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Human rights and the Clean Development Mechanism

Lessons learned from three case studies

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Human rights and the Clean Development Mechanism: lessons learned from three case studies

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Human Rights and the Clean Development Mechanism: Lessons Learned from Three Case Studies

Wolfgang Obergassel, Lauri Peterson, Florian Mersmann, Jeanette Schade, Jane Alice Hofbauer, Monika Mayrhofer

This article analyses human rights implications of projects under the Clean Development Mechanism (CDM) of the United Nations Framework Convention on Climate Change (UNFCCC). While the CDM is likely to expire in the near future, the experience gained should be used to inform the rules of the new mechanism to be established under the 2015 Paris Agreement. We argue that the CDM and the new mechanism, as international organisations under the guidance of UNFCCC member states, should apply the UN Guiding Principles on Business and Human Rights. Based on the experience drawn from three case studies (two hydro power projects in Barro Blanco, Panama, and Bujagali, Uganda, and one geothermal energy project in Olkaria, Kenya), we show that CDM projects, while in formal compliance with CDM rules, can lead to a number of human rights infringements. We conclude with a number of recommendations on how to achieve a greater recognition of human rights in the new mechanism under the Paris Agreement.

Keywords: Climate policy, human rights, Clean Development Mechanism, involuntary resettlement

1 INTRODUCTION

Mitigation of climate change requires large-scale investments in a range of projects in the near future, which—as is the case with all large-scale projects—have a high potential to infringe human rights.¹ The preamble of the 2015 Paris Agreement acknowledges that ‘Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity’.²

Human rights implications of international climate policy are not, though, only a matter for those states acting as hosts to concrete actions. In particular, climate-related actions in developing countries usually involve inter- and transnational (non-state) actors such as bilateral and multilateral development agencies and banks as well as private project implementers—a convergence of actors raising the question of extraterritorial human rights responsibilities.³

This paper analyses one international climate mechanism, the Kyoto Protocol’s Clean Development Mechanism (CDM), from a human rights perspective. The CDM was chosen because it is so far the largest international mitigation policy instrument for developing countries, and has about 7,700 registered projects.⁴ Moreover, accusations of human rights violations such as forcible evictions have accompanied the mechanism from the beginning,⁵ making it a particularly salient focus for a human rights analysis.

The CDM is likely to expire together with the Kyoto Protocol’s second commitment period, which ends in 2020. However, the 2015 Paris Agreement establishes a new ‘mechanism to contribute to the mitigation of greenhouse gas emissions and support sustainable development’.⁶ The decision by the Parties to the UNFCCC to adopt the Paris Agreement specifies that the rules for this mechanism are to be developed on the basis of, inter alia, ‘[e]xperience gained with and lessons learned from existing mechanisms’.⁷ Therefore, despite the fact that the CDM has only a limited lifetime left, an analysis of the mechanism can provide worthwhile input to the development of new mechanisms.

The present article first outlines relevant human rights norms and discusses obligations of state and non-state actors in extraterritorial activities. Next, the article analyses the extent to which extent human rights norms are considered by the CDM’s rules.

¹ UNHRC, ‘Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights’ (2009) A/HRC/10/61, 22ff. <<http://www.refworld.org/docid/498811532.html>> accessed 15 May 2015.

² United Nations, Paris Agreement, Preamble’, (United Nations 2015)

³ Extraterritorial responsibilities here are meant as those responsibilities of (non-state) actors that arise from activities outside the direct jurisdiction of their parent state (see also section 2.2 of this paper).

⁴ UNFCCC, ‘CDM: CDM-Home’ (cdm.unfccc.int, 2016) <<http://cdm.unfccc.int>> accessed 7 November 2016.

⁵ See e.g. Heidi Bachram, ‘Climate Fraud and Carbon Colonialism: The New Trade in Greenhouse Gases’ (2004) 15 *Capitalism Nature Socialism*; Larry Lohmann, *Carbon Trading: A Critical Conversation on Climate Change, Privatization and Power* (Dag Hammarskjöld Foundation, Uppsala 2006).

⁶ United Nations 2015 (n. 2), Art. 6.4.

⁷ UNFCCC, ‘Decision 1/CP.21, Adoption of the Paris Agreement. FCCC/CP/2015/10/Add.1, 29 January 2016, para 38’, (UNFCCC 2015)

The article then examines three CDM projects, the Barro Blanco hydropower project in Panama, the Bujagali hydropower project in Uganda and the Olkaria geothermal project in Kenya. These three cases were selected because they involve international actors and have recurrently been the subject of media reports concerning human rights allegations in the context of associated resettlement measures. As such, they provide useful sites for a detailed discussion of extraterritorial obligations.

The research approach applied in each case was a human rights impact assessment consisting of desk and field research, including interviews with key stakeholders and focus group discussions. The three cases were first extensively researched for written evidence in a desk-top research exercise. The findings from this stage then fed into a preliminary report that hypothesized possible infringements of human rights. The team then conducted field missions to each case study site, and conducted interviews and focus group discussions with a large number of different stakeholders. The interviewees included individuals directly affected by the projects, project developers, government officials involved in project approval and development, non-governmental organisations, and representatives of the bi- and multilateral donor organisations and banks involved in project finance. Finally, the article discusses procedural steps and institutional settings useful for the prevention of future human rights problems in future projects.

2. HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS: LARGE-SCALE INVESTMENT, HUMAN RIGHTS NORMS AND STATE OBLIGATIONS

Large-scale development investments very often involve displacement and resettlement of local populations, with consequent impacts on their livelihoods. According to estimates, about 15 million people are evicted worldwide each year as a result of infrastructure programmes (dams, urbanization, roads, etc.).⁸ Displacement and planned relocation frequently lead to 'interlocking disadvantages'⁹ that limit people's opportunities to maintain and improve their livelihoods, undermine their assets and capabilities and increase the risks they face. As a consequence, relocation frequently impairs the enjoyment of substantive human rights, such as the right to housing, food, water, health and property, as well as civil and political rights, such as the right to self-determination and to participation in decision-making.¹⁰ In order to prepare the ground for the following analysis, the following briefly outlines the most pertinent human rights affected in the case studies.

An important human right that protects local people from arbitrary evictions is the right to property, which makes expropriations conditional upon demonstrable public interest and

⁸ Anthony Oliver-Smith (ed.), *Development & Dispossession: The Crisis of Forced Displacement and Resettlement* (School for Advanced Research Press 2009).

⁹ Interlocking disadvantages "include a variety of forms of exclusion, discrimination and disempowerment, which in turn determine people's ability to access natural resources, social networks, education, health care, as well as labour, commodity and financial markets." quoted from Jeanette Schade and others, 'Climate Change And Climate Policy Induced Relocations: A Challenge For Social Justice' (International Organization for Migration (IOM) 2015), 3, <https://publications.iom.int/system/files/pdf/policy_brief_series_issue10_0.pdf> accessed 17 May 2016

¹⁰ *ibid*; Jeanette Schade and Wolfgang Obergassel, 'Human Rights And The Clean Development Mechanism' (2014) 27 *Cambridge Review of International Affairs* 717.

adequate compensation to those affected. The right to property is recognized by Article 17 of the Universal Declaration of Human Rights and by all regional human rights treaties. Moreover, this right relates to the question of secure land ownership during controversial development projects, a relationship acknowledged by CESCR General Comment No. 7, which notes that ‘forced evictions occur [also] in the name of development’.¹¹ The right to housing addresses this problem by defining ‘legal security of tenure’ to be part of the right.¹²

As set out in the UN Guiding Principles on Internal Displacement, Principle 6, displacement/evictions are allowed in certain circumstances, but this must be interpreted strictly. Relocations are permissible if the measure that necessitates it is justified by a compelling and overriding public interest. Principle 7 of the Guiding Principles stipulates that, where displacement is found to be unavoidable, measures must be taken to minimize it and its negative consequences. This obligation has *inter alia* led to the development of detailed guidelines by international organisations for carrying out relocations in the course of large-scale development projects, including prior environmental impact assessments.¹³

To safeguard against infringement of these substantive rights procedural norms are of high relevance. For example, the Inter-American Commission on Human Rights (IACHR) regards access to information, participation in decision-making processes, and access to legal remedies as crucial measures ‘to support and enhance the ability of individuals to safeguard and vindicate [their] rights’.¹⁴ Other treaty bodies have reached similar judgements.¹⁵ Indigenous peoples’ right to participation is protected by the non-binding UN Declaration on the Rights of Indigenous Peoples (UNDRIP) that declares that ‘no relocations shall take place without the free, prior and informed consent [FPIC] of the indigenous peoples involved’.¹⁶ FPIC has *inter alia* been endorsed by the treaty supervising bodies of the ICESCR and the International Convention on the Elimination of all Forms of Racial Discrimination (CERD).¹⁷ Procedural norms are particularly important in the context of this article. As will be argued below, the limited implementation of these norms is a core driver for the human rights infringements within the three case studies.

3.2 Extraterritorial obligations and obligations of foreign business actors

Implementing projects under the CDM and other international climate policy instruments in a specific country involves the engagement of foreign actors such as other states,

¹¹ CESCR, ‘General Comment No. 7: The Right to Adequate Housing (Art.11.1): Forced Evictions’ (UN Committee on Economic, Social and Cultural Rights 1997) para 7 <<http://www.refworld.org/docid/47a70799d.html>> accessed 27 May 2015.

¹² CESCR, ‘General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)’ (UN Committee on Economic, Social and Cultural Rights 1991) Sixth Session E/1992/23 para 8 <<http://www.refworld.org/docid/47a7079a1.html>> accessed 28 May 2015.

¹³ Walter Kälin, *Guiding Principles On Internal Displacement* (The American Society of International Law 2008), 26; 32; 36-41.

¹⁴ IACHR, ‘Report on the Situation of Human Rights in Ecuador’ (1997) FN34.

¹⁵ John H Knox, ‘Climate Change and Human Rights Law’ (2009) 50(1) *Virginia Journal of International Law* 198ff <<http://papers.ssrn.com/abstract=1480120>> accessed 28 August 2015.

¹⁶ UN, ‘United Nations Declaration on the Rights of Indigenous Peoples’ (UN General Assembly 2007) A/RES/61/295 <<http://www.refworld.org/docid/471355a82.html>> accessed 12 May 2015.

¹⁷ Tara Ward, ‘The Right to Free, Prior, and Informed Consent: Indigenous Peoples’ Participation Rights within International Law’ (2011) 10 *Northwestern Journal of International Human Rights* 54, 65.

international organisations, and foreign companies. While at least partly contested,¹⁸ the basic standpoint of the present article is that foreign states, and by extension the institutions and organisations they are members of, have the obligation to respect, protect and fulfil human rights in business dealings outside their direct territorial (or in the EU's case direct regulatory) boundaries.¹⁹ Following the UN Guiding Principles on Business and Human Rights (the 'Ruggie Principles'), endorsed by the Human Rights Council in June 2011, businesses based in states that are Parties to human rights treaties should in all their business dealings follow the rules set out by those treaties as well.²⁰

The Ruggie Principles state that 'At present states are generally not required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis'.²¹ The Ruggie Principles further stipulate that states should clearly set out the expectation that all business enterprises domiciled in their jurisdiction or territory must respect human rights; and put forward 'strong policy reasons' to regulate business activities abroad, particularly if the state is involved with or supports corporations operating abroad, e.g. through lending policies.²²

The Ruggie Principles also confirm that states 'retain their international human rights law obligations when they participate in [multilateral] institutions': states should seek to ensure that multilateral organisations do not restrain their members from respecting human rights; and should help other states to meet their duty to respect human rights.²³

In relation to businesses, a particularly important aspect for the present article is enshrined in principle 17: 'In order to identify, prevent and mitigate adverse human rights impacts, and to account for their performance, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, and tracking as well as communicating their performance'.²⁴ Principle 17 thus calls on businesses to generally conduct Human Rights Impact Assessments as part of their due diligence processes.

In summary, following the Ruggie Principles, since businesses are subject to national regulations in the countries they are based in, these countries need to ensure that human rights obligations are upheld in the dealings of those businesses both nationally and abroad.

¹⁸ ICCPR §(2)(1) sets out that the duty of a state to respect and ensure the rights recognized by the covenant is confined to "all individuals within its territory and subject to its jurisdiction".

The ICESCR contains no such paragraph limiting its jurisdiction. Instead, ICESCR Art. 2(1) states that each party to the Covenant undertakes steps 'individually and through international assistance and co-operation [...] with the view to achieving progressively the full realization of the rights recognized by the covenant [...] including particularly the adoption of legislative measures'.

¹⁹ OHCHR, 'Report of the Special Representative of the Secretary- General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (Office of the High Commissioner for Human Rights 2011) A/HRC/17/31 7. General Principles.

²⁰ *ibid.*

²¹ *ibid.*, Commentary to Principle 2.

²² *ibid.* 7, "The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation."

²³ *ibid.*, Commentary to Principle 10.

²⁴ *ibid.*, Principle 17.

Also, as states are the principals and constituents of international organisations, it is within their responsibility to ensure that international organisations respect uphold human rights in their work.

3 THE CLEAN DEVELOPMENT MECHANISM AND HUMAN RIGHTS

3.1 Standards of the Clean Development Mechanism

The aim of the CDM is defined in Article 12 of the Kyoto Protocol: to assist developing countries in achieving sustainable development and to assist industrialized countries in achieving compliance with the emission reduction commitments they adopted in the Protocol. The CDM issues Certified Emission Reductions (CERs) once a project has completed a pre-determined project cycle. Industrialized countries can count these CERs towards their Kyoto commitments. These countries may either be directly involved in the projects or, the usual model, simply purchase the CERs from private project operators.²⁵

The Marrakesh Accords (MA)²⁶ establish the detailed 'modalities and procedures' for the implementation of a CDM project.²⁷ The CDM is supervised by an Executive Board (the 'Board') and serviced by the UNFCCC Secretariat. If project participants wish to propose a project for the CDM, they need to prepare a Project Design Document (PDD) according to a template and regulations established by the Board. The PDD must be examined by a Designated Operational Entity (DOE)—a CDM-accredited independent certification company. The project also needs to be approved by the host country (where the project takes place) through its Designated National Authority (DNA) and—once CERs are to be sold—the countries importing the CERs. To be issued CERs, achieved reductions need to be monitored by the project participants and verified by another DOE.

While the CDM's modalities and procedures do not mention human rights, they require project participants to report on and to account for stakeholder comments and to report on the project's contribution to sustainable development. However, there are no internationally agreed CDM criteria for sustainable development, nor rules for how to conduct local stakeholder consultations. Developing countries rejected proposals for such standards and procedures as incompatible with their national sovereignty.²⁸

It is therefore up to host countries to define sustainable development criteria and procedures for local stakeholder consultations. Research has concluded that most host countries have rather general lists of non-binding guidelines instead of clear criteria and do not thoroughly investigate projects. Stakeholder consultations are often deficient.²⁹ Many

²⁵ Wolfgang Sterk and Christof Arens, 'Investing In Climate Protection. Project-Based Mechanisms CDM And JI' (Federal Ministry of the Environment, Nature Conservation and Nuclear Safety (BMU) 2010).

²⁶ The Marrakesh Accords contain detailed implementation rules for the Kyoto Protocol, particularly regarding emissions accounting and the functioning of the Kyoto Protocol's flexible mechanisms.

²⁷ Decision 3/CMP.1, FCCC/KP/CMP/2005/8/Add.1 of 30 March 2006.

²⁸ Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge University Press 2004).

²⁹ Emily Boyd and others, 'Reforming the CDM for sustainable development: lessons learned and policy futures' (2009) 12 *Environmental Science & Policy* 820; Karen Holm Olsen, 'The Clean Development Mechanism's

countries are thus seen as practicing market-enabling governance, rather than governance of the carbon market, with national authorities acting more like business developers than watch dogs.³⁰

Furthermore, all these processes take place before project implementation. The CDM rules contain no mechanisms for addressing problems that may not have been visible in the project design and approval phase. There also is no possibility to appeal Board decisions. The UNFCCC has been discussing the establishment of an appeals procedure, but the most recent draft decision text dates from December 2012 and has been pushed forward without further changes from meeting to meeting ever since. Controversial issues include the question of who would be allowed to appeal Board decisions and whether the right of appeal would cover project rejections only, or also cover approvals, and if so, on what grounds.³¹

Criticism of the lack of safeguards in the CDM has frequently been on the Board's agenda. Moreover, in 2011, the Board convened a High-Level Panel to conduct a CDM Policy Dialogue to identify avenues for improving the mechanism. The High-Level Panel recommended a list of actions to help ensure that CDM projects help achieve sustainable development. These actions include better assessment of projects; reporting, monitoring and verification of impacts throughout the lifetime of a project; enabling de-registration of projects with negative impacts; and establishing guidelines for local stakeholder consultations.³² Nonetheless, members from developing countries in particular repeatedly rejected such suggestions to strengthen rules as being incompatible with host countries' national sovereignty.³³

In 2015, the UNFCCC Secretariat produced a concept note on how to improve stakeholder consultations. The concept note recommended defining

- the scope of local stakeholder consultations as comprising both positive and negative impacts,
- the minimum group of stakeholders to be involved,

Contribution to Sustainable Development: A Review of the Literature' (2007) 84 Climatic Change 59; Lambert Schneider, 'Is the CDM Fulfilling Its Environmental and Sustainable Development Objective? An Evaluation of the CDM and Options for Improvement' (Öko-Institut 2007) <<http://www.oeko.de/oekodoc/622/2007-162-en.pdf>> accessed 14 April 2016; Wolfgang Sterk and others, 'Further Development of the Project-Based Mechanisms in a Post-2012 Regime' (Wuppertal Institute for Climate, Environment and Energy 2009) <http://www.carbon-mechanisms.de/fileadmin/media/dokumente/publikationen/cdm_post_2012_study_wi.pdf> accessed 14 April 2016.

³⁰ Böhm and others, 'Greening Capitalism? A Marxist Critique of Carbon Markets' (2012) 33 Organization Studies 1617; Jon Philips and Peter Newell, 'The governance of clean energy in India: The clean development mechanism (CDM) and domestic energy politics' (2013) 59 Energy Policy 654.

³¹ UNFCCC, 'Appeals mechanism, in: UNFCCC, Report of the Subsidiary Body for Implementation on its thirty-seventh session, held in Doha from 26 November to 2 December 2012. Addendum, FCCC/SBI/2012/33/Add.1, 7 March 2013, pp. 4-10 (UNFCCC 2013).

³² UNFCCC, *Climate Change, Carbon Markets and the CDM: A Call to Action, Report of the High-Level Panel on the CDM Policy Dialogue* (UNFCCC, Bonn 2012).

³³ Schade and Obergassel (n. 10).

- means for inviting stakeholders' participation,
- information to be made available to stakeholders and its format,
- how consultations shall be conducted,
- how project participants are to take comments into account,
- whether and how a second round of consultations should be carried out.³⁴

Based on this concept note, ninety-eight non-governmental networks, organizations and concerned citizens sent an open letter to the Executive Board, urging the Board to adopt the recommendations elaborated by the Secretariat. Furthermore, they urged the Board to develop a work programme to establish an independent accountability mechanism and international sustainable development criteria. They also urged that the UNFCCC Secretariat should be given a mandate to engage with the UN Office of the High Commissioner on Human Rights or special rapporteurs to ensure that concerns regarding human rights impacts of CDM projects are considered and addressed.³⁵ John Knox, UN Special Rapporteur on Human Rights and the Environment, similarly wrote a letter to the Executive Board, fully supporting the recommendations made by the UNFCCC Secretariat and the NGO letter.³⁶ In November 2015, the eighty-seventh meeting of the Board decided that if stakeholders submit comments on human rights concerns in projects, such information should be forwarded to the respective national authorities and to 'relevant bodies within the United Nations system', i.e. UN human rights bodies.³⁷

In addition, the Board approved a concept note on improving local stakeholder consultation processes. The Board mandated the UNFCCC Secretariat to draft amendments of the CDM's relevant regulatory documents for the consideration of the Board at a future meeting.³⁸ The Board considered draft revisions of the CDM standards at its ninety-second meeting in November 2016, including standards for stakeholder consultations. On this occasion the Board decided that the timing of local stakeholder consultations must be as required by host country rules, or before the start of the project if such rules do not exist. The Board also decided not to establish a deregistration process at this time. The Secretariat is to prepare a further draft revision of the CDM standards reflecting these decisions.³⁹

According to the decision adopted in November 2015, the scope of local stakeholder

³⁴ UNFCCC, 'Concept note, Improving stakeholder consultation processes, Version 01.0 (No. CDM-EB86-AA-A15)' (UNFCCC 2015).

³⁵ Open letter to implement UN obligations to respect human rights, 9 October 2015 <http://carbonmarketwatch.org/wp-content/uploads/2015/10/Open-letter-to-implement-UN-obligations-to-respect-human-rights_final_09102015.pdf> accessed 1 September 2016.

³⁶ Knox, John, Letter to the CDM Executive Board <<http://carbonmarketwatch.org/wp-content/uploads/2015/10/J.-Knox-Letter-to-CDM-Board-12-Oct-2015.pdf>> accessed 1 September 2016.

³⁷ UNFCCC, 'Meeting report, CDM Executive Board eighty-seventh meeting, Version 01.1 (No. CDM-EB87)' (UNFCCC 2015), para 52.

³⁸ *ibid.*, para 51.

³⁹ UNFCCC, 'Meeting report, CDM Executive Board ninety-second meeting, Version 01.0 (No. CDM-EB92)' (UNFCCC 2016), para 32..

consultations shall in future cover potential direct positive and negative impacts of projects on local stakeholders. As a minimum, representatives of local stakeholders directly affected by the project and representatives of local authorities relevant to the project shall be invited to participate in the project planning phase, and the project participants need to provide evidence that the respective invitations were sent. Information should be disseminated ‘in ways that are appropriate for the community that is directly affected’ and include a non-technical summary of the project and its alleged positive and negative impacts, and the means to provide comments.⁴⁰

The concept note also envisages that the project's DOE (i.e. the organisation auditing the project) should open a 14-day commenting period after publication of the first monitoring report to allow for comments on impacts triggered by project implementation, i.e. *after* project implementation has begun. If comments relate to CDM requirements—which as already noted do not cover human rights issues—these need to be resolved before credits can be issued. Otherwise, the Board will forward the comments to the host country authorities.⁴¹

It bears noticing that the new rules approved by the Board are much less detailed than the proposal made by the Secretariat. Suggestions made by the Secretariat that are not included in the document adopted by the Board include requirements for project participants to:

- substantiate how they identified the local people affected by the project,
- invite local non-governmental organisations working on topics relevant to the project,
- use best practices to invite stakeholders,
- provide a non-technical summary of the project in appropriate local language(s); the version adopted by the Board does not specify the language(s) to be used,
- provide management plans to contain potential adverse impacts,
- conduct an in-person stakeholder meeting,
- provide documented feedback to the stakeholders and conduct a further feedback round if residual concerns are communicated within 14 days.

3.3 Observations

Based on the Ruggie Principles, not only the host states, but also international donors, financial institutions, credit buyers and private investors involved in the CDM or individual projects have a responsibility to ensure the human rights compatibility of projects. Nonetheless, human rights are so far not mentioned anywhere in the CDM's rules and procedures. The only potential hooks for human rights concerns are the requirement that projects should contribute to sustainable development and should invite and duly take

⁴⁰ UNFCCC, ‘Improving stakeholder consultation processes, Version 01.0 (No. CDM-EB87-A12)’ (UNFCCC 2015)

⁴¹ *ibid.*

account of stakeholder comments. However, there are no internationally agreed criteria or procedures for assessing CDM projects' contributions to sustainable development, nor are there internationally agreed procedures for conducting local stakeholder consultations. Most host countries do not thoroughly investigate projects from a human rights perspective. Furthermore, there are no complaint or accountability mechanisms. Attempts to remedy these deficits have been met with resistance on the grounds that it would impinge on the national sovereignty of host countries.

In 2015, the Board took a step forward by deciding to forward human rights concerns to UN human rights bodies. However, the Board still has no mechanisms of its own to become informed of such concerns. It only becomes aware of human rights issues when they are raised by non-governmental organisations—which usually also inform the UN human rights bodies. The added value of this new approach may therefore be rather limited.

The Board also decided to strengthen stakeholder consultations. However, the new rules approved by the Board are yet to be implemented, and they are much less detailed than the proposal made by the Secretariat. Contrary to what the Secretariat had suggested, supported by NGOs and by Special Rapporteur John Knox, the new rules still contain no guidance on how to identify the relevant people affected, no requirement to provide project information in the appropriate local language(s), no requirement to provide management plans to address adverse impacts, no requirement to conduct in-person stakeholder meetings and no requirement to provide feedback to stakeholders.

While undoubtedly a step forward, the new rules therefore still do not solve the CDM's 'blindness' as regards sustainable development and human rights infringements through CDM projects. That this can be a real issue is exemplified with three case examples we have assessed in the course of our studies.

4 CASE STUDIES

4.1 The Barro Blanco hydropower project in Panama⁴²

4.1.1. Description of the CDM project

The hydroelectric power plant project Barro Blanco was constructed, and will be operated by, Panamanian GENISA, specifically founded for this project.⁴³ The Barro Blanco dam is located in the province of Chiriquí (district of Tolé) in the immediate proximity to an Annex area of the comarca Ngäbe-Buglé.⁴⁴ Once finished, it will have an installed capacity of 28.84 MW.⁴⁵

The estimated project costs of Barro Blanco, amounting to 78,316,800 USD, are financed by the *Deutsche Investitions- und Entwicklungsgesellschaft* GmbH (DEG), the Netherlands Development Finance Company (FMO)⁴⁶, and the Central American Bank for

⁴² The Barro Blanco case was investigated by Jane Alice Hofbauer and Monika Mayrhofer.

⁴³ GENISA, 'GENISA Project Management Report, Environmental and Social Summary Report' 9.

⁴⁴ Comarcas are demarcated indigenous regions, which have evolved into bodies with an autonomous administration.

⁴⁵ Barro Blanco PDD, 'CDM PDD Barro Blanco Version 03'.

⁴⁶ FMO/DEG Barro Blanco Complaint, 'Barro Blanco Complaint - Annex 1: Analysis of Policies and Procedures'.

Economic Integration (CABEI) (each investing approximately 25 million USD).⁴⁷

The Barro Blanco project obtained the letter of approval required to be registered as a CDM project by *Autoridad Nacional del Ambiente* (ANAM), Panama's then CDM Designated National Authority (DNA), on 17 November 2009.⁴⁸ In June 2011, Barro Blanco was registered by the CDM Executive Board.⁴⁹ According to the validation report of the Designated Operational Entity, AENOR, it was verified during their visit that the 'local communities (Veladero, Cerro Viejo, Palacios and Bellavista) had been consulted and had demonstrated their support for the development of the Barro Blanco Hydroelectric power plant project by signing the corresponding minutes of the meetings'.⁵⁰ In consequence, AENOR stated that after speaking to ANAM and the 'main communities involved in the area', the communities had 'agreed that the project will bring work and development to the area, and all of them supported the development of the project', and that 'no negative feedback was received'.⁵¹ Thus, AENOR concluded that it could recommend the Barro Blanco project for registration.

A number of NGO reports indicate that comments had been sent by global stakeholders, and their receipt had been confirmed. However, AENOR has not reflected on these comments and they have not appeared on the website of the UNFCCC.⁵²

With possibly the above exception, it is possible, therefore, to reach the conclusion that, from a CDM perspective, the rules have been observed, and that no major conflicts arise from the Barro Blanco project. A closer inspection of information on the case from outside the CDM realm, however, reveals a different picture.

4.1.2 *The case*

Once completed, the Barro Blanco hydroelectric dam will impact indigenous territory, which is protected by Panama's Constitution as well as by Law 10 of 1997 that establishes the *comarca* Ngäbe-Buglé. Thus, prior to granting GENISA a concession, the government of Panama was obligated by law to enter negotiations in good faith with the affected communities in order to obtain their free, prior and informed consent (FPIC).

According to the Panamanian Executive Decree No. 123,⁵³ a public forum is required as part of the impact assessment process. The Decree states that the public forum should be

⁴⁷ CABEI replaced the funding that was originally sought through the EIB. The EIB loan application was withdrawn by GENISA in 2010, after it learned that the EIB planned to visit the affected area due to a complaint registered with the EIB CM (Complaint Mechanism). EIB Barton, 'Written Questions to EIB Director Tamsyn Barton - Hearing on 21 January 2013'; EIB CM, 'Barro Blanco Hydroelectric, Panama' <<http://www.eib.org/about/accountability/complaints/cases/barro-blanco-hydroelectric-panama.htm>> accessed 19 May 2015.

⁴⁸ AENOR, 'CDM Validation Report' 9.

⁴⁹ UNFCCC, 'Executive Board of the Clean Development Mechanism. Sixty-first meeting. Report (No. CDM-EB61)' (UNFCCC 2011)

⁵⁰ AENOR (n 44) 24.

⁵¹ *ibid* 43.

⁵² Osvaldo Jordan, Oscar Sogandares and Miguel Arjona, 'Barro Blanco Hydropower Project in Panama Violates CDM Rules (Newsletter #12) - Carbon Market Watch' (15 February 2011) <<http://carbonmarketwatch.org/barro-blanco-hydropower-project-in-panama-violates-cdm-rules-newsletter-12/>> accessed 1 July 2015.

⁵³ Ministerio de Economía y Finanzas de Panama, 'Decreto Ejecutivo No. 123 - Reglamenta La Ley No. 41 General De Ambiente, August 14, 2009' (Panama 2009).

organised by the project promoter during the evaluation and analysis of the Environmental Impact Analysis (EIA), in order to provide information on the project and the opportunity for stakeholders to comment on the study.

GENISA conducted a public forum in early 2008, as part of the EIA.⁵⁴ The forum was held at a location outside of the indigenous territory that was difficult to reach for the affected communities (requiring a several hour foot-march), and was poorly advertised. As was reported in on-site interviews conducted by the authors, only a few members of the communities took part, and those who did were initially restricted from participating and only later allowed in. At this stage, no further consultations in the course of the EIA proceedings took place with the affected communities.

Importantly, the project does not include a resettlement plan although a verification mission of the UNDP in 2013⁵⁵ found that the project would lead to the displacement of several families.⁵⁶ The project company has not reached an agreement with the affected communities to purchase or lease their land. The lack of a resettlement plan also means that no precise data exists on the actual number of people affected by the project and that therefore no structured planning of compensation measures has taken place. In April 2014, a complaint was filed with the independent complaint mechanism of the FMO and DEG, which released a report on the case in May 2015. The report of the FMO/DEG complaint mechanism points out that the lenders were not fully apprised of several issues including environmental and social impacts, indigenous peoples, cultural heritage, biodiversity and ecosystem impacts at the time of project approval.⁵⁷

Previously, ANAM had temporarily suspended the project on 9 February 2015, *inter alia* because an agreement was not reached with the communities, the negotiation process was still ongoing and the National Institute of Culture (INAC) had not yet approved an archaeological management plan to protect local archaeological findings.⁵⁸ As of early 2016, construction of the dam had resumed even though there still is no agreement with the local communities.⁵⁹ Protests undertaken by the local population were still ongoing.⁶⁰ In May

⁵⁴ The EIA classified Barro Blanco as a category III project, which can result in significant adverse environmental impacts and calls for a more detailed analysis.

⁵⁵ The verification mission was carried out as a result of a political dialogue and mediation process that followed the protests and the blockage of the Pan-American Highway in 2012. The dialogue took place between the affected indigenous communities, the government and the project operator and was supported by the Catholic Church and UNDP.

⁵⁶ López García, L. (2013) Peritaje independiente de la presa de Barro Blanco, Panamá: informe final de la component de ingeniería hidráulica, 5 September 2013, http://media.gestorsutil.com/PNUD_web/651/centro_informacion_documentos/docs/0910718001378499234.pdf accessed November 8, 2016.

⁵⁷ FMO/DEG IEP, 'Barro Blanco Hydroelectric Project Panama - Panel Report No. 1', paras. 50-55.

⁵⁸ ANAM, 'ANAM Ordena Paralización de Obras Del Proyecto Hidroeléctrico Barro Blanco Por Incumplimientos de EIA' (*MiAmbiente*, 9 February 2015) <<http://miambiente.gob.pa/index.php/homepage/ultimas-noticias/otras-noticias/959-anam-ordena-paralizacion-de-obras-del-proyecto-hidroelectrico-barro-blanco-por-incumplimientos-de-eia>> accessed 23 June 2015.

⁵⁹ Meanwhile the government has taken over negotiations with the affected communities and a new round of negotiations started on 1 March 2016.

2016, it was reported that the floodgates of the dam were opened. On 9 June 2016, the flooding of the reservoir was stopped by the government after indigenous groups filed a criminal suit against the national Public Service Authority ASEP.⁶¹

4.13 Observations

The Barro Blanco Case showed multiple violations of human rights, even before the actual construction of the dam itself had started. The right to property and the right to housing in particular, but also the right to health of the local population are affected. The process of conducting the mandatory economic and social impact report was flawed and incomplete. However, these major deficiencies, as well as the conflicts with the local population, seem to have played no role in the issuance of the letter of approval by Panama's DNA, and also seem to have been significantly downplayed by the validation report of the DOE.

On the basis of the validation report, the CDM Executive Board could see no reason not to register the project. However, there is no mechanism to cross-check DOE validations for the CDM Executive Board. Also, there is no mechanism (yet) within the CDM to address complaints of local stakeholders after project registration.

Thus, due to the lack of procedural norms within the CDM, the project was registered under the CDM even though it failed to respect, protect and fulfil human rights.

4.2 The Bujagali hydropower project in Uganda

4.2.1 Description of the CDM project⁶²

The Bujagali Hydropower Project (BHP) is a registered CDM project in Uganda. It is located on the Victoria Nile river in the Buikwe District in the Central Region of Uganda and was registered with the CDM in October 2011.⁶³ A capacity of 250 MW was installed by the end of 2012, about half of Uganda's generation capacity. With total investments of nearly 800 million USD, the BHP is one of the biggest investment projects in Uganda.⁶⁴

The Bujagali dam project involved two major phases. A first attempt under the lead of US-based AES Nile Power (AESNP) in the late 1990s failed *inter alia* due to allegations of corruption that led to the withdrawal of the original lenders, and to an unfavourable report

⁶⁰ La Estrella, 'Indígenas vuelven a la calle por Barro Blanco' (*La Estrella de Panamá*, 21 January 2016) <<http://laestrella.com.pa/panama/nacional/indigenas-vuelven-calle-barro-blanco/23917307>> accessed April 15 2016.

⁶¹ Brasier, P-J, 'Barro Blanco: flooding suspended, international lenders pressured to act', 14 July 2016, <<http://carbonmarketwatch.org/barro-blanco-flooding-suspended-international-lenders-pressured-to-act/>> accessed September 9, 2016.

⁶² The Bujagali case was investigated by Florian Mersmann and Monika Mayrhofer

⁶³ CDM, 'Project 4217: Bujagali Hydropower Project' (*UNFCCC*) <<https://cdm.unfccc.int/Projects/DB/ERM-CVS1291830806.57/view>> accessed 17 May 2016.

⁶⁴ EJAtlas, 'Bujagali Hydropower Project, Uganda' (*Environmental Justice Atlas*, 13 November 2014) <<http://ejatlas.org/conflict/bujagali-hydropower-project-uganda>> accessed 13 November 2014; John Oyuke, 'Uganda's Bujagali Power Plant Switched on' (*Standard Digital News*, 11 October 2012) <<http://www.standardmedia.co.ke/business/article/2000068143/uganda-s-bujagali-power-plant-switched-on>> accessed 27 August 2015; UNEP DTU, 'UNEP DTU CDM/JI Pipeline Analysis and Database, September 1st 2014' (2014) <<http://www.cdmpipeline.org/publications/CDMPipeline.xlsm>> accessed 9 December 2014.

by the World Bank's Inspection Panel in 2001.⁶⁵ AESNP withdrew from the project in 2003, before construction started, even though it had already completed economic, social and environmental assessments and begun resettlement.⁶⁶ Approximately 8,700 people were resettled or lost assets without proper compensation upon project cancellation.⁶⁷

After the termination of the first project attempt, the Government of Uganda instated the Bujagali Implementation Unit (BIU) to manage community relations with the resettled people. However, BIU did not follow up on resettlement compensation activities.⁶⁸

Finally in 2005, the project was taken up again under a new company, Bujagali Energy Limited (BEL). In 2006, RJ Burnside International Limited carried out a Social and Environmental Assessment (SEA) and a comprehensive Public Consultation and Disclosure Program (PCDP) for BEL, which entailed, *inter alia*, meetings with government agencies, discussions with NGOs, consultations with local communities, public meetings and survey with affected communities.⁶⁹

According to the CDM PDD the project officially started on 21 December 2007.⁷⁰ The CDM PDD itself was developed in 2011. Within the PDD, BEL gave assurances that the company would take up responsibilities for those people affected by the project who had been displaced in the course of the previous project attempt.⁷¹

The CDM validation report was issued in 2011 by ERM Certification and Verification Services, which acted as DOE for the project. It reports *inter alia* that the project site had been assessed and that follow-up interviews with stakeholders had been conducted. The report concludes that the Bujagali dam 'meets all necessary criteria and requirements of the CDM [...]. The DNA of the host Party has confirmed that the project assists in meeting sustainable development criteria'.⁷²

⁶⁵ World Bank, 'Uganda - Bujagali Project : Inspection Panel Investigation Report' (World Bank 2002) Inspection Panel Report and Recommendations 23998
<<http://documents.worldbank.org/curated/en/2002/05/3054709/uganda-bujagali-project-inspection-panel-investigation-report>>.

⁶⁶ World Bank, 'Uganda - Bujagali Hydropower Project' (World Bank 2005)
<<http://documents.worldbank.org/curated/en/2005/10/6343110/uganda-bujagali-hydropower-project>>; Patrick McCully, 'International Rivers Comments on CDM Project Design Document for Bujagali Hydropower Project (Uganda)' (International Rivers 2010).

⁶⁷ AfDB, 'Independent Review Panel. Compliance Review Report on the Bujagali Hydropower and Interconnection Projects' (African Development Bank Group 2008)
<<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/30740990-EN-BUJAGALI-FINAL-REPORT-17-06-08.PDF>>.

⁶⁸ *ibid.*

⁶⁹ R.J. Burnside, 'Bujagali Energy Limited: Bujagali Hydropower Project' (RJ Burnside International Limited 2006) Social and Environmental Assessment – Main Report I-A 10045.

⁷⁰ CDM, 'Project Design Document: Bujagali Hydropower Project' (UNFCCC).<https://cdm.unfccc.int/filestorage/8/F/Z/8FZCNYUT9JB5AO6SM0KXR73QGEHIPV/PDD_form05-Bujagali%20V2.1%205March2014_clean.pdf?t=NVJ8bzVvYnpqfDB9_CD5Xoq7GeqVwYmmnBQf> accessed 15 April 2016.

⁷¹ The PDD was revised in 2014 in order to account for slightly higher generation values than originally expected. Otherwise, it remains unchanged.

⁷² ERM Certification and Verification Services, 'CDM Validation Report' (ERM CVS 2011).
<<https://cdm.unfccc.int/filestorage/H/A/0/HAOMN2GWX18YE4IC93R56UFPZ7QDT/1883%20v1%20Bujagali%20FVR%2006Oct2011signed.pdf?t=eTN8bzVvYnA3fDDPNofr9Q5mIaCRkUnQ1jk7>> accessed 15 April 2016.

Again, judging from official CDM documentation, the project seems to meet high standards, and no major infringements upon human rights should be expected. In practice, the project caused a significant number of human rights violations.

4.2.2 *The case*

Right from the preparatory phase of the project, the BHP faced opposition from local groups and environmental justice organisations. Complaints centred on the alleged inadequacy of the consultation and resettlement process and the lack of adequate compensation for the affected people who claimed to have lost their livelihoods. Among other complaints, the resettlement site was deemed inadequate in its location and inferior to the original settlement; houses and services (water, electricity, education) were unfinished. The resettled people did not have an adequate voice in the choice of the resettlement site. Because of the location far from the river, the people's main occupation of fishing could not be upheld, and many occupants fell into unemployment, leading to their inability to pay for school fees.⁷³

According to the CDM PDD, the consultation process with the local communities continued during the construction and operation of the dam. BEL worked with a witness NGO, InterAid Africa, in order to address grievances from affected persons.⁷⁴ From interviews that the authors of this present article conducted with the local population it became clear that, instead of relying on the grievance mechanism of the project implementer, affected people turned to other NGOs to represent them. These NGOs then turned to the grievance mechanisms of the multilateral banks that acted as lenders for the project.

In 2006, after a fact-finding mission, the AfDB's Compliance Review and Mediation Unit (CRMU) recommended the AfDB Group's Boards of Directors to conduct a compliance review. The review concluded that the BIP had not complied with, *inter alia*, the requirements of the Bank Policies on Involuntary Resettlement, Gender and Poverty Reduction, nor with environmental policies and guidelines.⁷⁵

In 2007, complaints were also filed with the World Bank's Inspection Panel. The Inspection Panel found that the project violated World Bank policies on environmental, hydrological, social, cultural, economic, and financial issues. The Panel further criticized the project, stating that 'the Project did not comply with the mandate of [World] Bank policy to improve or at least restore, in real terms, the livelihoods and standards of living of the people displaced by the Project'.⁷⁶

In response to the Inspection Panel's critique, the project management developed an action plan (MAP, latest progress report in 2013) to alleviate the shortcomings of the project. The action plan included improvements in institutional capacity, increased guidance on social safeguard issues, social impact assessments, and sharing of project benefits with affected

⁷³ EJAtlas (n 58); AfDB (n 61).

⁷⁴ Bujagali PDD (n 64).

⁷⁵ *ibid*; AfDB (n 61).

⁷⁶ World Bank, 'Management Report and Recommendation in Response to the Inspection Panel Investigation Report No. 44977-Ug of the Uganda: Private Power Generation (Bujagali) Project' (2008) IDA/R2008-0296.

people.⁷⁷

The interviewees regarded the redress mechanisms as effective and responsive to their complaints. The management plans set up by ADB and World Bank/IFC in response to the reports by the redress mechanisms were regarded by most interviewees as pivotal in righting the situation for the affected people. In fact, interviewees overwhelmingly pointed to the MDBs, especially to the World Bank Inspection Panel, as the most reliable reference for hearing complaints and righting failures.

4.2.3 Observations

Bujagali is a complicated case because of its two consecutive implementation phases, which muddled responsibilities and left affected people in limbo. Within the CDM realm, the project complied with all requirements, but, again, in the absence of clear rules of conduct, it was up to the host country to enforce any rules and laws a project needs to comply with. Such enforcement by the host country does not seem to have taken place in Bujagali. The case, however, shows how important clear procedural norms, and especially grievance mechanisms, can be in order to address human rights infringements caused by a project such as Bujagali.

The presence of international lenders seems to have been highly important in order to settle the multiple claims of infringements of human rights, which among others included right to housing, right to food, right to health and right to property. While the recommendations by the non-judicial grievance mechanisms of the multilateral banks are non-obligatory, they create pressure on the implementers to alleviate identified grievances of project-affected people.

4.3 The Olkaria geothermal project in Kenya

4.3.1 Description of the CDM project⁷⁸

The Olkaria IV geothermal power plant is located in Kenya's share of the African Rift close to Lake Naivasha and adjacent to the Hell's Gate National Park. Olkaria IV is operated by the parastatal Kenya Electricity Generating Company (KenGen). The project was approved by the Kenyan DNA in July 2012; the final PDD was completed in November 2012 and the validation report by the DOE followed shortly after. In December 2012, the DOE submitted its CDM registration request form; registration was then enacted in June 2013 and antedated to December 28, 2012.⁷⁹

The project is part of the larger Kenya Electricity Expansion Project (KEEP) of the World Bank. It is funded by five main lending institutions (the World Bank's International

⁷⁷ World Bank, 'Uganda - Private Power Generation (Bujagali) Project : Fourth Progress Report on Implementation of Management' (The World Bank 2013) 82625
<<http://documents.worldbank.org/curated/en/2015/02/18510512/uganda-private-power-generation-bujagali-project-fourth-progress-report-implementation-managements-action-plan-response-inspection-panel-investigation-report-uganda-private-power-generation-bujagali-project-fourth-progress-report-implementation-management>> accessed 4 February 2016.

⁷⁸ The Olkaria case was investigated by Jeanette Schade and Jane Alice Hofbauer.

⁷⁹ CDM, 'Project 8646: Olkaria Geothermal Project' (UNFCCC)<<http://cdm.unfccc.int/Projects/DB/JCI1355128868.24/view>>accessed 17 May 2016.

Development Agency IDA, the European Investment Bank EIB, the French Development Agency AFD, the German Development Bank KfW, and the Japanese International Cooperation Agency JICA)—by investments amounting to roughly 1.4 billion USD in total.⁸⁰

Lenders agreed that the involuntary resettlement necessary for the project would be carried out according to Operational Policy 4.12 of the World Bank. Three Maasai villages had to be resettled to vacate the land for Olkaria IV.⁸¹ A fourth one had to be resettled because of the projected air pollution.⁸² KenGen contracted a consultant firm, GIBB Africa, to elaborate a Resettlement Action Plan (RAP).

The CDM PDD for Olkaria IV mentions the existence of a land dispute between the Maasai and Kedong Ranch Ltd. concerning the land required for the project, the claim to be considered in job offerings, and claims for compensation.⁸³ KenGen's response in the PDD is that relocations will be organised according to approved standards, that funds are provided for community projects, and that Maasai applications for jobs will be considered in case of appropriate skills. However, appropriate job training for the mainly unskilled, semi-nomadic pastoralist Maasai are not mentioned.⁸⁴

The local stakeholder consultation for the CDM project's validation was carried out in March 2012 by the DOE Japan Consulting Institute (JCI). The DOE concludes in its summary of the public consultation process that '[a] good number (99%) of the respondents admitted that they were aware of the project [...]'⁸⁵ which is not surprising because resettlement planning has taken place since 2009.

As the DOE received, in its view, no major objections against the project, the consultation process raised no obstacle to the CDM project registration. Therefore the DOE issued a positive validation report.⁸⁶ Within the limits of the CDM registration process, all formal obligations have been observed.

4.3.2 *The case*

The community members of the four villages, all Maasai, have been resettled as one group. The new settlement site was agreed to provide for modern houses, modern infrastructure

⁸⁰ World Bank, 'Kenya - Electricity Expansion Project (English) - Integrated Safeguards Data Sheet' (2010) AC4957 <<http://documents.worldbank.org/curated/en/2010/03/11987133/kenya-electricity-expansion-kenya-electricity-expansion-project>> accessed 29 April 2016

⁸¹ GIBB Africa, 'Olkaria IV (Domes) Geothermal Project in Naivasha District: Resettlement Action Plan for Olkaria IV Power Station' (2011) <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/07/27/000333037_20120727015202/Rendered/PDF/RP8830v110P103OIAOIVORAP0JULY002012.pdf> accessed 29 April 2016

⁸² Mwangi-Gachau E, 'Resettlement of Project Affected Persons: A Case of Olkaria IV (Domes) Geothermal Project in Naivasha District, Kenya' (2011) 8 <http://www.gak.co.ke/nibs/web_resources/RESETTLEMENT%20OF%20PROJECT%20AFFECTED%20PERSONS-%20A%20CASE%20OF%20OLKARIA%20IV%20%28DOMES%29%20GEOOTHERMAL%20PROJECT%20IN%20NAIVA.pdf> accessed 29 April 2016.

⁸³ Olkaria PDD (n 69), 32.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Japan Consulting Institute, 'Validation Report Olkaria IV Geothermal Project' (JCI 2012) <<http://cdm.unfccc.int/filestorage/f/h/TKAX31U9OWMNS5LCZPIYJ2B0VG48RD.pdf/Validation%20Report%20Olkaria%20IV%20ver0.pdf?t=RVp8bzgzn3JsfDAt4a2W9pVvuUzmA2043iBT>> accessed 31 May 2016.

(roads, electricity and water pipes), social services (school and health centre), and additional land for pasturing of the cattle at the site. The total area for compensation of land was agreed upon as 1,700 acres over which the project affected persons (PAPs) are supposed to get their own title deeds. Resettlement planning was carried out by the Resettlement Action Plan Implementing Committee (RAPIC), which included representatives from all affected communities, local administration, the operator—and in 2012 an operational-level grievance mechanism was established.⁸⁷

However, when resettlement was effected in August 2014, complaints were submitted immediately to the World Bank Inspection Panel and the EIB Complaint Mechanism (EIB-CM), which in late 2014 started to investigate the project.

Main points raised by the complaining community members have been: flaws of the census and lack of houses, the quality of land, lack of title deeds, large distances from previous sources of livelihoods, use of compensation funds to pay for access to the electricity grid, shortcomings in livelihood restoration—in particular with respect to the Cultural Centre (one of the villages)—by not taking into account that tourism is its unique source of livelihood (not pastoralism),⁸⁸ incidents of intimidation and exclusion of (outspoken) community representatives in RAPIC, and lack of trust in RAPIC and its grievance mechanism. The majority of these complaints had already been an issue before the physical move.⁸⁹

The investigating bodies of the banks largely confirmed the allegations of the complainants, and in addition found that donors did not apply the World Bank's Operational Policy 4.10 on indigenous peoples, that the World Bank insufficiently monitored the resettlement, and that the Mutual Reliance Initiative (MRI), a joint co-financing mechanism of the European lenders, to some extent prevented EIB from complying with its due diligence.⁹⁰

4.3.3 Observations

The documentation of the local stakeholder consultation process is not included in the PDD, but in interviews conducted within the case study affected people confirmed that they had attended the meeting. It seems, however, that they are not aware what the CDM is about, nor of the political meaning of their participation in the consultation.

While the investigations conducted by the World Bank Inspection Panel and the EIB-CM found a number of significant flaws, not least concerning the consultation and participation of project-affected persons, the CDM Executive Board remained uninformed of the controversies. Since at the time of registration no possibility of a complaints review post-registration existed within the CDM, any righting of grievances has had to fall back on other structures, as provided by the multilateral development banks.

⁸⁷ GIBB, Resettlement Action Plan (n 70)

⁸⁸ It should be noted that different PAPs profit or suffer to different degrees from the relocation and that inter-community divisions and power imbalances exist.

⁸⁹ For further details see Jeanette Schade 'EU accountability for the due diligence failures of the European Investment Bank: Climate finance and involuntary resettlement in Olkaria, Kenya' in this Special Issue.

⁹⁰ World Bank Inspection Panel, 'KENYA Electricity Expansion Project (P103037) - Investigation Report July 2, 2015' (World Bank 2015) <<http://ewebapps.worldbank.org/apps/ip/PanelCases/97-Inspection%20Panel%20Investigation%20Report.pdf>> accessed 17 May 2016; EIB Complaints Mechanism, 'Conclusions Report. Olkaria I and IV, Kenya, Complaint SG/E/2014/07 and SG/E/2014/08' (2015).

5 CONCLUDING REFLECTIONS

5.1 Human rights infringements and CDM deficiencies

Based on the Ruggie Principles, not only host states, but also international donors, financial institutions, credit buyers and private investors involved in the CDM or individual projects have a responsibility to ensure human rights compatibility of projects. Nonetheless, human rights are thus far not mentioned anywhere in the CDM's rules and procedures—ensuring projects' contribution to sustainable development and adequate stakeholder consultations is left to each host country individually. Previous research has concluded that many host countries do not thoroughly investigate projects and that stakeholder consultations are often deficient. Furthermore, there are no complaint or accountability mechanisms.

These points are borne out by the cases discussed in this article. All three cases involve conflicts around resettlement and the consequent impairment of livelihoods as well as deficiencies in stakeholder consultations and impact assessments. Based on the rights to property and security of tenure as spelled out by Article 17 of the Universal Declaration of Human Rights, and elaborated upon in the Guiding Principles on Internal Displacement, involuntary displacement and resettlement can only be justified by a compelling and overriding public interest. The decision concerning whether there is a compelling public interest is linked *inter alia* to the obligation of conducting a prior environmental impact assessment. Those assessments were deficient in all three cases, which led to deficient implementation and also leaves a question mark over whether the resettlements were actually justified.

In the Barro Blanco case, the violation of state responsibility relates in particular to the failure to obtain the free, prior and informed consent of the affected indigenous communities. Closely connected to this issue is the problem of a faulty environmental and social impact assessment, which erroneously concluded that the project would not involve displacements. In addition, even though this initial assumption was disproved, there is still no resettlement plan yet, no precise data on the full range of people affected by the project and to date, no structured planning of compensation measures.

In the Bujagali case, the grievance mechanisms of the three MDBs involved concluded that the initial socio-economic survey had been faulty. Moreover, the project failed to at least restore the livelihoods and standards of living of the people displaced by the project, in particular during the hiatus period, when responsibility for the project lay solely with the government of Uganda. While deficiencies have been remedied since, in the interim the PAPs experienced a severely diminished standard of living. On the positive side, the MDB grievance mechanisms proved effective. The case thus demonstrates that social safeguard policies, expressed through procedural norms (in this case of the MDBs) can prove effective to safeguard against, or at least remedy, infringements on human rights.

The Olkaria case shows a similar picture with weaknesses in the impact assessment and stakeholder consultations. The census, providing the basis for any compensation entitlements, was methodologically flawed, which resulted in continuous complaints. Furthermore, the consultation process was accompanied by struggles over land rights and distrust in the project's mechanisms for participation.

Finally, all three cases highlight the CDM's limitations in terms of ensuring accuracy and accountability:

- The documentation of the Barro Blanco project claims that local communities have been consulted and have demonstrated their support for the project even though evidence points to the contrary;
- The documentation of the Bujagali project mentions that there was resettlement in the first project phase but makes no mention of the associated problems;
- The documentation of the Olkaria project mentions the land dispute and asserts that all problems will be resolved. However, this has not been the case. Moreover, many problems arose only during project implementation, but the CDM has no procedures for re-opening cases.

5.2 Ways forward

The Paris Agreement opens a new page for international climate policy. The acknowledgement of human rights as an integral part of decisions on climate action in the preamble of the agreement provides an opportunity to better integrate safeguards into the Agreement's mechanisms.

While the CDM is likely to expire with the ending of the Kyoto Protocol's second commitment period in 2020, the Paris Agreement establishes a new mechanism—the rules for which are to be developed on the basis of experience gained from existing mechanism. This should include the experience gained with the human rights issues caused by the CDM's lack of standards.

This article has deliberately focused on projects with negative media coverage in order to analyse human rights concerns and extraterritorial obligations as deeply as possible. Some authors see the fundamental orientation of carbon markets such as the CDM as being inherently geared towards exacerbating pre-existing inequalities. The CDM allows emitters in the 'Global North' to shift the cost of emission reductions to the 'Global South'. This shift necessarily appropriates local productive resources, impairing local livelihoods.⁹¹ Even if projects are run by well-intentioned developers—in the main 'carbon comes first' rather than local development needs since without emission reductions there will be no carbon finance.⁹² Bryant et al. even suggest that the generation of inexpensive emission credits, the core rationale of the CDM, crucially hinges on weak social and environmental regulation at the project level.⁹³ However, other research has identified CDM projects with positive impacts on local livelihoods.⁹⁴ So how to explain such differences in outcome?

The contribution to sustainable development (or lack thereof) depends in each case upon national and institutional priorities, market demands and the involvement of

⁹¹ Bachram (n. 5); Böhm and others (n. 30).

⁹² Adam Bumpus, *Realizing Local Development in the Carbon Commodity Chain Political Economy, Value and Connecting Carbon Commodities at Multiple Scales* (United Nations Research Institute for Social Development, Geneva 2011).

⁹³ Gareth Bryant and others, 'Fixing' the climate crisis: capital, states, and carbon offsetting in India' (2015) 47 *Environment and Planning A*.

⁹⁴ Boyd and others (n. 29); Bumpus (n. 92); Sterk and others (n. 29).

stakeholders at multiple levels.⁹⁵ Given the absence of international governance for sustainable development in the CDM, national governance is key. Responsibility for the deficiencies in the three projects analysed here to a large extent lies with the host countries: failing to obtain FPIC in the Barro Blanco case, failing to provide for resettled communities in the Bujagali case, and failing to organise orderly resettlement in the Olkaria case.

In the literature, Peru is frequently held up as a positive counter-example. Instead of relying on desk reviews as do many other countries' DNAs, the Peruvian DNA conducts site visits and consults with the local population on their needs and possible contributions to the project. Moreover, Peru requires sustainable development benefits to be included in the projects' monitoring plans. As consequence, Peruvian projects are found to have a high incidence of sustainable development benefits.⁹⁶

However, since regulation in other countries has been lacking, international regulation seems called for. Based on the experience gained in the CDM, one can conclude that all states that are parties to relevant human rights treaties have a responsibility to support proposals within the UNFCCC to improve the human rights compatibility of climate mechanisms. In reference to the Ruggie Principles, Parties to the UNFCCC should thus ensure that the mechanisms within the UNFCCC require all projects to undergo a human rights impact assessment (HRIA) with clear procedural requirements for stakeholder consultations. Application of standards should not be left to the fortuitous involvement of donors such as the multilateral banks. Projects that do not comply with the requirements should be deemed ineligible for registration. Moreover, projects should be required to monitor socio-economic impacts throughout their lifetime. To operationalize these requirements, DOEs should be given a mandate to assess compliance before and throughout project implementation.

Mandatory human rights standards would help empower local communities to influence project designs according to their needs. At a minimum, mandatory standards would prevent the new mechanism from providing resources to projects that involve human rights violations.

The UNFCCC should follow best practice of international organisations, notably the development banks, and establish an institutional grievance mechanism at the international level to address failures of the mechanism's governing body to adhere to standards. In addition, the UNFCCC should require the establishment of a project-level grievance mechanism if a project is deemed to have a significant adverse impact on communities and/or the environment. Grievance mechanisms at the operational level should at a minimum comply with the Ruggie Principles and applied procedural requirements should include the right to access to redress (complaints mechanisms). Finally, there should be procedures to allow the de-registering of projects if human rights violations are revealed after registration and are not satisfactorily addressed.

The introduction of mandatory human rights safeguards would significantly increase transaction costs. As the core objective of the CDM is to generate inexpensive emission reductions, Bryant et al. suggest that there may be significant political-economic limitations

⁹⁵ Adam Bumpus and John Cole, 'How can the current CDM deliver sustainable development?' (2010) 1 WIREs Climate Change 541.

⁹⁶ Boyd and others (n. 29); Bumpus and Cole (n. 95).

to the potential for reforming the CDM without undermining the very rationale of the instrument.⁹⁷ However, an empirical study of CDM Gold Standard projects—projects with a voluntary label that includes social and environmental criteria as well as mandatory procedures for how to conduct local stakeholder consultations—reveals that project developers generally deem the requirements to be manageable with a reasonable amount of additional work.⁹⁸ From a human rights viewpoint, there is in any case no excuse for making the most vulnerable groups bear the social costs of mitigation.⁹⁹

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⁹⁷ Bryant and others (n. 93).

⁹⁸ Sterk and others (n 31).

⁹⁹ Jeanette Schade, 'Les Migrants Des Politiques Climatiques : Nouveaux Défis Face Aux Déplacements Générés Par Le Changement Climatique' (2012) 88 *Cultures & conflits* 85.