

**JOINT SUBMISSION ON THE RULES, MODALITIES AND PROCEDURES FOR THE
SUSTAINABLE DEVELOPMENT MECHANISM**

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The Center for International Environmental Law, Business & Human Rights Resource Centre, Carbon Market Watch, CIDSE, European Association of Geographers, Forests of the World, Foundation for GAIA, Hawai'i Institute for Human Rights, Human Rights Watch, Indigenous Environmental Network, Indigenous Livelihoods Enhancement Partners, International Movement ATD Fourth World, Jeunes Volontaires pour l'Environnement, Norges Naturvernforbund (Friends of the Earth Norway), OCEANIA Human Rights, Parabukas, Planetary Association for Clean Energy, Rainforest Foundation Norway, and Stand Up For Your Rights respectfully make the following submission on views related to the rules, modalities and procedures for the mechanism established by Article 6, paragraph 4, of the Paris Agreement (referred to as the “Sustainable Development Mechanism” or “SDM”).

The impacts of climate change—as well as the responses taken to address climate change—are affecting the enjoyment of fundamental, internationally recognized human rights as well as the health and integrity of ecosystems. In light of these threats, urgent and ambitious action is required to minimize and halt the impacts of climate change and to ensure that mitigation measures respect human rights and maintain ecological integrity. In the development of the SDM, the Parties should learn from past experience with previous mechanisms (e.g. CDM, REDD+), while taking a transformative and rights-based approach that will help to achieve sustainable, low carbon development.

It is important to note that the design of some offset projects under the CDM has been fundamentally flawed. Past experience shows that CDM projects: have not prioritized sustainable development in the countries most in need; have led to perverse incentives in developing countries; and have shifted where emissions occur rather than promoting fundamental changes in emissions patterns to limit warming to well below 2°C toward 1.5°C. In addition, the CDM has had a varied record on stakeholder engagement and human rights more generally.

The integrity of the Paris Agreement requires that Parties close any loophole in its rules, modalities and procedures to ensure the accountability of all actors with regards to their commitments under the Paris Agreement and other international obligations. As such, this submission addresses (1) the overarching principles that should inform the development and implementation of the SDM; (2) the experiences and lessons learned from the Clean Development Mechanism; and (3) how the SDM should take a transformative and rights-based approach to financial transfers in a manner that enhances overall ambition.

Guiding principles in the development and implementation of the SDM

For effective and sustainable outcomes in the SDM, Parties need to design rules, modalities and procedures to: ensure ecological integrity and biodiversity protection; protect human rights; promote equity, equality and non-discrimination; and maximize public participation, transparency, and accountability.

With respect to the role of the private sector, the Parties should establish rules regulating business conduct to ensure that their operations promote sustainable development benefits and do not result in human and environmental harms. All private sector participants in the SDM should be required to fulfill their responsibilities to respect human rights as provided for in the UN Guiding Principles on Business and Human Rights.

Given that all Parties to the UNFCCC are also Parties to one or more international human rights treaties as well as biodiversity-related treaties, the duties of States under the UNFCCC are reinforced and complemented by obligations to respect human rights and protect biodiversity and wild fauna and flora. As set forth in the Paris Agreement, the Parties to the UNFCCC have recognized and strengthened their commitment to human rights, indigenous peoples rights, ecosystem integrity and biodiversity 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,

Noting the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity [...] when taking action to address climate change,¹

This language sends a clear signal to the Parties to the UNFCCC that climate actions—including the newly established Sustainable Development Mechanism—should be designed, implemented and monitored in a manner that protects ecosystem integrity and biodiversity and respects the full and effective enjoyment of human rights, including the rights of indigenous peoples and the rights of access to information, public participation, and access to justice. For example, in order to respect participatory rights, States should address climate change through transparent processes that enable the full and effective participation of all affected communities, including indigenous peoples and vulnerable and marginalized groups.

¹ UNFCCC, Paris Agreement, preambular paras. 11 and 13, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015).

Experiences and Lessons Learned from the Clean Development Mechanism

By encouraging investments that achieve emission reductions additional to what would otherwise have occurred, the Clean Development Mechanism was intended to (1) reduce greenhouse gas emissions and (2) promote sustainable development in developing countries. However, the CDM has been widely criticized for failing to achieve both mitigation and sustainable development outcomes, and described as an “example of how the principles behind 'results based financing' should not work.”² Further, in certain instances, CDM projects have contributed to human rights abuses.

There are several inherent and systemic flaws that have been identified:³

- **Many CDM projects would have happened anyway.** It is nearly impossible to show that most CDM projects would not have happened without the offset finance—in other words, that they are “additional”. The US Government Accountability Office’s (GAO) 2008 review of offsets stated “it is impossible to know with certainty whether any given project is additional.” The net effect is that greenhouse gas emissions are increasing because the CDM credit allows the developed country to continue polluting.
- **There are no guarantees of emissions cuts.** CDM projects cannot guarantee carbon cuts, and often exaggerate claims about the amount they will cut. Any system of credits for reductions against a hypothetical business-as-usual scenario is inherently prone to bias and questionable claims of certainty. Even if a project were additional, it is often impossible to accurately calculate exactly how much carbon a project is saving. This is because credits are calculated by judging action against alternative hypothetical futures – a guess of what might have happened.
- **CDM projects have not delivered benefits for developing countries.** In many cases, the CDM has not helped developing countries take a low-carbon path. In fact, many CDM projects subsidized carbon-intensive industries, including financing fossil-fuel power stations. In addition, the financial flows involved are far lower than those required to adequately or effectively support low-carbon development.

² Søren E. Lütken, UNEP DTU Partnership, *The Clean Development Mechanism Re-engineered* (Feb. 2016) at 5, at http://www.unepdtu.org/-/media/Sites/Unepriose/Working%20Papers/Working-Paper-12_-complete.ashx?la=da.

³ See e.g. CDM Policy Dialogue, *Climate Change, Carbon Markets and the CDM: A Call to Action* (Sep. 2012), at <http://www.cdmpolicydialogue.org/report/rpt110912.pdf>; Christina Voigt, *Is the Clean Development Mechanism Sustainable? Some Critical Aspects*, SUSTAINABLE DEVELOPMENT LAW & POLICY, Winter 2008, 15-21, 82-84, at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1173&context=sdlp>; International Rivers, *Rip Off-sets: The Failure of the Kyoto Protocol's Clean Development Mechanism* (Nov. 2008), at https://www.internationalrivers.org/sites/default/files/attached-files/cdm_factsheet_low-rez.pdf.

- **CDM projects have not provided benefits to countries with the greatest need, given that most CDM projects are in emerging economies.**

Despite the emphasis on the “need to promote equitable geographic distribution of clean development mechanisms project activities at regional and sub regional levels,”⁴ emerging markets have dominated the CDM while least developed countries (LDCs), particularly those in sub-Saharan Africa, have largely been absent. According to the UNFCCC, approximately 75% of registered projects have been in four countries (specifically Brazil, China, India and Mexico) compared to only 2% in sub-Saharan Africa.⁵

- **There is evidence of ecological and human rights abuses in CDM projects.** As the High-Level Panel for the CDM Policy Dialogue recognized, the CDM’s reputation is under attack in part due to claims of ecological and human rights abuses.⁶ Numerous concerns have been raised about human rights violations related to CDM projects. Despite these concerns and ongoing investigations in some cases, projects continue to be registered under the CDM without adequate safeguards to prevent harms and means of recourse to address harms once they occur. Three examples of such projects are the Bajo Aguán biogas project in Honduras (Project 3197), the Barro Blanco hydropower project in Panama (Project 3237), and the Sasan coal power project in India (Project 3690).⁷

SDM should take a transformative and rights-based approach to financial transfers

The SDM should take a transformative approach to financial transfers in a manner that enhances overall ambition. This means that contributing to a net decrease in global emissions should be prerequisite for the international transfer of carbon credits under the Paris Agreement, thereby ruling out offsetting as we have known it.

A net decrease is achieved when international transfers lead to emission reductions *beyond current pledges*.⁸ To achieve this, transferred mitigation outcomes need to go beyond host country pledges, and at least in part be canceled (not credited) by the recipient country. Specific rules, modalities and procedures for achieving net reductions must not place the

⁴ UNFCCC, *Decision 17/CP.7: Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol*, U.N. Doc FCCC/CP/2001/13/Add.2 (Jan. 21, 2002), at 20, at

http://cdm.unfccc.int/Reference/COPMOP/decisions_17_CP.7.pdf.

⁵ UNEP Risoe Center, *CDM Projects by Host Country*, available at <http://cdmpipeline.org/cdm-projects-region.htm>.

⁶ CDM Policy Dialogue, *Climate Change, Carbon Markets and the CDM: A Call to Action*, at 56.

⁷ For additional examples of CDM case studies, please visit: <https://business-humanrights.org/en/case-studies-renewable-energy>.

⁸ SEI, *Potential for International offsets to provide a net decrease in emissions* (2013), at 4, at <https://www.sei-international.org/mediamanager/documents/Publications/Climate/SEI-WP-2013-06-New-Market-Mechanisms.pdf>.

burden on vulnerable countries, through, for example, host country liability, discounting and buffer contributions. Such rules should consider recipient country cancellation of credits and discounting. Dramatically increased accountability, transparency, public participation and rights protections are necessary steps to ensure fair and effective rules, modalities and procedures that facilitate financial transfers for mitigation action that enhance ambition and contribute to sustainable development.

The following recommendations contribute to a transformative and rights-based approach in the context of the SDM:

The SDM should ensure that the mechanism contributes to sustainable development. The SDM modalities and procedures should develop clearly defined international safeguard policies to be applied as a condition of eligibility prior to project approval and throughout the project cycle. These policies must be consistent with the guiding principles of the Paris Agreement as well as with international obligations, including human rights, indigenous peoples rights, biodiversity and sustainable development frameworks, and give special attention to the most vulnerable and marginalized groups, such as women, children, people with disabilities, minorities, indigenous peoples, and people living in extreme poverty. They should draw on the positive aspects of the REDD+ safeguard policies. In addition, the process of establishing these policies should be open for consultation, including targeted outreach to affected stakeholders.

The SDM should develop a negative list of project types to be excluded. The SDM rules, modalities and procedures should include an exclusion list of project types that are so contrary to sustainable development that they should not be eligible for inclusion.

The SDM should develop a system for monitoring and reporting of the safeguard policies. The SDM modalities and procedures should require monitoring and reporting of both compliance with the safeguard policies and outcomes of SDM projects consistent with Parties' human rights obligations. These requirements should apply throughout project implementation. The SDM should look to the experiences on monitoring and reporting in REDD+ as it develops these policies.

The SDM should provide opportunities for public participation at both the policy and project levels. The SDM should establish clear guidance for project developers on how to conduct local and global stakeholder consultation processes to ensure meaningful and effective participation and protect the rights to consultation and to free, prior and informed consent. Among other things, the SDM modalities and procedures should provide rules describing how and when to conduct local stakeholder consultations, i.e., location, scope, contents, frequency, accessibility and timeline of public consultation meetings.

The SDM should establish an effective grievance process to provide a means of recourse for indigenous peoples and local communities adversely affected by SDM projects. The SDM should establish a grievance process that will consider and address

concerns raised by local stakeholders regarding the social and environmental impacts of SDM projects, for example, by considering concerns regarding a project's failure to comply with sustainable development criteria. Individual projects registered under the SDM should be required to have in place a grievance process in line with the effectiveness criteria outlined under Principle 31 of the UN Guiding Principles on Business and Human Rights.