

Office of the United Nations High Commissioner for Human Rights

4 November 2016

Comments and recommendations of OHCHR regarding the future UNFCCC Sustainable Development Mechanism

Introduction

The Office of the United Nations High Commissioner for Human Rights (OHCHR) welcomes the opportunity to provide input in response to the United Nations Framework Convention on Climate Change (UNFCCC) Subsidiary Body for Scientific and Technological Advice (SBSTA) call for submissions on the rules, modalities and procedures for the mechanism established by Article 6, paragraph 4, of the Paris Agreement (FCCC /SBSTA/2016/2, para. 100).

Article 6 of the Paris Agreement to the United Nations Framework Convention on Climate Change (UNFCCC) addresses voluntary cooperation between Parties involving “the use of internationally transferred mitigation outcomes towards nationally determined contributions.” Such cooperation should “promote sustainable development and ensure environmental integrity and transparency, including in governance, and shall apply robust accounting to ensure, inter alia, the avoidance of double counting.” (Art. 6.2). OHCHR believes that a transparent, fair, participatory and verifiable accounting system for emissions reductions that ensures against double-counting and inflated counting by Parties will be essential to the achievement of the objectives of the Paris Agreement.

1

This accounting system should apply to all mechanisms used to facilitate climate mitigation. Article 6.4 of the Agreement establishes “[a] mechanism to contribute to the mitigation of greenhouse gas emissions and support sustainable development.” The mechanism, commonly referred to as the Sustainable Development Mechanism (SDM), shall *inter alia* “promote the mitigation of greenhouse gas emissions while fostering sustainable development” and “incentivize and facilitate participation in the mitigation of greenhouse gas emissions by public and private entities authorized by a Party.” Since the 2030 Agenda for Sustainable Development has explicitly recognized that human rights are part of the foundation for sustainable development,¹ any action by parties to foster sustainable development must comply with their human rights obligations.

As described, the SDM has the potential to mobilize substantial resources to foster sustainable development, thereby, contributing to the fulfilment of State obligations to mobilize resources in order to prevent foreseeable human rights harms caused by climate change.² However, in order to achieve these objectives, the rules, modalities, and procedures for the SDM must honor the commitment of the Parties to the Paris Agreement to “respect, promote and consider their respective obligations on human rights” when taking action to address and mitigate climate change (preamb. para. 11).

¹ Transforming Our World: The 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1, paras. 10, 18 & 19.

² See OHCHR’s Key Messages on Human Rights and Climate Change at http://www.ohchr.org/Documents/Issues/ClimateChange/KeyMessages_on_HR_CC.pdf

To respect, promote and consider human rights, the SDM should aim beyond merely reducing emissions and should finance projects that will benefit those most vulnerable to the impacts of climate change. Approved projects should respect basic principles of climate justice including the commitments of Parties to protect future generations and to take action on climate change "on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities." Efforts to mitigate and adapt to the impacts of climate change should benefit all, in particular people living in developing countries, indigenous peoples, minorities, persons with disabilities, people in vulnerable situations, and future generations.

The importance of aiding developing countries is clearly articulated in Article 6 of the Paris Agreement which calls for "a share of the proceeds from activities under the mechanism... to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation." In order for the SDM to truly foster sustainable development it should ensure the equitable distribution of the benefits of its projects. At a minimum, SDM sponsored projects should do no harm.

A. The need for robust social and environmental safeguards consistent with international human rights norms and standards

In order for the SDM to achieve its objective of fostering sustainable development, Parties will need to ensure an adequate social and environmental safeguard system that guarantees the mobilization of resources to support climate action and does not infringe upon internationally recognized human rights.³ Development actors must exercise human rights due diligence to ensure their actions do not harm affected communities. Safeguards should play an important role in this regard. The Addis Ababa Action Agenda of the Third International Conference on Financing for Development, for example, encourages development banks "to establish or maintain social and environmental safeguards systems, including on human rights, gender equality and women's empowerment."(Para. 75).

2

Although not a development bank per se, the role of the SDM in facilitating large development projects is in many ways analogous to that of a development bank. Important lessons can be drawn from both the experiences of multi-lateral development banks and those of other climate financing mechanisms. Past experience have demonstrated that without strong human rights safeguards in place internationally financed development activities can contribute to human rights violations and failed projects.⁴ Indeed, even in the presence of safeguards, human rights violations may still occur where the safeguards or their implementation is inadequate.

According to the United Nations Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, "failing to include safeguards [in the SDM] will result in controversy that can derail projects... and harm the very people that the

³ For more information about safeguards, *see generally* OHCHR's Submission of 15 March 2016 on the Review and Update of the World Bank's Safeguards Policies, Comments and recommendations of UN/OHCHR in relation to the draft Environmental and Social Framework available at: https://consultations.worldbank.org/Data/hub/files/20160315_memoandum_ohchr_esf_with_annexes.pdf (hereinafter OHCHR Submission on World Bank Safeguards 2015).

⁴ See OHCHR Submission on World Bank Safeguards 2015 at pp. 24 -25 (citing multiple cases in which "the early integration of human rights risk information and mitigation measures may well have helped MDBs avoid costly failures and harm to communities").

projects are supposed to help.”⁵ The Special Rapporteur’s submission of May 2016 to the SBSTA on this subject further describes the flaws and strengths of safeguards found in previous climate financing mechanisms and outlined several key criteria for safeguarding human rights in the SDM.

B. Minimum elements for a safeguard system consistent with international human rights norms and standards

Drawing upon this previous work, human rights norms, and past experiences, OHCHR calls upon all Parties to work together to ensure adequate social and environmental safeguards in the SDM consistent with international human rights standards. At a minimum, such safeguards should:

1. Include a general commitment to respect all human rights and do no harm, clearly stipulating that the SDM will not support projects likely to cause, contribute to or exacerbate the violation of internationally recognized human rights;⁶
2. Include an explicit commitment to equality and non-discrimination, including all relevant grounds of discrimination prohibited under international law, particularly indigenous peoples, minorities, older persons, children, migrants, women, persons living with disabilities and others who are disproportionately impacted by climate change, coupled with reinforced due diligence mechanisms to prevent project-related impacts from disproportionately affecting marginalized groups and ensure that they enjoy equal access to development resources and project benefits;
3. Incorporate a mitigation hierarchy in order to seek to avoid adverse effects on people and the environment wherever possible, and take measures, in consultation with affected parties, to mitigate unavoidable adverse impacts;
4. Require that project proponents conduct ex ante social and environmental impact assessments and risk classifications of all projects and ensure that their results are timely disclosed in an appropriate and accessible manner;
5. Ensure that project proponents meaningfully consult potentially affected communities and individuals at the beginning of and throughout planning processes and project implementation;
6. Incorporate specific safeguard requirements in relation to involuntary resettlement, including inter alia the recognition of the principle of resettlement as a development opportunity, the prohibition of forced evictions, the principle of land to land compensation and other appropriate resettlement compensation schemes, in accordance with international best practice and international human rights standards.

⁵ See submission of the United Nations Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment to the SBSTA (3 May 2016) on Human Rights and Safeguards in the New Climate Mechanism established in Article 6, paragraph 4 of the Paris Agreement available at: http://www.ohchr.org/Documents/Issues/Environment/Letter_to_SBSTA_UNFCCC_May2016.pdf

⁶ See e.g. the policy of the Adaptation Fund which calls for projects and programs supported by the Fund to be in compliance with all applicable domestic and international law, and “respect and where applicable promote” international human rights, and meet core labour standards as identified by the International Labour Organization.

7. Incorporate specific safeguard requirements in relation to indigenous peoples, including the recognition of their rights over the land and resources they have traditionally occupied or otherwise used, and the obligation to ensure that indigenous peoples are consulted with a view to obtaining their free, prior and informed consent, in accordance with international best practice and international human rights standards.
8. Incorporate specific safeguards regarding labour and working conditions, including occupational health and safety, in accordance with international best practice and international human rights and labour standards. Require that project proponents comply with fundamental rights and principles at work as affirmed in ILO standards and refrain from discriminating or retaliating against project workers who participate, or seek to participate, in workers' organizations and collective bargaining or alternative mechanisms. Require also that private security companies comply with international human rights standards including the UN Principles on the Use of Force and Firearms by Law Enforcement Officials.
9. Require that business enterprises respect human rights and exercise human rights due diligence in order to prevent negative impacts on human rights in line with the United Nations Guiding Principles on Business and Human Rights;⁷
10. Incorporate a mechanism to ensure the rights of all persons to freedom of association and expression in relation to proposed projects and protect individuals exercising these rights from retaliation;
11. Establish independent third-party monitoring mechanisms, including community-based mechanisms; and
12. Establish independent non-judicial grievance mechanisms, which may include project-level mechanisms that are legitimate, accessible, predictable, equitable, transparent and rights-compatible.

⁷ Where States incorporate private financing or market-based approaches to climate change within the international climate change framework, including in the Paris Agreement, the compliance of businesses with these responsibilities is especially critical. In working together, States and businesses should incorporate social, environmental, labour, human rights and gender equality considerations into their activities and subject public private partnerships to human rights safeguards and rigorous due diligence, including human rights impact assessments.