

# Human Rights Implications of Climate Mitigation Actions - second edition

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## EXECUTIVE SUMMARY

Countries' obligations under international human rights law are well established. These include the obligations to respect, protect, and fulfill human rights, which are applicable in the context of climate change.

Parties to the United Nations Framework Convention on Climate Change (UNFCCC) recognize that they must respect human rights—including procedural rights—in all climate-related actions. As early as 1992, when countries negotiated the UNFCCC in Rio de Janeiro, the right to public participation and the principle of sustainable development were high on the political agenda, as reflected in the Rio Declaration of the same conference. Since then, the UNFCCC, the UN Human Rights Council, and other bodies have helped to further develop and clarify the legal obligations related to climate change.

Yet, as this policy brief demonstrates through various case studies, these obligations have not been fully operationalized in the development and implementation of climate mitigation actions.

After the Paris Agreement, and the Parties' most recent recognition of the linkage between human rights and climate change, the UNFCCC has a renewed mandate to ensure that human rights are taken into account in all climate actions. The preamble to the Paris Agreement provides that "Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity."

This policy brief reflects on the obligations of States to protect human rights and promote sustainable development and analyzes lessons learned from past mitigation actions and projects, as a means to inform and strengthen future mitigation policies and mechanisms such as the newly established sustainable development mechanism.

To this end, this report offers the following recommendations:

- ❖ Ensure that climate actions are based on a human rights-based approach that secures respect, protection, and fulfillment of human rights:
  - The interconnectivity of climate change and human rights needs further to be strengthened
  - Existing human rights obligations related to climate change need to be effectively operationalized
  - Safeguards and accountability processes need to be established that secure climate actions are designed, implemented and monitored in such a manner that rights of affected individuals, indigenous peoples and communities are protected
- ❖ Establish best-practice guidelines with clear, detailed guidance on local stakeholder consultation, including:
  - who must be consulted (at minimum, affected people);
  - how (through means of communication, including language and media, appropriate to the people being contacted);
  - when (early and throughout the project cycle, to ensure a communication channel if the project causes harm after approval or registration); and
  - how the concerns expressed in the consultations are taken into account in the decision making processes about the project. A refusal of the project by affected communities and indigenous peoples must be respected.
- ❖ Adopt clear, detailed guidance for sustainable development assessment and monitoring based on sustainable development indicators, including on:
  - minimum standards for sustainable development, reflecting international law obligations including the do-no-harm principle and requiring assessment throughout the project cycle and with indicators made publicly available;
  - public participation;
  - gender equality; and
  - safeguards against negative social and environmental impacts.
- ❖ Establish international-level communication channels and grievance mechanisms for people and communities regarding social and environmental impacts of climate change mitigation projects or actions.
- ❖ Adopt guidance, including minimum standards, for establishing grievance and complaint procedures at the national level, with reporting and transparency requirements.

# CLIMATE CHANGE IMPACTS ON HUMAN RIGHTS - A TWOFOLD PROBLEM

## PROBLEM

Man-made climate change has significant effects on the full enjoyment of several human rights, such as: the right to life, health, food, water and housing, among others.

## SOLUTION

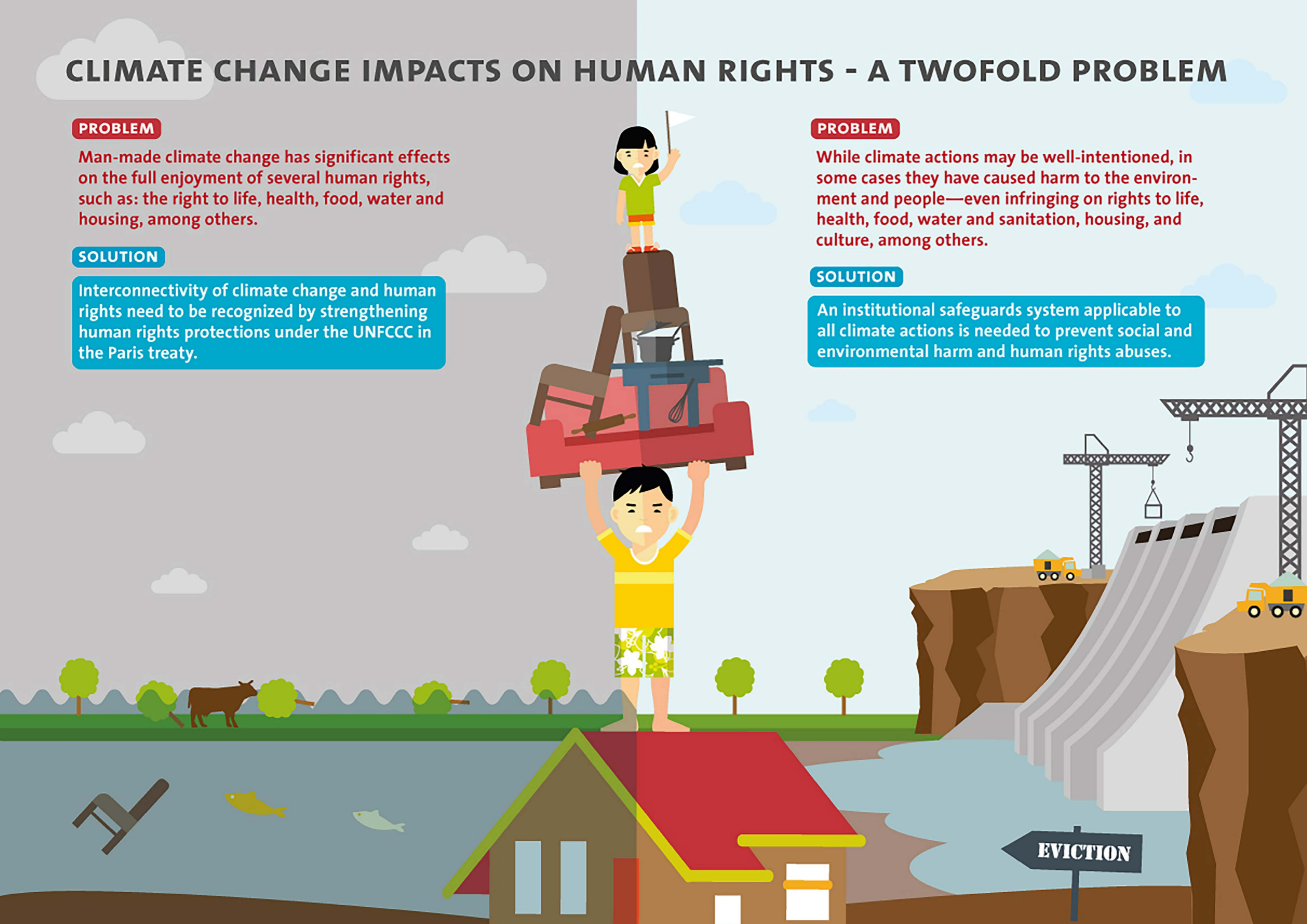
Interconnectivity of climate change and human rights need to be recognized by strengthening human rights protections under the UNFCCC in the Paris treaty.

## PROBLEM

While climate actions may be well-intentioned, in some cases they have caused harm to the environment and people—even infringing on rights to life, health, food, water and sanitation, housing, and culture, among others.

## SOLUTION

An institutional safeguards system applicable to all climate actions is needed to prevent social and environmental harm and human rights abuses.



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## I. INTRODUCTION

As States work towards developing the post-2020 climate architecture in the United Nations Framework Convention on Climate Change (UNFCCC), it is crucial to reflect on what has worked so far and what has not. One reason efforts have fallen short—or worse, led to additional problems—is a failure to fully appreciate the harm that can result from actions we take to mitigate climate change. This includes harm to individuals, indigenous peoples and communities.

With melting glaciers, rising sea levels, and stronger and more frequent storms, droughts and floods, it has become clear that climate change is interfering with the full and effective enjoyment of human rights. Perhaps less immediately obvious, but clear from recent examples, is the effect that climate change mitigation actions can have on human rights as well. Mitigation in the context of climate change refers to actions taken to prevent or reduce further contributions to the disruption of our climate, particularly by reducing emission levels and stabilizing greenhouse gas concentrations in the atmosphere.

While mitigation actions may be well intentioned, in some cases they have caused harm to the environment and people—even infringing on rights to life, health, food, water and sanitation, housing, and culture, among others. Invariably, the poor and most vulnerable (due to factors such as geography, gender, age, disability, and indigenous or minority status) have been the hardest hit.

Alongside the ever-increasing scientific consensus on the serious dangers we face from climate change, it is encouraging that States and private actors are taking steps to mitigate further harm to the environment from climate change. Especially encouraging is the recent attention to human rights and the way in which it featured high on the political agenda in the lead-up to and during the Paris climate negotiations. Given UNFCCC Parties' existing obligations to respect human rights in all climate-related actions (as recognized in the Paris Agreement), their mitigation actions must not threaten or violate human rights. As United Nations Special Rapporteur on Human Rights and the Environment John Knox put it, "States do not leave behind their human rights commitments when they negotiate a climate agreement or when they take individual actions to address climate change."<sup>1</sup>

Indeed, as countries develop the rules needed to operationalize the Paris Agreement, Parties should apply the same sort of forward-thinking approach to planning and to avoiding harm that they would for any other kind of project. For instance, if a community needed a school, but during the construction of the school, the community's homes would have to be bulldozed to make room for the equipment and site of the school, it would be wise to alter the project design to avoid that counterproductive result. Similarly, mitigation actions can end up causing more harm than good if not approached correctly. Proper planning in the design and implementation—each with full and effective participation and, when applicable, free, prior and informed consent of affected peoples and communities—are crucial to avoiding harmful consequences of mitigation actions.

Is there hope? Yes. It is entirely possible to undertake climate change mitigation actions without causing harm to peoples and communities. Unfortunately, some UNFCCC mechanisms have not taken the necessary steps to prevent such harm—and in some instances, mitigation actions have resulted in threats to or violations of human rights. Both positive and negative examples are described in section IV of this paper. Aiming to ensure that future climate mitigation actions finance architecture takes into account lessons learnt from the Clean Development Mechanism (CDM), Reducing Emissions from Deforestation and Degradation Programme (REDD+), and Nationally Appropriate Mitigation Actions (NAMAs), this briefing paper makes recommendations to promote mitigation actions that respect, protect and fulfil human rights through **policies and procedures related to local stakeholder consultation processes; sustainable development; and grievance mechanisms.**

Specifically, this paper outlines (i) the legal basis and justification for calling for strong human rights protections in the context of climate change; (ii) positive and negative examples from the current system, along with lessons learnt; (iii) state of play on human rights in the UNFCCC negotiations; and (iv) recommendations for mitigation actions that respect, protect, and fulfil human rights.

## II. HUMAN RIGHTS OBLIGATIONS OF STATES RELATED TO CLIMATE CHANGE

All Parties to the UNFCCC have existing obligations to respect, protect and fulfil human rights. These obligations apply in the context of climate change, and more specifically to mitigation actions.

### A. Obligations established under International Human Rights Treaties

All Parties to the UNFCCC have agreed to respect human rights in other international treaties. Indeed, all 195 State Parties to the UNFCCC have ratified at least one of the major United Nations human rights treaties. Among those treaties are the International Covenant on Civil and Political Rights with 168 Parties, and the International Covenant on Economic, Social and Cultural Rights with 164 Parties. Those States must uphold, not undermine, their human rights-related duties in their actions to mitigate climate change.

<sup>1</sup> John Knox, UN then-Independent Expert, now Special Rapporteur, on Human Rights and the Environment, "UN experts call on climate negotiators to integrate human rights," Outreach on Climate Change and Sustainable Development, Dec. 2014, <http://outreach.stakeholderforum.org/index.php/previous-editions/cop-20/cop20-day8-climate-justice-human-rights-health-food-nutrition/11838-cop20-day8-un-call-cc-integrate-human-rights>.

More broadly, States' obligations under the UNFCCC must be interpreted to be consistent with their obligations under those human rights treaties, and their actions under the UNFCCC must not conflict with their existing human rights obligations. Illustrating how these duties work together, the UN Committee on Economic, Social, and Cultural Rights "has urged States to implement strategies to combat global climate change that do not negatively affect the right to adequate food and freedom from hunger, but rather promote sustainable agriculture, as required by article 2 of the United Nations Framework Convention on Climate Change."<sup>2</sup>

Importantly, States' human rights obligations do not stop at their borders. As the Office of the United Nations High Commissioner for Human Rights (OHCHR) recognised in a report on human rights and climate change, "States have also committed themselves not only to implement the treaties within their jurisdiction, but also to contribute, through international cooperation, to global implementation"—highlighting developed countries' "particular responsibility and interest" to assist the poorer developing countries.<sup>3</sup> Drawing on the extraterritorial obligations identified by the Committee on Economic, Social, and Cultural Rights, OHCHR noted that States must promote economic, social and cultural rights in the following ways:

- Refrain from interfering with the enjoyment of human rights in other countries;
- Take measures to prevent third parties (e.g. private companies) over which they hold influence from interfering with the enjoyment of human rights in other countries;
- Take steps through international assistance and cooperation, depending on the availability of resources, to facilitate fulfilment of human rights in other countries [...];
- Ensure that human rights are given due attention in international agreements and that such agreements do not adversely impact upon human rights.<sup>4</sup>

The first three embody the duties to respect, protect, promote and fulfil human rights. The fourth is derived from all four levels of obligations and makes clear that, in negotiations of agreements such as the Paris Agreement, Parties must "[e]nsure that human rights are given due attention" and that the agreement "do[es] not adversely impact upon human rights."<sup>5</sup>

In addition to the general obligations described above, States' procedural human rights obligations also apply to climate change mitigation. More specifically, the rights of access to information, public participation in decision-making, and of access to justice in environmental matters enshrined in the Aarhus Convention and Rio Declaration apply to climate change mitigation design, planning, and implementation.<sup>6</sup> General principles of international law such as non-discrimination, transparency, and accountability accompany States' duties to uphold procedural rights. Indigenous peoples have heightened protection under international law, including the right to free, prior and informed consent (FPIC) in certain instances.

## B. Recognition that Human Rights Obligations apply in the Context of Climate Change

### i. Human Rights Obligations under the UNFCCC

The UNFCCC Conference of the Parties (COP) first recognized that human rights obligations apply to climate change-related actions in 2010. Specifically, in the Cancun Agreements, all Parties to the UNFCCC agreed to "fully respect human rights" in all climate change-related actions.<sup>7</sup>

More recently, during the Paris climate negotiations, the Parties recognized the need to strengthen and elaborate on these principles. As set forth in the preamble to the Paris Agreement, all "Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights"<sup>8</sup>

The Cancun Agreements also call on Parties to "promote and support" certain safeguards for REDD+ projects, including "[t]hat actions complement or are consistent with the objectives of [...] relevant international conventions and agreements."<sup>9</sup> Other safeguards include "[r]espect for the knowledge and rights of



<sup>2</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR), *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009) ("OHCHR 2009"), para. 66 (citing UN Committee on Economic, Social, and Cultural Rights (CESCR), E/C.12/2008/1, para. 13).

<sup>3</sup> OHCHR 2009, para. 85 (citing Committee on the Rights of the Child, General Comment No. 5, para. 7; CESCR General Comment No. 3, para. 14).

<sup>4</sup> OHCHR 2009, para. 86 (citing CESCR General Comments 12-15).

<sup>5</sup> See *id.*

<sup>6</sup> At the same time that countries from all over the world negotiated the UNFCCC at the Rio Conference in 1992, they recognised and accepted that the best way to make decisions on environmental issues is to give wide access to information and participation to the public. Principle 10 of the Rio Declaration on Environment and Development established: Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available.

<sup>7</sup> UNFCCC, Cancun Agreements (LCA), Decision 1/CP.16 2010, Shared Vision, para. 8.

<sup>8</sup> Paris Agreement, preamble

<sup>9</sup> UNFCCC, Cancun Agreements (LCA), Decision 1/CP.16, 2010, para. 69; appendix I, para. 2 (a), (c), (e).

indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws,” as well as ensuring that REDD-related actions are used “to enhance other social and environmental benefits.”<sup>10</sup> In addition, the UN-REDD Programme’s Social and Environmental Principles and Criteria detail applicable human rights obligations and “reflect the UN-REDD Programme’s responsibility to apply a human-rights based approach to its programming, uphold UN conventions, treaties and declarations, and apply the UN agencies’ policies and procedures.”<sup>11</sup>

Climate finance related to the UNFCCC also imposes human rights obligations. For instance, the Adaptation Fund’s Environmental and Social Policy includes a section on human rights stating that “[p]rojects/programmes supported by the Fund shall respect and where applicable promote international human rights.”<sup>12</sup> The Green Climate Fund (GCF) adopted interim environmental and social safeguards that call for human rights protections<sup>13</sup> as well as a grievance redress mechanism that will provide means for affected people and communities to seek recourse when they suffer harms associated with GCF projects.<sup>14</sup>

## ii. Climate Change related Obligations recognized by the UN Human Rights Council and the Office of the High Commissioner for Human Rights (OHCHR)

The United Nations Human Rights Council and OHCHR have repeatedly called attention to the adverse effects of climate change on human rights and to corresponding State duties.

The Human Rights Council has passed several resolutions on human rights and climate change. In those resolutions, the Council recognised that “climate change poses an immediate and far-reaching threat to people and communities around the world and has adverse implications for the full enjoyment of human rights” and that “the effects of climate change will be felt most acutely by individuals and communities around the world that are already in vulnerable situations owing to geography, poverty, gender, age, indigenous or minority status or disability.”<sup>15</sup>

The Special Procedures to the UN Human Rights Council affirmed that human rights obligations apply to climate change-related harm and apply extraterritorially.<sup>16</sup> As those experts observed, “[t]here can no longer be any doubt that climate change interferes with the enjoyment of human rights recognised and protected by international law.”<sup>17</sup> They noted that climate change “poses great risks and threats to the environment, human health, accessibility and inclusion, access to water, sanitation and food, security, and economic and social development.”<sup>18</sup>



In 2009, OHCHR issued an extensive report on the relationship between climate change and human rights. In that report OHCHR explained, “[i]nternational human rights law complements the United Nations Framework Convention on Climate Change by underlining that international cooperation is [...] a human rights obligation and that its central objective is the realization of human rights.”<sup>19</sup> OHCHR concluded that States have duties to protect the human rights of those affected by climate change, including those who have been displaced, and to ensure that their actions do not violate human rights.<sup>20</sup>

Focusing on physical impacts of climate change, OHCHR recognised that “addressing [climate change-related] harm remains a critical human rights concern and obligation under international law.”<sup>21</sup> Legal protection thus provides a “safeguard against climate change-related risks and infringements of human rights resulting from policies and measures taken at the national level to address climate change.”<sup>22</sup> This is particularly true where a State, through its acts or omissions, has failed to protect an individual’s fundamental rights.<sup>23</sup>

Addressing climate change mitigation measures, OHCHR described agro-fuel production as “one example of how mitigation measures may

<sup>10</sup> UNFCCC, Cancun Agreements (LCA), Decision 1/CP.16, 2010, appendix I, para. 2.

<sup>11</sup> UN-REDD Programme, [Social and Environmental Principles and Criteria](#), 2012, p. 2.

<sup>12</sup> Adaptation Fund, Environmental and Social Policy (approved in November 2015), para. 15, <http://www.adaptation-fund.org/wp-content/uploads/2015/09/Environmental-Social-Policy-approved-Nov2013.pdf>.

<sup>13</sup> Green Climate Fund, Decisions of the Board – Seventh Meeting of the Board, 18-21 May 2014, GCF/B.07/11, June 19, 2014, [http://gcfund.net/fileadmin/00\\_customer/documents/MOB201406-7th/GCF\\_B07\\_Decisions\\_Seventh\\_Meeting\\_fin\\_20140619.pdf](http://gcfund.net/fileadmin/00_customer/documents/MOB201406-7th/GCF_B07_Decisions_Seventh_Meeting_fin_20140619.pdf), at 36-37 (Performance Standards 4, 5, 7).

<sup>14</sup> [https://www.greenclimate.fund/documents/20182/24940/GCF\\_B.06\\_06\\_-\\_Independent\\_Integrity\\_Unit\\_and\\_the\\_Independent\\_Redress\\_Mechanism.pdf/1bb76226-9cba-46a3-b3a4-1a0b3cf37652?version=1.1](https://www.greenclimate.fund/documents/20182/24940/GCF_B.06_06_-_Independent_Integrity_Unit_and_the_Independent_Redress_Mechanism.pdf/1bb76226-9cba-46a3-b3a4-1a0b3cf37652?version=1.1)

<sup>15</sup> U.N. Human Rights Council, Res. 7/23, Human Rights and Climate Change, A/HRC/7/78 (Mar. 28, 2008), at 65; U.N. Human Rights Council, Res. 18/22, Human Rights and Climate Change, A/HRC/18/L.26/Rev.1 (Oct. 17, 2011), para. 1; U.N. Human Rights Council, Res. 26/27, Human Rights and Climate Change, A/HRC/26/27 (July 15, 2014), paras. 1, 3.

<sup>16</sup> An Open Letter from Special Procedures mandate-holders of the Human Rights Council to the State Parties to the UN Framework Convention on Climate Change on the occasion of the meeting of the Ad Hoc Working Group on the Durban Platform for Enhanced Action in Bonn (20-25 October 2014), “A New Climate Change Agreement Must Include Human Rights Protections for All,” Oct. 17, 2014, [http://www.ohchr.org/Documents/HRBodies/SP/SP\\_To\\_UNFCCC.pdf](http://www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf).

<sup>17</sup> *Id.*

<sup>18</sup> Statement of the United Nations Special Procedures Mandate Holders on the occasion of the Human Rights Day Geneva, 10 December 2014, “Climate Change and Human Rights,” <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15393&LangID=E>.

<sup>19</sup> See OHCHR 2009, para. 99.

<sup>20</sup> See OHCHR 2009, para. 86; see also OHCHR, para. 77 (noting States’ duty to “ensure the widest possible enjoyment of economic, social and cultural rights under any given circumstances”).

<sup>21</sup> OHCHR 2009; see also UN HRC Resolution, U.N. Human Rights Council, Res. 29/21, Human Rights and Climate Change, A/HRC/29/L.21/Rev.1 (June 30, 2015), para. 2 (“[e]mphasiz[ing] the urgent importance of continuing to address, as they relate to States’ human rights obligations, the adverse consequences of climate change for all”).

<sup>22</sup> OHCHR 2009, para. 96.

<sup>23</sup> See Council of Europe, Committee of Experts for the Development of Human Rights, “Exploring the Relationship Between Human Rights and Climate Change in Europe,” 12 Apr. 2010, [http://www.coe.int/t/dghl/standardsetting/hrpolicy/DH-DEV/DH-DEV-docs/DH-DEV\\_2010\\_04\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/DH-DEV/DH-DEV-docs/DH-DEV_2010_04_en.pdf), para. 20.

have adverse secondary effects on human rights,” especially the right to food and indigenous peoples’ rights to their traditional lands and culture —despite the possible positive climate change benefits.<sup>24</sup> In addition, “if individuals have to move away from a high-risk zone, the State must ensure adequate safeguards and take measures to avoid forced evictions.”<sup>25</sup> By extension, if a mitigation project forces individuals to move away, then the same obligations should apply.

Also applicable to climate change is States’ duty to protect individuals from foreseeable risks and threats to human rights.<sup>26</sup> As described in the OHCHR report, a Council of Europe committee noted that this duty could apply where climate change leads to an increased risk of flooding in certain areas, citing the European Court of Human Rights (ECHR) case *Budayeva v. Russia*.<sup>27</sup>

As for REDD+, OHCHR noted that “indigenous communities fear expropriation of their lands and displacement” and have concerns about the policy framework for REDD+.<sup>28</sup> OHCHR also highlighted the UN Permanent Forum on Indigenous Issues’s statement that new REDD+ proposals “must address the need for global and national policy reforms [...] respecting rights to land, territories and resources, and the rights of self-determination and the free, prior and informed consent of the indigenous peoples concerned.”<sup>29</sup>

## iii. Procedural Human Rights Obligations related to Climate Change

Generally speaking, in the words of OHCHR, “[t]he human rights framework seeks to empower individuals and underlines the critical importance of effective participation of individuals and communities in decision-making processes affecting their lives.”<sup>30</sup> To this end, “[h]uman rights standards and principles should inform and strengthen policymaking in the area of climate change, promoting policy coherence and sustainable outcomes.”<sup>31</sup>

Under the UNFCCC, this is already partly reflected in the recognition of some aspects of human rights principles and procedural rights related to access to information, participation, education, training and public awareness in Article 4 and further outlined in Article 6. In addition, the Cancun Agreements “[recognize] the need to engage a broad range of stakeholders at global, regional, national and local levels, be they government, including subnational and local government, private business or civil society, including youth and persons with disability, and [through] ... gender equality and the effective participation of women and indigenous peoples.”<sup>32</sup>

### 1. Access to Information

According to Article 6 of the UNFCCC, States “shall promote and facilitate ... the development and implementation of educational and public awareness programmes on climate change and its effects ... [and] public access to information on climate change and its effects.”<sup>33</sup> OHCHR noted these commitments under the UNFCCC in its 2009 report and called for the provision of early-warning information “in a manner accessible to all sectors of society.”<sup>34</sup> OHCHR further explained that under international human rights law, the rights to freedom of opinion and expression imply access to information.<sup>35</sup>

Specific to REDD+, the UNFCCC COP established that Parties should provide information on how all of the REDD+ safeguards established in the Cancun Agreements are being addressed and respected, indicating their level of compliance through national communications and other channels.<sup>36</sup>

### 2. Public Participation

Under the UNFCCC, Parties “shall promote and facilitate ... public participation in addressing climate change and its effects and developing

<sup>24</sup> OHCHR 2009, para. 65 (citation omitted).

<sup>25</sup> OHCHR 2009, para. 73; Council of Europe, Committee of Experts for the Development of Human Rights, “Exploring the Relationship Between Human Rights and Climate Change in Europe,” 12 Apr. 2010 [http://www.coe.int/t/dghl/standardsetting/hrpolicy/DH-DEV/DH-DEV-docs/DH-DEV\\_2010\\_04\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/DH-DEV/DH-DEV-docs/DH-DEV_2010_04_en.pdf), para. 20.

<sup>26</sup> OHCHR 2009 (citing *Budayeva v. Russia*, App. No. 15339/02, App. No. 15339/02, Eur. Ct. H.R., (Mar. 20, 2008)).

<sup>27</sup> In that case, the ECHR found that a State violated the right to life where its authorities “had failed to implement land-planning and emergency relief policies while they were aware of an increasing risk of a large-scale mudslide, ... not[ing] that the population had not been adequately informed about the risk.” Council of Europe, Committee of Experts for the Development of Human Rights, “Exploring the Relationship Between Human Rights and Climate Change in Europe,” 12 Apr. 2010.

<sup>28</sup> See OHCHR 2009, para. 68.

<sup>29</sup> OHCHR 2009, para. 68 (quoting E/C.19/2008/13, para. 45).

<sup>30</sup> OHCHR, para. 81.

<sup>31</sup> OHCHR, para. 80.

<sup>32</sup> UNFCCC, Cancun Agreements (LCA), Decision 1/CP.16, 2010, Shared Vision, para. 7.

<sup>33</sup> UNFCCC, art. 6(a)(i-ii).

<sup>34</sup> OHCHR 2009, para. 78.

<sup>35</sup> OHCHR 2009, para. 78 (citing Universal Declaration of Human Rights, art. 19, and ICCPR, art. 19).

<sup>36</sup> UNFCCC, Guidance on systems for providing information on how safeguards are addressed and respected and modalities relating to forest reference emission levels and forest reference levels as referred to in decision 1/CP.16, Decision 12/CP.17, Mar. 15, 2012.



adequate responses.<sup>37</sup> To align climate change policies and measures with overall human rights objectives, States should assess possible impacts of such policies and measures on human rights, with the widest possible involvement from the public. Unquestionably, “adequate and meaningful consultation with affected persons should precede decisions to relocate people away from hazardous zones.”<sup>38</sup> When indigenous peoples are among those affected, the right of indigenous peoples to free, prior, and informed consent (FPIC) comes into play, for example, when effects include relocation or major impacts on indigenous people’s land or territories.

As for mechanisms under the UNFCCC regime, the CDM’s main body of rules, known as the Modalities and Procedures, includes two requirements related to stakeholder consultation. At the project validation stage, the validator (known as the Designated Operational Entity (DOE)) must verify that in response to the project design document (PDD):

Comments by local stakeholders have been invited, a summary of the comments received has been provided, and a report to the designated operational entity on how due account was taken of any comments has been received.<sup>39</sup>

The DOE must also “[r]eceive, within 30 days, comments on the validation requirements from Parties, stakeholders and UNFCCC accredited non-governmental organizations and make them publicly available.”<sup>40</sup> In the Modalities and Procedures, the UNFCCC COP clarified that “[s]takeholders’ means the public, including individuals, groups or communities affected, or likely to be affected, by the proposed clean development mechanism project activity.”<sup>41</sup>

Regarding REDD+, echoing the Rio Declaration’s spirit of complete engagement and access to participation of stakeholders, the REDD+ safeguards, established in the Cancun Agreements, include “[t]he full and effective participation of relevant stakeholders, in particular indigenous peoples and local communities” in mitigation actions in the forest sector.<sup>42</sup> Elaborating on this commitment, the UN-REDD Programme and Forest Carbon Partnership Facility (FCPF) issued *Guidelines on Stakeholder Engagement*, which describe participation and how to plan and implement effective consultations in terms of timing, stakeholders, issues, and outreach methods, among other considerations.<sup>43</sup> The REDD+ safeguards further require respect for the rights of indigenous peoples, noting the universal application of the UN Declaration on the Rights of Indigenous Peoples.<sup>44</sup>

The guidelines call for a “clear commitment” to ensure that the rights of indigenous peoples and other forest-dwelling communities “are fully respected throughout the REDD+ program cycle.”<sup>45</sup> The UN-REDD Programme also issued Guidelines on Free, Prior and Informed Consent, which discuss extensively participation and consultation rights applicable to REDD+ projects.<sup>46</sup> The guidelines recognise that the right is one of *consent*, not consultation, and that, while the objective in consultation is to reach consent, indigenous peoples have the right to withhold consent.<sup>47</sup>

### 3. Access to Justice

As for access to justice, the human rights framework “also stresses the importance of accountability mechanisms in the implementation of measures and policies in the area of climate change and requires access to administrative and judicial remedies in cases of human rights violations.”<sup>48</sup> Such grievance mechanisms are crucial to the integrity and credibility of mitigation projects. Indeed, in the mindset of countries

at the time they negotiated the UNFCCC was the recognition in Principle 10 of the Rio Declaration that “[e]ffective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” Yet several climate mitigation programmes under the UNFCCC lack mechanisms to redress harms resulting from mitigation actions.

Under REDD+, however, National Programmes are required to establish grievance mechanisms.<sup>49</sup> Drawing from the UN Guiding Principles on Business and Human Rights, the UN-REDD Programme and FCPF Joint Guidance Note for REDD+ Countries on “[Establishing and Strengthening Grievance Redress Mechanisms](#)” list seven principles to guide the design of grievance mechanisms. They are to be legitimate, accessible, predictable, equitable, transparent, enabling continuous learning, and “rights-compatible,” that is, with outcomes “consistent with applicable national and internationally recognized rights.”<sup>50</sup>

## III. Human Rights Obligations with Respect to the Private Sector

In order to clarify the human rights obligations of States and the responsibilities of business enterprises in the context of climate actions, the UN Guiding Principles on Business and Human Rights (Guiding Principles) provide an important additional normative framework.<sup>51</sup> The Guiding Principles, which the UN Human Rights Council unanimously endorsed in 2011, rest on three pillars: 1) the obligation of States to *protect* human rights from abuses by businesses, through adequate policies, laws and other measures; 2) the responsibility of businesses to *respect* human rights in their own activities and business relationships along the supply chain; and 3) the right of affected people to have access to *remedy* in cases of human rights abuses.<sup>52</sup> Access to remedy includes access to courts, to non-judicial state complaint mechanisms, and to private complaint mechanisms of companies.

Pillar 2, the corporate responsibility to respect human rights, provides an internationally accepted minimum standard of conduct for business activities and relationships all over the world. To meet this responsibility, businesses have to develop and publish a policy statement in which they commit to respect the international human rights charter. They have to conduct human rights due diligence, which means to identify and assess the actual and potential impacts of their activities and relationships on human rights; to take adequate measures to mitigate and to redress such impacts; to track the effectiveness of these measures; and to report publicly about these human rights risks and the measures taken to deal with them. Finally, businesses have to provide a complaint mechanism that is based on human rights norms and principles.

On the one hand, the corporate responsibility to respect human rights is not a legally binding one. On the other hand, the obligation of States to protect human rights from abuses by companies (pillar 1) means that States have a duty to make sure that businesses respect human rights. Thus, States must make this expectation clear and require businesses to act accordingly. Moreover, according to pillar 3, states have a duty to ensure that victims have access to courts and other remedies when companies cause or contribute to human rights violations. Even though the Guiding Principles are not a treaty with binding character for States, they refer to and provide an interpretation of binding human rights treaties. This interpretation is internationally accepted as a minimum standard for States and businesses and as an authoritative policy framework for States.

As the Guiding Principles refer to all business activities and relationships globally, there is no doubt that they apply in the context of climate mitigation (and adaption) activities as well. Whenever such business activities receive governmental support through climate mitigation finance mechanisms under the UNFCCC, it is clear, that, even though not explicitly mentioned, they fall under the category of business activities with a “state-business-nexus,” as discussed in principle 4.<sup>53</sup> For activities “that receive substantial support and services from state agencies,” the principle 4 requires States to “take additional steps to protect against human rights abuses by business enterprises [...] including, where appropriate, by requiring human rights due diligence.”<sup>54</sup> In cases where States fail to take such steps, as the commentary to principle 4 explains, these States risk breaching their own legal obligation to respect human rights, as they may actively support activities that lead to human rights abuses.<sup>55</sup> Especially in cases of big energy projects that fall under areas of high risk to human rights, requiring human rights due diligence is “appropriate.”<sup>56</sup> In such cases, States would have to require human rights due diligence, including comprehensive human rights impact assessments as an essential component of it.

37 UNFCCC, art. 6(a)(iii).

38 OHCHR 2009, para. 79.

39 UNFCCC, Decision 3/CMP.1, Annex, ¶ (37)(b).

40 UNFCCC, Decision 3/CMP.1, Annex, ¶ (40)(c).

41 UNFCCC, Decision 3/CMP.1, Annex, ¶ (1)(e) (“Modalities and procedures for a clean development mechanism”).

42 UNFCCC, Cancun Agreements (LCA), Decision 1/CP.16, 2010, appendix I, para. 2.

43 UN-REDD Programme, [Guidelines on Stakeholder Engagement for REDD+ Readiness](#), Apr. 20, 2012.

44 *Id.* at 2.

45 *Id.*

46 UN-REDD Programme, Guidelines on Free, Prior and Informed Consent, Jan. 2013, [http://www.unredd.net/index.php?option=com\\_docman&task=doc\\_download&gid=8717&Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=8717&Itemid=53).

47 *Id.* at 20.

48 OHCHR, para. 83 (fn 117).

49 See [Guidelines on Stakeholder Engagement for REDD+ Readiness](#), p. 14.

50 UN-REDD Programme and Forest Carbon Partnership Facility, [Joint FCPF/UN-REDD Programme Guidance Note for REDD+ Countries: Establishing and Strengthening Grievance Redress Mechanisms](#), p. 6; see UN Human Rights Council, 2011. Report of the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework. A/HRC/17/31, 21 March (“UN Guiding Principles”), princ. 31.

51 UN Guiding Principles.

52 *Id.*

53 UN Guiding Principles, princ. 4.

54 *Id.*

55 *Id.*, princ. 4 commentary.

56 See *id.*, princ. 4.

## HUMAN RIGHTS IMPACT ASSESSMENTS

As a key component of human rights due diligence, principles 17 and 18 of the Guiding Principles require companies “to identify and assess” the “actual and potential impacts” of their activities and relationships. Actual impacts are those that can be observed already and can be assessed empirically after the fact (*ex post*). Potential impacts mean human rights risks in future activities that should be assessed *ex ante*, which means early enough before starting the activity in question.

**What kinds of impacts?** The Guiding Principles do not require companies to conduct human rights impact assessments (HRIA) on every single business activity or relationship. However, in situations where a serious human rights risk can or should be anticipated, human rights impacts must be assessed. The single most important criteria in determining the necessity of a HRIA is the *severity* of the actual or potential human rights impact. This criterion is met whenever the impact is serious or irreversible or the number of affected people is high.

**Based on which principles?** For such situations, the Guiding Principles establish basic principles that must be followed in conducting HRIAs:

- human rights must provide the normative framework for the assessment;
- the main focus must lay on groups that are most vulnerable to human rights abuses;
- these vulnerable groups, civil society organisations and other stakeholders have to be consulted in a direct and meaningful way;
- the assessment must conclude with clear recommendations on how to mitigate or redress the abuses;
- the whole process must be conducted in a transparent and non-discriminatory way;
- the methods and the results must be communicated transparently; and
- the assessment must be understood and conducted as a continuous process that includes tracking the effectiveness of the measures taken to address the human rights problems identified.

**Using what methodology?** The Guiding Principles do not prescribe or recommend a specific methodology to be applied in HRIAs. However, they propose elements and steps that should be part of any HRIA that have become a standard in academic literature on HRIA methodology and practice. Steps generally include a *screening* of rights and groups of people that may be affected, the formulation of guiding questions, indicators and methodological approaches (*scoping*), *evidence gathering* through a review of literature, documents, field visits and interviews with the affected people, civil society organisations, other experts and stakeholders, a *human rights analysis* based on the evidence gathered, *recommendations* on measures to be taken, and *tracking the effectiveness* of these measures as follow-up.

According to the UN Guiding Principles, States and intergovernmental organisations should only provide support to projects where businesses have conducted human rights due diligence; where major human rights risks can be excluded; or where comprehensive and credible counter-measures, have been agreed upon, following consultation with, and acceptance by the affected people. For this reason, when businesses conduct or commission HRIAs, it is essential that they are made public and reviewed by the affected people, independent experts, and the relevant decision-making bodies.

However, one must bear in mind that large energy projects are complex and that not all impacts are necessarily foreseeable even in HRIAs conducted with a good faith effort to identify and assess all actual and potential impacts. Thus, continuous monitoring and effective grievance mechanisms, where the affected people can file complaints with their concerns and these complaints are dealt with in a timely manner, are fundamental. Principle 31 of the Guiding Principles provides a list of relevant human rights-based criteria that must be taken into account in the design and implementation of such complaint or grievance mechanisms: human rights provide the normative framework for complaints, and the mechanism should be transparent, accessible, credible, predictable, non-discriminatory and effective.<sup>57</sup>

<sup>57</sup> UN Human Rights Council, 2011. Report of the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework. A/HRC/17/31, 21 March, princ. 31.

## IV. HUMAN RIGHTS IMPACTS OF CLIMATE MITIGATION ACTIONS

Despite the existing human rights obligations under international law described in section II, expressly of reducing carbon emissions and achieving sustainable development. The CDM allows companies and governments in developed countries with legally binding or voluntary emission reduction obligations (UNFCCC Annex I countries) to purchase certified emission reductions from greenhouse gas emission abatement projects in developing countries registered under the CDM. To date, more than 7500 projects are registered under the CDM, most of them implemented in China and India.

### A. Clean Development Mechanism (CDM)

Despite the CDM’s fundamental goal to deliver sustainable development benefits, field visits and first-hand reports from local communities in the vicinities of CDM projects have shown that many implemented projects do not live up to the sustainable development benefits indicated in the Project Design Documents (PDDs), the key document in the validation and registration process. This is largely due to the fact that the CDM has failed to establish internationally agreed sustainable development criteria or safeguards —instead, each country has the authority to decide upon criteria subject to its own discretion. In many cases, the defined criteria include only very general requirements and lack transparency and stringency. Moreover, the CDM rules do not provide mandatory monitoring requirements, making it difficult to assess whether projects have fulfilled their commitments to deliver sustainable outcomes.

Local stakeholder consultation (LSC) is a key requirement in the CDM process cycle and necessary for the registration of a CDM project. The CDM modalities and procedures provide for consultation processes during the design and validation stage of the project. Within these processes, stakeholders relevant for the proposed CDM project must be informed of the planned activity and be invited to make comments. Relevant stakeholders include the public, individuals as well as groups or communities affected or likely to be affected by a proposed CDM project. Although the CDM rules require local and global stakeholder consultation, as well as host-country approval that the project contributes to sustainable development, these rules do not provide enough specificity or definition to ensure that consultation is meaningful and that sustainable development is achieved.<sup>58</sup>

Despite several years of negotiation on the need for an appeals process, the CDM currently has no grievance mechanism or other means of recourse available to people and communities adversely affected by CDM projects. In November 2015, the CDM Board decided for the first time on how human rights should be addressed in the CDM. The Board adopted a new rule saying that stakeholder comments that pertain human rights issues need to be forwarded to the relevant bodies within the United Nations system and within the host government.<sup>59</sup> This establishes a mandate for the UNFCCC secretariat to forward problems to relevant human rights institutions.



### Case Study: Barro Blanco

The Barro Blanco Hydroelectric Power Plant Project is a 28.84 MW hydroelectric CDM project on the Tabasará River in the Ngäbe-Buglé Comarca and Chiriquí Province of Panama. Despite concerns raised by local communities and local and international civil society organisations, the project was registered under the Clean Development Mechanism in 2011 (CDM project number 3237).<sup>60</sup> European development banks from Germany (DEG) and the Netherlands (FMO), as well as the Central American Bank for Economic Integration loaned US\$78 million for the financing of the project.<sup>61</sup>

<sup>58</sup> See CDM, Decision 3/CMP.1, FCCC/KP/CMP/2005/8/Add.1, Annex: Modalities and Procedures for a Clean Development Mechanism, ¶¶ 37(b), 40(a), 40(c).

<sup>59</sup> CDM EB 97-meeting report, para. 52

<sup>60</sup> <http://cdm.unfccc.int/Projects/DB/AENOR1261468057.59/view>

<sup>61</sup> <http://www.bcie.org/?prj=35&title=Generadora%20del%20Istmo%20Proyecto%20Hidroel%20E9ctrico%20Barro%20Blanco&lang=es#.VffhZRGqBc>



According to a fact-finding mission led by the United Nations Development Programme (UNDP) in 2013,<sup>62</sup> the water reservoir of the dam is expected to flood three communities of the Ngäbe-Buglé Comarca —indigenous land owned and administered by Panama's indigenous Ngäbe and Buglé people. The dam will severely affect these indigenous Ngäbe communities by flooding territory that includes their homes, school, and religious, archaeological, and cultural sites. These communities have expressed their opposition to the project and protested against it since 2008.

In May 2014, the Panamanian indigenous organisation M-10, representing the affected communities, filed the first ever complaint to the Independent Complaints Mechanism (ICM) of FMO and DEG, alleging that the European lenders failed to ensure free, prior and informed consent before financing Barro Blanco. One year later, the ICM published a report concluding, that the banks violated their own policies by failing to adequately assess the risks to indigenous peoples rights and the environment before approving a US\$50 million loan to Generadora del Istmo SA (GENISA), the project developer, to implement the project.<sup>63</sup>

In February 2015, following protests by local indigenous communities, Panama's national environment agency made a landmark decision to temporarily suspend the dam's construction, which had advanced to 90 percent. The decision was based on non-compliance with national environmental impact assessment requirements, including shortcomings in the agreement with the locally affected indigenous communities. A dialogue roundtable was set up for indigenous communities and the government to discuss the compatibility of the dam with national laws and human rights. The process unfortunately failed to reach an agreement and ended in May 2015, leaving the affected communities to re-engage in peaceful protests.

In late August 2015, Panama's Environment Ministry (former ANAM) imposed \$775,200 in fines on the project developer (GENISA) for non-compliance with the EIA, one of the grounds being the failure to "negotiate with, relocate and compensate those affected by the hydroelectric project" and the violation of the social and cultural rights of the affected Ngäbe people<sup>64</sup>. Shortly after, the Environment Ministry lifted the temporary suspension, allowing GENISA to resume construction in September 2015.

As evidenced by the Environment Ministry's determination and the resulting penalties imposed on GENISA, the Government of Panama recognized the severe human rights impacts, which to this day have not been adequately addressed. Similarly, the Independent Complaints Mechanism (ICM) of the Dutch and German development banks (FMO and DEG respectively) acknowledged the severity of the problem, when it found that the "lenders [FMO and DEG] should have sought greater clarity on whether there was consent to the project from the appropriate indigenous authorities prior to project approval."<sup>65</sup> By its own recognition, the Government is in violation of international law<sup>66</sup> and national law<sup>67</sup> for its failure to adequately consult or obtain the free, prior and informed consent of the affected Ngäbe communities.

Despite these findings, the Barro Blanco project has continued and is supposed to be constructed by the end of April 2016. Local affected stakeholders may be forcefully evicted any time now to allow for the flooding of six hectares of the Ngäbe-Bugle territory.

Human rights that are impacted by the construction of the dam include but are not limited to: adequate housing; property, including free, prior and informed consent; food, water and means of subsistence; culture; and education.

### Local Stakeholder Consultation

Despite local communities' protests, along with concerns that local civil society organisations and Carbon Market Watch communicated to the CDM Executive Board<sup>68</sup> via two letters submitted on 9 February 2011 and 24 March 2011,<sup>69</sup> the Barro Blanco project was registered under the CDM in 2011. Among these concerns were that the documents submitted for validation and registration under the CDM did not adequately describe project impacts on local communities and that stakeholder consultation during CDM validation did not consider opinions from the affected indigenous communities. The findings from these two submissions indicate that the CDM local stakeholder consultation requirements were not met.

Indeed, after its visits to the affected communities, the UNDP-led mission concluded, "it is obvious that the residents of these communities were not consulted in the correct form." As then-UN Special Rapporteur on the rights of indigenous peoples, James Anaya declared after a field visit in 2013,<sup>70</sup> the Ngäbe people should have been properly consulted before the decision to authorise the dam. By allowing flooding of indigenous lands without adequate consultation and a proper agreement with affected indigenous communities, the CDM's decision to validate and register Barro Blanco contravened the international principle of free, prior and informed consent.<sup>71</sup>

Yet because the CDM process only provides for comments from affected communities prior to registration, the affected communities have no means to officially engage in the process during implementation.

62 [http://www.pa.undp.org/content/dam/panama/docs/documentos/undp\\_pa\\_peritaje\\_barro\\_blanco.pdf](http://www.pa.undp.org/content/dam/panama/docs/documentos/undp_pa_peritaje_barro_blanco.pdf)

63 <https://www.deginvest.de/International-financing/DEG/Die-DEG/Verantwortung/Beschwerdemanagement/Barro-Blanco/>

64 Please see ANAM sanction, page 10, para 3&4

65 <https://www.deginvest.de/International-financing/DEG/Die-DEG/Verantwortung/Beschwerdemanagement/Barro-Blanco/>

66 United Nations Declaration on the Rights of Indigenous Peoples, Art 10

67 General law #41 on the environment, art 103 which states that "in the event of activities, works or projects developed in indigenous communities territories, consultation procedures will guide the establishing of agreements with communities representatives, in relation to their rights and customs as well as the obtention of compensations for the use of the recourses, knowledge or lands" - [http://www.oas.org/juridico/spanish/pan\\_res67.pdf](http://www.oas.org/juridico/spanish/pan_res67.pdf)

68 The CDM Executive Board supervises the CDM. Its task is to establish CDM rules and provide guidance on how rules should be implemented.

69 [http://carbonmarketwatch.org/wp-content/uploads/2015/07/ANNEX-2\\_letter-submitted-to-CDM-Board-on-9-February-2011.pdf](http://carbonmarketwatch.org/wp-content/uploads/2015/07/ANNEX-2_letter-submitted-to-CDM-Board-on-9-February-2011.pdf); [http://carbonmarketwatch.org/wp-content/uploads/2015/07/ANNEX-3\\_letter-submitted-to-CDM-Board-on-24-March-2011.pdf](http://carbonmarketwatch.org/wp-content/uploads/2015/07/ANNEX-3_letter-submitted-to-CDM-Board-on-24-March-2011.pdf)

70 <http://unsr.jamesanaya.org/statements/declaracion-del-relator-especial-sobre-los-derechos-de-los-pueblos-indigenas-al-concluir-su-visita-oficial-a-panama>

71 <http://www.un.org/press/en/2007/ga10612.doc.htm>

## Sustainable Development

At the design stage of each CDM project, project developers specify how the project will contribute to the sustainable development of the host country in the Project Design Document (PDD). Regarding environmental and social impacts, the Barro Blanco PDD identified "non-reversible impacts on the vegetation, flora and fauna" but noted that they would be addressed by "a rescue plan," along with other measures "such as the placement of plant barriers in strategic points, [and] painting buildings with colours that match those of the landscape and monitoring plans." It also noted reversible negative impacts, such as "the generation of dust or noise by the works," that would be prevented by the installation of warning signs and a water irrigation programme. The PDD claimed that the project would eventually increase the quality of life of the inhabitants, "as a result of the number of jobs available and the improvement in the conditions of the quality of water and river banks, which will provide new leisure areas to the community."

However, the UNDP-led mission to the affected Ngäbe communities in 2013 identified many negative environmental and social impacts not reflected in the PDD. An amicus curiae brief,<sup>72</sup> submitted in 2013 to the Supreme Court of Panama by three NGOs (the Inter-American Association for Environmental Defense (AIDA, by its Spanish initials), the Center for International Environmental Law (CIEL) and Earthjustice) in support of Ngäbe community members' case to nullify the Environmental Impact Assessment (EIA), illustrates that the EIA did not contain complete information about the impacts of the project on indigenous territories, and did not guarantee effective participation of the affected communities.<sup>73</sup>

The Panamanian environment agency's decision to temporarily suspend the project in 2015 stemmed from several project outcomes that are incompatible with sustainable development. These include deficiencies in the negotiation processes; absence of an archaeological management plan approved to protect the petroglyphs and other archaeological findings detected; repeated failures to manage sedimentation and erosion; poor management of solid and hazardous waste; and logging without permission.

### Need for Stronger Human Rights Protections

The Barro Blanco project highlights the serious shortcomings of CDM rules on local stakeholder consultation and sustainable development and the need for more robust human rights protections in the UNFCCC. Failure to consult with the affected communities left them out of the process and put them at odds with the government and company implementing the project.

Indeed, local affected communities have paid a high price for their struggle. In 2012, while peacefully protesting against the exploitation of mining and hydroelectric power, including from Barro Blanco, on their territory, violent repression by the Panamanian national police killed two indigenous people<sup>74</sup> and left more than a hundred wounded. An investigative report by Panamanian human rights organisations described serious human rights violations, even reports of detained Ngäbe women, including a minor, who were raped by police agents, and noted that the Panamanian government had suspended cellular phone service in the indigenous territories for several days.<sup>75</sup> Likewise, in July 2015, indigenous people were arrested and injured following demonstrations against Barro Blanco.<sup>76</sup>

Stronger protections in the UNFCCC are needed to ensure that affected people are provided meaningful opportunities to participate in the CDM process; that the project contributes to sustainable development; and that affected people are offered a means of recourse if the project causes harm. Such protections could have reduced the harms the Ngäbe people have suffered and may continue to suffer due to the Barro Blanco project.

### Case study: Sasan

With a capacity to produce 3960 MW, the Sasan coal plant, located in Singrauli, India, is one of six coal power projects registered under the CDM and one of nine Ultra Mega Power Projects (UMPP) being pursued by the Indian government.<sup>77</sup> The total installed capacity of all thermal power plants in that area—a district emerging as India's energy capital—is around 10% of the total installed capacity in India. Claiming to employ more efficient super critical coal technology, the project was registered under the CDM in October 2010 (CDM project number 3690).

Local residents and tribal Baiga people who live in small villages near the Sasan project site mainly make a living from agriculture and cattle, using their farming products for the most part for self-sufficiency. The Sasan power project, which covers almost 10,000 acres of land, required large areas for construction.



72 An amicus curiae educates the court on points of law that are in doubt, gathers or organizes information, or raises awareness about some aspect of the case that the court might otherwise miss.

73 <http://earthjustice.org/sites/default/files/files/BARROBLANCO-AMICUS13029.pdf>

74 [http://internacional.elpais.com/internacional/2012/02/08/actualidad/1328736812\\_527523.html](http://internacional.elpais.com/internacional/2012/02/08/actualidad/1328736812_527523.html)

75 [http://cdn.otramerica.com/OTRAMERICA\\_web/48/posts/docs/0448033001330859048.pdf](http://cdn.otramerica.com/OTRAMERICA_web/48/posts/docs/0448033001330859048.pdf)

76 <https://intercontinentalcry.org/barro-blanco-protesters-injured-and-arrested-28467/>

77 See Project 3690: Greenhouse Gas Emission Reductions Through Super-Critical Technology- Sasan Power Ltd. [Project Design Document](#).

In the course of its construction, four villages and one tribal area had to be relocated. Rehabilitation areas have been provided for the relocated communities, but the standard of living was dramatically decreased as children no longer have access to schools, and critical infrastructure—such as roads and water pumps—are lacking at rehabilitation sites. Since most of the Baiga lived in areas allocated to the company for coal mine overburden, they have been forced to leave forests identified as government land. Some tribe members with land titles have been shifted to a rehabilitation colony far from the forest area. Without work or the forest that sustained them, most have been reduced to begging and struggle every day to survive.

In July 2014, concerned NGOs (Bank Information Center, Bharat Jan Vigyan Jatha, Carbon Market Watch, Center for International Environmental Law, Friends of the Earth US, Sierra Club and Sirjan Lokhit Samiti) filed a formal complaint with the Office of the Inspector General of the U.S. Export-Import Bank (Ex-Im Bank) because Ex-Im approved over \$900 million in financing for the Sasan coal power project in October 2010.<sup>78</sup> The complaint requested a full investigation and an assessment of compliance with Ex-Im policies including, but not limited to, environmental, social, human rights and anti-corruption policies.

The NGOs submitted this complaint in response to the numerous documented accounts of project-related corruption, as well as human rights and labour violations, which they had already communicated to Ex-Im Bank. In October 2014, a two-person team from the Office of the Inspector General (OIG) visited the Sasan project site. During the field visit, inspectors refused to meet the affected people in their communities and invited only a handful of representatives to come to their hotel to meet. In doing so, the OIG disregarded the cultural and ethical practices, particularly given that officials of project developer Reliance Power were present on the hotel premises and could see who participated in the meeting.<sup>79</sup>

Despite shortcomings of the OIG's field visit, the inspection report was critical in recognizing the 19 tragic deaths that occurred at the project.

This project infringes on a range of human rights and labour rights, including the rights to life, health, food, water, housing, adequate standard of living and free, prior and informed consent.

### Local Stakeholder Consultation

According to the Project Design Document for the Sasan project, the project developer, Reliance Power, identified and invited local stakeholders to a consultation announced in a local Hindi language daily newspaper. The local stakeholder consultation was scheduled in April 2008 in a community hall in the Singrauli area. Separate invitations were also sent to selected stakeholders, including contractors, environmental consultants, officials of the district magistrate and the media. The Sasan project document states that an open consultation meeting took place with overwhelming positive response for the project.<sup>80</sup> It is unclear though whether the company selected people who supported or were less opposed to the project, and whether this may have resulted in more positive comments on the project.

Moreover, given that this consultation was the only means to involve and inform local residents, it is important to note that the majority of local people living in the Singrauli area are illiterate. A newspaper announcement without any verbal announcement thus did not constitute effective outreach to the local population affected by the project activity. Furthermore, the local newspaper chosen to publicise the date and venue of the consultation has a small circulation. Therefore, areas directly affected by the project activity did not receive the information about the consultation.

At an NGO field visit in April and May 2014, many local people who were interviewed reported that they had neither been aware about a public hearing nor about the Sasan coal power project itself before the construction started.<sup>81</sup> At the beginning of construction locals had merely been informed that their residential and farming land was needed for a new coal power plant and had been asked to sell it to the project owner under the promise of secure employment opportunities as well as high compensation rates.

### Sustainable Development

The Project Design Document for the Sasan project outlines the sustainable development benefits the project will create in the Singrauli area, ranging from social to environmental as well as economic and technological well-being.<sup>82</sup> Sustainable development benefits that the project developer promised included that the project would empower “economically weaker sections of the society, including the scheduled castes and scheduled tribes,”<sup>83</sup> improving standard of living in the region, including that the “project participant is committed to improve medical and health care”<sup>84</sup> as well as to “constructing new school near project activity.”<sup>85</sup>

Moreover, the environmental benefits listed for the Singrauli area are described at length. It was outlined that the Sasan project would not only

<sup>78</sup> See Carbon Market Watch, The Sasan Coal-Fired Power Plant, in India: A Clean Development Mechanism project supporting human rights, environment, and labor violations (Dec. 2014) (Carbon Market Watch, Sasan Coal-Fired Power Plant).

<sup>79</sup> S. Dutta, “How not to conduct an inspection: US Ex-Im visit to the Sasan coal power project,” NGO Voices on Climate Finance & Carbon Markets #11 (Apr. 2015).

<sup>80</sup> See Project 3690: Greenhouse Gas Emission Reductions Through Super-Critical Technology- Sasan Power Ltd. [Project Design Document](#), at 77 (request by stakeholders “for the implementation of another such project by Reliance Power, deploying supercritical technology as it would benefit them, being environmentally friendly, and would create several livelihood opportunities”).

<sup>81</sup> See Carbon Market Watch report: The Sasan Coal-Fired Power Plant, in India. A Clean Development Mechanism project supporting human rights, environment, and labor violations, 2014.

<sup>82</sup> Technological well- being is one of the categories used by India to define the sustainable development benefits that can be generated by CDM projects. As defined by India: The CDM project activity should lead to transfer of environmentally safe and sound technologies that are comparable to best practices in order to assist in up-gradation of the technological base. The transfer of technology can be within the country as well from other developing countries also

<sup>83</sup> See Project 3690: Greenhouse Gas Emission Reductions Through Super-Critical Technology- Sasan Power Ltd. [Project Design Document](#), at 3.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

reduce CO<sub>2</sub> emissions, but also other major air pollutants and that the project would contribute to preserve natural terrain as it would only remove minimal vegetation for the construction of the plant.<sup>86</sup> The PDD also claimed that the increased electricity generated by the project would “support economic growth of the region and address the electricity deficit.”<sup>87</sup>

However, as documented in an NGO fact-finding report on the Sasan project, these claims starkly contrast with the situation on the ground.<sup>88</sup> For example, local residents still depend on generators, as the electricity generated is transmitted into the national grid. Moreover, fly ash generated by the project activity pollutes the water and poisons the harvest, making it unsafe to consume food and causing an increase of diseases in the affected area.

### Need for Stronger Human Rights Protections

The Sasan project has had major impacts on the local population and their human rights, illustrating the need to operationalize human rights protections in the climate regime. The fact that the project proponent selected participants for the consultation and used only a newspaper with limited circulation not encompassing the affected people, even though most are illiterate, threatens the right to non-discrimination and casts serious doubt on the sufficiency of the local stakeholder consultation for the Sasan project. Moreover, given that some of the affected are indigenous people, international law recognises their right to consent, not merely to be consulted. This project illustrates the need for rules that specify *how* to conduct such a consultation, especially given the major impacts on the local population. It also highlights the need for human rights protections that apply to all institutions and mechanisms established under the UNFCCC.

In several reported cases, construction started without consulting the affected population. Houses were bulldozed and streets and community property destroyed before clearance and acquisition was completed. Personal belongings were demolished and affected people forcibly displaced to rehabilitation areas without their permission. Being dependent on agriculture and the forest, this has far reaching consequences for their livelihoods. Their rights to an adequate standard of living was violated as they could no longer work on their fields and most were not hired for the project, in contrast to the project developer's promises. The rights of indigenous people were ignored. There was no separate consultation with the Baiga tribe, and few of their people have received any compensation.

Furthermore, the Sasan project has harmed human and environmental health in Singrauli, an area already plagued by numerous coal power plants. Fly ash has jeopardised air quality, water resources, and the harvest. The environmental concerns are all the more serious, given that the project lies in one of the most polluted areas in India, posing grave danger to the life and health of locals. These impacts infringe on numerous human rights, including rights to health, food, water, housing and right to adequate housing and means of subsistence.. Operationalizing human rights protections in the climate regime could help to avoid negative outcomes from projects in the future.

\* \* \*

To prevent future projects from resulting in similar, negative outcomes, CDM rules as well as the rules and procedures that will govern the Sustainable Development Mechanism must contain clear, specific requirements that ensure (i) adequate participation of the affected communities; (ii) that the projects contribute to, as opposed to undermine, sustainable development; (iii) that human and environmental harms are minimized and addressed; and (iv) that affected individuals, communities and indigenous peoples have access to a grievance mechanism or other means of recourse at any point during the project cycle. Politically, this has been difficult to achieve given the interest of many Parties involved in the CDM to get projects going, notwithstanding social and environmental costs.

## B. Reducing Emissions from Deforestation and forest Degradation (REDD+)

Through the 2010 Cancun Agreements, the UNFCCC COP established the Reducing Emissions from Deforestation and Forest Degradation (REDD) framework to support developing countries' mitigation actions and policies related to the forest sector. In addition to deforestation and degradation, REDD+ encompasses conservation of forest carbon stocks, sustainable management of forests, and enhancement of forest carbon stocks. REDD+ was established as a country-driven process involving the development and the implementation of national strategies or action plans, and results-based REDD+ with financing.

The UNFCCC COP largely finalised the modalities for the REDD+ framework in 2013 with the adoption of the “Warsaw Framework for REDD+,” a set of decisions that completed the guidance required for its full operationalisation.

The REDD+ safeguards take a forward-looking approach in an effort to avoid further social, environmental, and economic costs. Following the logic behind this approach, it is crucial for countries to invest the energy and resources necessary to properly carry out the public consultation and participation process to achieve successful implementation of REDD+ projects.

### *Case Study: REDD+ projects in Yucatán*

In Mexico, the issue of consultation and public participation in REDD+ is a very important, complex, and interesting topic, not only regarding the rights of indigenous peoples, but also because the main drivers of deforestation and forest degradation—agricultural and urban frontier expansion, and communication infrastructure—are outside the environmental sector ruled by the Environmental Ministry (SEMARANT) and

<sup>86</sup> *Id.* at 4.

<sup>87</sup> *Id.*

<sup>88</sup> Carbon Market Watch, Sasan Coal-Fired Power Plant, *supra* note 90.



the Forestry National Commission (CONAFOR). Therefore, if REDD+ is to succeed, it is crucial to effectively engage stakeholders from inside and outside the forests, particularly agricultural authorities, land owners (individual, collective and communal) and indigenous peoples who live and depend on forests.

The activities (or lack thereof) that the authorities carry out to promote access to information and public participation are crucial to ensure an effective and meaningful consultation process. In this line of thinking, access to information is not only a rhetorical human right, but a pragmatic pre-requisite for effective participation. It is the responsibility of the Mexican national government to make sure that information is available to the public (all stakeholders) in a way that is complete and clear, culturally appropriate, and of course, free of charge.

Specific to REDD+, the Mexican Government published the paper *Mexico's Vision for REDD+* in 2010 and developed a National REDD+ Strategy (ENAREDD+) draft in October 2012. However, the Mexican forest authority (CONAFOR) only began a national public consultation process for the ENAREDD+ in July 2015.

ENAREDD covers five strategic areas: institutional arrangements and public policy; financing schemes; forest reference level and measurement system, reporting and verification (MRV); capacity building; and communication, as well as social participation and transparency. This document also identifies priority actions, such as promoting sustainable forest management, regeneration of biological corridors and abandoned agricultural areas, among others.

The specific chapter on safeguards was developed with inputs of civil society organizations.

ENAREDD+ defines safeguards as defined principles, conditions or social and environmental criteria guiding the design and implementation of policies, programs and other actions. The safeguards are designed to prevent and mitigate any direct or indirect negative impact on ecosystems and on the population, particularly of communities and indigenous peoples who inhabit them, including their rights against irrigation or damage arising from actions to reduce emissions from deforestation and degradation.<sup>89</sup>

Since the publication of *Mexico's Vision for REDD+* in 2010, it has been clear that the stakeholders who should be engaged in the consultation

process include forest land owners (individual, collective and communal), possessors, users, and inhabitants; indigenous peoples and communities; rural women; civil society organisations; forestry and agriculture organisations; international organisations; academia and researchers, including intercultural universities; officials of various agencies involved in rural development; proponents of private initiatives, community forestry promoters; and the general public. Considering Mexico's socio-economic and jurisdictional dimensions, including the complexity of its social context and legal framework, achieving a good-faith, comprehensive, and meaningful consultation process has been a big challenge.

CONAFOR's original plan was to conduct consultation and gather opinions and feedback in just three months, so that it could reach agreements and conclude the process by the end of 2015. It is not possible to carry out a comprehensive and proper consultation process on a subject as complex as REDD+ in such little time. The case of Yucatán, México is a clear example of this.

### Local Stakeholder Consultation

For the state of Yucatán, CONAFOR held a public consultation forum in Mérida at the Hotel los Aluxes on Wednesday, July 15<sup>th</sup>. This is the only public consultation forum in Yucatán that has taken place so far. The forum was a good exercise in participation through working tables. Nevertheless, the government's failure to provide adequate information in advance and especially in a comprehensible way, including in an appropriate language, prevented a more profound and richer participation process.

In this respect, it is important to recognise that most rural people from Yucatan speak Mayan better than Spanish, yet all presentations, information and the process in general took place in Spanish. In fact, most people in the forestry communities (*ejidos* and *comunidades*) of Yucatán are indigenous Mayan. In addition, most of the information about the consultation forum, such as the address, date, time and the documents to be discussed were available and promoted mainly through CONAFOR's website, but most of the interested public has no access to the web.

While representatives from the federal government, 11 NGOs and the *Inter municipal Biocultural Board from the Puc* attended the public consultation forum, cattle, soya and corn farmers, agrarian authorities and other stakeholders relevant to the drivers of deforestation from outside forest lands were not adequately represented. The clear lack of participation from these groups was (and still is) a big problem.

For instance, during the consultation, CONAFOR mentioned that two more consultation forums are planned in Yucatán: one with the Technical Consultation Committee for REDD+ (CTC-REDD+) and another with local farmers. However, neither has been officially announced or scheduled yet and is not clear when and where they will take place and who will attend. Recalling the government's intent to conclude the consultation process by the end of 2015, there is concern that the government might change its course. The lack of representation of farmers at the first meeting makes it more difficult for these groups to hold the government to its word and ensure an inclusive process.

However, the efforts made by the government to promote the process of public consultation at national level must be recognized. According to official information different communication schemes, disclosure and dissemination of forest issues, climate change and REDD+ in Mexico, such as workshops, forums and webinars were promoted.<sup>90</sup> The process of public consultation can be summarized as follows:<sup>91</sup>

- Virtual Consultation- questionnaire with 25 questions ([www.enaredd.gob.mx](http://www.enaredd.gob.mx)), with the participation of 638 people, of whom 33 were indigenous peoples from 13 different villages
- 54 face-to-face forums, of which at least one was conducted in each state of the Mexican Republic (5,352 participants, of which 502 were indigenous peoples and 602 youth)
- Organization of face-to-face thematic forums, aimed at specific sectors involved in REDD+ (91 forums with indigenous peoples, 90 for the agricultural sector, 48 with the youth and 108 for women)
- Indigenous peoples organization, designed and implemented by the Commission for the Development of Indigenous Peoples (CDI) according to its protocol of implementation (12 consultations, 184 indigenous peoples and/or afro-decedents in 212 locations)

However, it needs to be kept in mind that Mexico is a country with more than 112 million people<sup>92</sup>, 15 million of which are indigenous peoples, which are from 68 officially recognized indigenous peoples communities. It furthermore needs to be taken into account that the country has about 138 million hectares of forest cover, accounting for almost 70 % of the country. In total, 15,584 forestry groups (*ejidos* and *comunidades*) live in Mexico, having a hold of 62.6 million ha of forest vegetation- 45% of the forest area of the country.

In addition, the socioeconomic and cultural conditions of indigenous peoples and rural groups need to be taken into account, such as limited access to the internet, language difficulties as well as the understanding of such a complex issue as REDD+. All those elements put in perspective- it is evident that the efforts put into the public consultation – especially compared to the whole REDD+ implication process is not sufficient.

### Need for Stronger Human Rights Protections

The Mexican government's public consultation faced some serious challenges due to the short timeframe it established for the entire national process (originally only 6 months). These include failure to communicate information in a manner appropriate, in terms of timing and language, for the people most affected—those who live and depend on forests. These deficiencies contravene Mexico's human rights obligations under

<sup>90</sup> [http://www.enaredd.gob.mx/?page\\_id=286](http://www.enaredd.gob.mx/?page_id=286)

<sup>91</sup> [http://www.enaredd.gob.mx/wp-content/uploads/2016/05/Avances\\_consulta\\_ENAREDD.pdf](http://www.enaredd.gob.mx/wp-content/uploads/2016/05/Avances_consulta_ENAREDD.pdf)

<sup>92</sup> According to the latest population census in 2010

<sup>89</sup> Comisión Nacional Forestal. *Estrategia Nacional para REDD+, "Borrador para Consulta"*. CONAFOR. México, Noviembre 2014. Pág. 92. Véase: [http://www.conafor.gob.mx:8080/documentos/docs/1/5755Borrador%205%20\(Para%20consulta\).pdf](http://www.conafor.gob.mx:8080/documentos/docs/1/5755Borrador%205%20(Para%20consulta).pdf) (consultado el 6 de noviembre de 2015).

the right of access to information.

Furthermore, the Mexican government's failure to ensure participation of all relevant groups (despite its identification of several in its 2010 vision) in the public consultation process, along with its failure to effectively engage relevant government bodies and non-environmental authorities on issues related to REDD+ contravene its human rights obligations under the right to participation. Its decisions to announce the consultation and to conduct it in Spanish despite the large number of indigenous Mayan people among the affected population further undermines its duties to respect rights of indigenous peoples.

These shortcomings contradict Mexico's commitments under the REDD+ safeguards to include "[t]he full and effective participation of relevant stakeholders, in particular indigenous peoples and local communities" in mitigation actions in the forest sector,<sup>93</sup> considering timing, stakeholders, issues, and outreach methods.<sup>94</sup> They also indicate the lack of a "clear commitment" to ensure that the rights of indigenous peoples and other forest-dwelling communities "are fully respected throughout the REDD+ program cycle."<sup>95</sup>

Mexico has been a leader in efforts to advance human rights protection in the UNFCCC process. Thus, it is important for Mexico to learn from its experience in Yucatán, and to take the necessary steps to fully protect human rights in climate action. In this particular context, Mexico needs to allot additional time for the consultation processes, communicate in appropriate languages to announce and conduct the consultations, and ensure wide participation that includes all relevant stakeholders, including those it identified in 2010.

However, this example highlights the lack of guidance and oversight in the implementation of REDD+ safeguards at the national level. Guidance on how and with whom to conduct local stakeholder consultation would enhance Parties' ability to ensure compliance with the REDD+ safeguards and other obligations under international law like the right to free, prior and informed consent of indigenous peoples that was established under the 169 ITO Agreement.

### C. Nationally Appropriate Mitigation Actions (NAMAs)

Nationally Appropriate Mitigation Actions (NAMAs) are a climate policy tool that allows developing countries to design their own proposals for emission reduction activities based on their national circumstances. The initial idea for NAMAs was born in 2007 with the Bali Action plan, with an aim to enhance the role of developing countries in national and international efforts towards mitigation of climate change. According to the Ecofys NAMA Database, as of April 2016, there were 178 NAMAs in different stages of development across 60 countries.<sup>96</sup>

NAMAs are designed to pursue two objectives: to contribute to domestic sustainable development and to reduce greenhouse gas (GHG) emissions below business-as-usual levels by 2020.<sup>97</sup> Aside from that, the instrument is fairly flexible and outlines that NAMA actions are to be "nationally appropriate." Firstly, that means that they can take a variety of forms, such as policies, sectoral goals, or project-based activities. Secondly, "nationally appropriate" means they are driven by national governments and primarily reflect national development needs, rather than solely needs for emission mitigation. In this respect, NAMAs are considered a policy instrument with a "development first" agenda, where the foremost goal is to secure social, economic and environmental prosperity.

Despite the significance of the goal to achieve sustainable development, UNFCCC COP decisions do not provide criteria, methodologies, incentives or safeguards to monitor and assess the sustainable development co-benefits of NAMA actions.<sup>98</sup> Initiatives are developed without direction from the COP, for example using the UNDP voluntary tool to report and monitor sustainable development benefits,<sup>99</sup> or the Sustainable Development Framework for NAMAs, currently being developed by the NAMA Partnership working group on sustainable development.<sup>100</sup>

Moreover, while there is a general understanding that NAMAs need to be designed, developed and implemented through all-inclusive stakeholder engagement, there are no official rules or decisions under the UNFCCC that call for stakeholder consultation in the NAMA development process. The absence of guidelines leaves NAMAs to be carried out largely according to national rules. This can be especially problematic given that a number of developing countries have weak or no rules for stakeholder engagement.

NAMAs have shown a great potential for contributing to the sustainable development needs of developing countries, adding to the well-being of local populations while achieving emission reductions. Georgia's NAMA described below offers a good example. However, without appropriate guidelines for consultation processes and safeguards against negative impacts, NAMAs ultimately face the same challenges as the CDM. NAMAs lack appropriate international guidance in order to ensure they deliver positive impacts on the ground. The human rights language in the Paris agreement can serve to address these insufficiencies by reiterating standards that are applicable to NAMAs.<sup>101</sup>

93 See UNFCCC, Cancun Agreements (LCA), Decision 1/CP.16, 2010, appendix I, para. 2.

94 See [Guidelines on Stakeholder Engagement for REDD+ Readiness](#), para. 5.

95 See *id.*; UNFCCC, Cancun Agreements (LCA), Decision 1/CP.16, 2010, appendix I, para. 2.

96 NAMA Database. [http://www.nama-database.org/index.php/Main\\_Page](http://www.nama-database.org/index.php/Main_Page).

97 "Nationally appropriate mitigation actions by developing country Parties in the context of sustainable development, supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner;" (Bali action Plan, Decision 1/CP.13 (b) (iii))

98 Report of the Conference of the Parties on its fifteenth session, held in Copenhagen from 7 to 19 December, FCCC/CP/2009/11/Add.1, 2009 <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf>

99 UNDP (2014) NAMA sustainable development evaluation tool, <http://www.undp.org/content/undp/en/home/librarypage/environment-energy/mdg-carbon/NAMA-sustainable-development-evaluation-tool.html>

100 Measuring sustainable development in NAMAs, <http://www.iisd.org/pdf/2014/measuring-sustainable-development-namas.pdf>.

101 See Carbon Market Watch, The missing ingredient for successful NAMAs (Dec 2015), <http://carbonmarketwatch.org/wp-content/uploads/2015/11/NC-THE-MISSING-INGREDIENTS-TO-THE-NAMAS-SUCCESS-WEB.pdf>.

### Case Study: Pilot phase for gender sensitive NAMA in Georgia

The population of Georgia, particularly local communities in rural areas, suffer from a severe lack of energy and struggle to provide heat and warm water for their households. The respective local populations of this NAMA project spend about one third of its income on energy needs. They largely depend on wood as a source of energy, which—due to unsustainable logging—leads to depletion of 6500 ha of forest annually. In addition to the environmental and economic implications, this also generates health problems from indoor air pollution and poses a social burden on women, who are generally responsible for collecting wood and taking care of the household. Despite the time and effort women put into domestic heating, they often do not cover the energy needs to maintain the household.<sup>102</sup>

In order to tackle these problems, civil society came together to develop a four-year project as a pilot phase to develop a gender-sensitive NAMA.<sup>103</sup> The project was led by a coalition of NGOs together with men and women from local communities and created a good basis and lessons learnt for implementation of NAMAs. It achieved reductions in firewood spending and emissions, and, most of all, it contributed substantially to benefits for the local population and empowerment of women. Those NGOs built capacity of local women and men through training and involvement in development and implementation of the project.<sup>104</sup>

Based on the lessons learnt from the pilot phase, the objective is to launch a gender-sensitive NAMA to address energy needs and strengthen the role of civil society organisations in fostering climate mitigation activities, low-carbon development and poverty reduction. The NAMA foresees installation of 12,000 energy efficient stoves and 12,000 solar water heaters in households in five rural areas that are spread across Georgia.<sup>105</sup> This would provide energy for over 20,000 families, reduce costs for heating water and houses by half, and add to the well-being of the local population.<sup>106</sup>

#### Local Stakeholder Consultation

Despite the absence of guidelines on stakeholder consultation processes in NAMAs,<sup>107</sup> the Georgian NAMA project demonstrated an inclusive, bottom-up process of stakeholder involvement. In fact, the project showcased that involvement of local stakeholders in project planning, capacity building and implementation is crucial for sustainability and local ownership of climate action.<sup>108</sup>

The consultation process was largely led by civil society, hand in hand with the local government. One of the main civil society groups involved in the project—Rural Communities Development Agency (RCDA), established a resource centre in the project region<sup>109</sup> and helped to organise stakeholder meetings and to identify potentially interested stakeholders.<sup>110</sup> Due to another energy project implemented in the region, the local population was aware of the benefits of solar water heaters and was inclined to collaborate. Consultation processes included the local population, private sector, regional NGOs and informal women's groups active in the community. Local stakeholder meetings were held once or twice per month with documentation including a list of participants and internal reports of the meetings.

#### Sustainable Development

The pilot for implementation of Georgia's gender-sensitive NAMA delivered substantial sustainable development benefits.<sup>111</sup> Prior to the beginning of the project, calculation of expected co-benefits was done with a set of indicators, against which the results of the project were measured.

Firstly, the project added to meaningful environmental benefits. Utilisation of solar water heaters curtailed the need for logging, which in turn reduced deforestation. This led to emission cuts of 36,000 tons of CO<sub>2</sub> per year<sup>112</sup> and contributed to protection of biodiversity.

Secondly, through involvement in the development and implementation of the project, the local community has profited from several economic and social benefits.<sup>113</sup> Both men and women were trained through the project development. Women were mostly involved in monitoring and maintenance of sustainable development benefits, while men were trained in construction of solar collectors. They spent less time and energy collecting firewood, which benefited both as it decreased the amount of unpaid work. Due to the new solar water heaters, households had to pay less for firewood, which helped to reduce energy spending and scaled down dependency on national energy. Overall, the project created 135 jobs, equally distributed among men and women, in different areas around the country.<sup>114</sup>

102 <http://namanews.org/news/2016/04/29/georgia-nama-seeks-support-for-rural-renewable-energy-transformation/>

103 NGO coalition consisting of Women in Europe for a Common Future (WECF), Greens Movement, Rural Communities Development Agency (RCDA), Georgian Ecological Agricultural Association (SEMA), and Social Development Center Akhaltsikhe (SDCA). They work together with the Georgian Ministry of Environment

104 [http://www.rcda.ge/cat\\_en.php?id=183](http://www.rcda.ge/cat_en.php?id=183)

105 See Case study: access to affordable low-cost solar water heating solutions as a basis for the first gender-sensitive Nationally Appropriate Mitigation Actions (NAMA) in Georgia (WECF 2015), page 18, [http://www.wecf.eu/download/2015/November/Gender\\_Sensitive\\_NAMA-WECF.pdf](http://www.wecf.eu/download/2015/November/Gender_Sensitive_NAMA-WECF.pdf)

106 <http://www.wecf.eu/english/about-wecf/issues-projects/projects/NAMA-sustainableenergy.php>

107 Sharma, S. (2011) NAMA Process Cycle and Stakeholder Participation. UNEP Risoe Centre

108 <http://carbonmarketwatch.org/side-event-effective-stakeholder-engagement-in-nama-development-and-implementation-2/>

109 See Case study: access to affordable low-cost solar water heating solutions as a basis for the first gender-sensitive Nationally Appropriate Mitigation Actions (NAMA) in Georgia (WECF 2015), page 18, [http://www.wecf.eu/download/2015/November/Gender\\_Sensitive\\_NAMA-WECF.pdf](http://www.wecf.eu/download/2015/November/Gender_Sensitive_NAMA-WECF.pdf)

110 *Id.*, page 36,

111 <http://namanews.org/news/2016/04/29/georgia-nama-seeks-support-for-rural-renewable-energy-transformation/>

112 *Id.*

113 *Id.*

114 <http://www.wecf.eu/english/about-wecf/issues-projects/projects/NAMA-sustainableenergy.php>

The pilot phase for NAMA development had a strong gender dimension and contributed significantly to equality of men and women. It improved living conditions, particularly for women, as it reduced their burden of collecting wood and enhanced their access to hot water for household needs while reducing their exposure to indoor air pollution. Moreover, the project contributed to empowerment of women, who were encouraged to get involved in the project and follow training modules. As a result, 40 percent of them became monitoring and maintenance experts in five regions, and were able to earn additional income.

### **Benefits of Human Rights Protections**

Georgia's successes largely stemmed from the inclusive process and active role of civil society in designing and implementing the NAMA, along with clear, attainable sustainable development objectives identified as indicators.

The most visible social impacts deriving from the project affected local women. The project significantly reduced the burden of collecting firewood for the needs of the households, which used to mainly fall on women's shoulders. This provided opportunities for women to spend their time differently. Moreover, their role in the community was strengthened as they became the key agents in information and management of the project.

The whole local community profited from notable economic benefits. In a community where the average annual income is 2,000 EUR, and where one third of it is spent on energy needs, a technology that is able to reduce this spending is of immense value. The installation of solar collectors reduced the energy spending by 15 percent, which enabled the local population to spend money on other essential needs.

The success of Georgia's project can serve as a model for other projects, particularly to offer guidance to countries whose national requirements related to public participation and sustainable development are weak, or where civil society faces hurdles to taking an active role in these processes. To better ensure that NAMAs elsewhere yield the same kinds of positive outcomes, NAMA guidelines should ensure the meaningful engagement of civil society and affected people; effective means to ensure realisation of sustainable development co-benefits, including use of sustainable development indicators; and a means of recourse for people adversely affected by NAMAs that do not achieve benefits promised when planned.

The human rights language in the Paris agreement should/ can serve to protect people affected by NAMAs because the agreement applies to NAMAs as part of the UNFCCC. In addition, such protections should be included in NAMA guidelines.

## **V. LESSONS LEARNT FROM CDM, REDD+ AND NAMAS**

### **A. Local Stakeholder Consultation**

None of the mechanisms described above has rules or guidance on with whom and how to conduct local stakeholder consultation. Yet the examples show a clear need for this kind of guidance.

While a general requirement to conduct a consultation process is an important first step, it has not proved sufficient to ensure participation of those most affected. The two CDM project examples, Barro Blanco and Sasan, demonstrate this point well. There, the people most directly affected were not adequately consulted—in most cases, entirely left out—of the process. Problems arose that could have been averted had local affected people been adequately engaged in the planning, design, and implementation processes. Thus, there is a clear need for rules or guidance on who must be consulted.

This guidance must go beyond recognizing the need for full and effective consultation and participation at every stage of the process, as exists for NAMAs, and make clear the need to consult local affected people, including the right to say no. This is vital to help Parties understand how to ensure they consult the appropriate stakeholders, which must include local affected communities. While in the Georgia example, civil society and the local government worked constructively and effectively together in an inclusive, bottom-up process, this is not guaranteed in every country and every action. Without guidance on whom to consult, the national government and/or the project developers have discretion to decide whether and how stakeholders are consulted. In developing guidance, Georgia's good experience could serve as a model, as can the approach of National Adaptation Programmes of Action (NAPAs), which have established guiding elements to include public participation processes involving stakeholders, especially local communities and "voices of the poor."<sup>115</sup>

Beyond guidance on *who* to consult, these mechanisms need rules or guidance on *how* to conduct consultations, starting with outreach to potential participants. As the Sasan case shows, leaving methods of communication and outreach to the project developer can result in the wholesale exclusion of affected communities. There, beyond deciding who to invite to participate, the project developer printed an announcement about the consultation in a small-circulation newspaper even though the project would affect mostly people who are illiterate and geographically outside that paper's circulation. In the REDD+ example, the forum was conducted in Spanish, and announced primarily online and in Spanish, even though most of the directly affected communities are indigenous Mayan.

Timing is another key element. Rules or guidance on stakeholder consultation must make clear that consultation begins early in the process, before approvals or other key decisions are made, and extends throughout the project cycle. The Barro Blanco case shows that problems can

arise after project registration, including recognition of errors or omissions in the documents on which CDM registration was based. However, there is currently no communication channel after project approval. Open lines of communication are crucial to the integrity and success of mitigation projects. Allowing for communication of project-specific problems and responses to those problems would thus benefit Parties, project developers, and local communities alike.

Timing for the consultation process as a whole must be adequate to ensure effective engagement and the widest possible participation of all relevant stakeholders. As the REDD+ example shows, Parties may need to prioritise inclusiveness over speed when determining the timeframe for consultation processes, particularly where the issues are complex, as they invariably are with climate change mitigation projects.

## **B. Sustainable Development**

The cases above illustrate a pressing need for sustainable development criteria, indicators or safeguard policies as well as detailed guidance to assess and monitor compliance with such standards. Internationally agreed criteria are needed to avoid subjective, inconsistent interpretation of sustainable development.

The two CDM projects show that, on the question of whether the project will contribute to sustainable development, a requirement to merely verify that the host country answered "yes" is insufficient to ensure that contribution in fact results from the project. In both cases, the project developers promised sustainable development co-benefits—positive social, economic, and environmental impacts—but did not deliver these benefits as documented in independent reports. For instance, the Sasan project developer claimed the coal plant would improve the standard of living, address the electricity deficit, and support economic growth in the region. However, an NGO report found that local residents depend on generators because the Sasan plant's electricity goes to the national grid, and that fly ash from the coal plant contaminated local water, soil, and food while increasing disease in the area. As for Barro Blanco, an UNDP-led report identified potential stakeholders affected by social and environmental impacts not included in the project's environmental impact assessment, which had omitted indigenous land from the project-affected area.

Without sustainable development criteria or indicators and/or social and environmental safeguard policies of UNFCCC and its related mechanisms, governments and project developers must determine themselves what sustainable development allows and requires. These examples show the need for clear, detailed guidance establishing minimum standards on sustainable development. Including a strong human rights component. Such standards should help Parties to ensure their actions complement or are consistent with international law, including the no-harm principle.

As the CDM and NAMA examples suggest, the guidance should address safeguards against negative social and environmental impacts, public participation, and gender equality, among other topics. In the NAMA example, government and civil society worked together to engage local communities and promote gender equality. Through their involvement in project development and implementation, local communities around the country gained jobs and received valuable training that enabled them to obtain energy more efficiently and cheaply. The NAMA also empowered women through jobs, training, and improving living conditions by reducing their burden of collecting wood, reducing their exposure to indoor air pollution, and enhancing their access to hot water for household needs.

Georgia's NAMA achieved a positive outcome in part by using indicators to establish expected sustainable development benefits and then measure the project's delivery of those benefits. Sustainable development indicators facilitate assessment and monitoring. Quantifiable outcomes in the NAMA example included an increase of 135 jobs and reduction of 1000kg in carbon dioxide emissions due to use of solar water heaters. Making indicators publicly available both nationally and internationally further facilitates assessment and monitoring and promotes transparency.

In addition to establishing indicators, there is a need to ensure that assessment occurs throughout the project cycle and is independently verified. The disparity between project developers' promises and the documented outcome in the CDM cases demonstrate the need to ensure that sustainable development impact assessment, including on human rights, continues throughout the project or action cycle, along with the value of third-party verification of benefits. One place to incorporate such verification is in a sustainability development tool (SD tool), which exists for both CDM and NAMAs. To maximise effectiveness of the tool and hold State and private actors accountable to their commitments, SD tools should become mandatory.

## **C. Grievance Mechanism**

The cases above further demonstrate the need for a grievance mechanism or other means of recourse when projects do not go according to plan. In light of communities' right of access to justice, accountability mechanisms for human rights, social and environmental impacts of climate change mitigation projects and actions are essential.

While it is useful and important to have such mechanisms at the national level, these mechanisms should exist at the international level, too, especially given the international nature of the UNFCCC. As the CDM examples show, harms can result from projects after they are registered, yet affected local communities and civil society lack a means of redress for non-compliance with international rules. Even for NAMAs, which are country-driven, international-level mechanisms are appropriate given that local communities might suffer impacts resulting from the implementation of a NAMA but lack an appropriate means of recourse at the national level. While large institutions that finance CDM, REDD+, and NAMA projects may have their own accountability mechanisms, the scope may be limited and may not address all human rights, social and environmental harms. Plus, these projects are increasingly seeking finance from the private sector and other donors that may not have safeguard policies or complaint mechanisms in place.

<sup>115</sup> UNFCCC, Least Developed Countries Expert Group, Annotated Guidelines for the Preparation of National Adaptation Programmes of Action, July 2002, [http://unfccc.int/files/cooperation\\_and\\_support/ldc/application/pdf/annguide.pdf](http://unfccc.int/files/cooperation_and_support/ldc/application/pdf/annguide.pdf), at 10, 23-24.

The Parties to the UNFCCC should establish an independent grievance mechanism to which individuals, communities or indigenous peoples whose rights may be impacted by mitigation actions can submit complaints and relevant information. The mechanism should include the possibility of an independent assessment of the impacts of the project, the compliance with the standards and the adequacy and effects of the response measures for the affected peoples or communities, including on their enjoyment of human rights. The complaint mechanisms of the World Bank with its Inspection Panel or the one of the European Bank for Reconstruction and Development (EBRD) should inspire such a new grievance mechanism. The assessments carried out by independent experts should recommend measures for preventing or minimizing harmful effects and for ensuring that the response measures do not interfere with their enjoyment of their rights.

Any grievance mechanism in the UNFCCC should be guided by the following principles:

- *Effectiveness*, in providing timely and meaningful recourse;
- *Legitimacy*, which requires independence from political influence;
- *Accessibility*, particularly for complainants;
- *Predictability*, by way of clear and known procedures and monitoring of implementation;
- *Equitability*, by ensuring aggrieved parties can engage in a process on fair and equitable terms;
- *Transparency* of process and outcome;
- *Rights compatibility* to ensure consistency with internationally recognized human rights standards;
- *Participation*, at all relevant stages of the decision-making process.

As for grievance mechanisms at the national level, to enhance uniformity across countries' adjudication approaches and discourage a race to the bottom of human rights standards, there is a need for guidance, with minimum standards, on grievance mechanisms. These standards should reflect the criteria for grievance mechanisms established in the UN Guiding Principles on Business and Human Rights: legitimate; accessible; predictable; equitable; transparent; rights-compatible; a source of continuous learning; based on engagement and dialogue. Reporting and transparency requirements are also important to enhance integrity of for national-level grievance processes for climate change mitigation projects or actions.

## VI. STATE OF PLAY ON HUMAN RIGHTS IN THE UNFCCC

As previously discussed, the UNFCCC took a critical first step when it adopted the Cancun Agreements, which explicitly call on Parties to respect human rights when taking actions to address climate change. However, these words were not translated into action in the years that followed. In the lead up to the Paris climate negotiations, it became clear that the Paris moment was an opportunity to raise awareness and more fully integrate human rights in the post-2020 climate framework.

In February 2015, the Parties introduced the first reference to human rights in the negotiating text for the Paris Agreement, when Mexico, Chile, Tuvalu, Uganda, and others championed human rights language. Despite growing support, there was also strong opposition from certain countries and negotiating blocs. Recognizing the need for a unified voice, civil society organizations worked as part of a broader coalition representing women and gender, indigenous peoples, trade unions, youth, faith-based, human rights, environmental, and climate justice groups. While they partly differed in their approaches, the members of the coalition shared a common message: human rights must be reflected in the operative text of the Paris Agreement.

In the end, the preamble to the Paris Agreement calls on Parties to respect and promote human rights in all actions taken to address climate change, a landmark achievement given that it is the first reference to human rights in any multilateral environmental agreement. While there are other references that reflect rights and equity in the preamble to the Paris Agreement and in the accompanying COP decision, the core language is as follows:

*Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.*

This wording recalls and strengthens earlier statements in the Cancun Agreements in 2010. However, since 2010, they have not further specified what full respect for human rights means in these contexts. The need to operationalise this language is clear from evidence of projects under these mechanisms that have adversely affected human rights (see section 5). As the Parties develop the necessary rules to operationalize the Paris Agreement, further guidance is needed to help Parties understand how to prevent human rights, social and environmental harm and to promote sustainable development, participation, transparency, accountability and equity when taking action to address climate change. This is also true for decisions related to the mechanisms under the UNFCCC, such as the CDM, REDD, and NAMAs.



The Paris climate deal established a new climate mitigation mechanism to 'contribute to the mitigation of greenhouse gas emissions and support sustainable development'<sup>116</sup> - in short the Sustainable Development Mechanism or SDM.

Anchored in Article 6 of the Paris Agreement, the mechanism will replace Kyoto's flexible mechanisms, including the CDM, and can be used on a voluntary basis by all Parties to meet their nationally determined contributions (NDCs). It is important to note, however, that Parties must pursue domestic climate policies to achieve their targets, thereby limiting the amount of international carbon credits that can be used to meet their NDCs.

Like the CDM, the SDM is intended not only to promote the mitigation of greenhouse gas emissions but also to foster sustainable development.<sup>117</sup> In implementing such mitigation actions, Parties must ensure environmental integrity,<sup>118</sup> which means that the markets will have to consider the environmental and social costs and benefits in addition to the amount of carbon being traded. Unlike the CDM, the SDM is wider in scope with respect to its accessibility to implementing Parties. For example, all countries will be able to generate and/ or use these offset credits, meaning that developed countries will compete with developing countries for investment in mitigation activities.

Several key issues remain to be addressed in the modalities and procedures to be developed by the Subsidiary Body for Scientific and Technological Advice (SBSTA). These issues include: how to assess sustainable development outcomes; how to deliver net mitigation; how to move beyond projects to broader policies and measures; and how to avoid double counting.<sup>119</sup> In addition, the need for transparent governance and robust and verifiable accounting must be reflected in the modalities and procedures.

The preambular reference to human rights in the Paris Agreement sets the foundation, reminding Parties that they must satisfy their human rights obligations as they move forward to develop and implement the sustainable development mechanism. In addition, the Agreement's accompanying COP decision recognizes the significance of building on the experiences gained and lessons learned from existing mechanisms and approaches adopted under the Convention.<sup>120</sup> To prevent repeating the same mistakes and help to ensure the mechanism's success, the Parties must take human rights obligations into account as they develop the modalities and procedures.

Since so much remains to be agreed, the SDM's contribution to mitigation efforts and to sustainable development will only be understood, once more detailed policies and procedures are established at the first meeting of the Conference of the Parties to the Paris Agreement. A first round of negotiations on the SDM modalities and procedures will take place at the Bonn intersessional in May 2016.

<sup>116</sup> Paris Agreement, Art. 6(4)

<sup>117</sup> Id.

<sup>118</sup> Id., Art. 6(1)

<sup>119</sup> See UNFCCC, Paris COP Decision, Decision 1/CP.21, 2015, para. 38(f) and Paris Agreement, Art. 6(4)

<sup>120</sup> UNFCCC, Paris COP Decision, Decision 1/CP.21, 2015, para. 38(f)



## VII. RECOMMENDATIONS

- Ensure that climate actions are based on a human rights-based approach that secures respect, protection, and fulfillment of human rights
  - The interconnectivity of climate change and human rights needs further to be strengthened
  - Existing human rights obligations related to climate change need to be effectively operationalized
  - Safeguards and accountability processes need to be established that secure climate actions are designed, implemented and monitored in such a manner that rights of affected individuals, indigenous peoples and communities are protected
- Develop and establish clear, detailed guidance for local stakeholder consultations in climate mechanisms, including FPIC. This shall include
  - who must be consulted (at a minimum, affected peoples and communities);
  - how (through means of communication, including language and media, appropriate to the people being contacted); and
  - when (early and throughout the project cycle, to ensure a communication channel if the project causes harm after approval or registration).
  - how the concerns expressed in the consultations are taken into account in the decision making processes about the project. A refusal of the project by affected communities and indigenous peoples must be respected.
- Adopt sustainable development criteria and indicators, including human rights and reflecting the do-no-harm principle and other international law obligations, to help ensure that actions or projects contribute to sustainable development;
- Adopt clear, detailed guidance for sustainable development assessment and monitoring to ensure compliance with relevant criteria or indicators throughout the project cycle
  - minimum standards for sustainable development, reflecting the no-harm principle and other international law obligations
  - public participation, including the right to say no;
  - gender equality; and
  - safeguards against negative human rights, social and environmental impacts.
- Make sustainable development criteria or indicators publicly available at national and international levels;
- Introduce third-party verification, do-no-harm principles, and public participation in the sustainable development tool (SD tool) under the CDM and NAMAs;
- Make SD tools under the CDM and NAMAs mandatory rather than voluntary;
- Establish an international-level independent grievance mechanism as a means for project-affected peoples and communities to raise their concerns, to request an independent assessment and have their concerns addressed in a timely manner;  
Provide guidance for establishing grievance and compliance review processes at the national level;

## VIII. CONCLUSION

The world is at a crossroads. We must decide on the future climate architecture to lead our transition to a decarbonised society.

Climate change mitigation projects and actions—along with the financing that makes them possible—will be instrumental in reaching this goal. However, as the paper has shown, those projects, actions, and financing have the potential to cause—and have caused—harm to human rights.

A simple step towards minimizing that harm is strengthening human rights protections under the UNFCCC: in the CDM Modalities and Procedures, in implementation of the REDD+safeguards, and in rules applicable to NAMAs.

This is also a critical opportunity to draw on the lessons learnt in shaping the newly established Sustainable Development Mechanism. Calling for the new modalities and procedures for the SDM to be based, among other issues, on the experience and lessons gained from the CDM<sup>1</sup> clearly underlines the need to not repeat the same mistakes. To ensure that the SDM is a success, Parties must take human rights obligations into account when negotiating the modalities and procedures.



<sup>1</sup> UNFCCC, Paris COP Decision, Decision 1/CP.21, 2015, para. 38(f)



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