

SUBMISSION ON VIEWS REGARDING THE REVISION OF THE CDM MODALITIES AND PROCEDURES

By Asociación Interamericana para la Defensa del Ambiente, Center for International Environmental Law, Earthjustice, and International Rivers

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Pursuant to paragraph 10 of Decision 5/CMP.8, *Asociación Interamericana para la Defensa del Ambiente, Center for International Environmental Law, Earthjustice, and International Rivers* respectfully make the following submission on views regarding the revision of the Modalities and Procedures for the Clean Development Mechanism (CDM). These organizations also make this submission on behalf of *the Human Rights & Climate Change Working Group, Abibimman Foundation, Alianza para la Conservación y el Desarrollo, Asociación Ambientalista de Chiriquí, Carbon Market Watch, Centro de Estudios Ecológicos de la República Argentina, Climate Concept Foundation, Colectivo Revuelta Verde, Friends of the Earth – England, Wales, and Northern Ireland, Foundation for GAIA, Global Alliance for Incinerator Alternatives, Gujarat Forum on CDM, Himal Prakriti - A Trust for Nature, International-Lawyers.Org, Klima ohne Grenzen gemeinnützige, La Mesa Nacional de Cambio Climático de Guatemala, Movimiento Ciudadano frente al Cambio Climático, Public Interest Network, Participatory Research & Action Network, Paryavaran Mitra, Planetary Association for Clean Energy, Regional Centre for Development Cooperation, Society for Promotion of Wasteland Development, Timbaktu Collective, and Uttarakhand Save the Rivers Campaign.*

As outlined in Appendix A, all States as well as UN institutions are bound by human rights obligations. These obligations require States to ensure that their responses to climate change do not violate human rights. These obligations further require States, individually and jointly, to take positive action to address and avert the threats posed by climate change to human rights. As such, climate change actions – in this case, CDM projects – must be designed, implemented, and monitored a way that respects the full and effective enjoyment of human rights, including the rights of access to information, public participation, and access to justice. To ensure the protection of fundamental rights and fulfill States' international obligations, the CDM must establish an institutional safeguard system that effectively prevents social and environmental harm, promotes sustainable development, and maximizes participation, transparency, and accountability. The review of the CDM Modalities and Procedures is an important opportunity for the CDM to integrate human rights protections into its governing policies and procedures.

As part of the review of the CDM Modalities and Procedures, the undersigned organizations call on the CDM to: (1) establish institutional safeguards; (2) strengthen local community and civil society participation; and (3) provide processes to ensure that affected communities have a means to raise concerns at any stage of the project cycle.

1. ESTABLISHING INSTITUTIONAL SAFEGUARDS TO PROTECT HUMAN RIGHTS

As the High-Level Panel for the CDM Policy Dialogue recognized, the CDM's reputation is under attack in part due to claims of human rights violations.¹ Numerous concerns have been raised about human rights violations related to CDM projects. Despite these concerns and ongoing international investigations of rights abuses in some cases, projects continue to be registered under the CDM.

Two examples of such projects are the Barro Blanco hydropower project in Panama (Project 3237) and the Bajo Aguán biogas project in Honduras (Project 3197). The Barro Blanco project came under international investigation for violations of indigenous peoples' rights due to impacts on their land, water, and natural resources. As the project nears completion, the Panamanian government is currently militarizing the area with heavily armed police troops in response to farmers and indigenous peoples' protests against the project.² Recent clashes with riot squads have left some protesters with injuries and the situation remains tense.³

The Bajo Aguán biogas project is also under investigation in light of allegations of extrajudicial executions and other serious human rights abuses on palm oil plantations that are owned by the company operating the biogas project and that supply the project with its palm oil. Following reports of murders of human rights defenders in Honduras, the Inter-American Commission on Human Rights conducted an on-site visit in May 2010 and held a hearing in October 2011 on the "Human Rights Situation in Bajo Aguán."⁴ In September 2012, the Commission "observe[d] that the situation [in Bajo Aguán] continues to be highly worrisome."⁵ The International Finance Corporation's Compliance Advisor Ombudsman is now investigating the Bajo Aguán project regarding attacks on local farmers.⁶ Both the Barro Blanco and Bajo Aguán projects failed to

¹ CDM Policy Dialogue, "Climate Change, Carbon Markets and the CDM: A Call to Action, Report of the High-Level Panel on the CDM Policy Dialogue, Sept. 2012, p. 56.

² Agence France-Presse, "Protests over planned dam turn violent in Panama," Mar. 9, 2013, <http://www.globalpost.com/dispatch/news/afp/130309/protests-over-planned-dam-turn-violent-panama> ("Police in riot gear seeking to reopen the highway cracked down on dozens of demonstrators who fought back with rocks and other blunt objects.").

³ Intercontinental Cry, Nagare Barro Blanco, Mar. 17, 2013, <http://intercontinentalcry.org/nagare-barro-blanco/>; Intercontinental Cry, "Panama: Police brutality signals impending storm over Barro Blanco hydroelectric project," Mar. 21, 2013, <http://intercontinentalcry.org/panama-police-brutality-signals-impending-storm-over-barro-blanco-hydroelectric-project/>.

⁴ Inter-American Commission on Human Rights (IACHR), Hearings and other public events, "Human Rights Situation in the Bajo Aguán," Honduras, Oct. 24, 2011, <http://www.oas.org/es/cidh/audiencias/Hearings.aspx?Lang=en&Session=123>; *see also* IACHR, 2011 Annual Report, ch. IV, ¶¶ 297-302; IACHR, 2010, Country Report, Honduras, http://www.cidh.org/countryrep/Honduras10eng/Honduras10TOC_eng.htm, ¶¶ 118-121.

⁵ IACHR, Press Release, "IACHR Condemns Murder of Human Rights Defenders in Honduras," Sept. 28, 2012, http://www.oas.org/en/iachr/media_center/PReleases/2012/121.asp.

⁶ *See* International Finance Corporation, Office of the Compliance Advisor/Ombudsman, "Audit of IFC's Environmental and Social Performance in relation to Dinant, Honduras," Feb. 26, 2013, http://www.caombudsman.org/documents/CAOcommuniqueDinant_February2013.pdf.

adequately consult or otherwise allow meaningful participation by local stakeholders, a failure that likely exacerbated tensions that may have contributed to other human rights violations.⁷

In light of the growing evidence of human rights abuses associated with CDM projects, the CDM must take steps to prevent social and environmental harms. Increased accountability, transparency and public participation are necessary steps to this end. Such improvements are also consistent with the CDM Policy Dialogue, which recognized that the CDM must “strengthen and restructure its governance to become a more accountable and efficient organization ... [and] strategically allocate responsibilities between its governing body and staff; enhance its openness, transparency and opportunities for stakeholder participation; create avenues to hear appeals and address grievances; and reduce costs and delays.”⁸

To ensure adequate accountability, transparency, and public participation, the revised CDM Modalities and Procedures must:

- **Establish clearly defined international sustainable development criteria that would apply in addition to the national criteria as a means to measure the sustainability of projects against a uniform set of standards (see Appendix B).⁹ These criteria must be consistent with international obligations, including human rights standards, giving special attention to the most vulnerable and/or special groups, such as women, children, disabled persons, minorities, and indigenous peoples;**
- **Develop a system for monitoring and reporting both compliance with the sustainable development criteria and of the outcomes (positive and negative) of CDM projects. This system should apply throughout project implementation;**
- **Provide clear guidance for project participants on how to conduct local and global stakeholder consultation processes to ensure meaningful and effective participation (see section 2 below);¹⁰**

⁷ See International Rivers, Letter to the CDM Executive Board Regarding the Barro Blanco Hydroelectric Project, Feb. 9, 2011, *available at* <http://www.internationalrivers.org/resources/letter-to-the-cdm-executive-board-regarding-the-barro-blanco-hydroelectric-project-3078>; CDM Watch (now Carbon Market Watch), Letter to the CDM Executive Board re: Inadequacy of local stakeholder consultation of CDM project 3197 (Bajo Aguan), Jun. 24, 2011, http://carbonmarketwatch.org/wp-content/uploads/2012/04/CDM-Watch-Unsolicited-Letter_inadequate-local-stakeholder-consultation.pdf.

⁸ CDM Policy Dialogue, *supra* n. 1, at 3, 19.

⁹ The current CDM Modalities and Procedures rely solely on the host country to define sustainable development criteria. See CDM, Decision 3/CMP.1, FCCC/KP/CMP/2005/8/Add.1, Annex: Modalities and Procedures for a Clean Development Mechanism, ¶ 40(a). International standards would ensure uniform measurement of benefits and common goals; provide the necessary guidance to assess and mitigate the environmental, social and economic impacts of CDM projects; and help to ensure that projects do not cause human harm, including rights violations. CIEL and Earthjustice, Joint Submission on the Sustainability Benefits of the Clean Development Mechanism, July 3, 2011, *available at* http://cdm.unfccc.int/public_inputs/2011/sustainability_benefits/cfi/907GTH1M85QF9HVB54ABJ0WEDX3I88.

¹⁰ This will further the CDM Executive Board’s objective that the CDM process “[e]nsure transparency by providing relevant information to stakeholders and opportunities for them to provide supplementary information/explanation in a timely manner....” CDM Executive Board, Modalities and Procedures for Direct Communication with Stakeholders (Version 01), ¶ 7(d).

- **Provide for a means for withdrawal of registration of projects that, at any stage during the project cycle, fail to meet sustainable development criteria, or violate applicable environmental, health, labor and human rights standards, laws and policies; and**
- **Establish a grievance process that allows stakeholders to raise concerns about environmental and social harms associated with CDM projects (see section 3 below).**

2. STRENGTHENING LOCAL COMMUNITY AND CIVIL SOCIETY PARTICIPATION IN THE CDM PROCESS

Stakeholder consultation is a key requirement in the CDM registration process. However, the stakeholder consultation requirements outlined in the current CDM Modalities and Procedures are poorly defined and do not require sufficient documentation to determine whether they have been satisfied. In many cases, people and communities directly affected by CDM projects are not adequately informed about those projects and their potential effects. As a result, dozens of projects have been registered without adequate stakeholder participation, and despite strong local opposition and clear evidence that the projects would likely harm local populations and/or ecosystems.¹¹

Further, the current requirements do not ensure effective evaluation of whether local stakeholders had a meaningful opportunity to participate in the consultation process.¹²

Considering that more than 6,000 projects are currently registered under the CDM and will be operational for many years to come, the revised CDM Modalities and Procedures must include clear, well-defined requirements for stakeholder involvement in the CDM and specifically must:

- **Develop clear rules describing how to undertake the local stakeholder consultation process, i.e., location, scope, contents, frequency, and timeline of public consultation meetings;**
- **Develop clear rules describing how and when to give notice of opportunities to participate in the local consultation process. Among other things, notice must be given early enough to enable stakeholders to engage and provide meaningful input into the decision-making process; and**
- **Ensure that public comment periods provide meaningful opportunities for local stakeholders to raise their concerns throughout the CDM project cycle.**

¹¹ See, e.g., International Rivers, CDM Comments, <http://www.internationalrivers.org/taxonomy/term/1025> (last visited Mar. 25, 2013) (commenting on hydropower projects that include Stung Tatay (Cambodia); Panan (India); Santo Antônio (Brazil); Jirau (Brazil); Teles Pires (Brazil); Kamchay (Cambodia) Marañon (Peru); Nam Ngum 5 (Lao PDR); Yunnan Gongguoqiao (China); Barro Blanco (Panama); and Bonyic (Panama)).

¹² For instance, the “comments” described in the *Energy Efficient Power Generation by Welspun Energy Madhya Pradesh Limited PDD* – documented as questions rather than statements or concerns – are almost identical to the same six to eight comments submitted in at least two other PDDs for supercritical coal plant projects in India. See *Energy Efficient Power Generation by Welspun Energy Madhya Pradesh Limited*; *Energy Efficient Power Generation by Welspun Energy Madhya Pradesh Limited India*; *Energy Efficient Power Generation by Welspun Energy Anuppur Private Limited India*, available at <http://cdm.unfccc.int/Projects/Validation/DB/F99Y7Y47SBQ9MFV18EDJJRKH9VBKDI/view.html>.

3. PROVIDING PROCESSES TO ENSURE THAT AFFECTED COMMUNITIES HAVE A MEANS TO RAISE CONCERNS AT ANY STAGE OF THE PROJECT CYCLE

At present, there is no means for affected people or civil society to raise concerns once a project is registered, even if adverse impacts occur during project implementation. In negotiations under the Subsidiary Body for Implementation, Parties to the Kyoto Protocol have been considering an appeals procedure for decisions of the CDM Executive Board (CDM EB) since June 2011. A CDM appeals procedure presents a crucial opportunity for the CDM EB to uphold human rights and to promote enhanced accountability, legitimacy, and public trust in and acceptance of the CDM as a valid tool for achieving its goals under the Kyoto Protocol.

However, the appeals procedure, as proposed, is limited to consideration of registration decisions made by the CDM EB. To protect the rights of local stakeholders, the CDM must establish a grievance process that can consider and address claims by or on behalf of affected or concerned people or communities about possible violations of the relevant rules at any stage of the project cycle. For this reason, we recommend that the revised CDM Modalities and Procedures do the following:

- **Establish an appeals procedure that provides legal standing for all stakeholders as defined in the CDM Modalities and Procedures¹³; and**
- **Provide a grievance process to address concerns raised throughout implementation by local stakeholders regarding the social and environmental impacts of CDM projects, for example by considering concerns regarding a project's failure to comply with sustainable development criteria.**

¹³ CDM, Decision 3/CMP.1, Annex, ¶ (A)(1)(e) (“Stakeholders’ means the public, including individuals, groups or communities affected, or likely to be affected, by the proposed clean development mechanism project activity.”).

APPENDIX A: EXISTING INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Under international law, the CDM and the Parties to the Kyoto Protocol must ensure that their responses to climate change do not themselves violate human rights. Existing human rights obligations – established under international treaties, instruments, and customary law – require States to take necessary measures to promote the realization of rights during all phases of the CDM process, including project development, implementation, and monitoring. These obligations have been recognized in the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, and the UN Charter, as well as decisions adopted under the UNFCCC and Kyoto Protocol.

- “Parties [to the UNFCCC] should, in all climate change-related actions, fully respect human rights.”¹⁴ (UNFCCC, Cancun Agreements);
- States have a duty “[t]o achieve international co-operation in...promoting and encouraging respect for human rights and for fundamental freedoms for all...”¹⁵ (UN Charter);
- “[T]he United Nations shall promote...universal respect for, and observance of, human rights and fundamental freedoms for all...”¹⁶ (UN Charter);
- Regarding stakeholder participation in decision-making related to climate change, UNFCCC Parties have a duty to “encourage the widest participation in this process, including that of NGOs” and to “promote and facilitate [...] public participation in addressing climate change and its effects and developing adequate responses.”¹⁷ (UNFCCC);
- “‘Stakeholders’ means the public, including individuals, groups or communities affected, or likely to be affected, by the proposed [CDM] project activity.”¹⁸ (Marrakesh Accords);
- CDM processes should “[e]nsure transparency by providing relevant information to stakeholders and opportunities for them to provide supplementary information/explanation in a timely manner...”¹⁹ (CDM EB);
- Development processes must respect and contribute to the realization of rights for all. All States have obligations to respect, protect, and fulfill both substantive and procedural rights (Declaration on the Right to Development)²⁰;
- Mitigation and adaptation measures should be aimed at preventing, but cannot justify violations of, human rights, whether substantive or procedural.²¹

¹⁴ UNFCCC, Cancun Long-term Cooperative Action Outcome, 2011, ¶ 8.

¹⁵ UN Charter, art. 1(3).

¹⁶ UN Charter, art. 55(c).

¹⁷ See Johl & Duyck, “Promoting Human Rights in the Future Climate Regime,” *Ethics, Policy and Environment*, vol. 15, no. 3, Oct. 2012, available at <http://www.tandfonline.com/doi/full/10.1080/21550085.2012.730240>, p. 300 (citing UNFCCC, arts. 4.1(i), 6.a(iii), 1771 U.N.T.S. 107, entered into force 21 Mar. 1994).

¹⁸ CDM, Decision 3/CMP.1, Annex, ¶ A(1)(e).

¹⁹ CDM Executive Board, Modalities and Procedures for Direct Communication with Stakeholders (Version 01), EB 62, Annex 15 (Jul. 15, 2011), available at http://cdm.unfccc.int/Reference/Procedures/eb_proc03.pdf, ¶ 7(d).

²⁰ See Declaration on the Right to Development, art. 6 (“All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights...”); see also *id.* art. 9(2) (“Nothing in the present Declaration shall be construed as [contradicting UN purposes and principles], or as implying that any State, group or person has a right to engage in any activity ... aimed at the violation of the rights set forth in the [International Bill of Human Rights].”).

²¹ See Declaration on the Right to Development, art. 6; see Johl & Lador, “A Human Rights-based Approach to Climate Finance,” Friedrich-Ebert-Stiftung International Policy Analysis, Feb. 2012, p. 4 (citing Orellana, Climate Change and the Right to Development, Feb. 2011, at 2; see also UNFCCC, pmb. ¶ 21 (“[R]esponses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter.”)).

APPENDIX B: SUSTAINABLE DEVELOPMENT CRITERIA

International sustainable development criteria must be consistent with existing international agreements, standards, and other relevant obligations, and must help further the UNFCCC and CDM's objectives of achieving sustainable development. In addition, such criteria must take into account environmental, social, and economic considerations as described below. In developing the sustainable development criteria, the CDM should also develop an exclusion list of project types, *e.g.*, coal-fired power plants, that are so contrary to sustainable development that they should not be eligible for inclusion in the CDM.

International sustainable development criteria should address, but not be limited to, the following:

- *Environmental and social impacts.* Project participants should assess and minimize the potential environmental and social impacts of a proposed project taking into account the natural environment (air, water, land and plant and animal species); human health and safety; social impacts (involuntary resettlement, indigenous peoples, and cultural resources); and transboundary and global environmental impacts.
- *Natural habitats.* Projects should not result in significant conversion or degradation of critical natural habitats, including those that are legally protected, officially proposed for protection, identified by authoritative sources for their high conservation value, or recognized as protected by traditional local communities.
- *Cultural resources.* Projects should not result in the alteration, damage, or removal of any critical cultural resources.
- *Involuntary resettlement.* Ensure that indigenous peoples and local communities are not forcibly removed from their lands or territories.
- *Indigenous peoples and local communities.* Projects should not result in direct or indirect removal or displacement of indigenous peoples and local communities from their lands or territories.
- *Environmental health and safety.* Development of general and industry-specific terms guidelines on environmental health and safety is necessary and should apply to all CDM projects. These guidelines should contain the performance levels and measures that are considered to be achievable in new facilities using existing technology at reasonable costs.
- *Participatory decision-making.* Projects should ensure access to information, full and effective participation, and effective measures to provide affected stakeholders with recourse when CDM rules and standards and other relevant obligations have not been properly met.
- *International obligations.* Projects should comply with existing international obligations, including human rights, labor, and environmental standards.