

# Promoting Rights-based Climate Finance for People and Planet

*Working Draft Paper for Discussion*



## ABOUT THE PAPER

This working draft is a collaboration between the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Heinrich Böll Stiftung North America (hbs North America) meant to stimulate exchange and discussion with human rights and climate finance and development finance experts from a range of backgrounds.

Shared for comment by the Heinrich Böll Stiftung North America and the Office of the United Nations High Commissioner for Human Rights, Washington, DC/Geneva, October 2017.

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Cover Image: **Typhoon Ketsana (Ondoy) Project in the Philippines (Asian Development Bank)**

In the aftermath of Typhoon Ketsana (Ondoy), a boy drags some possessions through the flooded streets of Metro Manila. Typhoon Ketsana (Ondoy) dropped 455 mm (17.9 in) of rain on Metro Manila in a span of 24 hours on 26 September 2009. A month's worth of rainfall in a single day washed away homes and flooded large areas, killing hundreds and stranding thousands in the city and nearby provinces.

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## I. Introduction: the importance of a human rights-based approach to climate finance.

As the need to mitigate and adapt to climate change becomes increasingly urgent, governments and other actors must take significant steps to mobilise funds. Recent progress includes the operationalization of the Green Climate Fund, and a collective pledge under the 2015 Paris Agreement to build on a USD\$100 billion per year baseline of climate finance after 2025.

Even so, the scale of the challenge of mobilizing sufficient climate finance remains considerable. Current progress should be seen in the context of the commitment made by States under the Paris Agreement to make ‘financial flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.’<sup>1</sup> It is estimated that climate funds will need to meet costs that annually run into hundreds of billions, if not trillions, of US dollars after 2030.<sup>2</sup> Adaptation costs for developing countries alone have been estimated in the range of USD\$140 to \$300 billion per year by 2030.<sup>3</sup> Pledges made by governments under the Paris Agreement that include national plans for mitigating and adapting to climate change, known as Intended Nationally Determined Contributions, have been estimated to cost approximately USD\$349 billion per year.<sup>4</sup>

The obligation to provide climate finance dovetails with an international commitment to finance the 2030 Agenda for Sustainable Development (2030 Agenda), which seeks to transform the global development paradigm into one that is more equitable, sustainable and resilient. The implementation of the 2030 Agenda, which includes a goal on climate change that is aligned with the Paris Agreement, is estimated to require an annual investment of around USD\$6 trillion.<sup>5</sup> Climate finance must be new and additional to financial flows that are directed towards sustainable development.

Given the evolving landscape for sustainable development and climate finance, this report seeks to clarify the normative framework that applies to the actions of States, international financial institutions and the private sector in this context. This requires aligning climate finance policies and processes with the obligations that governments and other actors have assumed under the international human rights framework and in the broader context of sustainable development cooperation.

The report sets out, the key human rights risks associated with climate finance, the human rights responsibilities of State and private actors in the mobilization and administration of funding and the governance of funds and the current international architecture for climate finance. While a single definition of climate finance has yet to be internationally agreed upon, the term is used here to refer to financial resources mobilised to help countries mitigate and adapt to the impacts of climate change.

A human rights-based approach to climate finance is essential for several reasons.

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<sup>1</sup> Paris Agreement, Art. 2(c).

<sup>2</sup> See, e.g., <http://www.worldbank.org/en/topic/climatefinance>

<sup>3</sup> UNEP, The Adaptation Finance Gap Report (2016). The Report notes that assumptions have a strong influence on cost estimates, and that studies that focus on policy implementation and national circumstances generally report higher adaptation costs.

<sup>4</sup> L Weischer, L Warland, D Eckstein, S Hoch, A Michaelowa, M Koelher and S Wehner (2016) Investing in Ambition: Analysis of the financial aspects in (Intended) Nationally Determined Contributions (GermanWatch, Perspectives Climate Group).

<sup>5</sup> <http://www.un.org/pga/71/2017/04/18/opening-of-sdg-financing-lab/>

First, and as discussed further in the body of this report, there is a clear legal imperative, anchored in binding international human rights instruments, for governments and the private sector to ensure human rights standards inform climate finance governance as well as the policies, processes, delivery methods and benefits or outcomes concerning climate finance.

Second, a human rights-based approach pro-actively shapes the way climate finance is programmed and guards against the risk that climate finance is used to support projects that result in human rights violations and the exacerbation of social and economic inequalities. While the threat that climate change poses to the enjoyment of human rights is immense,<sup>6</sup> responses to climate change also have the potential to undermine a range of procedural and substantive rights, often through impacts on access to and use of natural resources. These risks include infringement of the rights of affected individuals and communities to access to information and participation in decision-making, to the enjoyment of rights associated with livelihood, land, culture and self-determination, and to the right to redress for violations of those rights. These risks are discussed further in section II.

Third, integrating human rights considerations into the policies, processes and actions of climate funds ensures policy coherence. This includes coherence with existing human rights obligations and principles in key international instruments concerning sustainable development.<sup>7</sup> Governments recently reaffirmed the need for policy coherence, including coherence across the human rights and development agendas, in the 2030 Agenda for Sustainable Development<sup>8</sup> and the outcome document of the Third International Conference on Financing for Development, the Addis Ababa Action Agenda.<sup>9</sup> Further, the Paris Agreement in its preamble explicitly recognises that States 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

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<sup>6</sup> See e.g. A/HRC/RES/35/20 Resolution adopted by the Human Rights Council on 22 June 2017 which emphasizes, inter alia, 'that the adverse effects of climate change have a range of implications, which can increase with greater global warming, both direct and indirect, for the effective enjoyment of human rights, including, inter alia, the right to life, the right to adequate food, the right to the enjoyment of highest attainable standard of physical and mental health, the right to adequate housing, the right to self-determination, the rights to safe drinking water and sanitation and the right to development' (preamble); further, in 2014, 27 UN Special Rapporteurs and other independent experts issued a joint letter on the implications of climate change for human rights, which stated in part: A safe, clean, healthy and sustainable environment is indispensable to the full enjoyment of human rights, including rights to life, health, food, water and housing, among many others.... The most recent report of the Intergovernmental Panel on Climate Change (IPCC) brings into sharp focus the grave harm that climate change is already causing, and will continue to cause, to the environment on which we all depend. There can no longer be any doubt that climate change interferes with the enjoyment of human rights recognised and protected by international law. For further discussion of the human rights implications of climate change, see United Nations Environment Programme, *Climate Change and Human Rights* (2015); Annual Report of the UN High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: Report of the Office of the UN High Commissioner for Human Rights on the relationship between climate change and human rights (2009) A/HRC/10/61; Climate Vulnerable Forum, *The Marrakech Communiqué* (outcome document of the CVF High Level Meeting at UNFCCC COP22, 18 November 2016).

<sup>7</sup> For example, the 2030 Agenda for Sustainable Development; Rio Declaration on Environment and Development; Addis Ababa Action Agenda; Paris Declaration on Aid Effectiveness and Accra Agenda for Action.

<sup>8</sup> Target 17.13 and 17.14, 2030 Agenda for Sustainable Development.

<sup>9</sup> Paras. 9, 103, Addis Ababa Action Agenda. It also specifically calls upon 'all development banks to establish or maintain social and environmental safeguards systems, including on human rights, gender equality and women's empowerment, that are transparent, effective, efficient and time-sensitive' (para. 75).



the right to development, as well as gender equality, empowerment of women and intergenerational equity'.<sup>10</sup>

Fourth, a human rights-based approach improves the sustainability and equitability of the outcomes of development and climate change policies.<sup>11</sup> It does so in part by institutionalizing processes that are participatory, democratic, and accountable, and by shifting the focus from aggregate outcomes to individual ones, which is necessary to ensure no one is left behind, that groups that are traditionally socially or economically marginalised are not further disadvantaged, and that substantive equality is advanced.<sup>12</sup> As agreed to by 171 governments in the Vienna Declaration and Programme of Action more than twenty years ago, 'democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing'.<sup>13</sup> This underlines the value of going beyond merely 'safeguarding' against human rights violations and moving towards actively seeking to promote human rights as an outcome of development policy and climate actions.

Finally, a human rights-based approach helps to unpack the rights and responsibilities of the different actors involved in climate finance, including governments, international and national financial institutions, financial intermediaries, businesses, workers, and other affected individuals and communities. This is particularly important given the difficult 'trade-offs' between interests that policy-makers are often perceived to engage in in the realm of climate change policy-making. The human rights framework helps to inform these decision-making processes and to clarify the circumstances in which 'trading off' individual and community entitlements must be resisted. It also foregrounds the critical importance of the effective participation of individuals and communities in decision-making processes and policies that affect their lives.

## II. Key human rights risks associated with climate finance

In the absence of an effective commitment to understanding and accounting for human rights impacts, climate finance can contribute to a range of human rights violations and the exacerbation of social and economic inequalities. These risks are particularly acute when climate funds and development finance institutions (DFIs) operate on the basis of a 'do no harm' or safeguards model, rather than seeking to actively promote the realization of human rights throughout their operations and policies.<sup>14</sup>

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<sup>10</sup> Preamble, Paris Agreement.

<sup>11</sup> OHCHR, Frequently Asked Questions on Human Rights and Multilateral Development Banks (2016); OHCHR, Applying a Human Rights-based Approach to CC Negotiations, Policies and Measures (2010); A D Fisher, A Human Rights-based Approach to the Environment and Climate Change (GI-ESCR, 2014); UNICEF, Human Rights-based approach to Programming at [https://www.unicef.org/policyanalysis/rights/index\\_62012.html](https://www.unicef.org/policyanalysis/rights/index_62012.html); Council of the European Union, Council Conclusions on a rights-based approach to development cooperation, encompassing all human rights (2014); OHCHR, Frequently Asked Questions on a Human Rights-based approach to Development Cooperation (2006).

<sup>12</sup> For further discussion of the intrinsic and instrumental value of a human rights-based approach to development cooperation, see generally the UN Practitioners Portal on Human Rights Based Approaches to Programming at <http://hrbaportal.org/>; and OHCHR, Frequently Asked Questions on a Human Rights-based approach to Development Cooperation (2006).

<sup>13</sup> Art. 8, Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

<sup>14</sup> For a critique of the World Bank's approach to human rights, see Report of the Special Rapporteur on extreme poverty and human rights A/70/274 (4 Aug 2015).

Mitigation and adaptation projects that are supported by climate funds have the potential to undermine a range of procedural and substantive human rights. These include the rights to life, housing, food, health, self-determination, information, participation and the right to redress for violations of those rights. These risks can manifest themselves during the planning, construction, operation and decommissioning phases of individual projects. Projects associated with land use and energy production, including the development of renewable energy infrastructure which is attracting increasing levels of investment,<sup>15</sup> have been associated with particularly grave local social and environmental consequences. Hydropower projects, which are often touted as a source of 'clean' energy, are of particular concern from a human rights perspective. These concerns are discussed further below. Nonetheless, thousands of hydropower dams are currently under construction<sup>16</sup> and the hydropower sector continues to receive significant financial support from multilateral development banks and other financial institutions.<sup>17</sup> This is despite increasing evidence that large dams can emit significant volumes of greenhouse gases and disrupt the role that rivers play as global carbon sinks.<sup>18</sup>

### Rights to information and participation, and free, prior and informed consent

Respect for the procedural rights of individuals and communities affected by mitigation and adaptation projects, including their rights to information, participation in decision-making, and to free, prior and informed consent concerning the project, is essential for guarding against further substantive human rights violations. Yet violations of these rights remain pervasive in the context of large-scale development projects.

For example, a recent report issued by the Asian Development Bank (ADB) noted that most complaints received by the ADB's accountability mechanism listed a lack of adequate and meaningful consultation—including deficiencies in information, consultation and participation during project design and implementation—as a trigger for subsequent negative impacts; a fact that has not changed for more than a decade.<sup>19</sup> Further, a recent survey of fifty companies involved in renewable energy projects revealed a series of deficiencies in their human rights commitments and practices, including the absence of any reference to free, prior and informed consent, in the policies of forty of the companies surveyed.<sup>20</sup>

The frequent lack of attention to the rights of affected communities to information and participation in decision-making has been highlighted by UN human rights mandate-holders and civil society in

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<sup>15</sup> Global investment in renewable energy has increased from USD\$62 billion in 2004 to \$287 billion in 2016: E Horvath, M Benton, A Armeni, Investor Briefing: Renewable Energy Impacts on Communities: Managing Investors Risks and Responsibilities (Apr 2017).

<sup>16</sup> More than 3,700 dams are currently under construction and in the pipeline: Zarfl, C., Lumsdon, A.E., Berlekamp, J. et al., A global boom in hydropower dam construction, *Aquatic Sciences* (2015) 77(1) 161-170; regarding the ongoing development of Brazil's hydropower sector, see P Fearnside, How a Dam Building Boom is Transforming the Brazilian Amazon, *Yale Environment* 360, 26 September 2017.

<sup>17</sup> The World Bank, for example, still dedicates the majority of its renewable energy portfolio to large hydropower projects: International Rivers, *The World Bank and Dams Part 4: Behind the times on Renewable Energy* (2016)

<sup>18</sup> See, e.g., B Deemer et al, Greenhouse Gas Emissions from Reservoir Water Surfaces: A New Global Synthesis, *BioScience*, Vol 66, Issue 11, (1 Nov 2016).

<sup>19</sup> Asian Development Bank, 2016 Learning Report on the Implementation of the Accountability Mechanism Policy (2016)

<sup>20</sup> Details of study in E Horvath, M Benton, A Armeni, Investor Briefing: Renewable Energy Impacts on Communities: Managing Investors Risks and Responsibilities (Apr 2017).



the context of hydropower, biofuel and other extractive projects.<sup>21</sup> The risk of inadequate consultation with local communities is particularly acute when customary systems of land ownership and tenure are not formally recognised by governments.<sup>22</sup> This is a common challenge: one estimate suggests that less than a third of the land that local and indigenous peoples hold in accordance with customary tenure is formally recognised as belonging to them.<sup>23</sup>

The right to participation and the free, prior and informed consent standard are closely related to indigenous peoples' right to self-determination. Collectively, they reflect that indigenous peoples have the right to determine their own future and participate in all processes that have the potential to impact them. The Secretariat of the Permanent Forum on Indigenous Issues has stated that if climate finance is channeled in such a way that it does not recognize indigenous peoples' authority over their land, territories and resources; or if it supports non-indigenous civil society organisations over indigenous peoples' representative organisations, then it risks undermining indigenous peoples' self-determination.<sup>24</sup>

### Right to adequate housing

The risk of forced evictions and violations of the right to adequate housing is particularly high when projects involve large-scale acquisitions of land. The Special Rapporteur on the right to food has noted that the production of biofuels poses a threat to the right to housing in regions that are currently being targeted as potential sites for biofuel production.<sup>25</sup> The Special Rapporteur observed that the current practice of targeting countries with weak land governance for new land investments increases the risk of large-scale land deals turning into 'land grabs' where free, prior and informed consent of affected communities is not sought and human rights violations often occur.<sup>26</sup>

Large hydropower projects have also displaced tens of millions of people.<sup>27</sup> Dam-affected communities or populations are at risk of being deprived of housing that is adequate and appropriate as a result of displacement or inadequate resettlement plans.<sup>28</sup> Concerns have also been

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<sup>21</sup> Report of the Special Rapporteur on the rights of indigenous peoples A/HRC/36/46; Report of the Special Rapporteur on the rights of indigenous peoples on her mission to Brazil, 8 Aug 2016, A/HRC/33/42/Add.1; Report of the Special Rapporteur on the rights of indigenous peoples, Extractive Industries and indigenous peoples A/HRC/24/41 (2013); UN SR on the right to food, Note on the Impacts of the EU Biofuels Policy on the Right to Food (23 April 2013); International Rivers, Dam Standards: A Rights-based approach, A Guidebook for Civil Society (2014); UN Special Rapporteur on the Situation of Human Rights Defenders, They Spoke Truth to Power and Were Murdered in Cold Blood (2016).

<sup>22</sup> Report of the Special Rapporteur on the rights of indigenous peoples A/HRC/36/46; Inter-Agency Support Group on Indigenous Peoples' Issues, Thematic Paper towards the preparation of the 2014 World Conference on Indigenous Peoples, Land Territories and Resources (2014).

<sup>23</sup> Rights and Resources Initiative, Who Owns the World's Land? A global baseline of formally recognised indigenous and community land rights (2015).

<sup>24</sup> Permanent Forum on Indigenous Issues, Study on the extent to which climate change policies and projects adhere to the standards set forth in the UN Declaration on the Rights of Indigenous Peoples E/C.19/2010/7 2 Feb 2010.

<sup>25</sup> UN SR on the right to food, Note on the Impacts of the EU Biofuels Policy on the Right to Food (23 April 2013).

<sup>26</sup> UN SR on the right to food, Note on the Impacts of the EU Biofuels Policy on the Right to Food (23 April 2013).

<sup>27</sup> World Commission on Dams, Dams and Development: A New Framework for Decision-making (2000)

<sup>28</sup> Open letter to UN Special Rapporteurs: request to carry an on-site visit to assess situation regarding Barro Blanco (23 Feb 2017) <http://carbonmarketwatch.org/open-letter-to-un-special-rapporteurs-request-to-carry-an-on-site-visit-to-assess-situation-regarding-barro-blanco/>; International Rivers, Dam Standards: A Rights-based approach, A Guidebook for Civil Society (2014)

raised by indigenous communities that mitigation measures such as REDD+ programmes (Reduced Emissions from Deforestation and Degradation and Fostering Conservation and Forest Carbon Stock),<sup>29</sup> which incentivize the restoration and maintenance of forests, could lead to expropriation of land and displacement.<sup>30</sup> The Permanent Forum on Indigenous Issues stated that new proposals for reduced emissions from deforestation “must address the need for global and national policy reforms ... respecting rights to land, territories and resources, and the rights of self-determination and the free, prior and informed consent of the indigenous peoples concerned”.<sup>31</sup> For indigenous people, who often have strong cultural and spiritual ties to their ancestral land, interference with their connection to traditional lands can also encroach on their cultural rights.<sup>32</sup>

### Rights to adequate food and health

The production and use of biofuels as a strategy for climate change mitigation have created significant human rights risks, particularly in relation to the right to food.<sup>33</sup> The Office of the High Commissioner for Human Rights has observed that ‘whereas agro-fuel production could bring positive benefits for climate change and for farmers in developing countries, agro-fuels have also contributed to increasing the price of food commodities “because of the competition between food, feed and fuel for scarce arable land”’.<sup>34</sup> The diversion of land and water resources in source countries to the production of bio-fuels undermines the use of those resources to support the realization of the right to food of local populations. Further, increased demand for biofuels, which are also staple food crops, has introduced significant volatility into food commodities markets, increasing the price of food crops and causing further food insecurity.<sup>35</sup>

Disruptions in river ecosystems caused by hydropower dams can also destroy food sources of local communities, especially fish and flood-recession crops. It is estimated, for example, that 60% of the Cambodian population’s protein comes from fish derived from a river ecosystem in the Mekong that is now threatened by dam construction upstream.<sup>36</sup> The substantial drops in fish catch that are projected due to dams on the Mekong will have significant implications for the rights to food and health of communities that depend on fish consumption for their protein and other nutritional needs, including increased rates of malnutrition that most acutely affect children and pregnant

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<sup>29</sup> <http://www.un-redd.org>

<sup>30</sup> See, e.g., Indigenous Peoples denounce carbon offsets at United Nations; Demand Cancellation of REDD+, May 18, 2016 <http://no-redd.com/category/permanent-forum-on-indigenous-issues/>; Permanent Forum on Indigenous Issues, Report on the seventh session (21 April-2 May 2008) E/2008/43

<sup>31</sup> Permanent Forum on Indigenous Issues, Report on the seventh session (21 April-2 May 2008) E/2008/43

<sup>32</sup> The Committee on the elimination of all forms of racial discrimination has expressed concern about plans to establish a large-scale biofuel plantation and the threat it constituted to the rights of indigenous peoples to own their lands and enjoy their culture: Concluding Observations of the Committee on the Elimination of Racial Discrimination (15 August 2007) CERD/C/IDN/CO/3

<sup>33</sup> See N Roht-Arriaza, ‘First, do no harm’: Human Rights and Efforts to Combat Climate Change 38 Georgia Journal of International & Comparative Law 593 (2010); V Tauli-Corpuz, A Lynge, Impact of climate change mitigation measures on indigenous peoples and on their territories and lands (study presented at the UN Economic and Social Council, Permanent Forum on Indigenous Issues, 7th session, E/C.19/2008/10 (2008); see, also, UN FAO, ‘Climate Change Adaptation and Mitigation: Challenges and Opportunities in the Food Sector (2012).

<sup>34</sup> Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights A/HRC/10/61 (Jan. 15, 2009) (quoting the Special Rapporteur on the right to food).

<sup>35</sup> Agrofuels and the right to food—Q&A from the Special Rapporteur on the Right to Food (2012);

<sup>36</sup> Zarfl, C., Lumsdon, A.E., Berlekamp, J. et al., A global boom in hydropower dam construction, Aquatic Sciences (2015) 77(1) 161-170.

women.<sup>37</sup> This will compound the threats to food security and health already posed by climate change. A majority of National Adaptation Programmes of Action, for example, already identify food security as a core adaptation concern.<sup>38</sup>

Aside from the health implications of food insecurity, dams often create conditions that exacerbate the transmission of diseases such as malaria and other mosquito-borne virus. One study suggests that dams in Africa are responsible for at least one million additional cases of malaria each year.<sup>39</sup>

### Rights to freedom of expression, opinion, and assembly

Projects in the energy sector, including in relation to hydropower, have been associated with the brutal repression of protest and the use of violent intimidation tactics against human rights defenders.<sup>40</sup> 2015 marked the worst year on record for murders of environmental and human rights defenders, with the hydropower sector alone linked to 15 deaths, and with 40% of those killed being indigenous people.<sup>41</sup> In recent years, there has also been an increase in attacks on people who question or submit complaints related to development projects financed by international financial institutions.<sup>42</sup> These risks are at times exacerbated by governments' enactment of special laws to protect the interests of investors and waive standard social and environmental protections, whether through the creation of Special Economic Zones or laws specific to individual projects.<sup>43</sup>

### Right to an effective remedy

A lack of accountability for human rights harms can itself amount to a human rights violation. The right to an effective remedy is a core tenet of the international human rights system,<sup>44</sup> yet access to remedy is often elusive for those who have suffered harm in the context of large-scale development

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<sup>37</sup> M Harris, Rethinking Food Security: The Right to Food in the Mekong (2013L: ERI).

<sup>38</sup> The latest UNFCCC NAPA Sectoral Database shows food security concerns in NAPAs being prevalent. See: [http://unfccc.int/files/cooperation\\_support/least\\_developed\\_countries\\_portal/napa\\_priorities\\_database/application/pdf/napa\\_index\\_by\\_sector.pdf](http://unfccc.int/files/cooperation_support/least_developed_countries_portal/napa_priorities_database/application/pdf/napa_index_by_sector.pdf); UNFCCC NAPA Database: [http://unfccc.int/adaptation/workstreams/national\\_adaptation\\_programmes\\_of\\_action/items/4585.php](http://unfccc.int/adaptation/workstreams/national_adaptation_programmes_of_action/items/4585.php).

<sup>39</sup> S Kibret, J Lautze, M McCartney et al, Malaria Impact of large dams in sub-Saharan Africa: maps, estimates and predictions, Malaria Journal (2015).

<sup>40</sup> Global Witness, On Dangerous Ground (2015); see also Report of the Special Rapporteur on the rights of indigenous peoples, Extractive Industries and indigenous peoples A/HRC/24/41 (2013); End of mission statement on Honduras by the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz (10 Nov 2016); UN Special Rapporteur on the Situation of Human Rights Defenders, They Spoke Truth to Power and Were Murdered in Cold Blood (2016).

<sup>41</sup> Global Witness, On Dangerous Ground (2015).

<sup>42</sup> See, e.g., Global Witness, On Dangerous Ground (June 2016); Frontline Defenders, Annual Report on Human Rights Defenders at Risk in 2016 (2016), available at <https://www.frontlinedefenders.org/en/resource-publication/annual-report-human-rightsdefenders-risk-2016> (highlighting that in 2016, over 1,000 human rights defenders were killed, harassed, detained, or subjected to smear campaigns against them); Article 19, Center for International Environmental Law & Vermont Law School, A Deadly Shade of Green: Threats to Environmental and Human Rights Defenders in Latin America (2016).

<sup>43</sup> See, e.g., UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein (2017). Human rights trampled in push to build infrastructure. Miami Herald, March 7, 2017. Available at: <http://www.miamiherald.com/opinion/op-ed/article136884218.html>; see also Special Investment Region Act of the State of Gujarat, India. This Act gives significant powers to the state to acquire land for building smart cities like Dholera, a part of India's Delhi-Mumbai Corridor presently under construction. Section 24 of the Act gives the Regional Development Authority broad powers to deal with land and even evict people, bypassing the consent and compensation requirements of India's Land Acquisition Act (taken from OHCHR Infrastructure paper).

<sup>44</sup> See, e.g., ICCPR, Art 2(3).

projects.<sup>45</sup> While the reasons for this are case-specific, the accountability mechanisms of development finance institutions that support such projects have been widely criticized for the procedural and substantive hurdles that they create to access to justice.<sup>46</sup>

In the context of climate finance, enforcing accountability for the human rights impacts of projects will become increasingly complicated as sources of finance, particularly from the private sector, diversify. Financial intermediaries, for example, are playing an increasingly important role in all development sectors and in climate finance. This means that, rather than being used to directly finance projects or programmes, funds are channeled through intermediaries such as private equity funds, banks, or credit agencies.<sup>47</sup> The European Investment Bank has doubled its use of financial intermediaries over the last ten years,<sup>48</sup> and in 2011 over half of the overall portfolio of the International Finance Corporation (IFC) was made up of lending to financial intermediaries.<sup>49</sup>

The Green Climate Fund (GCF) also relies heavily on a model of financial intermediation, including through lending to public MDBs that use GCF resources and their own resources to invest in private sector activities. This poses additional challenges for accountability because of the lack of transparency around the activities of financial intermediaries, which hampers oversight. For example, a recent audit by the Compliance Advisor Ombudsman (the IFC's independent watchdog) of the IFC's investments in financial intermediaries found systematic non-compliance with IFC policies throughout the investment process. It concluded that the 'IFC does not, in general, have a basis to assess financial intermediaries' compliance with (the IFC's) environmental and social requirements.'<sup>50</sup>

The extent to which investors are themselves aware of the human rights impacts of projects they are financing will also vary depending on the nature of the investment and/or intermediary. Some investors may have decision-making authority over projects, while others may have no view into the underlying investments of the vehicle to which they have committed.<sup>51</sup>

Even when project financiers are easily identified, there can be significant obstacles to remedy and redress. A recent report that evaluated the experiences of affected individuals and communities with independent accountability mechanisms (IAMs) of a range of national, regional and international development banks found that 'the outcome rarely provides adequate remedy for the harm suffered.'<sup>52</sup> Among the deficiencies identified were a lack of awareness among project-affected people that IAMs exist; insufficient procedures to prevent and effectively respond to reprisals against complainants; a lack of institutional support and legitimacy provided to IAMs by the

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<sup>45</sup> C. Daniel, K. Genovese, M. van Huijstee & S. Singh (eds.) *Glass Half Full? The State of Accountability in Development Finance*. Amsterdam: SOMO (January 2016).

<sup>46</sup> See, e.g., C. Daniel, K. Genovese, M. van Huijstee & S. Singh (eds.) *Glass Half Full? The State of Accountability in Development Finance*. Amsterdam: SOMO (January 2016); *What is Remedy for Corporate Human Rights Abuses? Listening to Community Voices: A Field Report*, School of International and Public Affairs (SIPA), Columbia University and ACCESS Facility, December 2015

<sup>47</sup> Oxfam, CIEL, *Risky Business: Intermediary Lending and Development Finance* (2015).

<sup>48</sup> A. Tricarico (2011) 'EIB lending through financial intermediaries in Africa: a call for action', <http://ictsd.org/i/news/tni/108593>

<sup>49</sup> Oxfam, CIEL, *Risky Business: Intermediary Lending and Development Finance* (2015).

<sup>50</sup> Compliance Advisor Ombudsman, *Third Monitoring Report of IFC's Response to: CAO Audit of a Sample of IFC Investments in Third-Party Financial Intermediaries* (2017) p.20.

<sup>51</sup> E Horvath, M Benton, A Armeni, *Investor Briefing: Renewable Energy Impacts on Communities: Managing Investors Risks and Responsibilities* (Apr 2017)

<sup>52</sup> *Glass Half Full, State of Accountability in Dev Finance* (2016)

DFIs themselves; unpredictable and un-transparent processes for processing complaints; and the failure of DFIs to respond adequately to adverse findings made by IAMs.<sup>53</sup>

It is also worth noting that of all the complaints filed to the IAMs evaluated from the date of their establishment until June 2015, more than half have concerned infrastructure projects. They most commonly raised concerns regarding inadequate consultation and disclosure, insufficient due diligence and the environmental repercussions of projects. Projects in the energy and extractive industry sectors each accounted for about 20% of all cases.<sup>54</sup>

### Women's human rights

Globally, women play a critical role in supporting household and community food security and comprise a significant portion of the agricultural workforce.<sup>55</sup> This role becomes even more important as climate change, which disproportionately affects women, aggravates food security concerns in many developing countries. However, their rights to own, use and control land and natural resources remain extremely limited.<sup>56</sup> When combined with broader discriminatory norms and practices, women end up frequently marginalized in decision-making processes around land and natural resources, including in the context of hydropower and infrastructure development.<sup>57</sup> This is despite the fact that women's right to participate in decision-making processes, including decisions related to development projects, is explicitly protected in several international human rights instruments.<sup>58</sup> Women are also disproportionately affected by the social and environmental impacts of development projects, in part because of their role as primary caretakers and their obligation to provide food and water for their families and communities.<sup>59</sup> Women human rights defenders, including those protesting natural resource exploitation, are also subject to particularly vicious harassment and abuse, including rape, sexual harassment and stigmatization.<sup>60</sup>

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<sup>53</sup> Glass Half Full, State of Accountability in Dev Finance (2016)

<sup>54</sup> Glass Half Full, State of Accountability in Dev Finance (2016)

<sup>55</sup> UN Women, Leveraging Co-Benefits Between Gender Equality and Climate Action for Sustainable Development (2016).

<sup>56</sup> UN Women, Leveraging Co-Benefits Between Gender Equality and Climate Action for Sustainable Development (2016).

<sup>57</sup> International Rivers, Dam Standards: A Rights-based approach, A Guidebook for Civil Society (2014)

<sup>58</sup> Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (also known as the Declaration on human rights defenders), adopted by General Assembly Resolution A/RES/53/144; Article 7, Convention on the Elimination of All Forms of Discrimination against Women; the Beijing Declaration and Platform of Action also highlights the need to ensure women's participation in decision-making processes related to the environment. Report of the Fourth World Conference on Women, Beijing. 4-15 September 1995, para. 253.a.

<sup>59</sup> AWID, International Coalition of Women Human Rights Defenders, Women Human Rights Defenders Confronting Extractive Industries: An Overview of Critical Risks and Human Rights Obligations (2017)

<sup>60</sup> AWID, International Coalition of Women Human Rights Defenders, Women Human Rights Defenders Confronting Extractive Industries: An Overview of Critical Risks and Human Rights Obligations (2017); UN Special Rapporteur on the Situation of Human Rights Defenders, They Spoke Truth to Power and Were Murdered in Cold Blood (2016).

**Financing for the Agua Zarca hydro-power dam in Honduras:**

*The death in 2016 of indigenous leader and human rights defender Berta Cáceres is a stark illustration of the human rights risks of renewable energy projects. Cáceres was protesting the failure of the project develop, Desarrollos Energético SA (DESA), to obtain the free prior and informed consent of the Lenca indigenous people. Her colleague Nelson García was killed twelve days after Cáceres was murdered.<sup>61</sup> The company that is under investigation for Cáceres' death has stated that the security forces they hired abide by human rights policies and that free, prior and informed consent of the Lenca community was secured for the project.<sup>62</sup> This indicates a deep disconnect between the company's policies and events on the ground.*

*An independent fact-finding mission initiated by the Netherlands Development Finance Company (FMO), one of the development banks investing in the project, found that free, prior and informed consent was not obtained from the Lenca people prior to project approval.<sup>63</sup> Following Cáceres' death, the IFC and China's Sinohydro withdrew their funding for the project.<sup>64</sup> In 2017, the two European financiers of the project, FMO and Finnfund, also withdraw their funding.<sup>65</sup> DESA also secured funding for the project from the Central American Bank of Economic Integration (CABEI), a Central American development bank. CABEI, which is the largest investor, has not formally exited its contract with DESA, although it has stopped loan payments.<sup>66</sup> Despite their apparent failure to conduct human rights due diligence in relation to the Agua Zarca dam and DESA's action, CABEI and FMO over objections by GCF CSO observes have been accredited as implementing entities of the Green Climate Fund.<sup>67</sup>*

**Lessons learned from GCF Funding for a Wetland Project in Peru**

One of the first projects approved by the Green Climate Fund was a proposal for wetland management and livelihood support in the eastern Amazon region in Peru. It was the first project approved by the GCF that directly implicated the rights of indigenous peoples—in this case, the rights of primarily low-income indigenous communities living in the wetland ecosystem in which the project would be carried out.<sup>68</sup> The project caused division and conflict among the affected communities, raising concerns over the way the Peruvian implementing Entity, PROFONANPE (Peruvian Trust Fund for National Parks and Protected Areas) had managed its relationship with local

<sup>61</sup> Goldman Environmental Prize profile of Berta Cáceres: <http://www.goldmanprize.org/recipient/berta-caceres/>

<sup>62</sup> Desarrollos Energeticos: Renewable Energy and Human Rights <https://business-humanrights.org/en/desarrollos-energ%C3%A9ticos-desa-renewable-energy-human-rights>

<sup>63</sup> E Horvath, M Benton, A Armeni, Investor Briefing: Renewable Energy Impacts on Communities: Managing Investors Risks and Responsibilities (Apr 2017).

<sup>64</sup> G Poindexter, Financiers suspend activity in Honduras for 22-MW Agua Zarca small hydropower project, 3 March 2016, Hydroworld.com <http://www.hydroworld.com/articles/2016/03/financiers-suspend-activity-in-honduras-for-22-mw-agua-zarca-small-hydropower-project.html>

<sup>65</sup> FMO and Finnfund finalize exit from Agua Zarca, <https://www.fmo.nl/agua-zarca>

<sup>66</sup> N Lakhani, Backers of Honduran dam opposed by murdered activist withdraw funding, 4 June 2017, The Guardian <https://www.theguardian.com/world/2017/jun/04/honduras-dam-activist-berta-caceres>

<sup>67</sup> <http://www.greenclimate.fund/how-we-work/tools/entity-directory>

<sup>68</sup> Forest Peoples Programme, Tebtebba, The GCF and Free, Prior and Informed Consent and a call for the adoption of an Indigenous Peoples' Policy: the lessons learned from a wetland project in Peru (2015).



indigenous peoples' organisations, including the integrity of its consultation processes.<sup>69</sup> Prior to the project being proposed, a Peruvian indigenous peoples organisation had already written to the GCF opposing the accreditation of PROFONANPE as a recipient of GCF funding.<sup>70</sup>

Indigenous peoples organisations highlighted several concerns related to the project, including a lack of clarity regarding the impact the project would have on ongoing processes by indigenous peoples to secure recognition of their collective rights to customarily-held land and to customary resource use. For example, project documents did not address existing efforts of local indigenous communities to establish their own territorial and environmental governance initiatives.<sup>71</sup>

In response to these concerns, the GCF Board made funding of the project subject to certain conditions, including a requirement that PROFONANPE obtain clear written consent from representative indigenous organisations and provide an opportunity for those organisations to take part in the project design.<sup>72</sup> However, at issue is whether the project was miscategorized as a project with no environmental and social impacts (Cat.C), which also did not require an environmental and social impact assessment under current GCF regulations. Instead, as the project involved indigenous peoples and the necessity to ensure their free, prior and informed consent, the project should have been categorized as Cat. B (with some likely social and environmental impacts to be mitigated). In this case, the project proponent, PROFONAPE, which is only accredited for Cat. C micro-projects under the GCF, would not have been able to bring the project forward.

### **III. Human rights obligations of States and businesses in the context of climate finance.**

#### **1. Obligations of States**

Every country in the world is a party to multiple international human rights treaties. Human rights law is an integral part of the international system and governments have undertaken to implement human rights commitments internally, externally, and collectively. These obligations have significant implications for the way in which governments are required to engage in the mobilisation and administration of climate finance both domestically and internationally. This was affirmed in a recent Human Rights Council Resolution, which called upon States to integrate 'human rights in their climate actions at all levels.'<sup>73</sup>

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<sup>69</sup> C Lang, How the GCF approved a wetlands project in Peru without a process of free, prior and informed consent of indigenous peoples (19 Jan 2016).

<sup>70</sup> C Lang, How the GCF approved a wetlands project in Peru without a process of free, prior and informed consent of indigenous peoples (19 Jan 2016)

<sup>71</sup> Forest Peoples Programme, Tebtebba, The GCF and Free, Prior and Informed Consent and a call for the adoption of an Indigenous Peoples' Policy: the lessons learned from a wetland project in Peru (2015).

<sup>72</sup> Forest Peoples Programme, Tebtebba, The GCF and Free, Prior and Informed Consent and a call for the adoption of an Indigenous Peoples' Policy: the lessons learned from a wetland project in Peru (2015).

<sup>73</sup> A/HRC/RES/35/20.

## 1.1. Internal responsibilities

### 1.1.1 Human rights-based domestic climate change strategies

#### *Financing national climate change strategies*

Each State, regardless of its level of wealth, development, or its geographical location, will feel the impacts of climate change. To ensure that the social and environmental consequences of climate change do not undermine the enjoyment of human rights and that climate-related actions support the realisation of human rights, States must ensure that, in line with their human rights obligations, adequate resources are allocated to supporting national human rights-based climate change strategies.

In accordance with their obligations under the UNFCCC framework, including the Paris Agreement, almost all States have submitted nationally determined contributions (NDCs) indicating their intended mitigation and adaptation plans from 2020 onwards. The majority of NDCs submitted by developing countries state that their plans are at least partly conditional upon the receipt of additional finance and/or the transfer of technology.<sup>74</sup> Conversely, developed country NDCs rarely reference these issues or their international commitments to finance climate action.

While States are entitled to international assistance to aid them to fulfil their domestic human rights obligations (discussed further in section III.1.3 on States' collective responsibilities), under core human rights instruments they are also obliged to individually mobilise the maximum available resources for the progressive realisation of economic, social and cultural rights, as well as the advancement of civil and political rights and the right to development.<sup>75</sup> Given the human rights impacts of climate change, this may require climate change-responsive budgeting and the integration of climate related-risks into fiscal policy frameworks.

#### *Development and implementation of national climate change strategies*

A human rights-based approach to climate finance requires the integration of the following principles into all mitigation and adaptation actions.

#### Early, comprehensive and effective multi-stakeholder participation:

Access to information and participation are core principles in international human rights and environmental law.<sup>76</sup> The right to participation in the conduct of public affairs and processes that are relevant to development is enshrined in international human rights instruments such as the International Covenant on Civil and Political Rights, the UN Declaration on the Rights of Indigenous Peoples and the Declaration on the Right to Development.<sup>77</sup> Under the Rio Declaration on Environment and Development, States are required to facilitate and encourage public awareness

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<sup>74</sup> Germanwatch et al, Investing in Ambition: Analysis of the financial aspects in (Intended) Nationally Determined Contributions (6 June, 2016).

<sup>75</sup> E.g. International Covenant on Economic, Social and Cultural Rights, Art 2(1); see also OHCHR, Key Messages on Human Rights and Financing for Development (2015).

<sup>76</sup> OHCHR, Key Messages on Climate Change and Human Rights (2015).

<sup>77</sup> See, e.g., art. 25, ICCPR; art. 2, Declaration on the Right to Development; art. 5, Declaration on the Rights of Indigenous Peoples; art. 7, Convention on the Elimination of all Forms of Discrimination Against Women.

and participation in decision-making concerning environmental issues.<sup>78</sup> The Paris Agreement also explicitly requires States Parties to cooperate in taking measures to enhance ‘public participation and public access to information, recognising the importance of these steps with respect to enhancing actions’ under the Agreement.<sup>79</sup> The Aarhus Convention, a regional instrument that binds 43 State Parties including the European Community, also mandates effective public participation in decisions, plans, programmes and policies concerning the environment.<sup>80</sup> Finally, under the Paris Declaration on Aid Effectiveness, countries that are recipients of aid have also committed to develop and implement their national development strategies ‘through broad consultative processes.’<sup>81</sup>

These obligations extend to national-level planning processes for mitigation and adaptation actions, including the development of project pipelines or Fund-specific country investment programmes<sup>82</sup> as well as individual project and require that these processes are transparent, inclusive, accountable and premised on principles of equity and non-discrimination. Information concerning funding priorities, decision-making processes, and other relevant project preparation documents should be made publicly available and accessible.<sup>83</sup>

Attention should be paid to the engagement of the most marginalised individuals and communities, including indigenous communities, women, children, minorities, migrants, persons with disabilities and older persons.<sup>84</sup> This is also consistent with a long-standing recognition (in the Rio Declaration on Environment and Development, for example) of the ‘special role in environmental management and development’ of groups including women, youth, and indigenous peoples.<sup>85</sup> State Parties to the UNFCCC have also repeatedly recognised the importance of inclusive participation in order to ensure climate policy that is not just gender-responsive and human rights-based, but also effective.<sup>86</sup> This

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<sup>78</sup> Principle 10, Rio Declaration. This was affirmed in the outcome document for Rio+20, The Future We Want, which states that “broad public participation and access to information and judicial and administrative proceedings are essential to the promotion of sustainable development.”

<sup>79</sup> Art. 12, Paris Agreement. See, also, art. 6(a) of the UN Framework Convention on Climate Change and UN General Assembly Resolution 67/210, para. 12.

<sup>80</sup> See, e.g., articles 5 to 8, 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Areas (Aarhus Convention)

<sup>81</sup> Paris Declaration on Aid Effectiveness (2005), art. 14; see also Accra Agenda for Action, para. 12. In 2013, 173 Parliaments also adopted the Quito Communiqué which states: Being able to participate in the decisions that affect our lives and the social and environmental context around us is in itself a key dimension of well-being. Inversely, well-being is also necessary for citizens to participate effectively in the management of public affairs. Participation and its attendants of transparency and accountability are in turn key pillars of democracy and of the way democracy applies to the functioning of government at all levels - global, national and local - and in response to citizens’ needs. Participation, transparency and accountability constitute the core of *democratic governance*, which is an end in itself and an enabler of sustainable development: Quito Communiqué, Adopted by the 128<sup>th</sup> Inter-Parliamentary Union Assembly (2013).

<sup>82</sup> For example, the GCF urges recipient countries to submit country programmes outlining the country’s priorities for funding support from the GCF.

<sup>83</sup> HBF and ODI, *HBF/ODI, The Principles and Criteria of Public Climate Finance—A Normative Framework Nov 2016*

<sup>84</sup> OHCHR, Key Messages on Human Rights and Climate Change (2015).

<sup>85</sup> See Principles 20 to 22, Rio Declaration.

<sup>86</sup> E.g., Art. 12, Paris Agreement; Art. 7 in Decision 1/CP.16 (Cancun Agreements) which ‘recognises the need to engage a broad range of stakeholders at the global, regional, national and local levels...including youth and persons with disability, and the gender equality and the effective participation of women and indigenous peoples are important for effective action on all aspects of climate change.’ Decision 18/CP.20, adopted at COP20 in Lima, and the Paris Agreement also direct governments to achieve gender-responsive climate policy. There is also a growing body of research and literature that confirms the intrinsic and instrumental value of integrating gender-responsiveness into project design and implementation: see, e.g., L Schalatek, S Nakhooda,

has been affirmed in the findings of the Intergovernmental Panel on Climate Change (IPCC), which states in its latest Assessment Report that the incorporation of ‘diverse interests, circumstances...and expectations can benefit decision-making processes.’<sup>87</sup> In relation to indigenous peoples, the IPCC has stated that ‘indigenous local and traditional knowledge systems and practices, including indigenous peoples’ holistic view of community and environment, are a major resource for adapting to climate change.’<sup>88</sup> Given the systematic and structural exclusion of many of these groups from participation in public affairs, this will often require a targeted strategy aimed at the inclusion of relevant groups.<sup>89</sup>

Finally, as stated by the Special Rapporteur on human rights and the environment, informed public participation can only take place when the rights of freedom of expression and association are safeguarded, including for those who oppose proposed projects.<sup>90</sup> As highlighted in the discussion of key risks connected to climate finance, environmental and human rights defenders have been subject to reprisals for their protests. States are obliged to protect people exercising their rights to free expression and association from threats, harassment and violence.<sup>91</sup>

**Good practice example: stakeholder participation at the Adaptation Fund**

*The Adaptation Fund’s Environmental and Social Policy requires implementing agencies to ‘identify stakeholders and involve them as early as possible in planning any project/programme supported by the Fund.’<sup>92</sup> In particular, it requires that the results of the environmental and social screening and a draft environmental and social assessment, including any proposed management plan, be made available for public consultations, and that the consultations be ‘timely, effective, inclusive, and held free of coercion and in an appropriate way for communities that are directly affected by the proposed project/programme.’<sup>93</sup> It also requires that the final assessment be published on the Fund’s website ‘as soon as it is received’ by the secretariat. In addition, any significant proposed changes in the project/programme during implementation must also be made available for ‘effective and timely public consultation with directly affected communities’.<sup>94</sup>*

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Gender and Climate Finance (2016: HBS, ODI); Global Gender and Climate Alliance, UNDP, Gender, Climate Change and Food Security (2017).

<sup>87</sup> IPCC, AR5, p. 19

<sup>88</sup> IPCC, AR5, p. 19.

<sup>89</sup> Schalatek, A Matter of Principle: A Normative Framework for a Global Compact on Public Climate Finance.

<sup>90</sup> Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 1 Feb 2016, A/HRC/31/52.

<sup>91</sup> Mapping report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 30 Dec 2013, A/HRC/25/53; the Special Rapporteur on the situation of human rights defenders has underlined these obligations in the context of actions relating to environmental concerns (A/68/262, paras. 16 and 30), as has the Special Rapporteur on the rights of indigenous peoples (A/HRC/24/41, para. 21).

<sup>92</sup> Adaptation Fund, Environmental and Social Policy (2013), para. 33.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

**The importance of free, prior and informed consent (FPIC)**

*When projects are expected to affect indigenous communities, they should only proceed with their free, prior and informed consent (FPIC). The principle of FPIC is derived from several international instruments, including the UN Declaration on the Rights of Indigenous Peoples and ILO Convention No.169.<sup>95</sup> The application of the principle to climate change mitigation projects has also been elaborated upon by the UN-REDD programme.<sup>96</sup> In short, it requires that project proponents engage in an ongoing process of meaningful consultation and exchange with affected communities, with consent sought at key stages in project development. The process by which consent is achieved must itself be agreed upon by affected communities so that it accords with their decision-making structures, institutions, and approaches to resource-management. While the objective of a consultation process may be to reach an agreement, at the core of FPIC is the right of affected peoples to negotiate, grant or withhold consent.*

**Benefiting groups most vulnerable to climate change**

For climate finance to support the realisation of human rights and substantive equality, national climate change strategies should clearly articulate and demonstrate benefits for groups that are disproportionately at risk of experiencing the negative impacts of climate change. According to the Human Rights Council, ‘environmental damage is felt most acutely by those segments of the population already in vulnerable situations’ which include women, children, indigenous peoples, persons with disabilities, displaced persons, those living in poverty, and those who are landless or lack formal title to land.<sup>97</sup> Poverty is a particularly reliable indicator of vulnerability to climate change. As concluded by the Intergovernmental Panel on Climate Change, ‘climate-related hazards, including subtle shifts and trends to extreme events, affect poor people’s lives directly through impacts on livelihoods, such as losses in crop yields, destroyed homes, food insecurity, and loss of

<sup>95</sup> United Nations Declaration on the Rights of Indigenous Peoples *supra* note 64 at arts.10, 19, 32; ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (*adopted* 27 June 1989 by General Conference of the ILO, entered into force 5 September 1991) [hereinafter ILO Convention No. 169]; UN Convention on Biological Diversity art. 8(j) (*adopted* 5 June 1992 by UN Conference on Earth and Development, entered into force 29 December 1993). For a broad discussion of international standards, statements and jurisprudence affirming the existence of the right to FPIC, see UN-REDD Program, Legal Companion to the UN-REDD Program Guidelines on Free, Prior and Informed Consent (2013).

<sup>96</sup> See UN-REDD Program, Guidelines on Free, Prior and Informed Consent (2013); Climate, Community & Biodiversity Alliance, Climate, Community & Biodiversity Project Design Standards (2<sup>nd</sup> ed., 2008); REDD+ Social and Environmental Standards (10 September 2012); Decision 1/CP.16, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (*adopted* 10 December 2010 by Conference of Parties to the UNFCCC, UN Doc. FCCC/CP/2010/7/Add.1). The UN-REDD Program and World Bank Forest Carbon Partnership Facility (FCPF) have issued joint guidance on the requirements for effective stakeholder engagement and full and effective participation of local stakeholders in the context of UN-REDD Programs, and state that FPIC is essential. The same guidance states, in the context of the FCPF, that proponents should act in a way that is “substantially equivalent” to the principle of FPIC: UN-REDD Program, World Bank Forest Carbon Partnership Facility, Guidelines on Stakeholder Engagement in REDD+ Readiness with a focus on the participation of indigenous peoples and other forest-dependent communities (April 20, 2012); see, also, United Nations Development Group Guidelines on Indigenous Peoples’ Issues (2008).

<sup>97</sup> The IPCC’s Fifth Assessment report concludes that there is high agreement that “People who are socially, economically, culturally, politically, institutionally or otherwise marginalized are especially vulnerable to climate change and also to some adaptation and mitigation responses.”

sense of place, and indirectly through increased food prices.’<sup>98</sup> This underlines the imperative to ensure that climate finance contributes to poverty alleviation and the equitable distribution of development outcomes.

Human rights impact assessments (HRIAs) are a key tool for ensuring that the benefits of climate change programmes reach those most in need. Extensive guidance has been issued by UN human rights experts and others on the appropriate methodology and content of HRIAs.<sup>99</sup> At a minimum, assessments should use indicators based on core international human rights and labour standards, which require the collection of disaggregated data, and assessment processes should be iterative so that cumulative impacts are captured. Assessments should also identify steps to proactively advance the enjoyment of human rights. HRIAs should also be used to capture higher-level economic, environmental and social impacts, and not just those that manifest themselves at the project-level.<sup>100</sup>

### **The need for gender-responsive climate finance**

*Climate finance can exacerbate gender inequality if project proponents are not sufficiently attuned to the gendered impacts of climate change and patterns of discrimination that women face more generally. Conversely, gender-responsive climate finance has the potential to both enhance climate resilience and advance women’s enjoyment of human rights and gender equality. It is also a key requirement for the long-term sustainability of climate actions for mitigation and adaptation. For example, in mitigation, sustainable mass transit systems that are designed with the specific needs and vulnerabilities of women and girls in mind can both increase public use of mass transit and increase women’s access to employment, education and services that further facilitate the realisation of women’s human rights.<sup>101</sup> Likewise, renewable energy projects that improve women’s access to energy, especially for those women without prior access to electricity, not only reduce emissions but also women’s traditional care burdens and open up economic, educational and social opportunities, including for their civic engagement. In adaptation, actively seeking to promote women’s enjoyment of their rights is critical for increasing the food security and resilience of communities that depend on small-scale agricultural production for their food and livelihoods.<sup>102</sup> In most parts of the world, women play a major role in agricultural production and possess valuable knowledge concerning agricultural development.<sup>103</sup> Yet, because of barriers to land ownership and other discriminatory norms and practices, they are often excluded from formal consultation processes that determine the adaptation needs of rural communities.<sup>104</sup> Adopting a gender-responsive approach to financing and supporting adaptation projects, including addressing underlying gender inequalities in legal and normative frameworks, is therefore necessary to improve the livelihoods and increase the resilience of communities affected by climate change.*

<sup>98,99</sup> IPCC AR5, Working Group II, Chapter 13, Livelihoods and Poverty, 13.2.1, 13.3

<sup>99</sup> See, e.g., UN Special Rapporteur on the Right to Food, Guiding Principles on human rights impact assessments of trade and investment agreements; Danish Institute for Human Rights, Human Rights Impact Assessment guidance and toolbox, available at <https://www.humanrights.dk/business/tools/human-rights-impact-assessment-guidance-and-toolbox>

<sup>100</sup> See guidance in OHCHR Infrastructure paper.

<sup>101</sup> Check reference—CSO submission on GCF Gender Policy and Gender Action Plan

<sup>102</sup> L Schalatek, S Nakhooda, Gender and Climate Finance (2016: HBS, ODI); GGCA, UNDP, Gender, Climate Change and Food Security (2017).

<sup>103</sup> GGCA, UNDP, Gender, Climate Change and Food Security (2017);

<sup>104</sup> L Schalatek, S Nakhooda, Gender and Climate Finance (2016: HBS, ODI).



### 1.1.2 Human rights-based regulation of the private sector

As discussed in section III.2, the private sector is expected to play an increasingly prominent role in the mobilisation and implementation of climate finance. It is therefore imperative that States guard against human rights infringements arising from the actions of investors or businesses involved in mitigation and adaptation measures. As outlined in the UN Guiding Principles on Business and Human Rights, States have a clear duty to protect individuals and communities against human rights abuses by business enterprises.<sup>105</sup> This duty entails an obligation to ‘adopt legislative, administrative, educational, as well as other appropriate measures, to ensure effective protections against [human rights] violations linked to business activities’ and to provide victims of corporate abuses with access to effective remedies.<sup>106</sup>

#### *A human rights-based approach to PPPs*

While private finance can be channelled through a variety of instruments, public-private partnerships (PPPs) are emerging as a favoured model for structuring private investment in climate projects.<sup>107</sup> Experience with PPPs in other sectors suggests that there are several human rights-related risks that States contemplating entry into a PPP must actively address.

First, there is a risk that essential goods or services will become less accessible as private investors seek to recoup or capitalise on investment through increased tariffs or rationalisation of services.<sup>108</sup> For example, more than 180 cities and communities in 35 countries have ‘re-municipalised’ their water services in the last fifteen years after private providers increased tariffs or failed to invest in infrastructure.<sup>109</sup> Second, governments may unwittingly assume significant debt risks as a result of contingent liabilities embedded within PPP contracts.<sup>110</sup> While PPPs are often justified on the basis that they are a more efficient way to share the cost of public facilities or services, the performance of PPPs is rarely, if ever, compared to traditional government procurement and delivery systems.<sup>111</sup> An example of the considerable risks involved is a large-scale road-building programme in Mexico in the 1990s that involved more than 50 PPPs. Unanticipated costs and macroeconomic shocks led to the government bailing out over half of the PPPs and assuming close to \$8 billion in debt.<sup>112</sup> For

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<sup>105</sup> UN Guiding Principles on Business and Human Rights, part I.

<sup>106</sup> CESCR, E/C.12/GC/24, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities 23 June 2017; UN Guiding Principles on Business and Human Rights, part I.B ‘Operational Principles’.

<sup>107</sup> See, e.g., World Bank, A Public-Private Partnership Approach to Climate Finance (2013). The role of international financial institutions in promoting PPPs is discussed further in section III.1.3.4.

<sup>108</sup> D Hall, Why Public-Private Partnerships Don’t Work: The many advantages of the public alternative (2015: PSIRU); A Estache, C Philippe, The Impact of Private Participation in Infrastructure in Developing Countries: Taking Stock of about 20 Years of Experience (2012).

<sup>109</sup> E Lobina, S Kishimoto, O Petitjean ‘Here to Stay: Water Remunicipalisation as a Global Trend’ (2014: PSIRU, TNI and Multinationals Observatory)

<sup>110</sup> T Jones ‘The New Debt Trap: How the response to the last global financial crisis has laid the ground for the next’ (2015: Jubilee Debt Campaign).

<sup>111</sup> UNCTAD (2015) Trade and Development Report 160. The evidence that does exist suggests that PPPs are not more cost-efficient for governments: See, e.g., M Queyranne (2014) ‘Managing Fiscal Risks from Public-Private Partnerships (PPPs)’ (International Monetary Fund) .9; MJ Romero (2015) ‘What Lies Beneath?: A Critical Assessment of PPPs and their impact on sustainable development’ (EURODAD) 19. In fact, PPPs can create significant financial liabilities for governments that ‘are rarely fully quantified at the project level’: World Bank Independent Evaluation Group (undated) ‘World Bank Group Support to Public-Private Partnerships: Lessons from Experience in Client Countries,’ FY 02-12 (World Bank) .40.

<sup>112</sup> UNCTAD, ‘Trade and Development Report’ (2014) 18. See, also, T Jones ‘The New Debt Trap: How the response to the last global financial crisis has laid the ground for the next’ (2015: Jubilee Debt Campaign).

developing countries, liabilities on this scale have the potential to significantly undermine the availability of domestic resources for other social programmes or services.

For PPPs to support the realisation of human rights, governments should ensure the effective participation of local communities and stakeholders in decisions regarding projects or programmes that are being targeted for private involvement. This requires making project information publicly available and accessible. This is consistent with enjoyment of the rights to information and participation discussed above. Transparent and independent assessments of the fiscal risks, including contingent liabilities, entailed by PPPs should be conducted prior to the conclusion of PPP contracts. Such contracts should also clearly provide for the legal accountability of private partners, especially when the provision of social services is involved.

Further, comprehensive, iterative and participatory human rights impact assessments are particularly important for projects that are financed or operated through PPPs since the true public costs and impacts of PPPs may only become apparent over time.<sup>113</sup> The parameters of these assessments should be informed by recent guidance provided by the UN Committee on Economic, Social and Cultural Rights.<sup>114</sup> The Committee stated that private providers involved in the administration of areas ‘where the role of the public sector has traditionally been strong’ should be subject to ‘public service obligations.’<sup>115</sup> This is to guard against the risk that the enjoyment of rights will become conditional on the ability of individuals or communities to pay, exacerbating socio-economic inequalities. The Committee states that public service obligations in the context of the provision of water or electricity may include: ‘...requirements concerning universality of coverage and the continuity of the service, pricing policies, quality requirements, and user participation’.<sup>116</sup> Finally, as the Committee has stipulated, States are obliged to ensure that services are accessible to all, adequate, and regularly assessed to meet the changing needs of the public. These observations are particularly pertinent in the context of climate change-related projects, which will require the development of public infrastructure, such as energy grids, that meets adaptation and mitigation objectives.

## 1.2. External responsibilities

### 1.2.1. Supporting an enabling environment for the effective enjoyment of human rights and climate resilience

The actions and omissions of States acting in their individual capacity inevitably affects the broader enabling environment for human rights and sustainable development. A State’s foreign economic policies, for example, can undermine the ability of another State to fulfil its human rights obligations, including the latter State’s obligation to mobilise resources for the realization of human rights. In recognition of the contradictions that can characterise foreign policy, States have committed in the 2030 Agenda for Sustainable Development and Addis Ababa Action Agenda to enhancing policy and institutional coherence for sustainable development.<sup>117</sup>

Policy coherence requires aligning States’ trade, tax, investment and finance policies with their obligations to assist with the progressive realisation of human rights internationally and the

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<sup>113</sup> Bread for the World, Financing Infrastructure in Developing Countries through PPPs (2017).

<sup>114</sup> CESCR, E/C.12/GC/24, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities 23 June 2017, para. 21.

<sup>115</sup> CESCR, E/C.12/GC/24, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities 23 June 2017, para. 21.

<sup>116</sup> Ibid, para. 21.

<sup>117</sup> 2030 Agenda for Sustainable Development, targets 17.13-17.15; Addis Ababa Action Agenda, para. 9.

objectives of the Paris Agreement. One example of the way in which a lack of policy coherence can risk undermining the objectives of climate finance is the use of trade and investment agreements to directly undermine the ability of States to enact progressive environmental regulation. For example, the Swedish utility company Vattenfall, which is wholly owned by the Swedish government, has used provisions in investment agreements to sue the German government in an international arbitral tribunal for enacting environmental regulations that affected a coal-fired power plant owned by Vattenfall in the German city of Hamburg.<sup>118</sup> Government practices that contribute to abusive tax avoidance by multinational corporations are also inconsistent with their pledges to support climate and development financing. Tax avoidance has resulted in an estimated loss to developing countries of \$189 billion annually.<sup>119</sup> Such activity would not be possible without the complicity of countries acting as conduits of offshore finance destined for tax havens.<sup>120</sup>

Finally, it is imperative that States that accept obligations to finance greenhouse gas mitigation and adaptation and resilience building do not engage in investment practices abroad that support fossil fuel production or exploitation. For example, many official export credit agencies, which provide government-backed guarantees or finance to corporations from their home country, currently devote a significant part of their investment portfolios to fossil fuel infrastructure. One estimate suggests that export credit agencies from OECD countries provide USD\$32 billion in funding for coal projects between 2007 and 2013.<sup>121</sup> These practices cannot be reconciled with States' climate finance commitments.

### 1.3. Collective responsibilities

#### 1.3.1. Establishment of an equitable global partnership for climate finance

Under the international human rights framework, including the International Covenant on Economic Social and Cultural Rights and the Declaration on the Right to Development, States have committed to international cooperation for the realisation of human rights.<sup>122</sup> The systemic human rights risks posed by climate change therefore mandate a concerted global effort to mobilise the financial resources required for adaptation and mitigation. In line with their human rights obligations and their commitments made in the context of international environmental and development cooperation, States should ensure that international climate finance is centred around partnership between States and informed by solidarity, equity and justice.

#### *Common but differentiated responsibilities*

One of the greatest inequities of climate change is that the countries and regions that have contributed least to historical greenhouse gas emissions are likely to experience or are already experiencing the most severe impacts from climate change. In an effort to redress this, States have agreed to act in accordance with their common but differentiated responsibilities (CBDR). The principle of CBDR has been enshrined in the Rio Declaration on Environment and Development<sup>123</sup> and the UN Framework Convention on Climate Change.<sup>124</sup> In the former, the principle of CBDR in the

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<sup>118</sup> N Bernasconi, Background paper on Vattenfall v Germany arbitration (2009)

<sup>119</sup> J Griffiths (2014) 'The State of Finance for Developing Countries' (Eurodad) 17.

<sup>120</sup> J. Garcia-Bernardo, J. Fichtner, F.W. Takes and E.M. Heemskerk, Uncovering Offshore Financial Centers: Conduits and Sinks in the Global Corporate Ownership Network, *Scientific Reports* 7, article 6246, 2017.

<sup>121</sup> Bankwatch, Ending Fossil Fuel Support: the way forward (2014).

<sup>122</sup> See, e.g., art 2(1), ICESCR, Convention on the Rights of the Child, 1986 Declaration on the Right to Development.

<sup>123</sup> Art 7, Rio Declaration

<sup>124</sup> Art 3(1), UNFCCC.

pursuit of sustainable development is explicitly premised on both the pressure that developed countries have placed on the global environment and ‘the technological and financial resources they command.’<sup>125</sup> This was re-affirmed in the 2030 Agenda for Sustainable Development, which refers to the principle of CBDR as set out in the Rio Declaration.<sup>126</sup>

The imperative for States to act equitably in the context of climate action is also derived from the right to development, which is enshrined in the UN Declaration on the Right to Development and calls for the right to be fulfilled so as to equitably meet the developmental and environmental needs of present and future generations.<sup>127</sup> In the context of the UNFCCC, States Parties have accepted that ‘developed countries should take the lead in combating climate change and the adverse effects thereof’ and that the Paris Agreement must be implemented to ‘reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.’<sup>128</sup> The UN Human Rights Council has also repeatedly affirmed that responses to climate change should take into account the priorities of developing countries relating to the eradication of poverty and economic development.<sup>129</sup>

It is therefore incumbent upon developed countries, which have been responsible for the majority of accumulated greenhouse gas emissions and have benefited most from carbon-intensive development pathways, to assume the greatest responsibility for the provision of climate finance.

It has also been argued that this principle should shape the obligations of developed countries to provide finance for the loss and damage that is associated with climate change impacts in developing countries.<sup>130</sup> Loss and damage is clearly recognized in the Paris Agreement as a distinct issue separate from adaptation,<sup>131</sup> and State Parties to the UNFCCC have established a mechanism, known as the Warsaw Mechanism,<sup>132</sup> for promoting cooperation on loss and damage. However, neither the Warsaw Mechanism nor the Paris Agreement explicitly discuss the link between loss and damage and the obligation to provide climate finance.

### 1.3.2. Key attributes of equitable climate finance

The terms on which climate finance is provided will also determine whether it supports equitable action on climate change or compromises the ability of recipient countries to advance sustainable development and fulfill their human rights obligations.

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<sup>125</sup> Art 7, Rio Declaration states: States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

<sup>126</sup> Para. 12, 2030 Agenda for Sustainable Development

<sup>127</sup> The right to development is also recognized in the Rio Declaration on Environment and Development, the Rio+20 outcome document, and the Vienna Declaration and Programme of Action.

<sup>128</sup> Art 2(2), Paris Agreement.

<sup>129</sup> See, e.g. A/HRC/RES/35/20 (19 June 2017); A/HRC/RES/32/33 (18 July 2016).

<sup>130</sup> J Richards, L Schalatek, *Financing Loss and Damage: A Look at Governance and Implementation Options* (Heinrich Böll Stiftung, 2017).

<sup>131</sup> Art 8, Paris Agreement.

<sup>132</sup> COP10 (November 2013) established the Warsaw International Mechanism for Loss and Damage. See COP decision 2/CP.19 for details.

### *Grants vs. concessional lending*

First, consistent with the principles of equity, CBDR and the recognition of developed countries' historical responsibility for climate change, public adaptation finance should be provided in the form of grants, rather than as soft loans or other kinds of concessional finance. The 'polluter pays' principle, which is enshrined in the Rio Declaration, lends additional weight to the proposition that developed countries should bear the costs of adaptation.<sup>133</sup> Further, many of the countries that are most vulnerable to the impacts of climate change are already dealing with significant sovereign debt burdens. Servicing sovereign debt can seriously undermine the ability of governments to progressively realise human rights and advance social and economic equality.<sup>134</sup> Climate finance that is provided through concessional financing instruments risks aggravating these debt burdens.

### *New and additional finance*

Given the qualitatively different nature of climate finance from other kinds of development finance, it is critical that climate finance is new and additional to official development assistance (ODA) and is not merely a diversion of existing aid commitments. Governments have agreed to the importance of this principle in several decisions adopted under the UNFCCC, including the Bali Action Plan and the Cancun Agreements.<sup>135</sup> However, the lack of clear definitions and common reporting or accounting formats for climate finance has undermined attempts to monitor and verify the additionality of climate finance.<sup>136</sup> An international agreement on aid classification indicators and a common reporting format for public climate finance flows is therefore urgently needed for accountability for climate finance obligations. This is especially important in view of recent discussions among donor governments to further aggregate measures of finance (for example, the proposal to replace ODA measurement with a measure of 'total official support for sustainable development'<sup>137</sup>).

### *Respecting country ownership*

Aid effectiveness principles, including those adopted by States in the 2005 Paris Declaration on Aid Effectiveness, require donor States to respect national ownership and funding priorities.<sup>138</sup> This entails increasingly shifting development finance to direct budget support in recipient States to facilitate alignment of aid flows with national priorities and generally improve the efficiency of aid delivery systems.<sup>139</sup> Beyond any criteria agreed to between donor and recipient States, the latter are

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<sup>133</sup> Principle 16, Rio Declaration: National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment. See also Schalatek, *A Matter of Principle: A Normative Framework for a Global Compact on Public Climate Finance* (2012).

<sup>134</sup> Cite IE on Debt and Human Rights

<sup>135</sup> Article 1(e)(i) Bali Action Plan 2008; paras. 95, 97, Cancun Agreements, outcome doc of AWG-LCA.

<sup>136</sup> For example, a recent evaluation of 5,200 projects reported by OECD donors found that the large majority of projects were wrongly classified as adaption projects: R Weikmans, J T Roberts, J Baum, M Camila Bustos, A Durand, 'Assessing the Credibility of how climate adaptation aid projects are categorised' *Development in Practice* Vol 27 Issue 4 2017

<sup>137</sup> See, e.g., para. 55, Addis Ababa Action Agenda. Note, however, that the AAAA also recognized the need for transparent methodologies for reporting climate finance (para. 60).

<sup>138</sup> The Paris Declaration on Aid Effectiveness (2005) includes an explicit commitment to '[increase] alignment of aid with with partner countries' priorities, systems and procedures and helping to strengthen their capacities' (art. 3) and to 'be guided by development strategies and priorities established by partner countries' in determining the most effective modalities of aid delivery (art. 5); see, also, Accra Agenda for Action, para. 8.

<sup>139</sup> For further discussion of the principles of national ownership and subsidiarity in the context of climate finance, see Schalatek (2012).

also bound by human rights obligations that should shape the way that they administer climate finance to reach those most in need (discussed above in section III.1.1.1).

### 1.3.3. Human rights-based administration of climate finance

States are responsible for ensuring that the policies and actions of international financial institutions (IFIs) are in conformity with their human rights obligations.<sup>140</sup> For IFIs administering climate finance, this requires acting in accordance with the following substantive and procedural obligations.

#### *Transparent and participatory processes for designing, implementing and monitoring activities*

As discussed in relation to the national administration of climate finance (section III.1.1), IFIs must ensure that projects and programmes supported by climate funds are designed transparently and with the effective participation of affected groups, particularly marginalised groups, as well as broader civil society. This obligation is anchored in the same regional and international human rights and environmental law principles that shape equivalent national-level obligations.<sup>141</sup>

Transparency is an essential precondition for participation. In the context of international funding decisions, the disclosure of relevant project documentation at the earliest possible stage enables groups that may be physically removed from the decision-making process to access and, if necessary, translate and disseminate information to relevant stakeholders. Transparency also requires limiting the circumstances under which project proponents can withhold information on proprietary grounds. For example, the IFC's Access to Information Policy, which does not require the disclosure of 'commercially sensitive and confidential information', has attracted criticism from civil society for impairing the ability of people outside the institution to provide meaningful input on project proposals.<sup>142</sup>

The participation and input of affected communities and local civil society organisations is also crucial for ensuring that international funding decisions are responsive to local concerns and priorities.<sup>143</sup> As stated by the UN Special Rapporteur on environment, mechanisms for public participation 'must provide real opportunities for the views of the affected members of the public to be heard and to influence the decision-making process.'<sup>144</sup>

One way of facilitating this participation is by devolving decision-making regarding funding to the local level wherever possible. This is currently envisioned in international climate finance processes as 'Enhanced Direct Access' and is being implemented for national organizations accessing climate

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<sup>140</sup> See, e.g., the Concluding Observations of the Committee on Economic, Social and Cultural Rights (CESCR) on Germany in which it encouraged Germany, 'as a member of international financial institutions, in particular the International Monetary Fund and the World Bank, to do all it can to ensure that the policies and decisions of those organizations are in conformity with the obligations of States parties to the Covenant, in particular the obligations contained in articles 2 (1), 11, 15, 22 and 23 concerning international assistance and cooperation.'; Concluding Observations: Germany (2001) UN Doc E/C.12/1/Add.68 para 31; see also General Comment of the CESCR on the right to the highest attainable standard of health (2000) UN E/C.12/2000/4, para. 39; and General Comment No. 15 of the CESCR on the right to water (2003) UN Doc E/C.12/2002/11, para. 36.

<sup>141</sup> These principles are elaborated on in section III.1.1.1 above.

<sup>142</sup> See, e.g., Bretton Woods Project, IFC Weakens World Bank's transparency commitment, 14 September 2011

<sup>143</sup> See, e.g., comment in ADB evaluation that NGOs/CSOs have played a critical role in the implementation of accountability mechanism policy. The AM cases suggest that close relations of ADB with NGOs/CSOs in the borrowing countries will have benefits for the functioning of the AM and GRMs and may well reduce the likelihood of safeguards complaints materializing

<sup>144</sup> Report of the Special Rapporteur on human rights and the environment, 1 Feb 2016 A/HRC/31/52, para. 59.



funds directly through the Adaptation Fund and the Green Climate Fund. An example of this is the Community Adaptation Small Grants Facility (SGF) in South Africa, which has received USD\$2.5 million in funding from the Adaptation Fund.<sup>145</sup> The SGF, which is administered by local organisations, partners with communities in provinces that are particularly vulnerable to the impacts of climate change. It provides small grants directly to those communities to run their own projects with the objective of empowering those communities and increasing their capacity to adapt and protect local assets, livelihoods and ecosystem services from climate change.<sup>146</sup> The GCF is currently piloting its Enhanced Direct Access programme which has USD\$200 million in funding.

### *Supporting groups most vulnerable to climate change*

Given the distance that often separates decision-makers in IFIs from affected communities, it is particularly important that these institutions take proactive steps to ensure that project finance is benefiting those who are most vulnerable to climate change. As discussed in section III.1.1.1, human rights impact assessments (HRIAs) are an important tool that should be used early and iteratively to predict and evaluate the human rights impacts of projects. Beyond HRIAs, human rights considerations should be clearly addressed at every step of the project approval process.

This requires robust human rights ‘infrastructure’ within climate finance institutions, including technical human rights experts and appropriate human rights-budgeting, as well as engagement with existing international human rights experts and mechanisms to maximise lessons learned from experiences at other institutions.

#### **Good practice example – ADB gendered involuntary resettlement policy:**

*The Asian Development Bank has taken steps to ensure that the potentially gendered impacts of Bank policy and practice are, at least in theory, considered at every step.<sup>147</sup> Clearly articulating gender-related considerations in Bank policy is a necessary, although not sufficient, condition for these considerations to be implemented on the ground. For example, the ADB’s involuntary resettlement policy requires that it:<sup>148</sup>*

- 1. Screen the project early on to identify past, present, and future involuntary resettlement impacts and risks. Determine the scope of resettlement planning through a survey and/or census of displaced persons, including a gender analysis, specifically related to resettlement impacts and risks.*
- 2. ...Pay particular attention to the needs of vulnerable groups, especially those below the poverty line, the landless, the elderly, women and children, and Indigenous Peoples, and those without legal title to land, and ensure their participation in consultations. ...*
- 5. Improve the standards of living of the displaced poor and other vulnerable groups, including women, to at least national minimum standards. In rural areas provide them with legal and affordable access to land and resources, and in urban areas provide them with appropriate income sources and legal and affordable access to adequate housing.*

<sup>145</sup> Adaptation Fund, Taking Adaptation to the Ground: A Small Grants Facility for Enabling Local Level Responses to Climate Change, available at <https://www.adaptation-fund.org/project/taking-adaptation-to-the-ground-a-small-grants-facility-for-enabling-local-level-responses-to-climate-change/>

<sup>146</sup> SANBI, Funding to Help Communities Live with Climate Change: The Small Grants Facility

<sup>147</sup> ADB Safeguard Policy Statement (2009) available at <https://www.adb.org/sites/default/files/institutional-document/32056/safeguard-policy-statement-june2009.pdf>

<sup>148</sup> Involuntary Resettlement Safeguards, ADB Safeguard Policy Statement (2009).

### *Effective accountability mechanisms*

Given the human rights risks associated with climate finance, effective accountability mechanisms that are independent, accessible, transparent and have a mandate to remedy any harm done must be institutionalised.<sup>149</sup> The international legal framework also clearly requires access to redress so that rights-holders can safeguard and vindicate their rights.<sup>150</sup> While redress mechanisms need not be judicial, they must be known to, and have the trust of, affected stakeholder groups; be accessible without costs; be based on clear and known procedures; provide for reasonable access to sources of information, advice and expertise<sup>151</sup> to ensure equitable terms between parties; provide for adjudication by a legitimate, independent third-party mechanism; and provide effective protection for aggrieved parties against retaliation or reprisals.

For remedies to be effective, they must be capable of leading to a prompt, thorough and impartial investigation; cessation of the violation if it is ongoing; and adequate reparation, including, as necessary, restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition.<sup>152</sup>

A recent evaluation of independent accountability mechanisms (IAMs) of regional and global IFIs concluded that IAMs must be given a mandate to compel action if they are to be effective. Currently, many IAMs lack a mandate for compelling IFIs to provide a remedy or address non-compliance, even if they find that a complaint is well-substantiated.<sup>153</sup> Further, it was recommended that IFIs abandon their claim of legal immunity in relation to national courts given the clear evidence that IFIs can cause or contribute to human rights abuses.

### *Avoiding bias towards large-scale infrastructure investment*

A human rights-based approach to climate finance requires prioritisation of projects with the most beneficial human rights outcomes. In practice, this means moving away from an understanding of human rights outcomes as, at best, desirable ‘co-benefits’ subjugated to direct mitigation, adaptation or economic outcomes, to giving equal value to human rights outcomes and recognising those as ‘multiple benefits’. The effectiveness of a climate project or programme in supporting the realisation of human rights must be given an equally important consideration as its cost effectiveness or economic efficiency. While access to clean energy and other kinds of social and economic infrastructure may be a precondition for the enjoyment of a range of human rights, a bias towards supporting large-scale infrastructure projects over community-based approaches undermines a commitment to proactively design projects and programmes with strong human rights outcomes.

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<sup>149</sup> Report of the Special Rapporteur on human rights and the environment, 1 Feb 2016 A/HRC/31/52

<sup>150</sup> See, e.g., UN Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005); Principle 31, UNGPs; Article 9, Aarhus Convention.

<sup>151</sup> For guidance on the promotion of access to effective remedies, see, e.g., OHCHR, Comments of the Office of the High Commissioner for Human Rights on the Review of the Terms of Reference of the Independent Redress Mechanism of the Green Climate Fund 2 February 2017;

<http://www.ohchr.org/Documents/Issues/ClimateChange/GCF2Feb2017.pdf>; and Joint Response by a Group of CSOs on the Revised Terms of Reference for the Independent Redress Mechanism (2017)

[https://us.boell.org/sites/default/files/uploads/2012/10/cso\\_comments\\_-\\_revised\\_tor\\_of\\_the\\_gcfs\\_irm.pdf](https://us.boell.org/sites/default/files/uploads/2012/10/cso_comments_-_revised_tor_of_the_gcfs_irm.pdf)

<sup>152</sup> UN Principles and Guidelines on Reparation; See also Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, U.N. ESCOR, Comm’n on Hum. Rts., 61st Sess., Prov. Agenda Item 17, princ. 31, U.N. Doc. E/CN.4/2005/102/Add.1 (2005)

<sup>153</sup> C. Daniel, K. Genovese, M. van Huijstee & S. Singh (eds.) *Glass Half Full? The State of Accountability in Development Finance*. Amsterdam: SOMO (January 2016).

The human rights risks of large-scale infrastructure are well-documented.<sup>154</sup> Reacting to a string of recent decisions to finance large-scale adaptation projects, civil society has expressed its concern that the Green Climate Fund has already demonstrated a preference for supporting physical infrastructure over smaller-scale initiatives that increase the adaptive capacity of individuals, households and communities that are most vulnerable to the impacts of climate change.<sup>155</sup> The latter address the underlying causes of vulnerability, which range from a lack of livelihood diversification to gender-based discrimination.<sup>156</sup>

Further, in terms of access to energy, many IFIs continue to support the construction of environmentally and socially harmful hydropower dams,<sup>157</sup> even when decentralised, renewable energy clusters can offer a more equitable, sustainable and cost-effective alternative.<sup>158</sup> Community-centred methods, which focus on enabling communities to make decisions around the use of their resources, are also more likely to conform with human rights norms concerning equal participation in decision-making.<sup>159</sup> Alternatives to traditional policy and financial support for large-scale energy production are emerging. For example, the African Renewable Energy Initiative—an initiative of the African Union—has a specific mandate to promote and provide financing for renewable energy access and development, including decentralized, off-grid and mini-grid developments.<sup>160</sup> AREI's framework document adopts decentralization as a core principle for delivering its goals of sustainable development, enhanced human well-being, sound economic development, and low-carbon development strategies.<sup>161</sup> In spite of this seemingly positive approach, strong concerns have been expressed regarding its implementation.<sup>162</sup>

Among the examples of decentralized, renewable energy being shaped by communities is the CRELUZ Cooperativa de Energia e Desenvolvimento Rural do Médio Uruguai Ltda (CRELUZ). CRELUZ is a Brazilian energy cooperative that is developing environmentally sound, local mini-hydro generation plants to help provide energy to 20,000 families. It was created to serve the energy needs of small farmers and businesses in regions that did not have access to energy, and subsidises the cost of energy to low-income consumers.<sup>163</sup>

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<sup>154</sup> Heinrich Böll Foundation, *LATINDADD, Infrastructure: For People or Profit?* (2014); Zeid Ra'ad Al Hussein, UN High Commissioner for Human Rights, 'Human Rights Trampled in Push to Build Infrastructure' *Miami Herald*, 7 Mar 2017; N Alexander, *Infrastructure Investment and Public Private Partnerships* (15 Dec 2016: Heinrich Böll Foundation); Antonio Estache, Caroline Philippe, *The Impact of Private Participation in Infrastructure in Developing Countries: Taking Stock of about 20 Years of Experience* (2012); OHCHR, *Infrastructure Baseline Study* (2017).

<sup>155</sup> CSO letter to GCF

<sup>156</sup> 2007 World Resources Institute report, "[Weathering the Storm, Options for Framing Adaptation and Development](#)"

<sup>157</sup> <https://www.theguardian.com/environment/blog/2013/jul/16/world-bank-dams-africa>

<sup>158</sup> WEDO, Friends of the Earth Scotland, ActionAid, *Power for the People: Delivering on the Promise of Decentralised, Community-Controlled, Renewable Energy Access* (2016).

<sup>159</sup> See e.g. Grupo Yansa's community-based model for wind farms: Community Collaboration, The Yansa Group <http://www.yansa.org/community/>

<sup>160</sup> African Renewable Energy Initiative, *Framework* (2016)

<sup>161</sup> African Renewable Energy Initiative, *Framework* (2016), 'Goals and Development Objectives'.

<sup>162</sup> See Joint CSO Statement, *Stop European Hijacking of the African Renewable Energy Initiative*, at: <http://www.pacja.org/downloads/EUROPEAN%20HIJACKING%20OF%20THE%20AFRICA%20RENEWABLE%20ENERGY%20INITIATIVE.pdf>

<sup>163</sup> For more information and additional examples of decentralized, democratic approaches to renewable energy generation, see WEDO, Friends of the Earth Scotland, ActionAid, *Power for the People: Delivering on the Promise of Decentralised, Community-Controlled, Renewable Energy Access* (2016).

### 1.3.4. Promoting human rights policy coherence in international financial flows

Limited public financial flows to developing countries are frequently undermined by structural disadvantages embedded in international economic and financial architecture. This includes international trade, investment, tax and external debt sustainability regimes that deprive developing countries of domestic resources needed to fulfil their human rights obligations.<sup>164</sup> At present, the volume of international climate finance flowing to developing countries is less than the illicit financial flows leaving those countries.<sup>165</sup> For example, one estimate suggests that approximately US\$11.5 trillion is currently held in off-shore bank accounts, and that the tax that is evaded as a result may exceed USD\$255 billion each year.<sup>166</sup> Such tax evasion undermines domestic financing capabilities of developing countries to address climate change and the overall effectiveness and equity of international climate finance provided. Addressing this problem can help mobilize resources for climate action and is also necessary to bring States' actions into alignment with the right to development, which requires that States promote an international economic order based on sovereign equality, interdependence, mutual interest and cooperation among all States.<sup>167</sup>

A key condition for the realisation of an equitable international order is the preservation of each country's domestic policy space, which is necessary for governments to implement policies that respond to local developmental needs and priorities. This is reflected in the provisions for means of implementation of the 2030 Agenda, which includes a target to 'respect each country's policy space and leadership to establish and implement policies for poverty eradication and sustainable development.'<sup>168</sup> Moreover, the Agenda also acknowledges the importance of international financial institutions supporting the policy space of each country, in particular developing countries.<sup>169</sup>

Despite this, IFIs continue to privilege financial instruments and arrangements that have the potential to seriously encroach upon domestic policy space. One example is the current enthusiasm for public-private partnerships for complex infrastructure projects among institutions like the G20 and World Bank. The latter has established a Global Infrastructure Facility that aims to facilitate the preparation of complex infrastructure PPPs to enable mobilisation of private sector and institutional investor capital.<sup>170</sup>

<sup>164</sup> Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights (15 Jan 2016), A/HRC/31/61; Illicit financial flows, human rights and the post-2015 development agenda (10 Feb 2015) A/HRC/28/60; Report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights (9 Aug 2010) A/65/260.

<sup>165</sup> J Griffiths (2014) 'The State of Finance for Developing Countries' (Eurodad).

<sup>166</sup> Tax Justice Network, The Price of Offshore

<sup>167</sup> Art 3(3), Dec Right to Development. Several other international instruments recognize the necessity of an international environment that is conducive to addressing poverty and supporting the realization of human rights globally. E.g. the Universal Declaration of Human Rights (art. 26) stipulates that 'every is entitled to a social and international order in which the rights and freedoms in this Declaration can be fully realized.' The Committee on Economic, Social and Cultural Rights has also urged States to ensure that their economic policies, including trade policies, do not negatively impact the enjoyment of economic, social and cultural rights in other countries: UN Committee on Economic, Social and Cultural Rights (CESCR), *Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights : Germany*, 12 July 2011, E/C.12/DEU/CO/5, para. 9

<sup>168</sup> Target 17.15.

<sup>169</sup> Para. 44, preamble.

<sup>170</sup> See website for GIF: <http://www.worldbank.org/en/programs/global-infrastructure-facility>.

The general human rights risks associated with PPPs are discussed in section III.1.1.2. More specifically, a recent draft of recommended contractual provisions for PPPs prepared by the World Bank<sup>171</sup> raises serious concerns that the template, if adopted, would constrain the ability of governments to enact regulation to protect social and environmental objectives.<sup>172</sup> For example, recommended provisions concerning consequences of a ‘change in law’ (the World Bank uses the example of changes that would entail the private partner having to ‘meet new safety or environmental standards or to provide mandatory disabled access’ or the levying of additional tax<sup>173</sup>) heavily favour the private partner’s right to terminate the contract or seek compensation for such changes. This fails to recognize the legitimacy of changes in law that advance a government’s human rights or environmental obligations and the importance of preserving a government’s ability to enact those changes.<sup>174</sup> As stated in the UN Guiding Principles on Business and Human Rights, ‘States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.’<sup>175</sup>

### *Comprehensive divestment from fossil fuels*

Finally, international financial institutions should ensure policy coherence between the dedicated climate funding branch of the institutions and other portfolios of investments. Despite the increasing amounts of finance that multilateral development banks are dedicating to supporting climate change mitigation and adaptation<sup>176</sup>, in 2015, six major development banks alone provided over \$7 billion in support for fossil fuel projects.<sup>177</sup> In line with the goals of the Paris Agreement, IFIs must cease their support for greenhouse gas-intensive projects and must engage with client countries to develop human rights-based, zero-carbon development strategies.<sup>178</sup>

Further, States and IFIs should only provide finance or investment guarantees to private entities on the condition that their businesses do not directly or indirectly support fossil fuel extraction or infrastructure and that their investment portfolios are aligned with divestment strategies. Given the

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<sup>171</sup> World Bank, Draft Report on Recommended PPP Contractual Provisions 2016 edition, available at <http://pubdocs.worldbank.org/en/508161479239656383/For-Consultation-WBG-Final-Draft-Report-on-Recommended-PPP-Contractual-Provisions.pdf>

<sup>172</sup> N Alexander, Submission to the World Bank Group and Summary Contents on the Draft Report on Recommended PPP Contractual Provisions (12 Jun 2017) available at <http://us.boell.org/2017/06/30/submission-world-bank-group-and-summary-comments-draft-report-recommended-ppp-contractual>

<sup>173</sup> World Bank, Draft Report on Recommended PPP Contractual Provisions 2016 edition, p. 42

<sup>174</sup> N Alexander, Submission to the World Bank Group and Summary Contents on the Draft Report on Recommended PPP Contractual Provisions (12 Jun 2017) available at <http://us.boell.org/2017/06/30/submission-world-bank-group-and-summary-comments-draft-report-recommended-ppp-contractual>

<sup>175</sup> UN Guiding Principles on Business and Human Rights (2011) Principle 9.

<sup>176</sup> In 2016, six major multilateral development banks (MDBs) namely World Bank Group, the European Investment Bank, the European Bank for Reconstruction and Development, the Asian Development Bank, the African Development Bank, and the Inter-American Development Bank claimed to have spent USD 27.4 billion in climate finance commitments. Joint Report on Multilateral Banks’ Climate Finance (2016); available at: <http://www.eib.org/attachments/press/2016-joint-report-on-mdbs-climate-finance.pdf>.

<sup>177</sup> The six major multilateral development banks (MDBs) studied were the World Bank Group, the European Investment Bank, the European Bank for Reconstruction and Development, the Asian Development Bank, the African Development Bank, and the Inter-American Development Bank: Oil Change International, Fossil Fuel Finance at the MDBs: The Low-Hanging Fruit of Paris Compliance (2017).

<sup>178</sup> See, also, CAN, Public Finance for 1.5C and Zero-Carbon Development by 2050: Implications of 1.5C and Zero-Carbon by 2050 Goals for Public Finance Institutions, Position Paper June 2017.



urgency of greenhouse gas emissions reductions and their commitment to policy coherence, governments and IFIs should use their financial leverage to align private sector incentives with action on climate change.

**Divestment obligations under the Green Climate Fund (GCF):**

*Under the GCF's initial monitoring and accountability framework for accredited entities, the GCF considers the commitment of accredited entities to shifting their entire investment portfolio away from fossil fuels when deciding whether or not it should be re-accredited after five years. The GCF Secretariat and Accreditation Panel are currently in the process of developing baselines for tracking the shift of GCF accredited entities.*

*The framework states:*

*'...to advance the GCF's goal to promote the paradigm shift towards low-emission and climate-resilient development pathways in the context of sustainable development, the re-accreditation decision by the Board will take into account the Secretariat and Accreditation Panel's assessment of the extent to which the AE's overall portfolio of activities beyond those funded by the GCF has evolved in this direction during the accreditation period.'*<sup>179</sup>

## 2. Responsibility of the private sector

As discussed in section IV.2, the private sector is emerging as a key source of climate financing. Businesses have already assumed a formal role in climate finance institutions, such as the Green Climate Fund which has sought to integrate the private sector's involvement across its operations and allows accredited private sector actors to access its funding directly. Further, governments have embraced partnerships with private actors as both funders and implementers of mitigation and adaptation actions. Private financial institutions and markets are also independently mobilizing to invest in climate-focused projects and strategies.

The risks associated with private sector involvement in climate-related financing are frequently connected to an absence of regulation that addresses the maldistribution of risk and benefits between public and private sectors, and gaps in accountability for social and environmental harms caused by private actors. It is therefore imperative that the responsibilities of private entities in this context are clearly articulated and enforced.

As a starting point, the UN Guiding Principles on Business and Human Rights state that businesses have a responsibility to respect human rights.<sup>180</sup> These rights include those laid out in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the principles set out in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work. Pursuant to this responsibility, the Guiding Principles encourage businesses to undertake due diligence to avoid causing or contributing to adverse human rights impacts through their own activities, including in their supply chains. Businesses are also expected to seek to prevent or mitigate adverse human rights impacts to which they are directly linked and are expected to provide for, or cooperate in, the remediation of adverse human rights impacts.<sup>181</sup>

<sup>179</sup> GCF Monitoring and Accountability Framework for accredited entities, para. 35

<sup>180</sup> Part II, Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Respect and Remedy' Framework (2011).

<sup>181</sup> Part III, Guiding Principles (2011).



The Guiding Principles stop short, however, leave some troubling lacunae in terms of the protection of individuals and groups who suffer human rights violations because of the actions of private actors. This is especially problematic in the current global context, in which the private sector has assumed a prominent role in the provision of essential goods and services, and when there is a disjuncture between the scale of transnational business operations and the reach of most national legal frameworks.<sup>182</sup> Further, modern corporations are capable of exercising, and do exercise, multiple forms of political power, which includes framing and defining issues of public interest in their favour.<sup>183</sup> Given economic, political and social realities that blur the boundaries between the role of public and private sector actors, it is especially urgent to re-focus human rights discourse on the entitlements of rights-holders.

It's broadly accepted, and articulated in several core human rights instruments, that human rights derive from the inherent dignity of the human person.<sup>184</sup> Because of the intrinsic moral status that this confers on individuals, it is accepted that persons have fundamental interests that require protection, including their autonomy and well-being. Human rights, as proclaimed in international, regional and national instruments, exist to protect those interests, although the rights flowing from the inherent worth and dignity of human beings exist independently of that proclamation.

When human rights are understood from the perspective of the rights-holder, the focus of human rights obligations shifts to ensuring that those rights are not abrogated.<sup>185</sup> Any actor, whether public or private, must bear responsibility if there is a violation of those rights. While the Guiding Principles recognise that victims of human rights violations should be able to access a legal remedy,<sup>186</sup> they stop short of recognizing the antecedent legal obligation of private parties that cause the harm. This is despite the fact that the Guiding Principles recognise that the failure to properly attribute legal responsibility among members of a corporate group can 'facilitate the avoidance of appropriate accountability.'<sup>187</sup> The logic of human rights and human rights law therefore requires the recognition that private actors are indeed bearers of human rights duties.<sup>188</sup> The Committee on Economic, Social

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<sup>182</sup> See, e.g., A Scherer, G Palazzo, The New Political Role of Business in a Globalised World: A review of a new perspective on CSE and its implications for the Firm, Governance and Democracy, *Journal of Management Studies* 48 (2011); J Ruggie, *Multinationals as global institution: Power, Authority and relative autonomy* (2017) *Regulation and Governance* forthcoming?

<sup>183</sup> Consider, for example, the role of industry in funding think-tanks and special interest organisations that deny the scientific consensus around climate change: Greenpeace, Koch Industries: Secretly Funding the Climate Denial Machine (undated) available at <http://www.greenpeace.org/usa/global-warming/climate-deniers/koch-industries/>. John Ruggie adopts a typology of power that involves structural, instrumental and discursive power to describe the scale of the current political power exercised by multinational corporations: J Ruggie, *Multinationals as global institution: Power, Authority and relative autonomy* (2017) *Regulation and Governance* forthcoming?

<sup>184</sup> See, e.g., the preambles to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

<sup>185</sup> For further discussion, see, e.g., D Bilchitz, 'A chasm between 'is' and 'ought'? A Critique of the normative foundations of the SRSG's Framework and Guiding Principles in S Deva and D Bilchitz *Human Rights Obligation of Business: Beyond the Corporate Responsibility to Respect?* (2013) 111-114

<sup>186</sup> This is also stipulated in the CESCR Committee's General Comment on State Obligations in the Context of Business Activities.

<sup>187</sup> Guiding Principles, commentary to Principle 26 on State-based Judicial Mechanisms.

<sup>188</sup> D Bilchitz, 'A chasm between 'is' and 'ought'? A Critique of the normative foundations of the SRSG's Framework and Guiding Principles in S Deva and D Bilchitz *Human Rights Obligation of Business: Beyond the Corporate Responsibility to Respect?* (2013) 111-114

and Cultural Rights has also noted that such duties can flow from the International Covenant on Economic Social and Cultural Rights.<sup>189</sup>

Importantly, the Committee has already clarified that businesses involved in the administration of areas ‘where the role of the public sector has traditionally been strong’ should be subject to ‘public service obligations.’<sup>190</sup> This is particularly relevant in the context of climate finance specifically, and development finance more broadly, given the enthusiasm for public-private partnerships and increased private investment in social and economic infrastructure. Consistent with the entitlements of individuals and communities, the private sector has an obligation to ensure that essential services are adequate and accessible to all.

## IV. International climate finance architecture

The global architecture for climate finance, entailing both public and private flows of finance, is complex and dynamic. It encompasses institutions established under the auspices of the UN Framework Convention on Climate Change (UNFCCC); international, regional and bilateral funds and processes operating independently of the UNFCCC; as well as a vast array of private financial instruments.<sup>191</sup>

The development of international climate finance should also be seen in the context of a broader drive to mobilise trillions of dollars to finance the Sustainable Development Goals and to shift financial flows into climate-compatible pathways. In light of the vast sums of finance that will be needed over the next fifteen years, there is a consensus that an array of public, private and alternative sources of financing must be mobilized in order to support a global trajectory towards sustainable development in a climate-constrained world.

### 1. Public climate finance

States have long recognised the necessity of climate finance to support the realisation of the objectives in the UN Framework Convention on Climate Change, and the cost of transitioning from a fossil fuel-intensive development paradigm to one that is sustainable, low-emission and climate-resilient. In 1992, developed countries committed under the Convention to provide new and additional financial resources to meet the ‘agreed full incremental costs’ of measures taken by developing countries to meet obligations related to climate change.<sup>192</sup>

Subsequent decisions taken by the UNFCCC Conference of Parties (COP) have further affirmed and shaped climate financing obligations. For example, in the 2009 Copenhagen Accord, developed countries pledged to deliver finance approaching USD\$30 billion between 2010 and 2012, confirming this pledge in the outcomes of the 2010 and 2011 Conferences of Parties. Further, developed countries committed in Copenhagen to a goal of jointly mobilising USD\$100 billion a year

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<sup>189</sup> Para. 51, General Comment on State Obligations in the context of business activities: ‘...where the violation is directly attributable to a business entity, victims should be able to sue such an entity either directly on the basis of the Covenant in jurisdictions which consider that the Covenant imposes self-executing obligations on private actors, or on the basis of domestic legislation incorporating the Covenant in the national legal order.’

<sup>190</sup> CESCR, E/C.12/GC/24, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities 23 June 2017, para. 21.

<sup>191</sup> For a detailed discussion of the global climate finance architecture, see S Nakhooda, C Watson, L Schalatek, The Global Climate Finance Architecture, *Climate Finance Fundamentals No. 2*, Nov. 2016 (HBS North America, ODI)

<sup>192</sup> See, e.g., article 4.3 of the UNFCCC.

by 2020 from public, private and alternative sources to support climate action in developing countries. Most recently, governments committed under the Paris Agreement to set a new collective goal for finance in 2025 that builds on the USD\$100 billion baseline.

### 1.1. Climate funds operating under the UNFCCC<sup>193</sup>

Several mechanisms have been established to mobilise and administer finance under the UNFCCC's framework.

#### Global Environment Facility (GEF), including Least Developed Countries Fund (LDCF), and Special Climate Change Fund (SCCF)

The Global Environment Facility (GEF) was established in 1992 and, together with the Green Climate Fund, serves as an operating entity of the Financial Mechanism for the UNFCCC.<sup>194</sup> It is also the financial mechanism for several other environmental conventions, including conventions on biological diversity and desertification.<sup>195</sup> The GEF therefore has a mandate to fund environmental outcomes that are broader than just climate change.<sup>196</sup> In the most recent replenishment of the GEF, donors pledged USD\$3.72 billion over all focal areas, of which USD \$1.1 billion will specifically support climate change-related projects (although its funding is increasingly cross-cutting in nature). The GEF also administers the Least Developed Countries Fund<sup>197</sup> and the Special Climate Change Fund,<sup>198</sup> which provide smaller sums to support adaptation measures such as the development and implementation of national adaptation programmes and plans. From 2002 until mid-2017, the LDCF and SCCF have approved USD\$961 million and \$302 million, respectively, in grant financing to over 100 countries.

#### Adaptation Fund

The Adaptation Fund was established in 2001 to provide financing for concrete adaptation measures to developing countries that are Parties to the Kyoto Protocol.<sup>199</sup> It is the only UNFCCC fund with an automatic contribution scheme - it is financed through a 2% levy on the sale of emissions credits from the Clean Development Mechanism (a UNFCCC entity that enables countries to earn certified emission reduction credits via emission-reduction projects in developing countries) which are then counted towards meeting country targets under the Kyoto Protocol. However, as a result of decreasing carbon prices it now increasingly relies on voluntary country contributions. As of 2017, the Adaptation Fund has allocated USD\$438 million in funds to 67 countries with approved Adaptation Fund Initiatives.<sup>200</sup> The Adaptation Fund pioneered the 'direct access' approach, which allows national and regional accredited entities that meet agreed fiduciary and environmental, social

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<sup>193</sup> For an overview of the scale of funding pledged and delivered by major climate funds, see the independent website 'Climate Funds Update', available at <http://www.climatefundsupdate.org/>

<sup>194</sup> See COP Decision 12/CP.2, Memorandum of Understanding between the Conference of the Parties and the Council of the Global Environment Facility

<sup>195</sup> The GEF is a financial mechanism for the following international environmental conventions: the Minamata Convention on Mercury, the Stockholm Convention on Persistent Organic Pollutants (POPs), the United Nations Convention on Biological Diversity (UNCBD), the United Nations Convention to Combat Desertification (UNCCD) and the United Nations Framework Convention on Climate Change (UNFCCC)

<sup>196</sup> Instrument for the Establishment of the Restructured Global Environment Facility (2015) available at [https://www.thegef.org/sites/default/files/documents/GEF\\_Instrument-Interior-March23.2015.pdf](https://www.thegef.org/sites/default/files/documents/GEF_Instrument-Interior-March23.2015.pdf)

<sup>197</sup> The GEF has been entrusted to operate the Least Developed Countries Fund through COP decision 27/CP.7.

<sup>198</sup> Programming to Implement the Guidance for the Special Climate Change Fund Adopted by the Conference of Parties to the UNFCCC at its Ninth Session, November 2004, GEF/C/24/12.

<sup>199</sup> COP Decision 10/CP.7, Funding under the Kyoto Protocol (2001).

<sup>200</sup> See homepage of Adaptation Fund website, available at <https://www.adaptation-fund.org/>

and gender standards to implement funding directly, rather than having to work through intermediate international implementing agencies .

### Green Climate Fund

The Green Climate Fund became fully operational in 2015<sup>201</sup> and is expected to become the principal mechanism for channeling international public climate finance towards developing countries.<sup>202</sup> It also engages the private sector through a separate facility and both public and private accredited entities can access and implement GCF funds, including via direct access. Like the GEF, it serves as an operating entity of the financial mechanism of the UNFCCC and the Paris Agreement. The initial fundraising process for the GCF raised USD\$10.3 billion in pledges and, as of October 2017, the GCF had approved 54 projects with USD\$2.6 billion in GCF support. The GCF is committed to evenly balancing funding for climate mitigation and adaptation projects. The governance and decision-making process of the GCF is discussed in more detail in the GCF case study on page 42.

### Sustainable Development Mechanism

The Sustainable Development Mechanism (SDM) was established by article 6 of the Paris Agreement as a new mechanism to ‘contribute to the mitigation of greenhouse gases and support sustainable development.’ Parties that contribute to the reduction of GHG emissions in a host country Party can use resulting emissions reductions to fulfil their own mitigation ambition requirements. Unlike the existing carbon market mechanisms under the Kyoto Protocol—the Clean Development Mechanism (CDM) and the Joint Implementation (JI) programme—participation in the SDM is not limited to industrialised countries.

The rules, modalities and procedures governing the SDM are yet to be adopted by the Conference of Parties to the UNFCCC. However, Parties have agreed that such procedures will be adopted on the basis of, inter alia, ‘real, measurable and long-term benefits related to the mitigation of climate change’; ‘reductions in emissions that are additional to any that would otherwise occur’; and ‘experience gained with and lessons learned from existing mechanisms and approaches adopted under the Convention and its related legal instruments.’<sup>203</sup>

The establishment of the SDM therefore provides States Parties with an opportunity to develop a mechanism that is equally oriented to sustainable development benefits as it is to mitigation benefits and by doing so learn from and address shortcomings of the CDM in contributing to sustainable development. Additional recommendations for the operationalization of the SDM will be discussed in section X below.

## **1.2. Climate funds operating outside the UNFCCC**

International, regional and bilateral processes have also been established outside the UNFCCC framework with the same broad objective of mobilising and administering public climate finance.

### Climate Investment Funds

The Climate Investment Funds (CIFs) have been operating since 2008 in partnership with regional development banks, although they are administered by the World Bank. The CIFs have attracted

<sup>201</sup> The Green Climate Fund was established in 2010 by States Parties to the UNFCCC as an operating entity of the Financial Mechanism of the Convention through COP decision 1/CP.16.

<sup>202</sup> E.g. at the G7 Summit in June 2015, political leaders emphasized the GCF’s role as a key institution for climate finance: <http://www.greenclimate.fund/how-we-work/resource-mobilization>

<sup>203</sup> COP decision 1/CP.21 para. 37.

USD\$8.1 billion in pledges for a portfolio of over 300 projects in 72 developing and middle-income countries.<sup>204</sup> They are self-described as providing urgently needed resources to manage the challenges of climate change and the reduction of greenhouse gases, with a focus on transformation in the energy, climate resilience, transport and forestry sectors.<sup>205</sup> The CIFs comprise four programmes: the Clean Technology Fund,<sup>206</sup> the Strategic Climate Fund,<sup>207</sup> the Forest Investment Programme<sup>208</sup> and the Scaling-Up Renewable Energy in Low Income Countries Programme.<sup>209</sup> The CIFs were supposed to cease operating in 2016, but their operations have been extended until 2019.

### Multilateral development banks and UN agencies

Multilateral development banks (MDBs), in addition to implementing the CIFs, are playing an increasingly important role as actors in the delivery of climate finance, including as implementing entities for climate funds under the UNFCCC. Most MDBs also have their own climate finance initiatives with a thematic or regional focus. In 2016 alone, six major MDBs reported to have jointly committed USD 27.4 billion in climate finance commitments.<sup>210</sup> For example, the World Bank, which recently announced a commitment to increase climate finance to 28% of its portfolio by 2020, currently manages several initiatives with a focus on carbon market readiness. These include the Forest Carbon Partnership Facility, the Partnership for Market Readiness and the BioCarbon Fund. The European Investment Bank, which has a 2020 target for climate finance of 40%, and African Development Bank each administer climate finance, including through the EU Global Energy and Efficiency Renewable Energy Fund which focuses on using public finance to catalyse private sector investments in renewable energy infrastructure projects.

Many UN agencies such as the United Nations Development Programme (UNDP), the United Nations Environment Programme (UNEP) or the Food and Agriculture Organization of the United Nations (FAO) are also serving as accredited implementing entities for GEF, GCF and the Adaptation Fund.

The UN-REDD Programme, which aims to reduce emissions from deforestation, degradation and through fostering conservation and forest carbon stock,<sup>211</sup> is supported by three UN agencies—the UN Environment Programme, UN Development Programme and the UN Food and Agriculture Organisation (FAO). The Programme operates independently and not as part of the financial mechanism of the UNFCCC. Established in 2008 as a multi-donor trust fund, the Programme allows donors to pool resources and provide funding with the aim of reducing emissions in developing countries and has thus far approved USD\$289 million in projects.<sup>212</sup> Under the Paris Agreement, REDD activities are also expected to promote ‘non-carbon’ benefits.<sup>213</sup>

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<sup>204</sup> See CIFs website for up to date information on pledges and project funding, available at <https://www.climateinvestmentfunds.org/about>

<sup>205</sup> <https://www.climateinvestmentfunds.org/about>

<sup>206</sup> Governance Framework for the Clean Technology Fund (2014).

<sup>207</sup> Governance Framework for the Strategic Climate Fund (2008).

<sup>208</sup> Forest Investment Programme Operational Guidelines (2010).

<sup>209</sup> SREP Programming Modalities and Operational Guidelines (2010).

<sup>210</sup> The six major multilateral development banks (MDBs) are the World Bank Group, the European Investment Bank, the European Bank for Reconstruction and Development, the Asian Development Bank, the African Development Bank, and the Inter-American Development Bank. Joint Report on Multilateral Banks’ Climate Finance (2016); available at: <http://www.eib.org/attachments/press/2016-joint-report-on-mdbs-climate-finance.pdf>.

<sup>211</sup> <http://www.un-redd.org>.

<sup>212</sup> <http://www.climatefundsupdate.org/data>

<sup>213</sup> Art. 5.2, Paris Agreement.

The International Fund for Agricultural Development, a specialized agency of the UN, administers the Adaptation for Smallholder Agriculture Programme, which is dedicated to supporting the adaptation of poor smallholder farmers to climate change. It currently has committed funding of US \$301.5 million.

### Bilateral and regional funds

A significant amount of climate finance is being channeled through bilateral development assistance agencies. Notwithstanding the considerable challenges concerning the transparency and consistency of reporting bilateral climate finance, a total of approximately USD\$23.1 billion in climate-related official development assistance (ODA) was reported in 2014 to the OECD's Development Assistance Committee.<sup>214</sup> Several developing countries have also established regional and national channels for climate finance, such as Indonesia's Climate Change Trust Fund, which rely on a combination of international and domestic public and private finance for capitalisation.<sup>215</sup>

## **2. Private climate finance**

In line with current trends in development finance more broadly, governments are increasingly turning to the private sector as a key source of climate finance. This is implicitly recognized in the Paris Agreement, which urges developed countries to take the lead in mobilizing climate finance 'from a wide variety of sources, instruments and channels.'<sup>216</sup> It is also echoed in the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda, which give unprecedented attention to 'unlocking the transformative potential'<sup>217</sup> of the private sector, including through a target on public-private partnerships in the goal on means of implementation<sup>218</sup> and the space created for private sector involvement in the promotion of 'multi-stakeholder partnerships'.<sup>219</sup> The sources of private finance and kinds of capital tools that are emerging in this context are also diversifying. For example, key multilateral institutions including the G20, World Bank and OECD, are increasingly focused on mobilizing institutional investment in the infrastructure sector,<sup>220</sup> with growing calls to ensure that those investments are made in a climate-compatible way.<sup>221</sup>

While momentum in favour of sustainability-focused finance within the private sector is increasing (e.g., according to UNEP, issuance of green bonds in debt markets has grown from US\$11 billion in

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<sup>214</sup> OECD, Climate Policy Initiative, Climate Finance in 2013-14 and the USD100 billion goal (2015).

<sup>215</sup> S Nakhooda, C Watson, L Schalatek, The Global Climate Finance Architecture (ODI, HBS North America: 2016).

<sup>216</sup> Art 9(3) Paris Agreement.

<sup>217</sup> Addis Ababa AA, para. 5.

<sup>218</sup> 2030 Agenda for Sustainable Development (2015) Goal 17, target 17.17

<sup>219</sup> 2030 Agenda for Sustainable Development (2015) Goal 17, target 17.16; Addis Ababa Action Agenda (2015), paras. 10, 76

<sup>220</sup> While institutional investors have been slow to respond, there are signs that this is changing. For example, US asset management firm Blackrock recently announced the creation of a US\$280mn infrastructure debt fund that will be focused on highways and other infrastructure projects in Colombia: Blackrock Launches US\$280m Fund to Invest in Colombia Infrastructure June 20, 2017 <https://lavca.org/2017/06/20/blackrock-launches-us280m-fund-invest-colombia-infrastructure>

<sup>221</sup> See, e.g., Heinrich Böll Stiftung North America, Centre for American Progress, Advancing Climate-Compatible Infrastructure through the G20: Opportunities for Progress under the German Presidency (2016).



2013 to US \$81 billion in 2016<sup>222</sup>) the trend towards green investment is still in its early stages and still lacks common definitions of financial flows across assets and sectors.<sup>223</sup>

Further, there is recognition of the need to align the entire financial system, including banking, capital markets, insurance and institutional investment, with the goals of sustainable development, environmental sustainability and climate compatibility. UN Environment, for example, is currently developing a roadmap that focuses on the way in which governments and the private financial market can contribute towards the development of a financial system that meets the needs of an inclusive and environmentally sustainable economy.<sup>224</sup> The Financial Stability Board has also set up a Task Force on Climate-Related Financial Disclosures, which issued extensive recommendations in 2017 to assist investors to make better climate-compatible investment choices.<sup>225</sup>

## V. Existing human rights policies of public climate finance mechanisms

The extent to which different public and private actors acknowledge or address the human rights risks and obligations associated with climate finance is extremely varied. Public sector finance, whether channelled through MDBs or bilateral aid agencies, is much more likely than private finance to be administered within a formal framework that acknowledges and addresses social and environmental risk, even if that framework may fall short of actively promoting the realisation of human rights.<sup>226</sup> A brief overview of the human rights policies and standards of key climate finance institutions and mechanisms is provided below. Policies of the Green Climate Fund that are relevant to the realisation of human rights in its financing are discussed in detail in the case study in section VI.

### 1. Global Environment Facility

The Global Environment Facility approved a set of policies on environmental and social safeguards and gender mainstreaming in 2011.<sup>227</sup> The safeguards require an initial social and environmental impact assessment; the protection of the rights of indigenous peoples (including implementing free, prior and informed consent); avoiding and minimizing involuntary resettlement; the protection of physical and cultural resources; and various requirements for the protection of natural habitats. The GEF also requires its implementing partners to have capacity in implementing its gender mainstreaming approach.

The GEF's policies on environmental and social safeguards and gender mainstreaming contains limited public participation provisions and do not require the GEF itself to address or remediate human rights violations, although it recently created the position of a Conflict Resolution

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<sup>222</sup> UN Environment, Financial Centres for Sustainability: Reviewing G7 Financial Centres in Mobilizing Green and Sustainable Finance 2017

<sup>223</sup> But green bonds are just one part of a much wider trend – starting with listed equities and now extending to bank lending, insurance markets as well as infrastructure, private equity, derivatives and fintech. **A key unifying feature is the need for common definitions of financial flows across assets and sectors**

<sup>224</sup> See, e.g., UN Environment, World Bank Group, Roadmap for a Sustainable Financial System: A Summary for Consultation (2017).

<sup>225</sup> <https://www.fsb-tcfd.org/publications/>.

<sup>226</sup> For example, the Adaptation Fund's environmental and social policy.

<sup>227</sup> Global Environment Facility, Application of Policy on Agency Minimum Standards on Environmental and Social Safeguards, Guideline SD/GN/03; Agency Minimum Standards on Environmental and Social Safeguards, Policy SD/PL/03. Available at <https://www.thegef.org/documents/environmental-and-social-safeguards-policy>

Commissioner to work with its implementing partners.<sup>228</sup> The GEF delegates primary responsibility for accountability for its safeguards and redress of grievances to its partner entities. It requires that partner entities provide an independent, transparent, effective and accessible mechanism to address potential breaches of the entity's policies and procedures.

## 2. Adaptation Fund

The Board of the Adaptation Fund approved an environmental and social policy in 2013 which was upgraded to reflect the approval of an Adaptation Fund Gender Policy and Gender Action Plan in 2016.<sup>229</sup> The policy requires social and environmental impact assessments and outlines a process for implementing entities to adopt measures to mitigate negative impacts. Unlike other development finance institutions, the Adaptation Fund's environmental and social policy, which is principles based, explicitly requires it to 'respect and where applicable promote human rights'.

It requires that all projects supported by the Fund adhere to core labour standards identified by the International Labour Organisation and the UN Declaration on the Rights of Indigenous Peoples. Project proponents are also required to respect the rights of women and girls and persons in vulnerable situations and to not 'exacerbate existing inequities'. The policy also includes requirements for public disclosure and consultation. Like the GEF, the Adaptation Fund delegates responsibility for providing a grievance mechanism to implementing entities. The Adaptation Fund requires that those entities identify a grievance mechanism that provides affected persons with an 'accessible, transparent, fair and effective process' for receiving and addressing complaints.

The Adaptation Fund's environmental and social policies are often highlighted for clearly referencing the need of funding actions to protect and further human rights when compared to the practices and policies of other DFIs.<sup>230</sup> However, the Adaptation Fund does not provide for an independent grievance mechanism that is additional to, and separate from, the mechanisms required to be established by implementing entities. The existence of an independent mechanism which is accessible to project-affected individuals at any time, irrespective of the existence of other mechanisms at project-level or by implementing entities, can help to establish trust from affected communities and to provide recourse when, for example, an implementing entity fails to comply with the findings of its own grievance mechanism.<sup>231</sup>

## 3. World Bank and International Finance Corporation

The World Bank adopted an updated environment and social framework in 2016<sup>232</sup> that will apply to all new Bank investment projects starting in 2018. The framework is made up of the World Bank's

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<sup>228</sup> <https://www.thegef.org/content/conflict-resolution-commissioner>

<sup>229</sup> Adaptation Fund, Environmental and Social Policy (approved in November 2013) available at <https://www.adaptation-fund.org/wp-content/uploads/2015/09/Environmental-Social-Policy-approved-Nov2013.pdf>

<sup>230</sup> See, e.g., Letter from the Special Rapporteur on human rights and the environment on Human Rights and Safeguards in the New Climate Mechanism established in Article 6, paragraph 4 of the Paris Agreement (3 May 2016).

<sup>231</sup> See, e.g., Letter from the Special Rapporteur on human rights and the environment on Human Rights and Safeguards in the New Climate Mechanism established in Article 6, paragraph 4 of the Paris Agreement (3 May 2016); see OHCHR, Comments of the Office of the High Commissioner for HR on the Review of the Terms of Reference of the Independent Redress Mechanism of the Green Climate Fund 2 February 2017

<sup>232</sup> The World Bank Environmental and Social Framework (2017) available at <http://documents.worldbank.org/curated/en/383011492423734099/pdf/114278-WP-REVISED-PUBLIC-Environmental-and-Social-Framework-Web-005-Corrected-Footnotes.pdf>

vision for sustainable development, an Environmental and Social Policy for Investment Project Financing, and ten Environmental and Social Standards (ESS). These set out mandatory requirements for the World Bank and its borrowers.

The Bank's current safeguards<sup>233</sup> will run in parallel to the new framework for about seven years in order to cover existing projects. As with other MDBs, the safeguards largely rely on environmental and social impact assessments to protect against human rights violations. The World Bank's new framework avoids the language of human rights in the operative part of the policy, although it refers to human rights in the overarching vision statement and as an objective in its ESS on indigenous peoples/sub-Saharan African historically underserved traditional local communities.<sup>234</sup> The framework includes expanded commitments to avoid discrimination, protect labour standards and include stakeholder engagement throughout the project cycle. It also requires implementing entities to obtain the free, prior and informed consent of indigenous peoples who will be adversely affected by a proposed project.<sup>235</sup> On the whole, the framework 'places greater emphasis on the use of Borrower frameworks and capacity building' which has the purported aim of 'constructing sustainable Borrower institutions and increasing efficiency'.<sup>236</sup>

The International Finance Corporation (IFC), which is the World Bank's private sector arm, has a Sustainability Framework that comprises the IFC's Policy and Performance Standards on Environmental and Social Sustainability<sup>237</sup> (the latter are referred to as its Performance Standards) and the IFC's Access to Information Policy.<sup>238</sup> The Access to Information Policy outlines its institutional disclosure obligations regarding its investment and advisory services. The Performance Standards include eight standards concerning: i) assessment and management of social and environmental risks and impacts; ii) labour and working conditions; iii) resource efficiency and pollution prevention; iv) community health; v) safety and security; vi) land acquisition and involuntary resettlement; vii) biodiversity conservation and sustainable management of living natural resources; and viii) full respect of rights of indigenous people and protection of cultural heritage.

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<sup>233</sup> The Bank's current safeguards comprise 11 key Operational Policies and associated Bank Procedures. These are available at <http://www.worldbank.org/en/programs/environmental-and-social-policies-for-projects/brief/environmental-and-social-safeguards-policies>

<sup>234</sup> For an overview of the evolution of the World Bank's approach to human rights, see Report of the Special Rapporteur on extreme poverty and human rights A/70/274 (4 Aug 2015)

<sup>235</sup> The inclusion of a requirement to obtain the free, prior and informed consent (FPIC) of indigenous peoples comes after years of advocacy by indigenous communities and acknowledgments in the Bank's own publications of the necessity of observing FPIC. E.g. one report states, 'whether it is entrenched in law and regulations or the result of de facto demands of the affected indigenous peoples, FPIC is a necessary feature of successful decision-making': World Bank, *Indigenous Latin America in the Twenty-First Century* (2015), 95.

<sup>236</sup> Background, The Environmental and Social Framework:

<http://www.worldbank.org/en/programs/environmental-and-social-policies-for-projects/brief/the-environmental-and-social-framework-esf>

<sup>237</sup> IFC Performance Standards on Environmental and Social Sustainability, January 1 2012, available at [http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS\\_English\\_2012\\_Full-Document.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Document.pdf?MOD=AJPERES)

<sup>238</sup> IFC Access to Information Policy, Jan 1 2012, available at IFC Performance Standards on Environmental and Social Sustainability, January 1 2012, available at [http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS\\_English\\_2012\\_Full-Document.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Document.pdf?MOD=AJPERES)

The Performance Standards only require clients to conduct human rights due diligence in ‘high risk’ circumstances and not as a standard feature of impact assessments.<sup>239</sup> This falls short of the human rights due diligence standards in the UN Guiding Principles on Business and Human Rights. They also fail to make any clear commitment not to support activities that are likely to cause or contribute to human rights violations. Further, while the Access to Information Policy recognizes that ‘transparency and accountability are fundamental to fulfilling [the IFC’s] development mandate’, it does not require the disclosure of ‘commercially sensitive and confidential information’.<sup>240</sup> As civil society has observed, this effectively excludes stakeholders from accessing information or documents discussed within the IFC while projects are being designed.<sup>241</sup>

Finally, although the Performance Standards require a heightened consultation and participation process with stakeholders ‘for projects with potentially significant adverse impacts’, it is unclear when the threshold for ‘potentially significant impacts’ will be crossed, thereby triggering the additional engagement measures.

The shortcomings in the IFC’s Sustainability Framework are most aptly demonstrated by ongoing evidence of non-compliance by financial intermediaries with the IFC’s environmental and social standards<sup>242</sup> and allegations of human rights violations flowing from IFC-financed projects.<sup>243</sup> It is worth noting that the IFC’s Performance Standards are also the basis of the Equator Principles,<sup>244</sup> which are a voluntary environmental and social risk management framework adopted by 91 banks from 37 countries.<sup>245</sup>

## **VI. Case Study: Integrating Human Rights at the Green Climate Fund**

The Green Climate Fund, which is an operating entity of the Financial Mechanism of the UNFCCC, has been fully operational since 2015. Its overriding objective is to promote a paradigm shift towards low-emission and climate-resilient development pathways in the context of sustainable development.<sup>246</sup> The GCF is also guided by the principles and provisions of the UNFCCC,<sup>247</sup> including

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<sup>239</sup>Footnote 12, IFC Performance Standards on Environmental and Social Sustainability, January 1 2012, available at

[http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS\\_English\\_2012\\_Full-Document.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Document.pdf?MOD=AJPERES)

<sup>240</sup> Paragraph 11(a), IFC Access to Information Policy.

<sup>241</sup> Bretton Woods Project, IFC Weakens World Bank’s transparency commitment, 14 September 2011

<sup>242</sup> See, e.g., a recent audit by the Compliance Advisor Ombudsman (the IFC’s independent watchdog) of the IFC’s investments in financial intermediaries), which also concluded that the ‘IFC does not, in general, have a basis to assess financial intermediaries’ compliance with (the IFC’s) environmental and social requirements: Compliance Advisor Ombudsman, Third Monitoring Report of IFC’s Response to: CAO Audit of a Sample of IFC Investments in Third-Party Financial Intermediaries (2017) p.20.

<sup>243</sup> See, e.g., Inclusive Development International, Reckless Development: The IFC’s Dodgy Deals in Southeast Asia (2017); cases filed against the IFC in national courts, including an ongoing case against the IFC for its role in financing a coal-fired power plant in India that has alleged devastated fishing and farming communities, are discussed here: <https://www.earthrights.org/taxonomy/term/405>

<sup>244</sup> The Equator Principles, June 2013, available at [http://www.equator-principles.com/resources/equator\\_principles\\_III.pdf](http://www.equator-principles.com/resources/equator_principles_III.pdf)

<sup>245</sup> A recent inquiry by UN Environment Programme concluded that the Equator Principles are mainly adopted because of reputational benefits and risk management and that they do not create significant changes in project financing institutions: UNEP, The Equator Principles: do they make banks more sustainable? Inquiry Working Paper 16/05 (2016)

<sup>246</sup> Green Climate Fund, Initial Strategic Plan (2016).

<sup>247</sup> <http://www.greenclimate.fund/who-we-are/about-the-fund>

its human rights provisions and has committed to a gender-sensitive approach from the outset of its operations.

The GCF is expected to become the principal global mechanism for channeling international public climate finance towards developing countries and is uniquely positioned to shape the normative and operational frameworks that underpin international climate finance architecture. Aside from its central role in the implementation of the Paris Agreement, as an institution, the GCF brings together all the MDBs, many UN agencies and multiple national and regional public and private actors as implementing entities. By adopting a human rights-based approach and modelling best practices in its policies and processes, the GCF can directly influence the practices of all its partners and create an impact that is significantly broader than its pledged financing.

## **1. Governance and financing strategy<sup>248</sup>**

The GCF offers grants, concessional loans, equity investments and guarantees to accredited international and direct access entities. These entities can be public or private, and can work at a national, regional or global level. The GCF regularly reviews and updates its investment guidelines and overarching principles for public and private sector finance. It provides grants and loans (with varying levels of concessionality) for the public sector, while terms and conditions for private sector investments are set on a case-by-case basis with the goal of minimizing concessional terms and maximizing co-financing.

The GCF's 24-member board has equal representation from developed and developing countries. Its investment decisions are mandated to be country-driven and it only accepts proposals that have received a no-objection clearance from a national designated authority (NDA) or a country's focal point. NDAs develop and propose individual country work programmes for the GCF's consideration and ensure alignment of funding proposals with national development strategies. The GCF has a mandate to allocate funding evenly between mitigation and adaptation measures, and under its allocation framework ring-fences half of its adaptation support for the urgent needs of least developed countries, small island developing states, and African countries.

The GCF partners with public and private organisations, known as Accredited Entities (AEs), that work as implementing entities or financial intermediaries. All AEs must meet minimum social and environmental safeguards, demonstrate their ability to comply with the GCF's gender policy, and meet relevant fiduciary standards. The GCF adopts a 'fit for purpose' accreditation approach, whereby application of safeguards and fiduciary standards are matched to the risk level and complexity of the projects or programmes that the relevant AE is deemed capable of implementing.

The GCF's current results management framework includes performance indicators for mitigation and adaptation projects. These involve metrics concerning GHG emissions reductions as well as a focus on beneficiaries and increased resilience for adaptation as well as qualitative and quantitative measures focusing on development, social, economic, and environmental co-benefits and gender-sensitivity. The Board is currently evaluating projects against a set of investment criteria focusing on impact; paradigm shift potential; sustainable development potential; needs of the recipient countries and populations; coherence with a country's existing policies or climate strategies; and the effectiveness and efficiency of the proposed intervention, including its ability to leverage additional funding in the case of mitigation.

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<sup>248</sup> For a detailed discussion of the operations and functions of the GCF, see L Schalatek, S Nakhooda, C Watson, *The Green Climate Fund*, Nov. 2016 (HBS, ODI).

## 2. Current Integration of human rights obligations

The GCF conducts due diligence on proposals submitted to ensure compliance with the Fund's financial policies, its interim environmental and social safeguards, and its gender policy. It has yet to finalize its own environmental and social management system (ESMS), including a separate environmental and social policy (ESP) and the GCF's own safeguards. In the interim, the GCF is relying on the International Finance Corporation's (IFC's) environmental and social performance standards.<sup>249</sup> For more information about the IFC's eight performance standards and a critique thereof, see section V.3 above.

### 2.1. Transparency and participation

In 2016, the GCF Board adopted a comprehensive information disclosure policy, which operates on a presumption to disclose, but allows for several exemptions, including for documentation related to the private sector.<sup>250</sup> Most Board meeting documents are made available on the GCF website prior to the meetings and Board meetings are webcast. Two active observers each from the private sector and civil society are also permitted to make interventions on behalf of their respective constituencies during Board meetings. While this is a superficially equitable arrangement, the private sector has only to represent its own private interests, whereas civil society observers are expected to represent the broader public interest. The latter includes the interests of eight constituencies recognised under the UNFCCC, including women, youth and indigenous Peoples who do not have separate representation on the Board.

The GCF's governing instrument also provides for extensive stakeholder participation in the design, development and implementation of activities financed by the Fund. Stakeholders are defined as 'private sector actors, civil society organisations, vulnerable groups, women and indigenous peoples.'

In response to calls for strengthened transparency from civil society, the GCF has taken steps to improve the openness of its approvals processes. The identification of applicants for accreditation is now publicly disclosed weeks before the Board makes its decision. However, the views of civil society and other stakeholders are not formally incorporated into the Accreditation Panel's review process.

The GCF is still elaborating its stakeholder engagement guidelines to improve outreach and involvement of stakeholders and observers in the GCF, including the lack of financial support for participation of developing country CSO observers and the lack of direct representation for indigenous peoples. Further, it is yet to develop detailed best practice guidelines on inclusive and participatory domestic stakeholder engagement for NDAs and focal points.

### 2.2. Monitoring and accountability

The GCF's governing instrument provides for three separate accountability mechanisms: an independent evaluation unit (IEU) that reports to the Board; an independent integrity unit (IIU);

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<sup>249</sup> GCF Board decision B.07/02; available at:

[http://www.greenclimate.fund/documents/20182/24943/GCF\\_B.07\\_11\\_-\\_Decisions\\_of\\_the\\_Board\\_-\\_Seventh\\_Meeting\\_of\\_the\\_Board\\_18-21\\_May\\_2014.pdf/73c63432-2cb1-4210-9bdd-454b52b2846b](http://www.greenclimate.fund/documents/20182/24943/GCF_B.07_11_-_Decisions_of_the_Board_-_Seventh_Meeting_of_the_Board_18-21_May_2014.pdf/73c63432-2cb1-4210-9bdd-454b52b2846b), p.6f.

<sup>250</sup> GCF Board decision B.12/35; available at:

[http://www.greenclimate.fund/documents/20182/818273/GCF\\_Information\\_Disclosure\\_Policy.pdf/3f725d99-85e9-4d1d-aa9c-2f7ad539e4e6](http://www.greenclimate.fund/documents/20182/818273/GCF_Information_Disclosure_Policy.pdf/3f725d99-85e9-4d1d-aa9c-2f7ad539e4e6).



and an independent redress mechanism (IRM). According to the IRM's terms of reference, it will receive complaints by persons affected by Fund operations as well as recipient country complaints about funding decisions. In addition to providing a grievance mechanism, the IRM also has an advisory capacity. The Board has also approved an initial monitoring and accountability framework for accredited entities. While the framework primarily relies on self-reporting by accredited entities, it also includes an oversight role for local stakeholders through participatory monitoring approaches, which need further development.

### 2.3. Private sector operations

The GCF has established a separate Private Sector Facility (PSF) to encourage inputs by and collaboration with private sector entities, both domestic and international.<sup>251</sup> As part of its commitment to integrate private-sector operations across all GCF operations, the Fund has also established a 20-member Private Sector Advisory Group (PSAG) to provide strategic guidance on GCF engagement with private sector actors.<sup>252</sup> The PSAG is comprised of eight private sector representatives with equal representation from developed and developing countries; two civil society experts; and six Board members. Its recommendations to the Board to date include encouraging greater support to local businesses, particularly micro, small and medium-sized enterprises.

## 3. The future of human rights at the GCF

As noted above, the GCF has already demonstrated a willingness to engage with and consider the views of different stakeholders, including civil society, and has taken important steps towards facilitating transparency and participation. However, a real test of the GCF's commitment to human rights will lie in the content and procedural fairness of the environmental and social policies and management system it ultimately adopts. Further, it will require an orientation towards funding projects and programmes that have demonstrable human rights outcomes, regardless of their size and the sums of finance required to support those initiatives.

Fundamentally, this requires an intention on the part of the GCF to move beyond a 'do no harm' approach and towards the active promotion of the realization of human rights and sustainable development. No single policy or mechanism will be sufficient to achieve this. Rather, it requires an effective commitment to integrating human rights into the processes and outcomes of operational policies, board decisions, secretariat actions, implementing partners' practices, recipient country structures, and accountability mechanisms.

At a minimum, a human rights-based approach at the GCF would require the following:

**An equity-focused approach to financing.** This would require prioritizing financial instruments that provide full-cost or grant financing where possible, especially for adaptation.

**A commitment to support projects that actively advance the realization of human rights and sustainable development.** This requires an expansive understanding of the relationship between

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<sup>251</sup> <http://www.greenclimate.fund/what-we-do/private-sector-facility>.

<sup>252</sup> See GCF Decision B.5/13 and Annex XIX; available at:

[http://www.greenclimate.fund/documents/20182/24937/GCF\\_B.05\\_23\\_-\\_Decisions\\_of\\_the\\_Board\\_-\\_Fifth\\_Meeting\\_of\\_the\\_Board\\_8-10\\_October\\_2013.pdf/ea60c39e-444d-4505-86b7-e87eecd94fb3](http://www.greenclimate.fund/documents/20182/24937/GCF_B.05_23_-_Decisions_of_the_Board_-_Fifth_Meeting_of_the_Board_8-10_October_2013.pdf/ea60c39e-444d-4505-86b7-e87eecd94fb3), pp.9 and 50ff.

poverty alleviation, adaptation and mitigation; as well as the central role that local communities should play in determining how to strengthen their climate resilience and climate action. Appropriate steps include further developing enhanced direct access funding, including small grants facilities that are accessible to local communities.

**A commitment to support the meaningful participation of affected communities and other stakeholders**, including vulnerable groups, in multiple stages of the project approval, implementation and monitoring and evaluation process. Appropriate steps for fulfilling this commitment include:

- Increased transparency during the project/programme cycle, including earlier availability of concept notes and full proposal documents (including most annexes) to ensure stakeholders have access to all relevant information about proposed projects or programmes.
- Providing financial support, for example through readiness funding,<sup>253</sup> to enable recipient countries to strengthen their engagement with stakeholders. The GCF should also provide detailed best-practice guidance for stakeholder engagement to national designated authorities and focal points.

**Strengthened human rights policies and safeguards**, including on gender and indigenous peoples. Among its steps towards safeguarding human rights, the GCF is currently reviewing or revising its policies on gender and implementing a new policy on indigenous peoples. This is an opportunity to build on good practices and, consistent with a human-rights based approach, to integrate human rights standards into the development of policies as well as the policies themselves. Recommendations for the content of these policies are provided in section VII below.

### Developing the GCF's own Environmental and Social Safeguards (ESS)

The GCF should prioritize a participatory consultative approach in the process of developing its own ESS with a strong human rights framing. It should also stipulate respect for human rights principles as the basis for its safeguards.

### Indigenous Peoples rights

With respect to the development of Fund-wide Indigenous Peoples Policy, the GCF must be guided by its obligation to 'fully and effectively engage with indigenous peoples in the design, development and implementation of the strategies and activities to be financed by the Fund, while respecting their rights.'<sup>254</sup> Ensuring that these principles are respected will require capacity-building for the GCF Secretariat, NDAs and Accredited Entities to strengthen their understanding of indigenous peoples' perspectives. The GCF can build on the policies developed by other climate funds and international organizations, such as the UN Development Programme.<sup>255</sup>

### Women's rights and gender equality

Building upon its current Gender Policy and Gender Action Plan, the GCF should:<sup>256</sup>

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<sup>253</sup> The GCF's Readiness Programme is a funding programme to enhance country ownership and access to the Fund. The Programme provides resources for strengthening the institutional capacities of National Designated Authorities or Focal points and direct access entities to efficiently engage with the Fund. To learn more see: <http://www.greenclimate.fund/how-we-work/empowering-countries>

<sup>254</sup> Fund Governing Instrument.

<sup>255</sup> UNDP and Indigenous Peoples: A Policy of Engagement

<sup>256</sup> For detailed guidance, see CSO Suggestions and Recommendations for the Review and Update of the Green Climate Fund Gender Policy and Action Plan

- Ensure regular, comprehensive reporting on the implementation of its current Gender Policy and Gender Action Plan based on quantitative and qualitative indicators.
- Increase capacity-building for applicant entities to strengthen their institutional gender capacity.
- Establish a formal Gender Advisory Group modelled after the existing Private Sector Advisory Group that assists with the implementation of the Gender Policy throughout the Fund's administrative and operational processes;
- Require gender-budgeting and gender financial audits. This requires fully costing gender mainstreaming measures in project and programme budgets.

The GCF should significantly strengthen its Gender Policy and Gender Action Plan and intensify collaboration and exchange with other climate funds such as the Climate Investment Funds,<sup>257</sup> Global Environmental Facility,<sup>258</sup> and the Adaptation Fund<sup>259</sup> in order to harmonise efforts and institutionalise gender budgeting in all projects and programmes.

### Accountability and grievance resolution

The GCF's Independent Redress Mechanism has the potential to both prevent and remediate harm and encourage the integration of human rights due diligence. Given the IRM's commitment to 'follow international best practices', it should ensure its policies and processes are premised on the following principles, which are elaborated upon in section VII below:<sup>260</sup> legitimacy, accessibility, predictability, equitability, transparency, rights-compatibility, and a commitment to continuous learning. This includes, not the least, a clear commitment that the GCF's IRM can be approached by any aggrieved individual at any time, irrespective of the existence of project-specific grievance procedures or mechanisms set up by GCF implementing entities.

For the IRM to function effectively and engender the confidence of affected groups, it should also include a policy for dealing with retaliation against aggrieved parties. The policy should draw from guidance issued by UN human rights mechanisms on the issue of potential reprisals against human rights and environmental defenders.<sup>261</sup>

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<sup>257</sup> <http://www.climateinvestmentfunds.org/about/gender>.

<sup>258</sup> <https://www.thegef.org/topics/gender>

<sup>259</sup> [https://www.adaptation-fund.org/wp-content/uploads/2016/04/OPG-ANNEX4\\_Gender-Policies-and-ActionPlan\\_approved-in-March-2016.pdf](https://www.adaptation-fund.org/wp-content/uploads/2016/04/OPG-ANNEX4_Gender-Policies-and-ActionPlan_approved-in-March-2016.pdf)

<sup>260</sup> For further elaboration of the way in which these principles can be applied by the IRM, see OHCHR, Comments of the Office of the High Commissioner for HR on the Review of the Terms of Reference of the Independent Redress Mechanism of the Green Climate Fund 2 February 2017 <http://www.ohchr.org/Documents/Issues/ClimateChange/GCF2Feb2017.pdf>; and Joint Response by a Group of CSOs on the Revised Terms of Reference for the Independent Redress Mechanism (2017) [https://us.boell.org/sites/default/files/uploads/2012/10/cso\\_comments\\_-\\_revised\\_tor\\_of\\_the\\_gcfs\\_irm.pdf](https://us.boell.org/sites/default/files/uploads/2012/10/cso_comments_-_revised_tor_of_the_gcfs_irm.pdf)

<sup>261</sup> See e.g. UN Human Rights Treaty Bodies, Guidelines against Intimidation or Reprisals ("San Jose Guidelines"), adopted at the twenty-seventh meeting of chairpersons of the human rights treaty bodies, HRI/MC/2015/6 (2015); UN Special Procedures, Acts of intimidation and reprisal for cooperation with the special procedures available at: <http://www.ohchr.org/EN/HRBodies/SP/Pages/Actsofintimidationandreprisal.aspx>; UN Special Rapporteur on the situation of human rights defenders, Commentary to the Declaration on Human Rights Defenders: an essential guide to the right to defend human rights (2011) available at: <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/CommentarytotheDeclarationonHumanRightsDefenders.aspx>

### Human rights impact assessments

An overarching consideration for the implementation of a human rights-based approach is the need to incorporate human rights impact assessments and relevant project/programme-level indicators into every proposal to be considered by the GCF Board for approval. A human rights impact assessment could accompany the social and gender assessment which is already mandated for all project/programme proposals. Further, the GCF's results management and performance measurement frameworks for both mitigation and adaptation should incorporate human rights considerations.

### Strengthened monitoring and evaluation processes

The GCF's current approach to monitoring and evaluation heavily relies on self-reporting by accredited entities with regard to their compliance with the Fund's fiduciary, environmental and social standards and its gender policy. This is insufficient and must be complemented by independently verified oversight and evaluation.<sup>262</sup> The IFC, for example, which is significantly more well-resourced than the GCF and which also relies on a self-reporting approach, has found systematic non-compliance with its performance standards by financial intermediaries in the past.<sup>263</sup>

Independent monitoring and assessment should also involve participatory monitoring by affected communities. Building on its current commitment to undertake participatory monitoring,<sup>264</sup> the GCF should institutionalise processes to support active, early and ongoing engagement of stakeholders in project implementation.<sup>265</sup> Project budgets should reflect the cost of participatory monitoring.

## **VII. Key considerations for advancing a human rights-based approach to climate finance**

Given the increasing demand for climate finance that is likely to materialize in the years to come, a more robust integration of human rights concerns into climate finance policy and practice is urgently needed. Beyond informing the evolving policies of the Green Climate Fund, States should embrace a human rights-based approach while shaping the rules, modalities and procedures of the nascent Sustainable Development Mechanism.<sup>266</sup> This is consistent with the clear legal imperative for States and private actors to act consistently with human rights obligations in the context of climate action. As discussed throughout this report, a human rights-based approach is also needed to guard against project-level human rights risks; to ensure that climate finance supports the objectives of sustainable development, poverty alleviation and equality; to strengthen a just and equitable global response to climate change; and to curb fragmentation and incoherence between the principles that States have committed to in the realms of human rights, environmental protection and sustainable development, and their national, international and collective actions.

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<sup>262</sup> For further guidance, see Heinrich Böll Stiftung North America, Submission on the Monitoring & Accountability Framework of the Green Climate Fund (17 Aug 2015)

<sup>263</sup> See CAO audit of a sample of IFC investments in Third-Party Financial Intermediaries(2012); available at [http://www.cao-ombudsman.org/documents/Audit\\_Report\\_C-I-R9-Y10-135.pdf](http://www.cao-ombudsman.org/documents/Audit_Report_C-I-R9-Y10-135.pdf).

<sup>264</sup> GCF Governing Instrument, para. 57

<sup>265</sup> For further guidance, see HBS North America, Submission on the Monitoring & Accountability Framework of the Green Climate Fund (17 Aug 2015); see also UN FAO's Guidelines on participatory monitoring.

<sup>266</sup> <sup>266</sup> See, e.g., Letter from the Special Rapporteur on human rights and the environment on Human Rights and Safeguards in the New Climate Mechanism established in Article 6, paragraph 4 of the Paris Agreement (3 May 2016).

The advancement of a human rights-based approach to climate finance will not be achieved through the creation of a single institutional mechanism, policy or work programme. It will require the consistent integration of human rights standards into all climate finance policy discussions and processes, including in relation to the mobilisation, management, administration and disbursement of funding, regardless of whether public or private actors are involved. Ensuring that actions on the ground accord with formal commitments will also demand constant vigilance on the part of civil society and human rights defenders.

Drawing on the obligations outlined in the previous sections, the good practices of international financial institutions, and recommendations from civil society and human rights experts,<sup>267</sup> the following principles and processes should, at a minimum, guide the design and operation of all climate finance mechanisms.

### **A clear commitment to human rights and zero-emission development pathways**

There should be an explicit commitment in the governing or constitutional documents of any funding mechanism to respect and promote internationally recognized human rights and to take necessary measures to avoid supporting projects that may put a borrower, donor or the fund in breach of its obligations or responsibilities under international human rights agreements. Where national law and international law set different standards, it should be clear that the fund will respect the higher standard.

At a minimum, this commitment should encompass the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the eight core ILO Conventions, and the Universal Declaration of Human Rights. These core instruments should be supplemented as needed according to the nature, scope and subject matter of particular projects.

Further, given the urgency of decarbonisation if we are to meet the objectives of the Paris Agreement and avert a dangerous level of climate change, funding mechanisms should clearly commit to the goal of supporting a rapid transition to zero-emission development pathways.

### **An equity-focused approach to financing**

In line with the recognition of developed countries' historical responsibility for climate change and principles of equity such as CBDR, finance should be provided in the form of grants whenever possible, especially for adaptation.

Finance should also internalize aid effectiveness principles which require funders to respect local ownership and funding priorities, through providing direct budget support where possible. Finance should be made directly accessible to local communities through enhanced direct access approaches, such as the ones piloted by the GCF and the Adaptation Fund in supporting local small and micro-grant facilities. This would be consistent with an understanding of the central role that

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<sup>267</sup> See, e.g., OHCHR, Comments and recommendations of UN/OHCHR in relation to the draft Environmental and Social Framework (2016); Green Climate Fund, Compilation of Submissions: Monitoring and Accountability Framework Call for Public Input; CSO Suggestions and Recommendations for the Review and Update of the Green Climate Fund Gender Policy and Action Plan Civil Society Statement, Concerns Regarding GCF and Support for High Environmental and Social Risk Programmes/Projects (22 Sep 2016); HBS North America, Submission on the Monitoring & Accountability Framework of the Green Climate Fund (17 Aug 2015). For a range of CSO submissions and advocacy calls to the Green Climate Fund, see <https://us.boell.org/2012/10/26/cso-submissions-and-advocacy-calls>

local communities should play in determining how to strengthen their climate resilience and climate action.

Where funding mechanisms have a broad financial or investment portfolio, they must cease support for greenhouse gas-intensive projects and must engage with client countries to develop human rights-based, zero-emission development strategies.<sup>268</sup> Any financial guarantees to private entities should require that businesses do not directly or indirectly support fossil fuel extraction or infrastructure and that their investment portfolios are aligned with divestment strategies. A similar approach should apply to States that accept obligations to provide climate finance—it would be inconsistent with this obligation to continue to engage in foreign investment practices that support fossil fuel production or exploitation.

Finally, climate funds should adopt clear definitions and a common reporting or accounting format for climate finance. This is essential for verifying the additionality of climate finance.

### Participation of stakeholders

To promote the fulfilment of rights to information and participation, particularly among affected communities, funds must actively support stakeholder participation as an iterative process at multiple stages of the project approval, implementation and monitoring and evaluation processes. This is necessary to prevent human rights harms and ensure that project benefits are shared equitably. Steps should be taken to institutionalise the following:

- Increased transparency during the project/programme cycle, including timely disclosure of concept notes and full proposal documents to ensure stakeholders have access to all relevant information about proposed projects or programmes. This information should be understandable and readily accessible to affected communities, including by being made available in local languages.
- Provision of financial support and capacity-building by international mechanisms to enable recipient countries to strengthen their engagement with stakeholders as well as direct financial support for the engagement of local stakeholders in funding instrument procedures.
- Dedicated support and roles for affected communities, marginalized and vulnerable groups and their representatives, including indigenous communities, women, and migrants. For example, this would require dedicated space for local and national women's rights organisations in national coordination or steering fora.
- Consultation processes during the project cycle should be iterative and undertaken in an atmosphere that is conducive to participation, including being free of intimidation or coercion, gender-responsive and tailored to the needs of marginalized or vulnerable groups.

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<sup>268</sup> See, also, CAN, Public Finance for 1.5C and Zero-Carbon Development by 2050: Implications of 1.5C and Zero-Carbon by 2050 Goals for Public Finance Institutions, Position Paper June 2017



**Good practice example: -- ADB “meaningful consultation” guidance:**

*The Asian Development Bank defines “meaningful consultation” as a process that “(i) begins early in the project preparation stage and is carried out on an ongoing basis throughout the project cycle; (ii) provides timely disclosure of relevant and adequate information that is understandable and readily accessible to affected people (iii) is undertaken in an atmosphere free of intimidation or coercion; (iv) is gender inclusive and responsive, and tailored to the needs of disadvantaged and vulnerable groups; and (v) enables the incorporation of all relevant views of affected people and other stakeholders into decision making, such as project design, mitigation measures, the sharing of development benefits and opportunities, and implementation issues.”*

**Internal human rights infrastructure**

Funding mechanisms should also institutionalise human rights expertise by creating staff positions for technical experts who are mandated to support accountability for monitoring human rights impacts, to increase the human rights competencies of staff, key advisory and decision-making bodies, and to support human rights-related capacity-building at partner entities. Further, funds should recruit experts and advisors to oversee the implementation of human rights policies on specific issues, such as gender and indigenous peoples’ rights. Gender balance should also be reflected in the composition of staff and decision-making bodies across an institution.

**Human rights policies**

Human rights should form an integral part of any mechanism’s environmental and social management system. This should reflect a commitment to moving beyond simply avoiding human rights risks towards actively promoting equitable outcomes that advance the enjoyment of human rights. This requires policies and processes that prioritise support for projects with strong human rights outcomes, as well as mandating human rights due diligence and integrating human rights principles into environmental and social safeguards.

Results frameworks and performance objectives should include human rights criteria, including qualitative and quantitative indicators for measuring how projects contribute to human rights objectives. This could include indicators that measure changes in access to land, housing and natural resources, essential services including water, energy and health services, and gender-based violence. Measuring discriminatory impacts will require the collection of data that is disaggregated on the basis of gender, age, and other relevant social and economic grounds.

Funds should also develop separate policies addressing gender and indigenous peoples’ rights that affirm the universality and interdependency of human rights principles. Each should be developed with the full and effective engagement of women and indigenous people, respectively, and representative CSOs.

Indigenous peoples’ policy: The objectives of any indigenous peoples’ policy must include, at a minimum, full respect for the rights of indigenous peoples in all the fund’s activities, in line with standards such as the UN Declaration on the Rights of Indigenous Peoples and ILO Convention 169. Central to this is the right of indigenous peoples to collectively own, use, develop and control the

lands, territories and resources that they possess because of traditional ownership, occupation or use, and the principle of free, prior and informed consent.<sup>269</sup>

Gender policy: Funds should strive to systematically integrate women's human rights and gender equality into their governance structures, project approval and implementation processes, and public participation mechanisms in a way that is truly gender-responsive and fundamentally informs the focus of funding operations.<sup>270</sup> At a minimum this requires:<sup>271</sup>

- Regular, comprehensive reporting on the implementation of existing gender policies based on quantitative and qualitative indicators. At the project level, this requires the collection of gender-disaggregated data throughout the project cycle, including to establish a baseline. Participatory monitoring of projects should ensure the active role of local women, in particular indigenous women.
- Developing guidance for best practice gender-responsive country coordination and stakeholder consultation to facilitate the participation of national and local women's organisations. The quality of participation matters in this context and should be focused on women's agency.
- In considering how to integrate gender concerns into its programmes and projects, funds should be guided by the multi-dimensional and intersectional experience of women in the context of climate change. 'Engendering' climate change goes beyond a narrow understanding of how to reduce emissions or build resilience and incorporates a broad range of considerations, including the impact on women's access to land, natural and financial resources, services, and income; climate-induced displacement and migration; gender-based violence; and a gendered focus on health and well-being.
- Mandatory gender-budgeting and gender financial audits. This requires fully costing gender mainstreaming measures in project and programme budgets.

### Human rights safeguards

Environmental and social safeguards established by financing mechanisms should require compliance with core international human rights standards and good practices in relation to the prevention of common human rights violations. Compliance with human rights safeguards should be evaluated through comprehensive, iterative and participatory human rights impact assessments. Safeguard systems should cover all lending mechanisms and be binding on the funder and borrower, whether public or private.

The content of human rights safeguards, while based on internationally recognized human principles, should be updated to reflect the evolution of human rights norms. For example, in relation to public-private partnerships that affect the provision of essential services, safeguards should reflect an expectation that services are universally accessible and equitably provided, regardless of whether they are being provided by a public or private operator.

Further, safeguards around land acquisition and involuntary resettlement should be broad enough to cover any physical and economic displacement caused by projects (this captures downstream impacts in relation, for example, to hydropower dams) and should require the improvement or, at

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<sup>269</sup> For further guidance, see An Indigenous Peoples Policy for the GCF: Joint IPs and CSO Submission to the GCF, April 2017.

<sup>270</sup> For an overview of the gender policies of climate funds including the GCF, see Gender and Climate Finance, HBF, ODI, Nov 2016.

<sup>271</sup> For detailed guidance, see CSO Suggestions and Recommendations for the Review and Update of the Green Climate Fund Gender Policy and Action Plan

least, restoration of the livelihoods of those individuals and communities that have been negatively impacted.

Finally, the internationally recognized standard of free, prior and informed consent should inform all consultations with indigenous people.

### Adoption of the highest standard of human rights protection and promotion

The important objectives of country ownership and strengthening the environmental and social frameworks of borrower countries and institutions should not compromise the objectives of social and environmental risk management. This means that projects should be governed by the strongest safeguards and safeguard systems should not be delegated to borrowers. Any sub-projects therefore need to be consistent with the requirements of those policies.

### Due diligence and initial screening of project proposals

To comply with the human rights obligations of recipient countries and public and private implementing agencies, guidelines for project proposals should require that proposals articulate the poverty alleviation and human rights implications of a proposed project in addition to its mitigation or adaptation potential. Proposals should explicitly state the benefits of the project for the groups most vulnerable to climate change and how and to what extent their enjoyment of human rights is strengthened.

Further, human rights due diligence should be undertaken in relation to any project proposal, not just ones that prima facie disclose substantial human rights risks. In addition to considering project-specific risks, information from international human rights bodies<sup>272</sup> should be incorporated into the due diligence process so that broader contextual risks are also considered.

The appraisal process for any project that indicates potential human rights risks, such as infrastructure projects or those involving public-private partnerships, should require at a minimum:

- A draft stakeholder engagement plan. Where relevant, this should include a plan for engaging affected local and indigenous communities in a manner that is consistent with the processes required by the principle of free, prior and informed consent,
- A preliminary environmental, social and human rights impact assessment, which explicitly addresses the Borrower or partner entity's human rights track record, as well as anticipated impacts on traditionally marginalised groups. This should consider the broader human rights and socio-economic context and outline:
  - social and economic disadvantages experienced by local groups;
  - constraints on public participation and free expression. Given the increasing risks that environmental and human rights defenders face in many countries, funds should seriously consider the risks of funding projects in environments where affected communities may face retaliation for raising grievances;
  - risk factors that are sector-specific, e.g. weaknesses in legal frameworks regarding land title or tenure

Project budgets should also reflect any costs associated with the protection and promotion of human rights and should allocate adequate resources for doing so.

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<sup>272</sup> This includes the UN Human Rights Council, Special Procedures, UN treaty monitoring bodies, and ILO supervisory mechanisms.

### Effective oversight and monitoring of partner entities, including financial intermediaries

Funds must establish robust oversight and monitoring frameworks to ensure compliance by partner entities with a fund's human rights policy. This is especially important where projects are funded through financial intermediaries. Funds should not rely on self-reporting by partner entities—where self-reporting does take place, it must be complemented by independently verified monitoring and evaluation.

Independent monitoring and assessment should also involve participatory monitoring by affected communities. This requires the active, early and ongoing engagement of stakeholders in project implementation, including in determining relevant indicators and in the gathering, analysis, documentation and reporting of data.<sup>273</sup>

A community monitoring mechanism should also be established whenever projects disclose high human rights risks, including where the Borrower capacity, commitment and/or track record are considered weak. Project and programme budgets should accordingly reflect the cost of participatory monitoring.

Monitoring reports should also be made public and easily accessible to stakeholders and affected communities.

### Accountability and grievance resolution policies

Experience from other development finance institutions has clarified the critically important role of accountability mechanisms. They provide an enforcement tool for social and environmental policies and other core institutional policies, and vindicate the grievances and human rights entitlements of affected individuals and groups.

Accountability policies should require that partner entities provide for local accountability mechanisms that are independent, easily accessible, transparent and have a mandate to remedy any harm done, while respecting the right of affected people to bypass local mechanisms if their independence is in doubt. Particular attention should be paid to raising awareness among affected communities that such accountability mechanisms exist.

Further, funds should establish their own independent accountability mechanisms (IAM) that have the mandate to compel the funding mechanism to take action and provide remediation. Any such mechanism should be premised on the following principles:<sup>274</sup>

- legitimacy, which requires putting in place policies to ensure the trust of groups that access the IAM, including sensitivity to real and apparent conflicts of interests and ensuring implementation of remedial measures.
- accessibility, which entails that the IAM can be effectively accessed and that access isn't impeded by barriers linked to language, cost, literacy, etc. The establishment of a compensation or remedy fund to defray costs associated with the IAM could assist in this

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<sup>273</sup> For further guidance, see HBS North America, Submission on the Monitoring & Accountability Framework of the Green Climate Fund (17 Aug 2015); see also UN FAO's Guidelines on participatory monitoring.

<sup>274</sup> For further elaboration of the way in which these principles can be applied by the IRM, see OHCHR, Comments of the Office of the High Commissioner for HR on the Review of the Terms of Reference of the Independent Redress Mechanism of the Green Climate Fund 2 February 2017 <http://www.ohchr.org/Documents/Issues/ClimateChange/GCF2Feb2017.pdf>; and Joint Response by a Group of CSOs on the Revised Terms of Reference for the Independent Redress Mechanism (2017) [https://us.boell.org/sites/default/files/uploads/2012/10/cso\\_comments\\_-\\_revised\\_tor\\_of\\_the\\_gcfs\\_irm.pdf](https://us.boell.org/sites/default/files/uploads/2012/10/cso_comments_-_revised_tor_of_the_gcfs_irm.pdf)

context. The IAM should also adopt broad eligibility criteria that allows for any individual or group to allege actual or potential direct or indirect harm.<sup>275</sup>

- predictability, which requires transparency and clarity in relation to the IAM's timeframes and procedures.
- equitability, which requires that affected groups engagement with the IAM is on fair, informed and respectful terms.
- transparency, which requires that affected groups are kept apprised of the progress of complaints and the IAM's processes.
- rights-compatibility, which requires that outcomes and remedies accord with internationally-recognised human rights; and
- a criterion of continuous learning, which requires that the IAM operates in a way that ensures that it draws upon lessons learned.

For remedies to be effective, they must be capable of leading to a prompt, thorough and impartial investigation; cessation of the violation if it is ongoing; and adequate reparation, including, as necessary, restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition.

Accountability frameworks should also include a policy for dealing with retaliation against aggrieved parties. The policy should draw from guidance issued by UN human rights mechanisms on the issue of potential reprisals against human rights and environmental defenders.<sup>276</sup> Further, given the increasing risks to human rights defenders around the world, funds should give careful consideration to issues related to shrinking civil society space in some of the countries where they may be considering projects.<sup>277</sup> International funding institutions should also abandon their claim of legal immunity in relation to national courts in order to facilitate access to justice for victims of human rights violations. Funds should ensure that there is sufficient institutional support, resources and legitimacy provided to the IAM.

The UN Human Rights Council may also wish to establish a dedicated international mechanism for receiving complaints about human rights violations specifically associated with the implementation of climate change response measures, such as a UN Special Rapporteur on Climate Change and Human Rights. This could be a key resource for the documentation of the human rights impacts of climate finance.<sup>278</sup>

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<sup>275</sup> Other independent accountability mechanisms, including the World Bank Inspection Panel, allow those both 'affected and potentially affected' by harm to bring complaints. For further detail, see OHCHR, Comments of the Office of the High Commissioner for HR on the Review of the Terms of Reference of the Independent Redress Mechanism of the Green Climate Fund 2 February 2017

<http://www.ohchr.org/Documents/Issues/ClimateChange/GCF2Feb2017.pdf>; and Joint Response by a Group of CSOs on the Revised Terms of Reference for the Independent Redress Mechanism (2017)

<sup>276</sup> See e.g. UN Human Rights Treaty Bodies, Guidelines against Intimidation or Reprisals ("San Jose Guidelines"), adopted at the twenty-seventh meeting of chairpersons of the human rights treaty bodies, HRI/MC/2015/6 (2015); UN Special Procedures, Acts of intimidation and reprisal for cooperation with the special procedures available at:

<http://www.ohchr.org/EN/HRBodies/SP/Pages/Actsofintimidationandreprisal.aspx>; UN Special Rapporteur on the situation of human rights defenders, Commentary to the Declaration on Human Rights Defenders: an essential guide to the right to defend human rights (2011) available at:

<http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/CommentarytotheDeclarationonHumanRightsDefenders.aspx>

<sup>277</sup> For further guidance, see Joint Response by a Group of CSOs on a GCF Whistleblower and Witness Protection Policy (2017); available at:

<https://us.boell.org/sites/default/files/uploads/2012/10/gcfwhistleblower-witnessprotectionpolicycsosubmission-final.pdf>.

<sup>278</sup> Savaresi, Climate Change and Human Rights (2017).