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04 RIGHTS-BASED FRAMEWORKS FOR CLIMATE FINANCE

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DEVELOPING SUSTAINABLE & EQUITABLE LEGAL FRAMEWORKS FOR
THE GLOBAL LOW-CARBON ECONOMY
LEGAL EXPERTS REPORT SERIES¹

RIGHTS-BASED FRAMEWORKS FOR CLIMATE FINANCE

Sébastien Jodoin²

1. Introduction

The UNFCCC recognizes that developed countries should take the lead in combating climate change and its effects as a result of their historical responsibility for emitting GHGs and their greater resources and capabilities. Moreover, actions to combat climate change should take into account the objective of developing countries for the achievement of sustained economic growth and the eradication of poverty.³ This commitment to common but differentiated obligations has led to the establishment of a number of schemes and arrangements for the provision of climate finance by developed countries to developing countries, including the Clean Development Mechanism (CDM), the nascent mechanism for Reducing Emissions from Deforestation and Degradation (REDD), the Kyoto Protocol Adaptation Fund, the Special Climate Change Fund and the Least Developed Countries Fund (LDC Fund) run through the Global Environmental Facility (GEF). Furthermore, the Copenhagen Accord sets both short term and long term objectives for North-South financial flows and directs the establishment of a Copenhagen Green Climate Fund to this end.

International human rights law is of critical importance to the design and implementation of these arrangements for climate finance. Rights-based frameworks are needed to ensure that laws, policies and mechanisms for financing climate change mitigation and adaptation protect, respect and fulfil human rights throughout the various stages of response measures, including policy-making, planning, funding, implementation, monitoring and evaluation. Rights-based frameworks and approaches do not only

¹ This Legal Experts Report was produced through consultation with key experts participating in the programme of activities hosted by the Centre for International Sustainable Development Law (CISDL) and the International Development Law Organisation (IDLO) during U.N. climate change negotiations in Copenhagen, December 2009. The symposium engaged leading academic partners from the University of Cambridge, the University of Chile, the University of Copenhagen, Hong Kong University, Ibadan University of Nigeria, University of Atma Jaya of Indonesia, Jawaharlal Nehru University of India, McGill University, the National Litoral University of Argentina, New York University, the University of Oslo, the University of Sydney, the University of Toronto, Tsinghua University of China, the Arabian Gulf University, and Yale University. Key collaborators included the International Law Association, UNEP, UNDP, OHCHR, IUCN, ClimateFocus, the Clinton Climate Initiative and the Assembly of First Nations (AFN).

² Lead Counsel, CISDL; Associate Fellow, McGill Centre on Human Rights and Legal Pluralism. Special thanks are due to Stuart Wuttke, AFN; Ulrik Halsteen, OHCHR; Tracy Coates, CISDL; Patricia Parkinson and Paul Crowley, IDLO for their comments and the Government of Québec for its financial support.

³ See e.g. UNFCCC Preamble and arts 3(1), 3(2), 4(5)-4(7).

ensure that responses to climate change will conform to existing human rights obligations and principles, they also have the potential to strengthen the effectiveness and long-term success of these measures.

2. Key Legal Trends

2.1 Human Rights and Legal Justifications for Climate Finance

Climate change has affected and will continue to affect a number of core human rights, including the rights to life, the right to self-determination, and a range of social, economic and cultural rights.⁴ In this way, human rights may provide a justification for funding the mitigation and adaptation responses to climate change. Indeed, in the context of the climate change negotiations, a number of states and NGOs argue that the human rights impacts of climate change oblige states to support the efforts of developing countries to mitigate climate change and the initiatives of vulnerable communities to adapt to its effects by providing funding, cooperation and assistance.

Increasingly, the proponents of this approach have emphasized the liability and responsibility of developed states for the current and projected human rights violations arising from human-induced climate change. For instance, in 2005, a group of Inuit in the Canadian and Alaskan Arctic sought compensation from the United States for alleged violations of their human rights resulting from climate change before the Inter-American Commission on Human Rights (IACHR).⁵ Although the IACHR deemed the case inadmissible, similar litigation has been or is in the course of being launched.⁶

However, there are good reasons to think a strong or exclusive focus on the potential of human rights responsibility for the impacts of climate change may not form the best legal foundation for climate finance. To begin with, as underscored by the Office of the United Nations High Commissioner for Human Rights (OHCHR), it is less than clear that the invocation of state responsibility for human rights violations arising from climate change finds strong support in existing international human rights law.⁷ More importantly, conditioning climate finance on liability may undermine the obligations of shared responsibility of all states for the realization of human rights included in the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁸ and may create arbitrary

⁴ U.N. Human Rights Council, Resolution 10/4, 41st meeting, 25 March 2009, U.N. Doc. A/HRC/10/L.11, preamble.

⁵ See Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming caused by Acts and Omissions of the United States, submitted by Sheila Watt-Cloutier, with the support of the Inuit Circumpolar Conference, on behalf of all Inuit of the Arctic Regions of the United States and Canada, 7 December 2005, available at: <http://inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>.

⁶ See Center for Climate Change Law, Columbia Law School, Climate Change Litigation Resources, available at: <http://www.law.columbia.edu/centers/climatechange/resources>.

⁷ Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, 15 January 2009, UN Doc A/HRC/10/61, para. 70.

⁸ Committee on Economic, Social and Cultural Rights, General Comment no 3, 14 December 1990, U.N. Doc. E/1991/23, para. 14.

distinctions between environmental disasters or change based on whether they can be linked or not to the consequences of climate change.

2.2 Human Rights and Legal Constraints on the Implementation of Climate Finance

Many of the climate mitigation or adaptation activities funded or potentially funded by climate finance have direct and indirect impacts on a range of human rights. To the extent that one of the priority concerns of human rights has always been the protection of individual rights in the face of governmental action, it is only natural that state responses to climate change, which often involve major policy changes and large projects with impacts on the life, safety and free movement of individuals, attract the scrutiny of human rights.

Concerns have most notably arisen over the four following response measures:

1. Hydroelectric dams and the rights of displaced communities. The construction of hydroelectric dams has long raised serious human rights concerns relating to the forced displacement or relocation of local and Indigenous communities and the subsequent loss of land, access to food and water, and means of subsistence. There are serious concerns that climate finance, most notably through the CDM, have supported and will continue to support the construction of large hydroelectric dams where proper human rights safeguards have not been implemented. The CDM standards as well as recourse to the standards of the World Commission on Dams have not allayed these concerns.⁹

2. Biofuel development and the right to food. Numerous states in both the developed and developing worlds have set standards and establishment programmes for the use and development of biofuel. This has encouraged a shift in agricultural production from growing food to growing biofuels, contributing to a reduction in land use dedicated to growing food and a global rise in food commodity prices. Although both of these trends may have benefits for farmers in developing countries, they have had negative impacts on the right to adequate food and freedom from hunger.¹⁰

3. Forest conservation and the rights of local and Indigenous communities. While potential benefits exist for local and Indigenous communities in the establishment of financial mechanisms for protecting forests in the developing world (such as REDD), there is also considerable apprehension that the framework for REDD that may be adopted in the current negotiations could fail to adequately respect, protect and fulfil the rights of local communities and Indigenous peoples. Particular concerns have been expressed regarding the inclusion of the right to free, prior and informed consent of Indigenous peoples to activities that affect their land, an important emerging norm of customary international law that is

⁹ Naomi Roht-Arriaza, 'Human Rights in the Climate Change Regime,' (2010) (1)(2) *Journal of Human Rights and the Environment* 211 at 215-219.

¹⁰ Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, 15 January 2009, UN Doc A/HRC/10/61, para. 66.

recognised in a number of international instruments and decisions, including the U.N. Declaration on the Rights of Indigenous Peoples.¹¹

4. *Relocation, resettlement and the right to housing.* In the event that developing country governments may need to relocate or resettle communities vulnerable to the effects of climate change, these governments may violate, or may not be in a position to respect, the housing rights protected by the ICESCR.¹² The right to housing notably prohibits the practice of forced evictions and, in situations where evictions are justified, specifies that states must ensure that they are carried out in a manner warranted by a law which is compatible with applicable human rights standards, including a number of procedural protections, such as an opportunity for genuine consultation, reasonable notice or the provision of legal remedies.¹³

3. Legal Challenges

In this context, four key legal challenges have emerged:

1. Basing international and national climate finance laws and policies on a recognition of the human rights impacts of climate change, particularly the rights to life, an adequate standard of living, culture, health, food, and water.
2. Linking international climate finance laws and policies to the shared obligation of all states to ensure the realization of economic, social and cultural rights, including through provision of international funding and assistance by developed countries to developing countries.
3. Ensuring that international and national climate finance laws and policies respect, protect and fulfil the full range of human rights, taking into account the adverse consequences of certain response measures on vulnerable and disadvantaged groups potentially affected by response measures.
4. Scaling up the use of rights-based approaches at the project level to design effective and equitable climate finance frameworks and mechanisms at the international, national and sub-national levels.

4. Innovative Legal Best Practices in this Area

The principal innovative legal best practices in the role of human rights in climate finance have principally involved the use of human rights in non-governmental standard-setting and certification schemes. Two sets of standards are worth mentioning in this regard. The Climate, Community and Biodiversity Alliance (CCBA) has developed draft standards for the validation of avoided deforestation and forest degradation projects, falling within the REDD framework. The draft standards include 15 criteria, which, among other things, require demonstration that a project has not

¹¹ UN Human Rights Council Resolution 2006/2, 13 Sept. 2007, UN Doc. A/RES/61/295, Articles 10, 11(2), 19, 28, 29(2) and 32(2).

¹² ICESCR, G.A. Res. 2200A, U.N. Doc. A/6316, art. 11 para. 1

¹³ Committee on Economic, Social and Cultural Rights, General Comment no 7, 20 May 1997, U.N. Doc. E/1998/22, para. 15.

encroached on property rights, has obtained the free, prior and informed consent of those whose rights are affected by a project, and does not entail involuntary relocation.¹⁴ Another innovative non-governmental standard is the Gold Standard Rules and Procedures for CDM. Launched in 2003, the Gold Standard provides a robust methodology for ensuring that CDM projects lead to real and verifiable reductions in emissions and actually contribute to sustainable development in developing countries. In terms of human rights, Gold Standard (version 2.1) most notably includes safeguards that projects should respect internationally human rights and labour standards and not be involved or complicit in human rights abuses, involuntary resettlement or the alteration, damage or removal of any critical cultural heritage.¹⁵ In both cases however, challenges remain with respect to the implementation and validation of standards.¹⁶

There is also a growing body of literature and practice on the use of rights-based approaches to climate response measures. Two of the leading guides in this field have been produced or supported by the International Union for Conservation of Nature (IUCN).¹⁷ There are also a number of CDM projects and REDD demonstration projects that have sought to implement rights-based approaches.¹⁸ The challenge moving forward for the first initiative is how to implement rights-based principles at the project level, while the challenge for the second is one of replication. While projects and programmes making adoption of a rights-based approach to development could be of critical use to integrating human rights into climate adaptation development aid, this field is also facing similar implementation challenges in concrete as well as broader contexts.¹⁹

5. Conclusion

Over the last three years, many states, scholars and advocates have sought to call attention to the importance of human rights obligations, principles and approaches for addressing climate change. Although much of the focus has remained on the consequences of climate change for human rights, there has been an increasing focus on the equally important role that human rights can play in designing and constraining responses to climate change. The current climate change negotiations aimed at renewing or replacing the Kyoto Protocol for the post-2012 period has only partially and often inadequately dealt with human rights

¹⁴ CCBA, *Climate, Community and Biodiversity Project Design Standards*, 2nd Edition, Indicator G5, available at <http://www.climate-standards.org/standards/index.html>.

¹⁵ Gold Standard, Version 2.1, available at <http://www.cdmgoldstandard.org/Current-GS-Rules.102.0.html>.

¹⁶ Roht-Arriaza, *supra* note 9, at 219 and 232.

¹⁷ See Thomas Greiber, Melinda Janki, Marcos Orellana, Annalisa Savaresi, and Dinah Shelton, ed., *Conservation with Justice* (IUCN Environmental Law and Policy Paper No. 71, 2009); Jessica Campese, Terry Sunderland, Thomas Greiber and Gonzalo Oviedo, eds., *Rights-based approaches: Exploring issues and opportunities for conservation* (Bogor, Indonesia: CIFOR and IUCN, 2009).

¹⁸ *Ibid.*

¹⁹ Sam Hickey and Diana Mitlin, eds., *Rights-based approaches to development: exploring the potential and pitfalls* (Sterling, VA: Kumarian Press, 2009); Emma Harris-Curtis, Oscar Marleyn and Oliver Bakewell, "The implications for Northern NGOs of adopting rights-based approaches," INTRAC Occasional Papers Series 41, 2005.

issues and concerns relevant to climate finance.²⁰ As a result, much of the innovation in the field of rights-based approaches to climate finance lies in non-governmental certification schemes and demonstration projects. The key challenge for the future governance of climate finance involves the integration of these best practices and other relevant human rights standards into international and global rules and mechanisms for the global low-carbon economy.

²⁰ See generally Sébastien Jodoin, 'Human Rights and Climate Change Governance,' CISDL Legal Working Paper, December 2010.

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