



Human Rights Law Clinic Papers 2020

The Minority and Indigenous Peoples' Rights Implications of Carbon Trading Schemes

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i. Table of Legal Instruments

Convention on the Elimination of All Forms of Discrimination Against Women (adopted 1 March 1980, entered into force 3 September 1981) 1249 UNTS 13

Directive 2003/87/EC of the European Parliament and of the Council 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the community and amending Council Directive 96/61/EC [2003] L 275/32

European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5

European Union, Consolidated version of the Treaty on European Union, 13 December 2007, 2008/C 115/01

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3

International Labour Organization Convention No.169 Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383

Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162

Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) 16 TIAS 1104

United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107

United Nations General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 3 February 1992, UN Doc. A/RES/47/135

United Nations General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: Resolution / adopted by the General Assembly, 2 October 2007, UN Doc. A/RES/61/295

United Nations Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III)

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

ii. Table of Abbreviations

AAU	Assigned Amount Units
CCBS	Climate Community and Biodiversity Standard
CDI	Clean Development Mechanism
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CER	Certified Emission Reduction
CO2	Carbon Dioxide
COP	Conference of the Parties
ERU	Emission Reduction Unit
EU	European Union
EU ETS	European Union emissions Trading System
FACE PROFAFOR	The Dutch Face Programme for Forestation in Ecuador S.A
FPIC	Free Prior and Informed Consent
FSC	Forest Stewardship Council
GCF	Green Climate Fund
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IETS	International Emissions Trading System
IIPFCC	International Indigenous Peoples Forum on Climate Change
ILO C169	International Labour Convention on the Rights of Indigenous and Tribal Peoples 1989
ITMO	Internationally Transferred Mitigation Outcomes
JI	Joint Implementation
NDC	Nationally Determined Contributions
NGO	Non-Governmental Organisation

REDD+	Reducing Emissions through Deforestation and Forest Degradation
RIA	REDD+ Indigena Amazonico
Ruggie Principles	UN Guiding Principles on Business and Human Rights
SDM	Sustainable Development Mechanism
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNFCCC	United Nations Framework Convention on Climate Change
UNREDD	United Nations Programme on Reducing Emissions through
VDPA	Vienna Programme of Action

1. Introduction and Background

Climate change has been recognised as a critical global emergency, irreversibly damaging the environment and threatening the fundamental rights of the world's most vulnerable populations. Despite contributing little to global greenhouse gas emissions, indigenous peoples are profoundly and disproportionately impacted by the threats of anthropogenic warming due to their geographical locations, their distinct relationship with their supportive ecosystems, and their dependence upon the environment and its resources.¹

Since the drafting and inception of the United Nations Framework Convention on Climate Change (UNFCCC) in 1992, initiatives to adapt to and mitigate anthropogenic warming have been at the forefront of State Party policy debate.² Introduced by the Kyoto Protocol, carbon trading is presented as a solution for climate change; designed as a mechanism to reduce greenhouse gas emissions through the commodification of carbon. Evidence has shown that fifteen years of carbon trading schemes have resulted in a catalogue of human rights violations and irreversible negative impacts on local minority and indigenous communities. Despite this, State parties to the UNFCCC are considering the continuation of these schemes after 2020 through Article 6 of the Paris Agreement.³ This memorandum will provide a comprehensive overview of the legal development of carbon trading, the practical realities of carbon market mechanisms in action, and the current state of negotiations regarding the future of carbon trading under Article 6 of the Paris Agreement.

Section two of this memorandum will briefly summarise the international environmental legal developments upon which the carbon market has been constructed and identify any acknowledgement of minority and indigenous peoples' rights. Section three will then provide case study examples of projects implemented under the carbon market mechanisms and analyse their impact on local communities to illustrate patterns of repeated malpractice and human rights violations. A summary of the relevant international human rights instruments that protect minorities and indigenous peoples will be incorporated into this case study analysis. Section four will comparatively analyse the proposed changes to Article 6 with evidence of malpractice found within the case studies, ultimately arguing that the current text of Article 6

¹ Sarah Krakoff, 'Indigenous Peoples and Climate Change', in Danial A. Farber & Marjan Peeters (eds), *Climate Change Law, Vol. 1* (Edward Elgar, 2016), pp. 627–36, at 628; The Indigenous Peoples' Global Summit on Climate Change, The Anchorage Declaration, April 24, 2009 [hereinafter The Anchorage Declaration] <<https://unfccc.int/resource/docs/2009/smsn/ngo/168.pdf>> accessed 18 May 2020

² United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 [hereinafter UNFCCC].

³ Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) 16 TIAS 1104 [hereinafter Paris Agreement].

is not sufficient to protect the rights of minorities and indigenous peoples. This section will explore alternative initiatives proposed by minority and indigenous communities and outline recommendations advanced by other NGOs. Finally, this memorandum will summarise its findings, in order to present a clear conclusion, including policy recommendations, to Minority Rights Group International.

2. The International Carbon Market Legal Framework

The unique impacts of climate change on indigenous and minority communities are often overlooked within the discourse of international environmental law. This section will outline the development of international climate change law and the emergence of carbon trading, illustrating the inherent reluctance to acknowledge minority and indigenous peoples' rights within climate change policy.

2.1. United Nations Framework Convention on Climate Change

Adopted in 1992 and entering into force in 1994, the UNFCCC established the need to stabilise greenhouse gas concentrations 'at a level that would prevent dangerous anthropogenic interference with the climate system' as a 'common concern of humankind'.⁴ Despite strongly advocating global inclusion and cooperation, neither the preamble nor the binding articles of the UNFCCC make reference to the rights of minorities and indigenous peoples. There is also a distinct failure to recognise the importance of their traditional knowledge systems in global mitigation and adaptation measures. However, it is suggested that Article 3(2) of the UNFCCC could be interpreted to somewhat recognise the unique susceptibility of minorities and indigenous peoples to the direct impacts of climate change, insofar as it refers to the 'specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable'. Also of relevance is Article 6 of the UNFCCC, which provides that Parties shall promote and facilitate 'public participation on addressing climate change and developing adequate responses'.⁵

Despite the lack of any reference to minority and indigenous peoples' rights in the UNFCCC itself, there has been a slow movement, evidenced in the decisions of the annual COP sessions towards stronger protection of minority and indigenous rights.⁶ Decision 2 at COP11 in 2005 made the first reference, in an UNFCCC text, to 'the importance of local and

⁴ UNFCCC preamble; The Convention constitutes the foundation of international climate change law and policy, as well as establishing principles and ideals that are integral to the operation of the carbon market.

⁵ This provision is of particular importance, as the right to participation is an important prerequisite of the right to free, prior and informed consent (FPIC) – a right frequently violated in CDM projects.

⁶ James Ford and others 'Adaption and Indigenous Peoples in the United Nations Framework Convention on Climate Change', *Climate Change* (2016) 139:429-443, pp 439; Indigenous Peoples' Forum on Climate Change and Center for International Environmental Law, *Indigenous Peoples and Traditional Knowledge in the Context of the UN Framework Convention on Climate Change – Compilation of Decisions and Conclusions Adopted by the Parties to the Convention*, Report (November 2013) < <https://www.ciel.org/wp-content/uploads/2019/08/Indigenous-Peoples-and-Traditional-Knowledge-in-the-Context-of-the-UNFCCC-2019-Update.pdf>> accessed 28 March 2020

indigenous knowledge', with a focus on adaptation initiatives.⁷ In the context of climate change mitigation, the needs of local and indigenous communities were expressly recognised at COP13 in 2007, two years after the inception of international and regional carbon market mechanisms.⁸ Paragraphs 7 and 8 of the Cancun Agreements in 2010, contain the first explicit reference to human rights, specifically indigenous peoples' rights, in the UN climate regime.⁹ Parties referred to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)¹⁰ to stress the importance of protecting indigenous peoples' rights in deforestation initiatives and to recognise their fundamental role in climate change policies.¹¹ Paragraph 7 of the Cancun Agreements also marks the beginning of UNFCCC tendency to refer to minority and indigenous peoples' rights alongside the rights of other vulnerable individuals, such as children, the elderly, women, and persons with disabilities, and a recognition that many individuals are situated in multiple categories.¹² Significantly, COP decisions are not legally binding but are of a more administrative character, developing climate change proposals and policy recommendations, as well as forming the basis upon which Protocols and Treaties can be constructed.¹³ The annual sessions reflect an increasing acknowledgment and evolving attitude over the past two decades towards the specific rights and essential role of minorities and indigenous peoples in regulating climate change and reducing carbon emissions.

A notable advancement in the recognition of indigenous peoples within the UNFCCC, and particularly in relation to climate change mitigation, was the establishment, in 2008, of the International Indigenous Peoples Forum on Climate Change (IIPFCC), or the Indigenous Peoples' Caucus.¹⁴ Their mandate is to come to a collective agreement, in a culturally safe space, on what indigenous peoples' representatives will be proposing and negotiating for in

⁷ Decision 2/CP.11, 'Five-year Programme of Work of the SB-STA on Impacts, Vulnerability and Adaptation to Climate Change', in Report of the Conference of the Parties on its eleventh session, Addendum Part Two: Action taken by the Conference of the Parties, FCCC/CP/2005/5/Add.1 (30 March 2006)

⁸ Decision 2/CP.13, 'Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action', in Report of the Conference of the Parties on its thirteenth session, Addendum, Part Two: Action taken by the Conference of the Parties, FCCC/CP/2007/6/Add.1 (14 March 2008)

⁹ Decision 1/CP.16, 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention,' in Report of the Conference of the Parties on its sixteenth session, Addendum, Part Two: Action taken by the Conference of the Parties, FCCC/CP/2010/7/Add.1 (15 March 2011); James Ford, Michelle Maillet, Vincent Pouliot, Thomas Meredith, Alicia Cavanaugh & IHACC Research Team, 'Adaption and Indigenous Peoples in the United Nations Framework Convention on Climate Change' (2016) 139 *Climate Change* 429-443

¹⁰ United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295*

¹¹ Decision 1/CP.16, 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention,' in Report of the Conference of the Parties on its sixteenth session, Addendum, Part Two: Action taken by the Conference of the Parties, FCCC/CP/2010/7/Add.1 (15 March 2011)

¹² Ibid

¹³ Ibid

¹⁴ UNFCCC

¹⁴ Indigenous Peoples' Forum on Climate Change and Center for International Environmental Law (2019), *Indigenous Peoples and Traditional Knowledge in the Context of the UN Framework Convention on Climate Change – Compilation of Decisions and Conclusions Adopted by the Parties to the Convention*

UNFCCC processes. The aim of this agreement is to unify and amplify the voices of indigenous peoples in the international sphere.¹⁵

2.2. The Kyoto Protocol

Adopted in 1997 and entering into force in 2005, the Kyoto Protocol is a multilateral agreement that determines binding and differentiated emission targets for 37 industrialised countries and the European Union (EU), otherwise known as the Annex B Parties.¹⁶ In facilitating Parties' achievement of emissions targets, the Protocol establishes three separate but interrelated 'flexible mechanisms', namely an International Emissions Trading System (IETS),¹⁷ Joint Implementation (JI),¹⁸ and the Clean Development Mechanism (CDM).¹⁹ It is through these mechanisms that the concept of a global carbon market was first introduced. This memorandum will focus its analysis on projects that are registered under the CDM.²⁰

2.3. The Clean Development Mechanism

The CDM is a carbon market mechanism with two fundamental and concurrent aims: to promote sustainable development in developing countries and to contribute to the overall objective of the UNFCCC by reducing global emissions.²¹ The mechanism allows an Annex B country to finance and implement an emission reduction project in a developing country.²² Successful projects are issued credits – known as Certified Emission Reductions (CERs) – that can be traded between Annex B countries in the carbon market. Renewable energy projects approved by and funded through by the CDM have been reported as violating the fundamental rights of the local minority and indigenous communities.²³ In 2016, John Knox criticised the CDM for its lack of 'effective social and environmental safeguards' and its

¹⁵ Indigenous Peoples' Forum on Climate Change and Center for International Environmental Law (2019), *Indigenous Peoples and Traditional Knowledge in the Context of the UN Framework Convention on Climate Change – Compilation of Decisions and Conclusions Adopted by the Parties to the Convention*

¹⁶ Kyoto Protocol, art 3

¹⁷ Kyoto Protocol, art 17; The levels of permitted emissions for Annex B Parties are expressed as Assigned Amount Units (AAUs), thus creating an international commodity of carbon

¹⁸ Kyoto Protocol, art 6

¹⁹ Kyoto Protocol, art 12

²⁰ Ibid

²¹ The Marrakesh Accords, Report of the Conference of the Parties on its seventh session, held at Marrakesh from 29 October to 10 November 2001. Addendum. Part two: Action taken by the Conference of the Parties. Volume I.

²² Marcos A. Orellana, 'Climate Change and the Millennium Development Goals: The Right to Development, International Cooperation and the Clean Development Mechanism', *International Journal on Human Rights* 12 (June 2010) p 145, 151

²³ Ibid; United National Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples, 1 November 2017 A/HRC/36/46

undeniable tendency to support projects that cause serious human rights abuses.²⁴

The CDM 'Modalities and Procedures' form part of the Marrakesh Accords in 2001, and set out detailed implementation rules for the Kyoto flexible mechanisms. Much like Kyoto itself, there is no mention of minority or indigenous peoples' rights within this rulebook; this is a concerning exclusion considering that the purpose of the mechanism is to facilitate large-scale projects in developing countries. The CDM modalities and procedures provide that information regarding 'local communities, indigenous peoples, land tenure, local employment, food production, cultural and religious sites, and access to fuel wood and other forest products' must be considered in the socio-economic impact assessment of reforestation projects.²⁵ No such reference is made to environmental impact assessments nor to large-scale projects.

2.4. European Union Emissions Trading System

Introduced in 2005, the European Union Emissions Trading System (EU ETS) exists today as the world's oldest and largest carbon market and operates in accordance with the objectives of the UNFCCC and the mechanisms established in the Kyoto Protocol.²⁶ Though there is no mention of human rights or the rights of affected minority and indigenous communities in the directives concerning the EU ETS, adherence to human rights standards is enshrined in the foundational treaties of the EU. The Treaty of the European Union, as amended by the Lisbon Treaty of 2009, preserves the EU's commitment to uphold and promote human rights, both within the community and in the 'wider world'.²⁷ EU investors are, therefore, obliged to ensure projects are carried out in a way that is compatible with human right standards, with this obligation being extraterritorial.²⁸ Notably, the ETS has no complaint mechanism in the text establishing it. Following the EU ETS, further emissions trading systems have emerged across

²⁴ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc. A/HRC/31/52 (1 February 2016) [hereinafter Knox Climate Change Report]. Page 4

²⁵ FCCC/KP/CMP/2005/8/Add.1, Appendix B, Project design documentation for afforestation and reforestation project

²⁶ Intergovernmental Panel on Climate Change, *Climate Change 2014: Mitigation of Climate Change: Working Group III Contribution to the PICC Fifth Assessment Report* (Cambridge University Press, 2015) at 1021; Directive 2003/87/EC of the European Parliament and of the Council 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the community and amending Council Directive 96/61/EC [2003] L 275/32; Many of the projects discussed below are funded by EU institutions, States, and corporations.

²⁷ European Union, Consolidated version of the Treaty on European Union, 13 December 2007, 2008/C 115/01, art 2 and 3(5)

²⁸ Jeanette Schade and Wolfgang Obergassel, 'Human Rights and the Clean Development Mechanism, *Cambridge Review of International Affairs* (2014) vol.27 no.4 717-735, 720-722

the globe.²⁹

2.5. Reducing Emissions through Deforestation and Forest Degradation (REDD+ Projects)

In 2007, Parties agreed that incentives to reduce emissions from deforestation should be included within climate change mitigation.³⁰ REDD+ is a global initiative in which developing countries are offered financial incentives to ensure forest conservation rather than forest destruction within their States.³¹ Strategies to finance REDD+ programmes have varied. Although many developing countries have advocated for the programme to be publicly funded, for example, through the Green Climate Fund (GCF),³² there has been support for including the financing of REDD+ activities in the Kyoto credit mechanisms.³³ Including forest management within the carbon market is problematic for the respect of human rights, interfering further with the livelihoods of local stakeholders. The legal framework for REDD+ provides specific safeguards that respect principles contained in the UNDRIP; this is considered as a victory for indigenous peoples.³⁴ Specific protection for minority groups and indigenous peoples is concretised in the United Nations Programme on Reducing Emissions through Deforestation and Forest Degradation (UNREDD) text which gives governments authority to design country-led safeguards to protect local communities.³⁵

²⁹ The New Zealand ETS legislated for in 2008, California ETS launched in 2013, and South Korea's ETS launched in 2015 are some of the biggest regional carbon markets, all permitting the use of carbon credits generated by the Kyoto mechanisms.

³⁰ UN-REDD Programme Fact Sheet, About REDD+ (February 2016) <https://www.unredd.net/index.php?option=com_docman&view=document&alias=15279-fact-sheet-about-redd&category_slug=fact-sheets&Itemid=134> accessed 5 May 2020

³¹ Copenhagen Accord (Dec 19, 2009), in Report of the Conference of the Parties on its Fifteenth Session, Decision 2/CP.15, U.N. Doc. FCCC/CP/2009/11/Add.1 30 March 2010.

³² Decisions 9-15/CP.19, The Warsaw Framework for REDD+: Decision 9/CP.19, Work Programme on Results-based Finance to Progress the Full Implementation of the Activities Referred to in Decision 1/CP.16, Paragraph 70; Decision 10/CP.19, Coordination of Support for the Implementation of Activities in Relation to Mitigation Actions in the Forest Sector by Developing Countries Including Institutional Arrangements; Decision 11/CP.19, Modalities for National Forest Monitoring Systems; Decision 12/CP.19, The Timing and the Frequency of Presentations of the Summary of Information on how all the Safeguards Referred to in Decision 1/CP.16, Appendix I, are being Addressed and Respected; Decision 13/CP.19, Guidelines and Procedures for the Technical Assessment of Submissions from Parties on Proposed Forest Reference Emission Levels and/or Forest Reference Levels; Decision 14/CP.19, Modalities for Measuring, Reporting and Verifying; Decision 15/CP.19, Addressing the Drivers of Deforestation and Forest Degradation, UN Doc. FCCC/CP/2013/10/Add.1, 31 January 2014.

³³ Angelson A, Wang Gierløff C, Mendoza Beltrán A and den Elzen M, 'REDD credits in a global carbon market: Options and Impacts' (*TemaNord* 2014) <https://www.pbl.nl/sites/default/files/downloads/pbl-2014-redd-credits-in-a-global-carbon-market_01583.pdf> accessed 14 May 2020

³⁴ Victoria Tauli-Cropuz, Special Rapporteur for Indigenous Peoples

³⁵ UN-REDD Programme Fact Sheet, About REDD+ (February 2016). The UNFCCC does not have any inbuilt complaint mechanisms but the communities the world bank Inspection panel, the various human rights bodies created by established human rights instruments and the Aarhus convention to make claims.

The carbon trading market is established and regulated by a number of comprehensive legal frameworks that oversee the operation of credit-generating projects, often in indigenous territories. Despite the fact that these projects have the potential to significantly interfere with the livelihoods of local minority and indigenous communities, there is little to no mention of human rights within this legal structure.

3. Respect, Protection and Promotion of Minority and Indigenous Peoples' Rights Within the Carbon Market Mechanisms

The rights of minority and indigenous peoples pertinent to climate change are found in a range of international standards that converge in international human rights law, international climate change law, and international labour law. This section will first briefly outline the primary legal instruments that protect the rights of minority and indigenous peoples and then provide an analysis of patterns of human rights violations found in carbon market projects..

The International Covenant on Economic, Social and Cultural Rights (ICESCR)³⁶ and the International Covenant on Civil and Political Rights (ICCPR)³⁷ form the core structure of the international human rights framework, containing many of the legally binding obligations with regard to the respect, protection, and promotion of minority and indigenous peoples' rights. Notable examples include the right to self-determination,³⁸ and the right of persons belonging to minorities to maintain their own culture, religion and language.³⁹ The International Labour Organization Convention on the Rights of Indigenous and Tribal Peoples (ILO C169) and UNDRIP are complementary instruments, providing a rights agenda that is tailored to the distinctive aspirations and needs of indigenous peoples.⁴⁰

The UN Guiding Principles on Business and Human Rights, (the Ruggie Principles), are pivotal when considering the implementation of CDM projects, existing as a set of non-binding, though instructive, rules to address human rights abuses in the operation of transnational corporations and businesses.⁴¹ The framework is comprised of three core values: the State duty to provide human rights protection; the corporate obligation to respect human rights; and the assurance of effective access to remedies for local stakeholders.⁴² Principle 17 imposes a responsibility on businesses to take due diligence to promote, protect, and advance human rights in the communities in which they operate.⁴³ There is a distinct failure to adhere to these standards

³⁶ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 [hereinafter ICESCR]

³⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [hereinafter ICCPR]

³⁸ ICCPR art 1; ICESCR art 1

³⁹ ICCPR art 27

⁴⁰ International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989 [hereinafter ILO C169]; Although the ILO C169 remains as the only legally binding international instrument explicitly providing rights for indigenous peoples' rights, the UNDRIP is more widely recognised and endorsed

⁴¹ United Nations Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 7 April 2008, UN Doc A/HRC/8/5 [hereinafter Ruggie Principles]

⁴² United Nations Human Rights Council, A/HRC/RES/17/4 6 July 2011

⁴³ Ruggie Principles, Principle 17

throughout all the case studies discussed, but, for the purpose of this memorandum, analysis will focus on the legally binding State obligations.

3.1. Land rights

This section discusses land rights within carbon credit-generating projects. The right to participation and free prior and informed consent (FPIC) of local communities will be discussed first, before examining the right to conserve and protect their environment.

3.1.1 Right to free, prior, and informed consent

This section discusses the right to participation and to FPIC and illustrates violations of these rights in the construction of the Barro Blanco Hydropower Project in Panama. Indigenous peoples' distinct right to own and control their lands is affirmed in UNDRIP.⁴⁴ Furthermore, UNDRIP sets out that States shall consult and cooperate with indigenous peoples to obtain their FPIC before the approval of projects that may affect them or their lands, and that the communities should be compensated.⁴⁵ Similar provisions are also enshrined in Articles 14 and 19 ILO No.169, rendering them binding upon States that have ratified this Convention. An important condition of effective participation is access to information – a right that received some recognition in climate change legal discourse, for example in Article 6 UNFCCC.⁴⁶

The Barro Blanco Hydroelectric Project has led to numerous violations of the local Ngäbe peoples' land rights, stemming directly from the failure of the Panamanian government and project operators to obtain FPIC of the affected communities.⁴⁷ Panama voted in favour of UNDRIP, with the right to FPIC and to consultation being a central element of this declaration. Panama is also a Party to ICESCR, ICCPR, and has signed and ratified the American Convention on Human Rights and therefore has international and regional obligations to uphold the fundamental rights of individuals within its State, including the right to adequate housing and health.⁴⁸ In terms of the right to FPIC, the consultation process in this case was not 'culturally appropriate', with meetings being held far from indigenous territories, as well as

⁴⁴ UNDRIP arts 25, 26 and 27

⁴⁵ UNDRIP arts 10, 27 and 32

⁴⁶ UNFCCC art 6; FCCC/KP/CMP/2005/8/Add.1, Appendix B, Project design documentation for afforestation and reforestation project

⁴⁷ Beatriz Felipe Pérez, Jane A. Hofbauer, Monika Mayrhofer and Paola Villavicencio Calzadilla, 'Rethinking the Role of Development Banks in Climate Finance' (2016) 12 *Law Environment and Development Journal* 1; Wolfgang Obergassel, Lauri Peterson, Florian Mersmann, Jeanette Schade, Jane Alice Hofbauer and Monika Mayrhofer, 'Human Rights and the Clean Development Mechanism: Lessons Learned from three case studies' (2017) 8(1) *Journal of Human Rights and the Environment* 51-71

⁴⁸ ICESCR art 11 and 12

being inadequately advertised.⁴⁹ Further, there were reports that those who attempted to attend the meetings were not permitted entrance.⁵⁰ By obstructing the communities' participation in planning meetings, the operators had failed to consult those impacted by the project and had not acquired FPIC. In 2015, the Panamanian government recognised that approval of the Barro Blanco project violated the land rights of the Ngäbe, and, following directly from this, infringed their social and cultural rights.⁵¹ Importantly, the project did not include any environmental or socio-economic assessments or protection plans for the Ngäbe peoples, whose livelihood is inextricably linked to the river and surrounding environment.⁵² The failure of the government to ensure adequate consultation and to obtain the FPIC of the affected communities amounts to a violation under UNDRIP. With the opening of the floodgates and the destruction of the Ngäbe peoples' housing, water sources and religious, cultural, and archaeological sites, the State is also liable to an infringement of social, economic, and cultural rights under the ICESCR and the American Convention.

3.1.2 Right to conservation and protection of the environment

An equally crucial aspect to the effective protection of indigenous peoples' land rights, and of which is directly linked to the right to participation and to FPIC, is guaranteeing their right to the conservation and protection of their territories and natural resources. The spiritual relationship indigenous peoples hold with their land is central to their livelihood, and must be understood as a constituent of the fundamental basis of their cultures, their traditional way of life, and their social and economic survival.⁵³ The ILO C169 provides that indigenous peoples are given the right to own, possess, dwell on, and protect their territories and natural resources.⁵⁴ Further to this, Article 7 ILO C169 asserts that governments shall carry out studies to 'assess the social, spiritual, cultural and environmental impact on them of planned development activities' and 'shall take measures, in co-operation with the peoples concerned,

⁴⁹ Beatriz Felipe Pérez, Jane A. Hofbauer, Monika Mayrhofer and Paola Villavicencio Calzadilla, 'Rethinking the Role of Development Banks in Climate Finance' (2016) 12 *Law Environment and Development Journal* 1

⁵⁰ Ibid

⁵¹ Manolo Miranda, 'Barro Blanco: Flooding begins on UN approved hydro dam as indigenous defenders are forcefully removed' (Center for International Law, 24 May 2016) <<https://www.ciel.org/news/barro-blanco-flooding-begins-un-approved-hydro-dam-indigenous-defenders-forcefully-evicted/>> accessed 9 May 2020; Upon these assertions, the State fined the project developer \$775,000 for failure to consult, compensate, and effectively relocate those impacted by the dam; Goejet Miranda, President of the Ngäbe Community Movement Formed by the affected communities of Barro Blank to defend the Tasbasara River, Reported in Carbon Market Watch, 'Local Realities of CDM Projects: A Compilation of case Studies' (November 2013) <<https://carbonmarketwatch.org/publications/local-realities-of-cdm-projects-a-compilation-of-case-studies-2/>> accessed 10 May 2020

⁵² Manolo Miranda, 'Barro Blanco: Flooding begins on UN approved hydro dam as indigenous defenders are forcefully removed' (Center for International Law, 24 May 2016) <<https://www.ciel.org/news/barro-blanco-flooding-begins-un-approved-hydro-dam-indigenous-defenders-forcefully-evicted/>> accessed 9 May 2020

⁵³ Siegfried Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) 22(1) *European Journal of International Law* 121; UNDRIP, art 25

⁵⁴ ILO C169, arts 13, 14, 15 and 16

to protect and preserve the environment of the territories they inhabit'.⁵⁵ Indigenous peoples right to the conservation and protection of the environment is also contained in Articles 25-29 UNDRIP, with Article 29 setting out a positive obligation on States to 'establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination'. The right to conserve and protect their environment is also linked with the right to maintain traditional knowledge and cultural practices, as provided for in Articles 8 and 31 UNDRIP, with these practices being an integral part of indigenous livelihood and crucial to the realisation of fundamental human rights. The right has been interpreted from both Article 27 ICCPR and Article 15 ICESCR to mean that minorities and indigenous peoples have the right to participate, benefit from, and preserve national, collective and individual culture.⁵⁶ Cultural customs, practices, and traditions are at the core of indigenous communities and individuals.⁵⁷

The Kachung Central Forest Reserve Afforestation CDM project in Uganda highlights the important role of minority and indigenous peoples in protecting and conserving natural resources and the devastating impact of implementing projects with poor ecological knowledge.⁵⁸ Uganda is party to both ICCPR and ICESCR but has not adopted UNDRIP.⁵⁹ However, it is asserted that Uganda could, as a party to the African Charter and a member of the African Union (AU), be expected to conform with the advisory opinion of the African Commission on Human and Peoples Rights (ACHPR) that UNDRIP is compatible with 'similar provisions contained in many other instruments adopted by the AU'.⁶⁰ The Kachung CDM project was certified with the Forest Stewardship Council (FSC) and was validated under the Climate Community and Biodiversity Standard (CCBS), although the project design documents did not include any information regarding both the human and environmental history of the area.⁶¹ The project has evidenced forced evictions of farmers, infringement of

⁵⁵ ILO C169, arts 7(3) and 7(4)

⁵⁶ ICCPR, art 27; Art 15 ICESCR; CESCR General Discussion on the Right to Take Part in Cultural Life as Recognized In Article 15 of the Covenant, UN Doc E/C. 12/1992/SR.17 (1992), para.6

⁵⁷ Lucy Claridge and Alexandra Xanthaki, 'Protecting the right to culture for minorities and indigenous peoples: an overview of international case law', *State of the World's Minorities and Indigenous Peoples* (Minority Rights, 2016) <<https://minorityrights.org/wp-content/uploads/2016/07/Protecting-the-right-of-culture-for-minorities-and-indigenous-peoples.pdf>> accessed 8 May 2020

⁵⁸ Kristen Lyons and David Ssemwogerere 'Carbon Colonialism: Failure of Green Resources' Carbon Offset Project in Uganda' (The Oakland Institute, 2017) <[https://www.oaklandinstitute.org/carbon-colonialism-failure-greenresources-carbon- offset-project-uganda](https://www.oaklandinstitute.org/carbon-colonialism-failure-greenresources-carbon-offset-project-uganda)> accessed 8 May 2020

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⁶⁰ ACHPR (2007) 'Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples', adopted by the African Commission on Human and Peoples' Rights at its 41st Ordinary Session held in May 2007 in Accra, African Union <https://www.iwgia.org/images/publications/0460_ACHPR_Advisory_Op-UNDRIP_UK_2010.pdf> accessed 12 May 2020

⁶¹ Flora Hajdu, Oskar Penje and Klara Fischer, 'Questioning the use of 'degradation' in climate mitigation: A case study of a forest carbon CDM project in Uganda', (2016) 59 *Land Use Policy* 412-422; Giles Dufresne, 'The Clean Development Mechanism: Local Impacts of a Global System' (*Carbon Market Watch*, October 2018) <<https://carbonmarketwatch.org/publications/the-clean-development-mechanism-local-impacts-of-a-global-system/>> accessed 8 May 2020

indigenous peoples' rights to land, as well as pesticide pollution of land and adjacent watercourses.⁶² Impacts on the environment have included chemical runoff that has destroyed vegetation and killed animals; the replacement of biodiverse ecosystems with monoculture tree plantations has devastated the habitats of vital insects, birds, and other animals.⁶³ These negative environmental impacts have had direct consequences for vital livelihood activities and have increased levels of hunger and poverty in local villages.⁶⁴ The project illustrates the critical need for impact assessments prior to implementation of a project, and social and environmental safeguards during its operation. The local indigenous peoples had maintained a fragile ecosystem, developed an intricate understanding of the biodiversity present, and understood how to protect it; this was completely undermined by the external CDM project implementors.⁶⁵

The CDM Xacbal Hydroelectric Project in Guatemala evidences a disregard for the cultural and spiritual value of minority and indigenous lands.⁶⁶ Central to the abundance of human rights violations in this case is the infringement of the local Mayan-Ixil inhabitants', right to conserve and protect their own environment using traditional practices.⁶⁷ Guatemala is party to the ICESCR, the ICCPR, and the American Convention on Human Rights, and voted in favour of the UNDRIP. Most importantly, Guatemala has ratified the legally binding ILO C169, and therefore the State is under a legal obligation to respect indigenous peoples' right to own and protect their lands and natural resources. This right is further bolstered by their commitment to UNDRIP, which provides for a positive duty to establish programmes to aid indigenous peoples in protecting their environment..⁶⁸ The reported deforestation, landslides, and impairment of water and river resources caused by the construction on the project constitutes a violation of the Mayan-Ixil's legal right to protect and conserve their own environment and natural resources, contained in Article 15 ILO C169. Furthermore, the failure of the Guatemalan State to assess the impact of the project on the indigenous community and the failure to ensure protection of the territorial environment infringes Article 7 ILO C169, as set out above. The blocked access to spiritual sites includes the archaeological and

⁶² Frida Arounsavath and Sanjida Shamsher, 'Lessons Learned from Kachung' (*SwedWatch*, 5 November 2015) <<https://swedwatch.org/uncategorized/lessons-learned-kachung/>> accessed 28 April 2020

⁶³ Giles Dufrasne, 'The Clean Development Mechanism: Local Impacts of a Global System' (*Carbon Market Watch*, October 2018) <<https://carbonmarketwatch.org/publications/the-clean-development-mechanism-local-impacts-of-a-global-system/>> accessed 8 May 2020

⁶⁴ *ibid*

⁶⁵ *Ibid*

⁶⁶ *Ibid*

⁶⁷ *Ibid*

⁶⁸ *Ibid*

ceremonial site, Panchita, the Ixil population's oldest site, evidencing a disregard for the cultural rights enshrined within UNDRIP.⁶⁹

Considering the extensive impact on their livelihood and the irreversible damage caused by CDM projects, the exclusion of local minorities and indigenous peoples is a concerning commonality throughout these case studies. The patterns of land rights violations highlight the importance of meaningful consultation with local indigenous communities and the need to ensure their inclusion in the planning and operation of carbon market initiatives.

3.2. Right to health, water and food and an adequate standard of living

This section identifies common violations of minority and indigenous peoples' social and economic rights in carbon market projects, with a distinct focus on the right to health. This section first sets out the legal structure of the right to health and to an adequate standard of living, and then highlights violations of the right within the Alto Maipo hydropower project in Chile and the Adani Mundra project in India. Article 11 ICESCR contains the right of everyone to 'an adequate standard of living' and Article 12 ICESCR asserts that everyone has a right to the 'highest attainable state of physical and mental health'. The right to health is an inclusive right, with the CESCR recognising a number of 'underlying determinants of health' such as safe food, adequate nutrition and housing, healthy working and environmental conditions, safe drinking water, and adequate sanitation.⁷⁰ Importantly, Article 29(3) UNDRIP provides that measures be taken to ensure that the health of indigenous peoples are taken care of if affected by anthropogenic activities linked to the environment.

The construction of the Alto Maipo hydropower project provides a clear illustration of the negative impacts of large-scale CDM projects on local populations basic rights to food, water, and a safe and healthy environment; by extension, their right to health.⁷¹ The project is comprised of two hydroelectric facilities that use the natural flow of the river to generate electricity and have rerouted 100km of the Maipo river away from many settlements, notably

⁶⁹ Giles Dufrasne, 'The Clean Development Mechanism: Local Impacts of a Global System' (*Carbon Market Watch*, October 2018) <<https://carbonmarketwatch.org/publications/the-clean-development-mechanism-local-impacts-of-a-global-system/>> accessed 8 May 2020

⁷⁰ United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: *The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, UN Doc E/C.12/2000/4

⁷¹ Center for International Environmental Law, 'Chile's Alto Maipo Hydroelectric Project' (2017) <https://www.ciel.org/wp-content/uploads/2017/02/FactSheet_AltoMaipo_Chile.pdf> accessed 28 February 2020

the city of Santiago and the local commune of San Jose de Maipo.⁷² The river is the primary source of water for both these major communities and local indigenous settlements. As a party to ICESCR and the American Convention on Human Rights, and a supporter of UNDRIP, there is a fabric of legal protection over the rights of local minority and indigenous peoples to health and a healthy environment. Falling under this right to health, and central to all the rights violations evidenced in this case, is the fundamental right to water. The intrinsic and vital link between access to water and the right to health has been recognised by the CDESCR, who have affirmed that water ‘is indispensable for leading a life in human dignity’ and ‘is a prerequisite for the realization for other human rights’.⁷³ The construction of the Alto Maipo project has already severely impacted the local water supply, and will continue to endanger the quality and availability of safe water to nearby settlements, thus constituting a violation of the communities’ right to water.⁷⁴ Construction has also impacted the land used for grazing by local communities and negatively impacted agriculture.⁷⁵ This interference with the local populations’ lands and water supply has not only infringed their right to food, water, and sanitation, but also has irreversible consequences on the economic development of the villages, with local industries such as livestock, beekeeping, and tourism being destroyed.⁷⁶

The Adani Mundra CDM project has been found to compromise the rights to food, water, and a healthy environment of the local minority Muslim population, the Wagner.⁷⁷ India is party to the ICESCR and is, therefore, bound by the negative responsibility to respect the right to health, as well as the positive obligations to actively protect and fulfil. The duty to respect includes the obligation to refrain from activities that are detrimental to health, such as environmental pollution.⁷⁸ As well as being contained within Article 11 of the ICESCR and recognised as a determinant of the right to health, the right to adequate food has been defined

⁷² Center for International Environmental Law, ‘Lessons from CDM-Registered Alto Maipo Hydroelectric Project: Impacted Communities Emphasize that Any Agreement on Climate Action Must Protect Human Rights & the Environment’ (9 December 2019) <<https://www.ciel.org/news/lessons-from-cdm-registered-alto-maipo-hydroelectric-project-impacted-communities-emphasize-that-any-agreement-on-climate-action-must-protect-human-rights-the-environment/>> accessed 28 April 2020

⁷³ United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: *The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, UN Doc E/C.12/2002/11

⁷⁴ Giles Dufrasne, ‘The Clean Development Mechanism: Local Impacts of a Global System’ (*Carbon Market Watch*, October 2018) <<https://carbonmarketwatch.org/publications/the-clean-development-mechanism-local-impacts-of-a-global-system/>> accessed 8 May 2020

⁷⁵ Center for International Environmental Law, ‘The Maipo Valley’s Hydroelectric Nightmare: When “Clean” Development Harms People and their Environment’, (26 November 2019) <<https://www.ciel.org/the-maipo-valleys-hydroelectric-nightmare/>> accessed 14 May 2020; In August 2019, the Chilean Government declared an ‘agricultural emergency’ in Chile due to a year of extreme drought and the threat of desertification, yet have allowed the construction of the Alto Maipo project to continue.

⁷⁶ Giles Dufrasne, ‘The Clean Development Mechanism: Local Impacts of a Global System’ (*Carbon Market Watch*, October 2018) <<https://carbonmarketwatch.org/publications/the-clean-development-mechanism-local-impacts-of-a-global-system/>> accessed 8 May 2020

⁷⁷ Falguni Joshi, ‘Local Realities of CDM Projects: A Compilation of case Studies’ (*Carbon Market Watch*, November 2013) <<https://carbonmarketwatch.org/publications/local-realities-of-cdm-projects-a-compilation-of-case-studies-2/>> accessed 10 May 2020

⁷⁸ Ibid

by the CESCR.⁷⁹ The construction phase of the project evidenced the destruction of grazing land and mangroves that local farmers and fisherman have relied on for decades, obstructing the local populations' access to food.⁸⁰ Since operation commenced, the coal-fired plant has emitted fly ash which has contaminated water sources and fish, rendering both unsafe to consume.⁸¹ Both the construction and operation of the power plant have violated the Wagner's right to food, right to water, and right to live in a healthy environment, as provided for in the ICESCR and General Comment No.12. The Indian government has failed in its legal obligation to ensure protection of these rights, in particular the positive duty to ensure that projects do not deprive access to food and the negative duty to respect individual's existing modes of accessing food.

These cases highlight the need for robust, rights-based social safeguards in CDM initiatives, with the projects outlined above shown to deprive the communities of resources that have been relied upon for years, directly infringing the rights to food, water, and health. Projects that are underpinned with ideals of promoting sustainable development and protecting the global interest of climate change cannot continue to operate in a way that undermines minority and indigenous peoples' development.

3.3. Rights of women within minority and indigenous communities

This section will focus on the rights of minority and indigenous women in the context of carbon market projects, first setting out the legal framework protecting women before outlining common modes of intersectional discrimination. Both UNDRIP and ILO C169 state that the content of each document must be applied without gender discrimination.⁸² The Beijing Declaration represents a compilation of progressive commitments that seek to advance women's rights.⁸³ Paragraph 32 of this Declaration provides that efforts must be intensified 'to

⁷⁹ United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999 E/C.12/1999/5; The Comment sets out that the right to food incorporates obligations to respect and protect 'existing access to adequate food', comprised of a negative duty 'not to take any measures that result in preventing such access' and a positive duty to 'ensure that enterprises or individuals do not deprive individuals of their access to adequate food'

⁸⁰ Falguni Joshi, 'Local Realities of CDM Projects: A Compilation of case Studies' (*Carbon Market Watch*, November 2013) <<https://carbonmarketwatch.org/publications/local-realities-of-cdm-projects-a-compilation-of-case-studies-2/>> accessed 10 May 2020

⁸¹ Ibid

⁸² UNDRIP art 2; ILO C169 art 3

⁸³ United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995

ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment'.⁸⁴

The 2017 Report of the Special Rapporteur on the rights of indigenous peoples highlights that the impacts of climate change are intrinsically gendered, with migration and water scarcity disproportionately affecting women and girls, as well as intensifying their vulnerability and susceptibility to exploitation.⁸⁵ These disproportionate impacts are inherent in the implementation of large-scale CDM projects, such as those outlined above, with a tendency to ignore the gendered dimension of projects. For example, women are more reliant on the surrounding natural resources, holding traditional knowledge of both conservation and food sources. CDM projects that use forced evictions from indigenous ancestral lands and damage the surrounding environment force women (who have a duty to feed their families) to travel further to find adequate food sources and seek alternative means of fulfilling their responsibilities.⁸⁶

The Bagepalli Biogas Programme in India is used as an example of a positive carbon market initiative.⁸⁷ The project involves the installation of 5,500 biogas units that produce cooking oil from cow dung for use in local households. The programme is relatively small in scale, has been heavily influenced by local communities and grassroots organisations, and has directly involved women at all stages.⁸⁸ In this sense, the project has adhered to the standards of consultation, participation, and FPIC. This involvement has resulted in women benefiting from carbon trading schemes, receiving an equitable share in the revenue generated from the CERs.⁸⁹ In addition to providing a regular income for the local women, the project has reduced the need for women to collect fuel and, therefore, improved general health and made more time available for women to engage in activities that facilitate economic empowerment. It is

⁸⁴ Paragraph 32 provides that barriers include 'such factors as race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous peoples'; State obligation to prohibit all discrimination against women and to effectively protect women against any act of discrimination is also contained within the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 1 March 1980, entered into force 3 September 1981) 1249 UNTS 13 [hereinafter CEDAW]

⁸⁵ United National Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples, 1 November 2017 UN Doc A/HRC/36/46; Gail Kalsson, 'Exposing the Gender Gaps in Financing Climate Change Mitigation – and Proposing Solutions' (Department for International Development, 2015) <<https://assets.publishing.service.gov.uk/media/57a0897fed915d622c000243/CDKN-Gender-Gaps-in-Financing.pdf>> accessed 12 May 2020

⁸⁶ For example, the Dutch Face Programme for Forestation in Ecuador; Raquel Nuñez and Gender CC, 'Tree Plantations, climate change and women' in Steffen B and Siddhartha D (eds) *Upsetting the Offset: The Political Economy of Carbon Markets* (Mayfly Books, 2009)

⁸⁷ Project 2591: Biogas CDM Project of Bagepalli Collie Sangha; Sreyamsa Bairiganjan, 'Bringing Clean Energy to Rural India: A Case Study of the Bagepalli CDM Biogas Project', Institute for Financial Management and Research, Centre for Development Finance Working Paper Series (December 2008)

⁸⁸ United Nations Development Programme, Global Gender and Climate Alliance, Gender Dimensions of the Clean Development Mechanism: Exploring the Gender Dimensions of Climate Finance Mechanism' (2010)

⁸⁹ United Nations Development Programme, Global Gender and Climate Alliance, Gender Dimensions of the Clean Development Mechanism: Exploring the Gender Dimensions of Climate Finance Mechanism' (2010)

also reported that children's school attendance has increased.⁹⁰ Fundamentally, the project has better respected the local communities' right to social, economic, and cultural development by ensuring participation in the development is non-discriminatory. Cooperation rather than conflict with the communities, as well as gender integration from the planning stages of the project, has ensured that the project benefits both the local population and the project implementors.⁹¹

The cases discussed throughout this section illustrate that the rights of minority and indigenous peoples are consistently violated in CDM projects, often stemming from a violation of the rights to self-determination and FPIC at the very start. Adequate impact assessments are crucial to any project, and must include the safeguarding of human rights, socio-economic wellbeing and the surrounding environment. The recognition of FPIC must be robustly monitored, with an accessible channel of communication between the indigenous communities and the project developers throughout all stages of a project.⁹²

⁹⁰ CDM Project Co-Benefits in Kolar District, India: Providing Rural Households with Low-Cost Energy Services, factsheet compiled by the UNFCCC Secretariat to highlight the types of co-benefits generated by the CDM.

⁹¹ Gail Kalsson, 'Exposing the Gender Gaps in Financing Climate Change Mitigation – and Proposing Solutions' (Department for International Development, 2015) <<https://assets.publishing.service.gov.uk/media/57a0897fed915d622c000243/CDKN-Gender-Gaps-in-Financing.pdf>> accessed 12 May 2020; other examples of gender-sensitive climate change mitigation projects include the Nepal Biogas Support Program, Household Energy and Universal Rural Energy in Mali and the Bogotá, Colombia TransMilenio Nus Rapid Transit System

⁹² World Indigenous Peoples Initiative to the UNSG Climate Action Summit, Commitments for Action on Climate September 23 2019 <http://www.iwgia.org/images/documents/Statements-support/FullStatement_ClimateSummit_UK.pdf> accessed 20 May 2020

4. The Paris Agreement

With the second implementation period of the Kyoto Protocol coming to an end this year, States parties to the UNFCCC have spent the past five years negotiating the post-2020 international climate regime, otherwise referred to as the Paris Agreement.⁹³ Entering into force in 2016, the Agreement has the overarching objective of strengthening the global response to the threat of climate change by ensuring that global temperature rise this century does not exceed 2°C above preindustrial levels, and pursuing the more ambitious goal of limiting temperature rise to 1.5°C.⁹⁴ In pursuance of these objectives, Article 6 sets down the foundation for a remodelled carbon market, and recognises the importance of non-market mechanisms. This section will outline the three mechanisms outlined within the text of Article 6 and explore initiatives proposed by minorities and indigenous peoples, as well as NGOs.

4.1. Human Rights in the Paris Agreement

The operative articles of the Paris Agreement contain no mention of minority or indigenous rights, nor any reference to human rights at all. The only explicit reference is contained within the preamble of the Agreement, acknowledging that:

climate change is a common concern of humankind' and States parties must '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 vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.⁹⁵

Under international law, the content of a preamble forms an integral part of an international legal document and should be considered when interpreting any of the substantive provisions that it precedes.⁹⁶ In this sense, Article 6 should be read in a way that is compatible with the overarching principles set out in the preamble. However, not including rights protections within the operative Articles and providing no explicit recognition of the role of minorities and indigenous peoples in mitigation and adaptation schemes has been widely criticised.⁹⁷ Case

⁹³ Adoption of the Paris Agreement, Decision 1/CP.21, in COP Report No. 21, Addendum, at 2, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016)

⁹⁴ Paris Agreement

⁹⁵ Paris Agreement, preamble

⁹⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

⁹⁷ Phillipe Cullet, 'The Kyoto Protocol and Vulnerability: Human Rights and Equality Dimensions' in Stephen Humphreys, *Human Rights and Climate Change* (Cambridge University Press, 2009) at 183 ; Sebastien Duyck,

studies of CDM and REDD/REDD+ projects have shown that implicit non-binding provisions are not sufficient to provide protection to local minority and indigenous communities.

4.2. Article 6

One of the most contentious features of the Paris Agreement is Article 6, otherwise known as the 'Paris rulebook'. With the aim of providing an 'integrated, holistic and balanced' framework that facilitates the achievement of State Parties' emissions reduction targets, Article 6 outlines three separate mechanisms for 'voluntary cooperation' that will allow for raised climate change ambition, as well as the promotion of 'sustainable development' and 'environmental integrity'.⁹⁸

The first market mechanism is contained within Articles 6(2) and 6(3), where guidelines are provided for internationally transferred mitigation outcomes (ITMO) to be used towards State Parties' achievement of their nationally determined contributions (NDC) to reducing climate change.⁹⁹ As negotiations stand, ITMO could refer to any sort of bilateral, regional, or multilateral trading or offsetting scheme; networks of carbon pricing mechanisms (such as an ETS); transfer of technology; or the provision of climate finance.¹⁰⁰ Within these frameworks, countries can negotiate agreements to transfer a portion of their NDC to another country, in exchange for mitigation outcomes. The structure of this mechanism is concerning, appearing to be a similar, more flexible model of the Kyoto Protocol's IETS. Further, REDD/REDD+ schemes (continued under Article 5 of the Paris Agreement) and the Sustainable Development Mechanism outlined in Article 6(4), are being suggested as sources of ITMOs.¹⁰¹ ITMOs establish Article 6 as a framework for carbon trading; continuing the market-based approach to mitigating climate change that has so poorly adhered to human rights standards.

Article 6(4) Paris Agreement establishes the second market mechanism, commonly being referred to as the Sustainable Development Mechanism (SDM). The SDM is intended to

'The Paris Climate Agreement and the Protection of Human Rights in a Changing Climate' (2015) 26(1) *Yearbook of International Environmental Law* 3-45; Sam Adelman, 'Human Rights in the Paris Agreement: Too Little, Too Late?' (2017) 7(1) *Transnational Environmental Law* 17

⁹⁸ Paris Agreement, art 6(1)

⁹⁹ Paris Agreement, arts 6(2) and 6(3); ITMOs are a new concept and the scope of what they will include is not yet established

¹⁰⁰ Indigenous Environmental Network and Climate Justice Alliance, 'Carbon Pricing: A Critical Perspective for Community Resistance – Building Solidarity Against the Threat of Linking Global Carbon Markets Volume 1' (October 2017) < <https://www.ienearth.org/wp-content/uploads/2017/11/Carbon-Pricing-A-Critical-Perspective-for-Community-Resistance-Online-Version.pdf>> accessed 18 May 2020

¹⁰¹ Romany Webb and Jessica Wentz, 'Human Rights and Article 6 of the Paris Agreement: Ensuring Adequate Protection of Human Rights in the SDM and ITMO Framework' (*Sabin Center for Climate Change Law, Colombia Law School*, May 2018) < <http://columbiaclimatelaw.com/files/2018/05/Webb-Wentz-2018-05-Human-Rights-and-Article-6-of-the-Paris-Agreement.pdf>> accessed 14 May 2020

replace the CDM and JI, with its objectives being to ‘promote the mitigation of greenhouse gas emissions while fostering sustainable development’ and to ‘incentivise and facilitate participation in the mitigation of greenhouse gas emissions by public and private entities authorised by a Party’.¹⁰² Importantly, the Paris Agreement expresses that States parties should build on practical experience from the Kyoto mechanisms.¹⁰³ However, the UNFCCC discussions surrounding the SDM raise concerns regarding the impact of the mechanism on human rights, with the architecture of the mechanism taking a similar shape to that of the CDM. Despite repeated violations of the right to FPIC and to participation in CDM projects, there is no indication that the new Article 6(4) mechanism will protect local stakeholders and indigenous communities. The inclusion of a mechanism that ensures effective stakeholder consultation is heavily advocated for amongst NGOs.¹⁰⁴

Article 6(8) Paris Agreement provides a formal framework for non-market climate cooperation between State parties. This mechanism is less well defined, but acknowledges the ‘importance of integrated, holistic and balanced non-market approaches’ as part of the framework assisting States parties in the implementation of their national determined contributions.¹⁰⁵ This mechanism has been left as broad and ambiguous; it could contain a range of non-market based activities and refer to mitigation, adaptation finance, technology transfer, as well as capacity-building approaches.¹⁰⁶

Human rights language needs to be integrated into the text of Article 6, with specific provisions that establish safeguarding processes, credible impact assessments, and accessible

¹⁰² Paris Agreement, Art 6(4); Gilles Dufrasne, ‘Building Blocks for a Robust Sustainable Development Mechanism’, (Carbon Market Watch, 2017) <https://carbonmarketwatch.org/wp-content/uploads/2017/05/BUILDING-BLOCKS-FOR-A-ROBUST-SUSTAINABLE-DEVELOPMENT-MECHANISM_WEB-SINGLE_FINAL.pdf> accessed 28 April 2020

¹⁰³ Paris Agreement

¹⁰⁴ Manolo Miranda, ‘Barro Blanco: Flooding begins on UN approved hydro dam as indigenous defenders are forcefully removed’ (Center for International Law, 24 May 2016) <<https://www.ciel.org/news/barro-blanco-flooding-begins-un-approved-hydro-dam-indigenous-defenders-forcefully-evicted/>> accessed 9 May 2020; Friends of the Earth Europe, ‘False Solutions to Climate Change’ <<https://www.foeeurope.org/false-solutions>> accessed 18 May 2020; Gilles Dufrasne, ‘Building Blocks for a Robust Sustainable Development Mechanism’, (Carbon Market Watch, 2017) <https://carbonmarketwatch.org/wp-content/uploads/2017/05/BUILDING-BLOCKS-FOR-A-ROBUST-SUSTAINABLE-DEVELOPMENT-MECHANISM_WEB-SINGLE_FINAL.pdf> accessed 28 April 2020; Sebastian Duyck and others, ‘Delivering on the Paris Promises: Combating Climate Change while Protecting Rights, Recommendations for the Negotiations of the Paris Rule Book’, (Center for International Environmental Law, 2017) <<https://www.ciel.org/wp-content/uploads/2017/05/Delivering-On-Paris-Web.pdf>> accessed 2 May 2020

¹⁰⁵ Jennifer Falcon, ‘False Solutions to Climate Change Flop at UN’s COP25 After Indigenous Uprising’ *Native News Online* (Madrid, 16 December 2019) <https://nativenewsonline.net/currents/false-solutions-to-climate-change-flop-at-uns-cop25-after-indigenous-uprising/?fbclid=IwAR1dWAJTUb_OZ7AA_HYTKkrT8rFcytss5dw2X7pm5jdKb90ocuiZaXePAJM> accessed 14 May 2020

¹⁰⁶ Center for International Environmental Law, ‘COP-25 Briefing Note: Integrating Human Rights in Climate Action’, (Climate Governance Note 2019/6, November 2019) <https://www.business-humanrights.org/sites/default/files/documents/CIEL%20BriefingNote_HRCCciel_COP25-final%2B.pdf> accessed 2 May 2020

grievance forums in all three mechanisms. Considering the violations that occurred under the operation of the CDM, an implicit reference to human rights protections is likely to be inadequate.

4.3. Initiatives Proposed by Minority and Indigenous Communities and other NGOs

The Anchorage Declaration, produced at the 2009 Indigenous Peoples' Global Summit on Climate Change, expressly rejects carbon trading. The Declaration calls on States to 'abandon false solutions to climate change that negatively impact Indigenous Peoples' rights, lands, air, oceans, forests, territories and waters'.¹⁰⁷ These include market based mechanisms such as carbon trading, the CDM, and forest offsetting schemes.¹⁰⁸ Despite the explicit message communicated throughout the Anchorage Declaration, the Paris Agreement provides for a remodelled carbon market structure. This section sets out proposed alternatives to the carbon market that better respect the rights of minorities and indigenous peoples, comparing these initiatives with the CDM projects discussed in section 3.

The REDD+ Indígena Amazónico (RIA) was created in Peru in 2010 by indigenous organisations in Latin America as a 'socially-acceptable alternative' to the UN REDD+ schemes in the Amazon Basin.¹⁰⁹ RIA retains the concept of reducing emissions through deforestation but removes the profit-based, carbon market dimension of REDD+. The principle of self-determination is a central element of the initiative, advocating for the full recognition of the local indigenous peoples, their collective rights, and their fundamental role in forest management. RIA recognises that sustainable forest management is more effectively achieved by indigenous peoples, with traditional indigenous concepts and practices combining 'productive use with simultaneous protection'. Further, the RIA recognises the decisive role played by women in adaptation and mitigation plans.¹¹⁰ The values underpinning the RIA initiative could supplant the current models of the CDM and REDD+, and recognise that indigenous peoples have an intricate knowledge of and relationship with the environment and are in the best position to lead emission-reducing initiatives. The case studies analysed in section 3 of this memorandum illustrate that external project investors fail to take local

¹⁰⁷ The Anchorage Declaration

¹⁰⁸ Ibid, para 6

¹⁰⁹ UN REDDY, A Critical Look at the REDD+ and Indigenous Strategies for Comprehensive Forest Protection, Climate Alliance of European Cities with Indigenous Rainforest Peoples in cooperation with Climate Alliance Luxembourg/ASTM (Action Solidarité Tiers Monde), (2015); The initiative was developed by the Interethnic Association for the Development of the Peruvian Rainforest (AIDSESP) and the Coordinator of Indigenous Organizations of the Amazon River Basin (COICA)

¹¹⁰ Ibid

populations into account, have little understanding of the surrounding ecosystems, and repeatedly undermine the synergy between indigenous peoples and the earth.

Advanced by a global alliance of farmers, growers, consumers and activists, food sovereignty is presented as a system that can contribute to halting the effects of climate change, whilst also protecting the rights of minority and indigenous peoples.¹¹¹ Food sovereignty refers to the right of peoples to define their own food and agricultural systems and the right healthy food produced through sustainable methods, placing local stakeholders at the centre of project planning, ensuring that environmental decisions are made by those with the best understanding of the surrounding ecosystems and biodiversity.¹¹² La Via Campesina is one of the largest social movements for global food sovereignty.¹¹³ A central principle of the Via Campesina project is that large-scale projects are environmentally damaging and do not benefit the local communities. Evidence of this can be seen in projects such as the Kachung Forest Reserve in Uganda and the Adani Mundra in India, where the surrounding environments of minority and indigenous communities were irreversibly destroyed due to large-scale CDM projects. In both of these cases, the local populations' distinct symbiotic relationships with their surrounding ecosystems and natural resources were undermined. Instead, small-scale projects, such as food and energy sovereignty movements that harness traditional and scientific knowledge on both conservation and farming practices should be supported.¹¹⁴

Friends of the Earth (FOE) have advocated for over a decade that carbon trading and carbon offsetting are not the solutions to climate change, emphasising that 'regulation, taxation and subsidies are more effective at delivering the scale and speed of emissions reductions necessary to avoid catastrophic climate change'.¹¹⁵ Focusing particularly on the EU ETS, FOE believe that market mechanisms are too uncertain, ineffective and unfair to be tackling climate change, and call instead for States to implement stronger national climate laws, focus on developing renewable energy and restricting fossil fuel extraction. Above all, EU States and

¹¹¹ Via Campesina Views, 'Small-Scale Sustainable Farmers Are Cooling Down the Earth', (*GRAIN*, December 2009) <<https://www.grain.org/en/article/4163-small-scale-sustainable-farmers-are-cooling-down-the-earth>> accessed 18 May 2020

¹¹² Ibid

¹¹³ Global Justice, *The six pillars of food sovereignty* < <https://www.globaljustice.org.uk/six-pillars-food-sovereignty>> accessed 10 May 2020

¹¹⁴ Rinku Singh & G. S. Singh, 'Traditional agriculture: a climate-smart approach for sustainable food production', (2017) 2 *Energy, Ecology and Environment* 296-316; Patricia K. Mogomotsi, Amogelang Sekelemani and Goemeone E. J. Mogomotsi, 'Climate change adaptation strategies of small-scale farmers in Ngamiland East, Botswana' (2020) 159 *Climatic Change* 441-460

¹¹⁵ Friends of the Earth Europe, 'False Solutions to Climate Change' <<https://www.foeeurope.org/false-solutions>> accessed 18 May 2020

companies needs to make genuine emissions cuts, rather than attempting to offset emissions in the Global South.¹¹⁶

¹¹⁶ Jennifer Falcon, 'False Solutions to Climate Change Flop at UN's COP25 After Indigenous Uprising' *Native News Online* (Madrid, 16 December 2019) < https://nativenewsonline.net/currents/false-solutions-to-climate-change-flop-at-uns-cop25-after-indigenous-uprising/?fbclid=IwAR1dWAJTUb_OZ7AA_HYTkkrT8rFcytss5dw2X7pm5jdKb90ocuiZaXePAJM> accessed 14 May 2020

5. Conclusions and Recommendations

The impacts of climate change are inherently unjust and carbon market projects over the last 15 years have only intensified this inequality, as demonstrated through the case studies above. However, the carbon market is unlikely to be completely abandoned, with much of the academic literature and NGO reports instead focusing on ways to reshape the market to effectively respect the rights of local minority and indigenous stakeholders.¹¹⁷ Although this memorandum stresses the importance of alternatives, such as food and energy sovereignty movements, there is a reluctant recognition that UNFCCC State parties are, in the majority, pushing for a continuation of carbon trading under Article 6. Furthermore, the scheme is likely to go on because minorities and indigenous groups do not have a unified stance towards the carbon trading and offsetting schemes. While some groups perceive it as manipulative, others consider it a platform for income generation and development. Hence, this conclusion outlines some key policy proposals that should be integral to the modalities of a new carbon market framework:

- Projects that fall under the remit of the new SDM should be small-scale, community-based initiatives that benefit local stakeholders, particularly women, from the outset and are moulded around their livelihoods.
- All projects should be implemented with meaningful consultation and effective stakeholder participation, including minority groups, indigenous peoples and women within the community. Projects should operate under strict adherence to the standards of FPIC and empower local communities to lead and control the planning of initiatives. All consultation should be culturally appropriate, ensuring all information and meetings are is transparent, accessible and in all required languages.
- Activities under Article 6 should incorporate robust socio-economic and environmental safeguards. This should include comprehensive impact assessments carried out prior to any project development and include the knowledge of local minority and indigenous communities. Safeguards should be established under Article 6, and projects should demonstrate compatibility with such standards before being approved.

¹¹⁷ Sam Adelman, 'Human Rights in the Paris Agreement: Too Little, Too Late?' (2017) 7(1) *Transnational Environmental Law* 17; Center for International Environmental Law, 'COP-25 Briefing Note: Integrating Human Rights in Climate Action', (Climate Governance Note 2019/6, November 2019) < https://www.business-humanrights.org/sites/default/files/documents/CIEL%20BriefingNote_HRCCciel_COP25-final%2B.pdf> accessed 2 May 2020

- Article 6 must provide for an independent, accessible and equitable grievance mechanism. Local minority and indigenous peoples must have a forum in which to access redress and justice where they are harmed by a project.

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