrated and Transboundary Conservation of Biodiversity in the Basins of the Republic of Cameroon, TRIDOM II, Case No. SECU0008 (Social and Environmental Compliance Unit, 27 August 2020).

UNDP, ‘Advisory Review India High Range Landscape Project, Case No. SECU0001’ (Social and Environmental Compliance Unit, 21 November 2016).

UNGA, ‘The Human Right to a Clean, Healthy and Sustainable Environment’ (2022) UN Doc A/76/L.75.

UNGA, ‘Transforming our world: the 2030 Agenda for Sustainable Development’ (2015) UN Doc A/RES/70/1.

UNGA, ‘Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)’ (2015), UN Doc A/RES/69/313.

UNGA, ‘Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston’ (2015) UN Doc A/70/274 (2015).

UNGA, ‘Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, Victoria Tauli-Corpuz’ (2016) UN. Doc A/71/229.

UNGA, ‘Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Léo Heller’ (2016) UN Doc A/71/302

UNGA, ‘International Development Strategy for the Second United Nations Development Decade’ (1970) UN Doc A/RES/2626(XXV).

UNGA, ‘Report of the International Law Commission’ (2021) UN Doc A/76/10.

UNGA, ‘United Nations Conference on Environment and Development’ (1989), UN Doc A/RES/44/228.

UNGA, 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations' (1970) UN Doc A/RES/2625(XXV).

UNEP, 'Report of the Ad hoc Working Group of Legal and Technical Experts on Biological Diversity on the Work of Its Second Session' (7 March 1991) UN Doc UNEP/Bio. Div.3/5.

WIPO, 'The Protection of Traditional Knowledge: Draft Articles' WIPO/GRTKF/IC/47/4 (2023).

World Bank, 'Resolution No. IBRD 2020-0005 and Resolution No. IDA 2020-0004' (8 September 2020).

World Bank, 'Documents Concerning the Establishment of the Global Environment Facility' (1991) 30(6) International Legal Materials 1735.

World Bank Inspection Panel, 'Request for inspection Kenya: Natural Resource Management Project (P095050)' (30 January 2013) Doc number lPN REQUEST RQ 13/02.

GEF documents

GEF, 'Amendments to Instrument for the Establishment of a Restructured Global Environment Facility' (GEF/A.7/08, 24 August 2023).

GEF, 'Ratification of the Global Biodiversity Framework Fund, Seventh GEF Assembly' (GEF/A.7/09, 2023).

GEF, 'Report of the ad hoc Working Group on Governance' (GEF/C.62/09/Rev.01, 20 June 2022).

GEF, 'Draft GEF-8 Replenishment Resolution, Fourth Meeting for the Eighth Replenishment of the GEF Trust Fund' (GEF/R.08/34, 28 March 2022).

GEF, 'GEF Trust Fund Financial Report, Summary of Financial Information as of September 30, 2021' (GEF/C.61/Inf.06, 16 November 2021).

GEF, 'GEF-8 Replenishment: Financial Structure, Second Meeting for the Eighth Replenishment of the GEF Trust Fund' (GEF/R.8/09, 8 September 2021).

GEF, ‘Progress Report on Agencies’ Compliance with Minimum Standards in the GEF Policies on: Environmental and Social Safeguards; Gender Equality; and Stakeholder Engagement’ (GEF/C.59/Inf.16, 9 November 2020).

GEF, ‘Instrument for the Establishment of the Restructured Global Environment Facility’ (2019).

GEF, ‘Policy & Guidelines on System for Transparent Allocation of Resources (STAR)’ (GA/PL/01, 26 June 2018).

Global Environment Facility Independent Evaluation Office (GEF IEO), ‘OPS6 Final Report: The GEF in the Changing Environmental Finance Landscape’ (GEF IEO, Washington, DC 2018).

GEF, ‘GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards, (GEF/C.41/10/Rev.01, 18 November 2011).

GEF, ‘Broadening the GEF Partnership Under Paragraph 28 of the GEF Instrument’, (GEF/C.40/09, 26 April 2011).

GEF, ‘Policy on Environmental and Social Safeguards’ (SD/PL/03, 2019).

GEF, ‘Guidelines on GEF’s Policy on Environmental and Social Safeguards’ (SD/GN/03, 2019).

GEF, ‘Updated Policy on Environmental and Social Safeguards’ (GEF/C.55/07/Rev.01, 2018).

GEF, ‘Policy on Monitoring’ (GEF/C.56/03, 2019).

GEF, ‘Review of the GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards’ (GEF/ME/C.52/inf. 08, 2017).

GEF, ‘Policy on Gender Equality’ (SD/PL/02, 2017).

GEF, ‘Guidelines on Gender Equality’ (SD/GN/02, 2017).

GEF, ‘Policy on Stakeholder Engagement’ (SD/PL/01, 2017).

GEF, ‘Guidelines on the Implementation of the Policy on Stakeholder Engagement’ (SD/GN/01, 2018).

GEF, ‘Principles and Guidelines for Engagement with Indigenous Peoples’ (GEF/C.42/Inf.03/Rev.1, 2012).

Reports

ACHPR and International Work Group for Indigenous Affairs, ‘Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities’ (2005).

Alcamo J and others, ‘Ecosystems and Human Well-being: A Framework for Assessment’ (Island Press 2003).

Asian Infrastructure Investment Bank (AIIB), ‘Environmental and Social Framework (ESF)’ (2021).

Boyd DR and Keene S, ‘Human Rights-based Approaches to Conserving Biodiversity: Equitable, Effective and Imperative’ Policy Brief No. 1 (2021).

CBD Secretariat, ‘CBD Handbook’ (3rd edn, 2005).

CBD Secretariat, ‘Glossary of Relevant Key Terms and Concepts within the Context of Article 8(j) and Related Provisions’ (CBD Guidelines Series, 2019).

Deutz A and others, ‘Financing Nature: Closing the global biodiversity financing gap’ (The Paulson Institute, The Nature Conservancy, and the Cornell Atkinson Center for Sustainability 2020).

ECOSOC, ‘Standard-Setting Activities: Evolution of Standards Concerning The Rights Of Indigenous People Working Paper by Erica-Irene A. Daes on the concept of “indigenous people”’ (1996) UN Doc E/CN.4/Sub.2/AC.4/1996/2.

ECOSOC, ‘Background Study for the Development Cooperation Forum - Towards a Strengthened Framework for Aid Effectiveness’ (2008).

Gilmour D, ‘Forty Years of Community-Based Forestry: A Review of Its Extent and Effectiveness’ (FAO, 2016).

Glowka L and others, ‘A Guide to the Convention on Biological Diversity’ (IUCN, Gland and Cambridge 1994).

Global Partnership for Effective Development Co-operation, 'Nairobi Outcome Document' (Nairobi, 2016).

Hans-Otto Portner et al., 'IPBES-IPCC Co-Sponsored Workshop Biodiversity and Climate Change Workshop Report IPBES and IPCC' (IPBES and IPCC, 2021).

ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law Report of the Study Group' (2006).

IAIA, 'What Is Impact Assessment?' (IAIA, 2009).

Ituarte-Lima C and others, 'Biodiversity financing and safeguards – Lessons learned and proposed guidelines' (Stockholm Resilience Centre, 2014).

Nordic Trust Fund and the World Bank, 'Study on Human Rights Impact Assessments - A Review of the Literature, Differences with other Forms of Assessments and Relevance for Development' (World Bank, 2013), 29, 8, 33.

OECD, 'Development Co-operation Report 2023: Debating the Aid System' (OECD Publishing, 2023).

OECD, 'A Comprehensive Overview of Global Biodiversity Finance' (OECD Publishing 2020).

OECD, 'Financing for Development in Support of Biodiversity and Ecosystem Services' (OECD Development Co-operation Working Papers, No 23, 2015).

OECD, 'Mainstreaming Biodiversity for Sustainable Development' (OECD Publishing, 2018).

OECD, 'Policy Statement on Integrating Biodiversity and Associated Ecosystem Services into Development Co-Operation' (2010).

OECD, 'Action-oriented policy paper on human rights and development' (2007) Document Number DCD/DAC (2007)15.

OECD, 'Integrating Human Rights into Development, Donor Approaches, Experiences and Challenges' (OECD Publishing 2006).

OCHA, 'Key messages on Human Rights and Financing for Development' (Preparatory documents for the Third International Conference on Financing for Development, 2015).

OHCHR, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide' (OHCHR, 2012).

OHCHR, 'UN Guiding Principles on Business and Human Rights' (OHCHR, 2011).

Roe D, Seddon N, and Elliott J, 'Biodiversity Loss is a Development Issue: A Rapid Review of Evidence' (IIED 2019).

UNDESA, 'Financing for Development: Progress and Prospects, Report of the Inter-agency Task Force on Financing for Development' (2019).

UNDP, 'Gender Equality Strategy 2022–2025' (2022).

UNDP, 'Small Grants Programme Monitoring and Evaluation Strategy' (2021).

UNDP, 'Human Development Report 2020, The Next Frontier – Human Development and the Anthropocene' (2020).

UNDP, 'Social and Environmental Standards' (UNDP, 2019).

UNDP, 'Social and Environmental Screening Procedure' (Guidance note, 2019).

UNDP, 'The Biodiversity Finance Initiative' (BIOFIN Workbook, 2018).

UNDP, 'UNDP and Indigenous Peoples: A Policy of Engagement' (UNDP, 2015)

UNDP, 'Stakeholder Response Mechanism: Overview and Guidance' (2014).

UNDP, 'N≠a Jaqna Conservancy: Namibia' in 'Equator Initiative Case Studies - Local Sustainable Development Solutions for People, Nature, and Resilient Communities' (UNDP, 2012).

UNEP, 'Environmental and Social Sustainability Framework' (UNEP, 2020).

UNEP, 'Promoting Greater Protection for Environmental Defenders Policy' (UNEP, 2018).

UNEP, 'Gender Equality and the Environment Policy and Strategy' (UNEP, 2015).

UNEP, 'UNEP and Indigenous Peoples: A Partnership in Caring for the Environment Policy Guidance' (UNEP, 2012).

UNEP, 'UNEP Partnership Policy and Procedures' (UNEP, 2011).

World Bank, 'Environmental and Social Framework' (World Bank, 2017).

World Bank and OECD, 'Integrating Human Rights into Development: Donor Approaches, Experiences, and Challenges' (2nd edn, World Bank Publications, 2013).

WEF, 'Global Risks 2019 - A Global Risk Network Report' (2019).

WEF, 'Global Risks 2009 - A Global Risk Network Report' (2009).

WEC, 'Global Risks' (2006).

National policies

Costa Rica: *Ministerio de Planificación Nacional y Política Económica, 'Política de Cooperación Internacional de Costa Rica, 2014-2022'* (2014).

Honduras: *Gobierno de la Republica de Honduras, 'Política Nacional de Cooperación para el Desarrollo Sostenible'* (2019).

Blog posts

Ahmed N, 'World Bank and UN carbon offset scheme 'complicit' in genocidal land grabs – NGOs,' (The Guardian, 3rd July 2014) <https://www.theguardian.com/environment/earth-insight/2014/jul/03/world-bank-un-redd-genocide-land-carbon-grab-sengwer-kenya> Accessed 27 November 2023.

Fall I, 'Closing Statement by the Secretary-General of the World Conference on Human Rights' (Vienna, 25 June 1993) <https://www.ohchr.org/sites/default/files/Documents/AboutUs/WC1993_statements/Statement_closing_vienna25June93_Fall_en.pdf> Accessed 27 November 2023.

Goldberg DM, 'The Global Environment Facility: Green Fund or Green Folly?' (Center for International Environmental Law 1993) <https://www.ciel.org/reports/the-global-environment-facility-green-fund-or-green-folly-383-wise-news-communique-special-edition-energy-development-1993-goldberg-cc93-2-2/> Accessed 27 November 2023.

Kenrick J, 'Kenyan Government torches hundreds of Sengwer homes in the forest glades in Embobut,' (Forest Peoples Programme, 20 January 2014)

<https://www.forestpeoples.org/topics/legal-human-rights/news/2014/01/kenyan-government-torches-hundreds-sengwer-homes-forest-glade> Accessed 27 November 2023.

Klingebiel S and Li X, 'Crisis or Progress? The Global Partnership for Effective Development Cooperation (GPEDC) after Nairobi' (International Development Blog, 2016) <https://www.idos-research.de/en/the-current-column/article/crisis-or-progress-the-global-partnership-for-effective-development-cooperation-gpedc-after-nairobi/> Accessed 27 November 2023.

Loft P and Brien P, 'The 0.7% Aid Target' (House of Commons Library, 29 November 2022) <https://commonslibrary.parliament.uk/research-briefings/sn03714/> Accessed 27 November 2023.

Morgera E, 'Reflections on 2016 UN Biodiversity Conference (Part II): assessing the Mo'otz kuxtal guidelines on benefit-sharing from the use of traditional knowledge' (BeneLex Blog, 1 March 2017) <https://benelexblog.wordpress.com/2017/03/01/reflections-on-2016-un-biodiversity-conference-part-ii-assessing-the-mootz-kuxtal-guidelines-on-benefit-sharing-from-the-use-of-traditional-knowledge/> Accessed 27 November 2023.

Paşca Palmer C, 'The Role, Influence and Impact of Women in Biodiversity Conservation' (IIED, 9 October 2018) <https://www.iied.org/role-influence-impact-women-biodiversity-conservation> Accessed 27 November 2023.

United Kingdom's TaxPayers' Alliance, 'New Report Confirms That Aid Money Is Wasted (We Told You So)' (19 July 2017) <https://www.taxpayersalliance.com/new_report_confirms_that_aid_money_is_wasted_we_told_you_so> Accessed on 27 November 2023.

United Nations, 'With 161 Votes in Favour, 8 Abstentions, General Assembly Adopts Landmark Resolution Recognizing Clean, Healthy, Sustainable Environment as Human Right' (Press release GA/12437, 28 July 2022) <https://press.un.org/en/2022/ga12437.doc.htm> Accessed 27 November 2023.

Williams Z, 'The UK peddles a cynical colonialism and calls it aid' (The Guardian, 23 July 2017) <https://www.theguardian.com/commentisfree/2017/jul/23/uk-colonialism-aid-spending> Accessed on 27 November 2023.

Yi S and Wang W, 'AIIB's Environmental and Social Safeguards Under Scrutiny Ahead of Annual Meeting' (China Dialogue, 26 October 2021) <https://chinadialogue.net/en/business/aiib-agm-environmental-and-social-safeguards-under-scrutiny/> Accessed 27 November 2023.

Websites

OECD, ‘Biodiversity-Related Official Development Finance’ (OECD, 2017) <https://public.tableau.com/views/RioMarkers/ByProvider?:embed=y&:display_count=no&%3AshowVizHome=no%20#3> Accessed 27 November 2023.

OECD, ‘Official Development Assistance (ODA)’ in OECD Glossary of Statistical Terms. <https://www.oecd.org/dac/dac-glossary.htm#ODA> Accessed on 27 November 2023.

OECD, ‘The Busan Partnership for Effective Development Co-operation’ <www.oecd.org/dac/effectiveness/busanpartnership.htm> Accessed 27 November 2023.

OHCHR, ‘Frequently Asked Questions on Human Rights and Multilateral Development Banks’<https://www.ohchr.org/Documents/Issues/Development/DFI/FAQonMultilateralDevelopmentBanksandHumanRights.pdf> Accessed 27 November 2023.

OHCHR, ‘Technical Cooperation in the field of human rights’ <https://www.ohchr.org/en/countries/technical-cooperation> Accessed on 27 November 2023.

OHCHR, ‘What We Do: An Overview’ <https://www.ohchr.org/en/about-us/what-we-do> Accessed on 27 November 2023.

UNDP, ‘About Us’ <https://www.undp.org/about-us> Accessed 27 November 2023.

Victoria Williams, ‘Foreign Aid’ (Encyclopedia Britannica, 2023) <https://www.britannica.com/money/topic/foreign-aid> Accessed on 27 November 2023.

World Bank Inspection Panel, ‘Panel Cases’ <https://www.inspectionpanel.org/panel-cases> Accessed 27 November 2023.

World Bank, ‘About the Inspection Panel’ <https://www.inspectionpanel.org/about-us/about-inspection-panel> Accessed 27 November 2023.