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HUMAN RIGHTS AND ARTICLE 6 OF THE PARIS AGREEMENT:

Ensuring Adequate Protection of Human Rights in the SDM and ITMO Frameworks

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EXECUTIVE SUMMARY

Article 6 of the Paris Agreement recognizes the right of Parties to cooperate in the implementation of their nationally determined contributions (NDCs) through both market- and non-market-based approaches. One market-based approach is outlined in Article 6.2 which provides for "the use of internationally transferred mitigation outcomes [(ITMOs)] towards" NDCs. This is widely seen as establishing a "bottom-up" approach, whereby "mitigation outcomes," representing emission reduction credits, can be transferred internationally and then become ITMOs. It can be contrasted with other market-based approaches that are "top-down," involving centralized programs supporting emission reduction projects. One such program is created in Article 6.4 of the Paris Agreement which establishes a new "mechanism to contribute to the mitigation of greenhouse gas emissions and support sustainable development" (sustainable development mechanism or SDM).

Under Article 6.2 of the Paris Agreement, in making use of ITMOs, Parties must "promote sustainable development and ensure environmental integrity." Similarly, under Article 6.4, the SDM is intended to "support" and "foster" sustainable development. While that phrase is not defined in the agreement, several Parties have argued that it requires the protection and promotion of human rights, consistent with the 2030 Agenda for Sustainable Development. That argument is supported by the recognition, in the preamble to the agreement, that Parties should "respect, promote, and consider their respective obligations on human rights" when taking action to address climate change. This creates an overarching expectation that Parties will, in implementing the agreement, take steps to protect human rights.

This paper identifies, describes, and explores different approaches to ensuring human rights are protected in the context of Article 6. We consider, as one possible approach, whether and how social and environmental safeguards could be incorporated into the rules governing ITMOs and the SDM. We find that there is a compelling policy rationale for incorporating safeguards into both the ITMO and SDM frameworks, not only to prevent human rights abuses, but also to ensure the success of ITMO and SDM programs and projects. Safeguards minimize the risk of public opposition and other controversies that have, in the past, derailed individual projects and called entire programs into question.

While the above considerations suggest that safeguards should be incorporated into the Article 6 frameworks, the legal basis for doing so is somewhat uncertain, particularly in the context of the ITMO regime. This has implications for the scope, substance, and enforcement of the safeguards:

- With respect to *scope*, Parties may choose to pursue:
  - a limited approach, whereby safeguards are developed only for the SDM, and embedded within the rules, procedures, and modalities adopted therefor;
  - a more comprehensive approach, whereby separate safeguards are developed for both the SDM and ITMO frameworks, and included in their respective governing rules; or
  - an integrated approach, whereby a single set of safeguards applying to both the SDM and ITMO frameworks are developed, perhaps in the Paris Implementation Guidelines.

  The limited approach is the most legally defensible and appears to have the greatest support among Parties to the Paris Agreement. There is, however, also some support for the second more comprehensive approach. That approach could be justified on the basis that both the SDM and ITMO frameworks are intended to promote sustainable development, which arguably requires the protection of human rights. The fact that both frameworks have the same goal, and are grouped together as "cooperative approaches" under Article 6 of the Paris Agreement, also supports the integrated approach.
- With respect to *substance*, Parties should draw on experience with existing safeguard policies, utilized in connection with other similar mechanisms. The extent to which various policies are drawn on will likely depend, in part, on the scope of the safeguards developed under the Paris Agreement. In particular:
  - If safeguards are developed solely for the SDM, Parties should draw on the policies utilized in connection with the Clean Development Mechanism, the framework for Reducing Emissions from Deforestation and Forest Degradation, and the various climate funds.
  - If safeguards are also developed for the ITMO framework, Parties may draw on the policies identified above, but should also consider those developed for other emissions trading schemes.
- With respect to enforcement, various approaches may be taken, depending on the scope and substance of the safeguards. SDM-specific safeguards would likely be subject to centralized

enforcement, either by the governing body for the SDM or another entity designed by it. There is, however, greater uncertainty regarding the enforcement of any ITMO-specific safeguards. Possible options include:

- centralized enforcement, whereby an international body (perhaps the SDM-governing body) would be responsible for certifying that projects comply with the safeguards;
- national-level enforcement, whereby national governments would be responsible for certifying compliance, and there would be no international oversight; or
- hybrid enforcement, whereby compliance certificates issued by national governments would be subject to review by an international body.

In addition to analyzing the possible use of safeguards, we also consider other approaches to help protect and promote human rights in the implementation of Article 6. Specifically, we discuss how a rights-based approach could inform the rules governing the adaptation funding mechanism envisioned in Article 6.6, as well as the overarching implementation guidelines for the Paris Agreement. With respect these other approaches, we find that:

- With regards to funding, we find that:
  - Article 6 expressly requires that a share of the proceeds from the SDM be used to fund adaptation projects in vulnerable countries. The Parties could adopt rules or guidance to ensure that these funds are invested in a manner that will best serve the purpose of protecting and promoting human rights.
  - Article 6 does not require that a share of the ITMO revenue be used for adaptation, but some Parties have nonetheless advocated for a similar funding requirement to be embedded within the ITMO guidelines, as applies to the SDM. While Article 6 could be interpreted expansively to permit the establishment of an ITMO funding requirement, it is unlikely that all Parties would agree to this. That said, the Parties could adopt non-binding guidance recommending that ITMO revenue be used to meet adaptation funding commitments or enter into a new agreement which establishes a requirement pertaining to ITMO revenue and adaptation funding.
- With regards to the overarching implementation guidelines, we note that provisions pertaining to human rights could be incorporated into these guidelines – for example, requirements that countries report on how they are respecting and promoting human rights in the

implementation of Article 6 mechanisms. However, it is unlikely that such overarching guidelines would provide the same level of protection as more targeted rules aimed at safeguarding human rights in the context of Article 6 implementation.

CONTENTS

1. INTRODUCTION

Recognizing the need for action to address the "urgent threat of climate change," in December 2015, the global community adopted the Paris Agreement.[1] The Agreement aims to "strengthen the global response" to climate change, both by limiting future temperature increases, and enhancing countries' ability to deal with the adverse effects of such increases.[2] To that end, the Agreement urges countries to pursue "ambitious efforts" to mitigate and adapt to climate change, through both domestic and global-level action.[3] At the same time, however, it acknowledges that such action may itself have adverse effects and must therefore be pursued with care.[4]

Actions to mitigate and adapt to climate change are needed to protect human rights against threats associated with the impacts of climate change. But past experience with projects aimed at mitigating and adapting to climate change clearly demonstrates the potential for harm to local communities and the environment. One example is hydroelectric projects which, while delivering climate benefits in the form of clean energy, have also resulted in serious human rights abuses. The Paris Agreement is the first international environmental agreement to recognize the need to avoid such abuses, with the Parties acknowledging in the preamble that they:

> "should, when taking action to address climate change, respect, promote, and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity."[5]

This statement creates an expectation that the Parties will take steps to safeguard human rights when implementing the Paris Agreement – not only by pursuing ambitious mitigation and

[1] UNFCCC, Conference of the Parties on its Twenty-First Session, Adoption of the Paris Agreement, Decision 1/CP.21, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015).

[2] Paris Agreement, Art. 2.1.

[3] *Id*. at Art. 3.

[4] *Id*. at Premable (The Parties recognize that they "may be affected not only by climate change, but also by the impact of measures taken in response to it").

[5] *Id*. at Preamble.

adaptation actions, but also by ensuring that the actions themselves do not interfere with the full enjoyment of human rights. Notably however, the need for human rights safeguards is not addressed in any of the substantive provisions of the Paris Agreement, leading to questions as to whether and how they will be incorporated.

This paper explores the incorporation of human rights safeguards under Article 6 of the Paris Agreement which provides for international cooperation on actions to mitigate climate change. The paper focuses on the two market-based "cooperative approaches" – one involving the use of "internationally transferred mitigation outcomes" (ITMOs) representing emissions reduction credits and the other creating a new "sustainable development mechanism" (SDM) to support emissions reduction projects – identified in Articles 6.2 and 6.4 of the Paris Agreement. While neither article expressly references human rights, they both acknowledge the need for cooperative approaches to further "sustainable development,"6 which has been found to require the protection of rights.[7] Recognizing this, in their comments on how the articles should be operationalized, several Parties have recommended that human right safeguards be incorporated into the ITMO and SDM frameworks. This paper identifies, describes, and explores various ways in which that recommendation could be implemented.

The remainder of the paper is structured as follows: Part 2 outlines the market-based mechanisms in Article 6 of the Paris Agreement. The relationship between those mechanisms and existing market-based emission reduction programs is then discussed in Part 3. Drawing on experience with the existing programs, Part 4 explores whether and how human rights safeguards can be incorporated into the Article 6 mechanisms, and what form any such safeguards should take. Part 5 then identifies other approaches to protecting and promoting human rights in the context of the Article 6 mechanisms. Part 6 concludes.

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[6] *Id*. at Art. 6.2 (requiring Parties, when using ITMOs towards their nationally determined contributions, to "promote sustainable development and ensure environmental integrity"). *See also id*. at Art. 6.4 (indicating that the SDM is intended "to contribute to the mitigation of greenhouse gas emissions and support sustainable development").

[7] *See, e.g.*, United Nations Office of the High Commissioner for Human Rights (OHCHR), *Human Rights and the 2030 Agenda for Sustainable Development*, https://perma.cc/9KDL-DHDQ (last visited Apr. 29, 2018); United Nations Division for Social Policy and Development Disability, *Relationship between Development and Human Rights*, https://perma.cc/NGS5-C2EM (last visited Apr. 29, 2018).

2. MARKET MECHANISMS IN ARTICLE 6 OF THE PARIS AGREEMENT

Article 6 of the Paris Agreement, often termed the "cooperative approaches provision," establishes a framework under which Parties may cooperate in the implementation of their nationally determined contributions (NDCs).[8] The article identifies three possible forms of cooperation – two market-based approaches and one non-market approach[9] – but these are arguably intended as examples.[10] Several Parties to the Paris Agreement, as well as some commentators and observers, have argued that Article 6 is sufficiently broad to encompass any form of "voluntary cooperation" used by Parties to advance progress towards their NDCs.[11]

This paper focuses on the market-based cooperative approaches in Articles 6.2 and 6.4 of the Paris Agreement. While the potential for non-market cooperation is also recognized in Article 6.8 of the Paris Agreement, that option is less well developed, with the article merely stating that "non-market approaches [are] available to Parties" and providing no detail on what form those approaches may take. In this way, Article 6.8 differs from Articles 6.2 and 6.4, which identify specific forms of market-based cooperation. Similarly, whereas Articles 6.2 and 6.4 are the subject of a detailed work program aimed at operationalizing the market-based approaches, the work program for Article 6.8 is expressed in general terms. Indeed, the only direction provided is that the work program should consider "how to facilitate the implementation and coordination of non-market approaches." As a result, significant uncertainty remains as to how Article 6.8 will be

[8] Paris Agreement, Art. 6.1

[9] *Id*. at Art. 6.2, 6.4, & 6.8.

[10] ANDREI MARCU, CARBON MARKET PROVISIONS IN THE PARIS AGREEMENT 4 (2016), https://perma.cc/7KFE-P3AT (arguing that "Paragraphs 6.2-6.3 (transfers), paragraphs 6.4-6.7 (creation of reductions / mitigation outcomes under the CMA), and a non-market framework (paragraphs 6.8-6.9) are particular cases of cooperative approaches, but the interpretation can be that this does not represent an exhaustive list").

[11] *Id*. (indicating that Article 6 "is broad, is meant to be broad, and is understood to cover all types of cooperation among Parties in implementation of their NDCs"). *See also* Submission of Norway on Article 6 of the Paris Agreement (Oct. 30, 2017), https://perma.cc/7PCQ-QNEA (noting that "the nature of cooperation may . . . change over time. New approaches can play an important role in future market-based cooperation").

operationalized and, in particular, the future design of any non-market approaches pursued thereunder. For that reason, non-market approaches are not considered in this paper.

2.1 Article 6.2: Internationally Transferred Mitigation Outcomes

Article 6.2 provides for "the use of internationally transferred mitigation outcomes [or ITMOs] towards" NDCs. This is a new concept – the term "ITMO" was first used during informal negotiations in the lead-up to adoption of the Paris Agreement – intended to encompass all international transfers engaged in by Parties for the purpose of achieving their NDCs. It establishes a "bottom-up" approach, whereby "mitigation outcomes" resulting from domestic or international programs may be transferred by Parties, at which point they become ITMOs.[12]

The Paris Agreement does not on its face impose any restrictions on the source of mitigation outcomes.[13] Various international programs have been identified by Parties to the Agreement, observers, and commentators as possible sources, including the existing framework for Reducing Emissions from Deforestation and Forest Degradation (REDD/REDD+) which is continued under Article 5 of the Paris Agreement, and the new sustainable development mechanism (SDM) created in Article 6 of the Agreement.[14] Existing and new programs at the regional or national level, such as Japan's Joint Crediting Mechanism, might also be a source of mitigation outcomes.[15]

Mitigation outcomes developed through these and other programs can only be transferred internationally for use towards NDCs in accordance with Articles 6.2 and 6.3 of the Paris

[12] *See generally*, Submission of New Zealand on Article 6.4 of the Paris Agreement (Oct. 17, 2017), https://perma.cc/N65Y-389U (stating that Article 6.2 reflects "a 'bottom-up' world of cooperation in which mitigation outcomes are transferred from one Party to another and used towards the achievement of that other Party's . . . NDC").

[13] Marcu, *supra* note [10], at 5 (noting that the Paris Agreement does not contain "any qualifier to restrict the use of these provisions to units / outcomes emanating from mechanisms / procedures / protocols that are under the authority of the COP").

[14] *See generally*, SBSTA, Report of Round-Table Discussion Among Parties Held on 4 November 2017 (Nov. 6, 2017), https://perma.cc/LLZ5-J6LJ (noting that some Parties view emissions reductions generated through the SDM as ITMOs "that are subject to the accounting guidance in Article 6.2 when they are internationally transferred").

[15] Marcu, *supra* note [10], at 6.

Agreement.[16] Under those articles, transfers must "be voluntary and authorized by Participating Parties,"[17] who must "promote sustainable development and ensure environmental integrity and transparency, including in governance, and . . . apply robust accounting to ensure, inter alia, the avoidance of double counting consistent with guidance adopted by the Conference of the Parties [to the UNFCCC (COP),] serving as the meeting of the Parties to this Agreement" (CMA), on the recommendation of the Subsidiary Body for Scientific and Technological Advice (SBSTA).[18] Under the Paris Agreement work program, SBSTA must develop recommended guidance, which will be considered during the first session of the CMA.[19]

In submissions to SBSTA, Parties have expressed opposing views on the appropriate scope of the guidance and, in particular, whether it should be limited to provisions dealing with accounting for ITMOs. Such limits have been supported by some Parties, including Australia and Japan, who emphasize that the Paris Agreement only envisages the adoption of accounting guidance and leaves other issues relating to the use of ITMOs, such as how to ensure environmental integrity, to the discretion of national governments.[20] Other Parties have, however,

[16] Articles 6.2 and 6.3 of the Paris Agreement do not apply to domestic use of mitigation outcomes (i.e., by the country in which they were produced). *See* Paris Agreement, Art. 6.2 (referring to "international" transfers).

[17] *Id*. at Art. 6.3.

[18] *Id*. at Art. 6.2. *See also* Decisions Adopted by the COP at its 21st Session, FCCC/CP/2015/10/Add.1, P 36 (Jan. 29, 2016), https://perma.cc/Y7Y9-HD7W (requesting that the SBSTA "develop and recommend the guidance referred to under Article 6, paragraph 2, of the Agreement") [hereinafter COP21 Decisions].

[19] *Id*.

[20] *See e.g.*, Submission of Japan on Guidance on Cooperative Approaches Referred to in Article 6, Paragraph 2, of the Paris Agreement (Mar. 17, 2017), https://perma.cc/Y3KN-QMWJ (stating that "[t]he scope of the guidance is limited to the accounting towards the achievement NDCs" and recommending that other matters arising under Article 6.2, such as "[p]romoting sustainable development and ensuring environmental integrity . . . should be carried out under the responsibility of the Parties engaging in the cooperative approaches"); Submission of Australia on the Content of the Guidance for Article 6.2, Including the Structure and Areas, Issues and Elements to be Addressed (Oct. 26, 2017), https://perma.cc/R2SX-TU35 (arguing that "[g]uidance is not mandated nor required" on environmental integrity and sustainable development).

expressed concern regarding the adequacy of this approach and recommended the adoption of broad guidance on environmental integrity and other issues arising under Articles 6.2 and 6.3.[21]

Some of those in favor of broad guidance have also advocated for centralized oversight of the use of ITMOs, arguing that this is necessary to ensure compliance with Articles 6.2 and 6.3 of the Paris Agreement.[22] Some Parties appear to support the establishment of a new international body to oversee the ITMO framework, while others have suggested assigning oversight responsibility to the body created under Article 6.4 to supervise the SDM (see part [2.2] below). A third group have opposed both approaches, arguing that the Paris Agreement does not envisage establishment of a central body to oversee the ITMO framework, but rather assumes oversight will occur at the national level.[23]

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[21] *See e.g.*, Submission of Saint Lucia on behalf of the Caribbean Community on Guidance Referred to in Article 6.2 of the Paris Agreement (Oct. 31, 2016), https://perma.cc/UQ65-HSPH (arguing that "[i]t will not be sufficient for Article 6 guidance to just address the mechanics of accounting"); Submission by the Republic of the Maldives on behalf of the Alliance of Small Island States on Articles 6.2 and 6.4 of the Paris Agreement (Apr. 27, 2017), https://perma.cc/Q94U-TZ6D (calling for guidance on how to ensure environmental integrity and promote sustainable development in activities under Article 6.2). Note that several countries' submissions supported the adoption of guidance on how to ensure environmental integrity, but not how to promote sustainable development, arguing that this is a national prerogative. *See e.g.*, Submission of Brazil on the Guidance Referred to in Article 6, Paragraph 2, of the Paris Agreement (Mar. 31, 2017), https://perma.cc/SGK3-S7MP.

[22] *See generally* SBST, Report of Round-Table Discussion Among Parties Held on 5 November 2017 (Nov. 6, 2017), https://perma.cc/2RSQ-ALAB (noting that some Parties recommended "establishment of a centralized oversight body . . . [to] ensure Parties act consistently with CMA guidance in order to comply with "shall requirements" in Articles 6.2 and 6.3). *See also,* Submission of Saint Lucia on behalf of the Caribbean Community on Guidance Referred to in Article 6.2 of the Paris Agreement (Oct. 31, 2016), https://perma.cc/UQ65-HSPH (calling for international oversight under the CMA); Submission of the Federal Democratic Republic of Ethiopia on behalf of the Least Developed Countries Group on Operationalization of Article 6, paragraph 2 of the Paris Agreement (Mar. 22, 2017), https://perma.cc/CV45-YYDV (arguing that a "centralized oversight mechanism should be established" under the auspices of the UNFCCC Secretariat).

[23] *See e.g.*, Submission of New Zealand on the Guidance Referred to in Article 6(2) of the Paris Agreement (Sep. 20, 2017), https://perma.cc/DF9D-9P8A (arguing that "the COP did not request the SBSTA to develop rules or recommendations for a supervising body for the cooperative approaches envisaged in Article 6.2" and recommending that such approaches be supervised at the national level); Submission of Switzerland on behalf of the Environmental Integrity Group on Art.

2.2 Article 6.4: Sustainable Development Mechanism

Whereas Article 6.2 of the Paris Agreement reflects a "bottom-up" approach to cooperation, Article 6.4 embodies a "top-down" approach, whereby mitigation outcomes are produced and certified through an international mechanism.[24] It is similar to Article 12 of the Kyoto Protocol, which established the Clean Development Mechanism (CDM) allowing industrialized countries to meet their emission reduction targets using credits generated by projects hosted in developing countries.[25] Article 6.4 of the Paris Agreement establishes a new, broader mechanism, known as the SDM, under which any country may elect to host credit-generating emission reduction projects.[26] The host country may, subject to international oversight, transfer the credits to others for use in meeting their NDCs.[27]

Under Article 6.4, SDM projects must both "contribute to the mitigation of greenhouse gas emissions and support sustainable development."[28] With respect to the former, Article 6.4 provides that the SDM should "contribute to the reduction of emissions levels in the host" country[29] and "deliver an overall mitigation in global emissions,"[30] suggesting that projects must not simply

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6 of the Paris Agreement (Oct. 31, 2017), https://perma.cc/LSG9-77HC (arguing that the use of ITMOs should be supervised by national authorities).

[24] *See generally*, Marcu, supra note [x], at 13 (arguing that "[t]he SDM set-up is in clear contrast to cooperative approaches (P.A. Articles 6.2-6.3), which can be seen as a procedure / protocol for transferring mitigation outcomes internationally and where Parties are the principal actors and follow accounting protocols that are consistent with CMA guidance"). *See also* Submission of New Zealand on Article 6.4 of the Paris Agreement (Oct. 17, 2017), https://perma.cc/N65Y-389U (describing the SDM as a "'top-down' mechanism established under the guidance and authority of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA) with a supervising body designated by the CMA").

[25] *See generally*, Susan Biniaz, *Analyzing Articles 6.2 and 6.4 of the Paris Agreement Along a "Nationally" and "Internationally" Determined Continuum*, *in* MARKET MECHANISMS AND THE PARIS AGREEMENT 55, 57 (Harvard Project on Climate Agreement, 2017).

[26] Paris Agreement, Art. 6.4(c). *See also* Marcu, *supra* note [10], at 15 (noting that "there is no reference made in paragraphs 6.4-6.76 [sic] of the PA to any differentiation, or limitation that would not allow the SDM to operate in certain Parties").

[27] *See* Paris Agreement, Art. 6.4(c).

[28] *Id*. at Art. 6.4(a).

[29] *Id*. at Art. 6.4(c).

[30] *Id*. at Art. 6.4(d).

involve offsetting or shifting emissions between countries.[31] Consistent with this view, the Paris Agreement work programme requires adoption of rules[32] to ensure projects deliver "real, measurable, and long-term reductions," which are "additional to any that would otherwise occur."[33] The rules must also include procedures for the verification and certification of emissions reductions, which will be performed by a newly established international body.[34]

Unlike the ITMO regime, for which no governance system is defined in the Paris Agreement, the SDM is declared to be under the CMA's authority and subject to supervision by a CMA-designated body.[35] While the composition and structure of the supervising body has not yet been agreed, it is widely expected to be modelled on the CDM Executive Board (EB).[36] Some changes will, however, likely be made to address perceived shortcomings in the design of the CDM EB. For example, whereas membership of the CDM EB is weighted towards industrialized countries, there is broad agreement that the SDM supervising board should include an equal number of members from developing countries.[37] A number of Parties have also criticized the

[31] CARBON MARKET WATCH, BUILDING BLOCKS FOR A ROBUST SUSTAINABLE DEVELOPMENT MECHANISM 3-4 (2017), https://perma.cc/86QT-4XUE (arguing that "the SDM must not be an offsetting tool," but "must lead to emissions reductions that would not have otherwise occurred, must not correspond to increased emissions elsewhere, and contribute to a ratchet of ambition over time").

[32] Draft rules are currently being developed by SBSTA and will be submitted to SMA for adoption during its first session.

[33] COP21 Decisions, *supra* note 18, at 37.

[34] *Id*.

[35] Paris Agreement, Article 6.4.

[36] *See e.g.*, Marcu, supra note [x], at 4 (indicating that "the CDM Executive Board (EB) will be very much the model used").

[37] *See e.g.*, Submission of the Republic of Rwanda on behalf of the Member States of the Central African Forestry Commission (COMIFAC) on Article 6 (Mar. 21, 2017), https://perma.cc/8X5E-TBJT (arguing that the composition of the supervising body should "ensure parity between developing and advanced countries"); Submission of the Federal Democratic Republic of Ethiopia on behalf of the Least Developed Countries Group on Matters Relating to Article 6, Paragraph 4 of the Paris Agreement (July 11, 2017), https://perma.cc/C87C-HYM5 (indicating that the supervisory board should "consist of equal representation of developed and developing country Parties and . . . include one representative from an LDC [Least Developed Country] Party and one from an AOSIS [Alliance of Small Island States] Party"); Submission of New Zealand on Article 6.4 of the Paris Agreement (Oct. 17, 2017), https://perma.cc/N65Y-389U (arguing that "the composition of [the supervising] body should be broadly and equitably

political nature of the CDM EB and argued that the SDM supervising board should be comprised of technical experts rather than bureaucrats (as is currently true of the CDM EB).[38]

The SDM supervising body will oversee emissions reduction projects and, after verifying that they have delivered "real, measurable, and long-term" savings, issue credits that can be used by Parties towards their NDCs.[39] Oversight may also occur at the national level, with several Parties arguing that countries should be required to designate national authorities to oversee their involvement in the SDM.[40] According to some Parties, these national authorities should be

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geographically representative to align with inclusive participation in the mechanism." The body should "should comprise of two representatives from each UN regional group, 1 representative from Small Island Developing States and 1 representative from Least Developed Countries").

[38] *See e.g.*, Submission by South Africa on rules, modalities and procedures for the mechanism established by Article 6, paragraph 4, of the Paris Agreement 2 (Apr. 25, 2017), https://perma.cc/3NZY-JLDH (stating that "the [SDM] governance body needs sound technical expertise to ensure the efficient functioning of the mechanism"); Submission of the Republic of Indonesia on Article 6 of the Paris Agreement (May 5, 2017), https://perma.cc/DB9R-ZPCX (arguing that the SDM body should be "more technical and less political"). Submission by Switzerland on behalf of the Environmental Integrity Group on Article 6 of the Paris Agreement (Oct. 31, 2017), https://perma.cc/EB52-4YFR (arguing that the supervising body should comprise "technical experts, so that it is less politicized as [sic] similar existing bodies"). For a discussion of the politicization of the CDM EB, see FLORENS FLUES ET AL., UN APPROVAL OF GREENHOUSE GAS EMISSIONS REDUCTION PROJECTS IN DEVELOPING COUNTRIES: THE POLITICAL ECONOMY OF THE CDM EXECUTIVE BOARD 2 (2008), http://perma.cc/4ZMK-ZQE3.

[39] *See generally*, Susan Biniaz, Analyzing Articles 6.2 and 6.4 of the Paris Agreement along a "Nationally" and "Internationally" Determined Continuum, in Market Mechanisms and the Paris Agreement 55, 56 (Harvard Project on Climate Agreements, 2017).

[40] *See e.g.*, Submission of Ethiopia on behalf of the Least Developed Countries Group on Matters Relating Under Article 6, Paragraph 4 of the Paris Agreement (Nov. 7. 2017), https://perma.cc/Z8UL-37SG (arguing that "[e]ach Party that wishes to host [SDM] activities shall establish a national designated authority to oversee the governance of [the] activities" and "[e]ach Party that that wishes to undertake a mitigation activity within another Party as a means of fulfilling their NDC must establish a national designated authority to oversee the activities"); Submission of Liechtenstein, Mexico, Monaco, and Switzerland on Matters Relating to Article 6 of the Paris Agreement (Oct. 31, 2017), https://perma.cc/M8BY-Q5AN (indicating that Parties participating in the SDM should "designate[], by communicating it to the Secretariat, a national authority that authorizes participation of activities on its territory . . . and records international transfers of emissions credits"); Submission of South Africa on Matters Relating to Article 6 of the Paris Agreement: Rules, Modalities and Procedures for the Mechanism Established by Article 6, Paragraph 4, of the Paris Agreement (Oct. 30, 2017), https://perma.cc/6AB9-B7D7 (arguing that

responsible for ensuring that activities under the SDM promote sustainable development (i.e., as required under Article 6.4 of the Paris Agreement),[41] though others have suggested that this falls within the responsibility of the central supervising body.[42]

2.3 Related Provisions of the Paris Agreement

While market-based cooperation is primarily dealt with in Article 6 of the Paris Agreement, which outlines the key rules governing ITMOs and the SDM, use of those instruments is also affected by several other provisions. The most important provisions are discussed in this part.

Article 4.13: Accounting. Under Article 4.13 of the Paris Agreement, Parties must account for all anthropogenic greenhouse gas emissions and sinks corresponding to their NDCs, in accordance with guidance adopted by the CMA. The guidance may include provisions on accounting for transfers under Article 6 to ensure that emissions reductions sold thereunder are not counted towards achievement of the seller's NDC and indicating when / how they may be counted by the purchaser.[43] These issues could, in addition or as an alternative, also be dealt with in the guidance adopted under Articles 6.2 and 6.4 of the Paris Agreement.[44]

Article 13: Transparency. Article 13.1 of the Paris Agreement establishes a so-called "enhanced transparency framework" intended to, among other things, provide a "clear understanding" of Parties progress towards achieving their NDCs.[45] To that end, under Article

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activities "must be monitored and judged at the national level through an appropriate designated national authority").

[41] *See e.g.*, Submission of South Africa on Matters Relating to Article 6 of the Paris Agreement: Rules, Modalities and Procedures for the Mechanism Established by Article 6, Paragraph 4, of the Paris Agreement (Oct. 30, 2017), https://perma.cc/6AB9-B7D7 (arguing that the promotion of sustainable development must be monitored and judged at the national level through an appropriate designated national authority").

[42] *See generally*, SBSTA, Informal Note on Rules, Modalities and Procedures for the Mechanism Established by Article 6, Paragraph 4 of the Paris Agreement (Nov. 10, 2017), https://perma.cc/K5L2-Q49R.

[43] *See generally*, Ad Hoc Working Group on the Paris Agreement, Informal Note on APA Agenda Item 3: Further Guidance in Relation to the Mitigation Section of Decision 1/CP.21 (Nov. 13, 2017), https://perma.cc/62E9-DNAJ (listing rules relating to "transfers of ITMOs" as a possible element of the accounting guidance).

[44] *Id*. (suggesting that the accounting guidance "cross-reference" to the guidance developed under Article 6).

[45] Paris Agreement, Art. 13.5.

13.7, Parties must produce regular greenhouse gas inventory reports showing emissions and removals by source.[46] Draft guidance on the reports, developed by the Ad Hoc Working Group on the Paris Agreement, indicates that they should "account for any transfer[s]" under Article 6.[47] The guidance further recommends that Parties provide information on how (if at all) transfers were used to achieve their NDCs.[48] This and other information will be subject to technical expert review, under which a panel drawn from the UNFCCC's Roster of Experts[49] will assess the relevant Party's progress towards achieving its NDC, and identify any areas for improvement.[50] The panel could review any transfers undertaken by the party, for example, to determine whether they comply with the requirements of Article 6 of the Paris Agreement.[51]

Article 15: Implementation and Compliance. Article 15.1 establishes a "mechanism to facilitate implementation of and promote compliance with" the Paris Agreement. The mechanism is to consist of a twelve-member committee which will be responsible for assisting Parties to implement the provisions of the Paris Agreement and comply with their obligations thereunder.[52] Consistent with this mandate, the committee could monitor transfers to ensure they comply with Article 6, and work with Parties to remedy any non-compliance. Draft operating rules for the committee indicate that it may issue warning statements and/or other communications to Parties that fail to comply with the Paris Agreement and/or work with them to develop remedial action plans.[53]

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[46] Id. at Art. 13.7(a).

[47] APA, Informal Note on Draft Elements for APA Agenda Item 5: Modalities, Procedures and Guidelines for the Transparency Framework for Action and Support Referred to in Article 13 of the Paris Agreement 14 (Nov. 14, 2017), https://perma.cc/2H3J-EQPH [hereinafter Informal Note on Article 13].

[48] *Id*. at 18, 21

[49] The UNFCCC Roster of Experts is comprised of individuals nominated by their respective governments to contribute to various processes mandated by the COP, CMA, and subsidiary bodies. See UNFCCC, Roster of Experts, https://perma.cc/2E5E-JFSQ (accessed Feb. 27, 2018).

[50] Paris Agreement, Art. 13.11 – 13.12. *See also* Informal Note on Article 13, supra note 47, at 42.

[51] *Id*.

[52] *Id*. at 15.2; COP21 Decisions, supra note 18, at 102.

[53] APA, Draft Elements for APA Agenda Item 7: Modalities and Procedures for the Effective Operation of the Committee to Facilitate Implementation and Promote Compliance Referred to in Article 15.2 of the Paris Agreement 12-13 (Nov. 13, 2017), https://perma.cc/H3GA-KGW2.

3. RELATIONSHIP OF ARTICLE 6 TO EXISTING EMISSION REDUCTION MECHANISMS AND POLICY FRAMEWORKS

The cooperative approaches in Article 6 of the Paris Agreement build on, and in some respects duplicate, pre-existing mechanisms established in the Kyoto Protocol and other international agreements. Some of these mechanisms (e.g., the CDM) are expected to be phased out, while others (e.g., REDD/REDD+) may continue to operate, though both approaches remain contentious. There is significant uncertainty as to how any phase-outs will occur and the likely interaction of any continued mechanisms with the ITMO framework and SDM. These issues are explored below.

3.1 Kyoto Protocol Flexibility Mechanisms

Unlike the Paris Agreement, which expects all countries to take action on climate change, the Kyoto Protocol only required action by developed countries, which are subject to binding emissions reduction targets (Annex B countries). These targets, which are expressed as allowed emissions or "assigned amounts" over the periods 2008-2012 and 2013-2020, may be met either through domestic action or using international trading mechanisms. Three such mechanisms are identified in the Kyoto Protocol, namely:

1. International Emissions Trading (IET), whereby Annex B countries may transfer emissions units (known as "assigned amount units" or "AAUs") from their targets, such that the seller emits less than its assigned amount and the purchaser can emit more;
2. Joint Implementation (JI), whereby one Annex B country may fund emission reduction projects in another, and use the resulting credits (known as "emission reduction units" or "ERUs") to meet its assigned amount; and
3. Clean Development Mechanism (CDM), whereby an Annex B country may use credits (known as "certified emissions reductions" or "CERs") generated through projects it funds in other, non-Annex B countries.

The JI/CDM framework is widely considered to have been the model for the SDM in Article 6.4 of the Paris Agreement. While some Parties to the Paris Agreement have suggested that the

JI/CDM framework could continue operating alongside the SDM,[54] most have advocated its phasing out, indicating that it should no longer be used to fund emissions reduction projects from 2020.[55] Less consideration has, however, been given to the treatment of JI/CDM projects funded prior to 2020 that continue to deliver emissions reductions thereafter.

The COP decision accompanying the Paris Agreement "[e]ncourages Parties to promote the voluntary cancellation" of credits from existing JI/CDM projects,[56] but goes on to suggest that any uncanceled credits may be used by Parties towards their NDCs.[57] Some Parties appear to assume that no restrictions will be imposed on the use of JI/CDM project credits,[58] whereas others have suggested that use should only be permitted where the project meets the requirements of the SDM.[59] This would necessitate reassessment of projects – though how this would occur and by whom remains uncertain – and may limit the number of JI/CDM credits that can be reused.[60]

[54] *See e.g.*, Submission of Norway on Article 6 of the Paris Agreement (Oct. 5, 2017), https://perma.cc/5B74-ZDRJ (noting that "[t]he Kyoto Protocol is not limited in time, and in principle the CDM could continue").

[55] *See e.g.*, Submission of Estonia and the European Commission on Behalf of the European Union and its Members on Article 6 (Oct. 6, 2017), https://perma.cc/4XC3-KPMY (arguing that "the mechanisms defined under the Kyoto Protocol shall not continue after the second commitment period" ending in 2020).

[56] COP21 Decisions, *supra* note [18], at 106.

[57] *Id*. at 107 (urging Parties to report transparently on ITMOs generated through the Kyoto Protocol flexibility mechanisms).

[58] *See e.g.*, Submission of the Republic of Tunisia on 1) the Guidance Referred to in Article 6(2) of the Paris Agreement, 2) Rules, Modalities and Procedures for the Mechanism Established by Article 6, paragraph 4, of the Paris Agreement and 3) on the work programme under the framework for non-market approaches referred to in Article 6, paragraph 8, of the Paris Agreement (Sep. 30, 2016), https://perma.cc/ECE2-HNQL (calling, generally, for the continued issuance of CER for "CDM activities with crediting periods beyond year-end of 2019).

[59] *See e.g.*, Submission of Republic of Korea on Art. 6.2 and 6.4 of the Paris Agreement (Nov. 2, 2011), https://perma.cc/X733-S2XH (arguing that CDM projects should "continue to be valid after reassessment in accordance with relevant rules, modalities, and procedures under Art. 6.4").

[60] Some stakeholders have argued that existing JI/CDM projects cannot be considered to deliver "additional" emissions reductions as required under the SDM. *See* ASH SHARMA, CARBON MARKETS FIRMLY BACK ON THE AGENDA (2016), https://perma.cc/7EV7-V8YN.

3.2 Reducing Emissions from Deforestation and Forest Degradation

The Paris Agreement expressly provides for the continuation of REDD/REDD+, with Article 5 encouraging Parties "to take action to implement and support . . . the existing framework" therefor. Briefly, under the REDD/REDD+ framework, developing countries can obtain results-based payments for emissions reductions associated with avoiding deforestation and forest degradation, conserving and enhancing forest carbon stocks, and ensuring sustainable forest management.[61] Payments may be channeled through international organizations, such as the World Bank, or provided by individual countries and have often taken the form of "donations" for which the funder receives nothing in return.[62] Recently, however, there has been a push to use REDD/REDD+ projects to generate credits which can be sold to third parties for use in meeting their domestic or international emissions reduction commitments. One example of this approach is the World Bank's Forest Carbon Partnership Facility, whereby governments and others can contribute to a carbon fund, which is used to purchase emissions reduction credits generated through REDD/REDD+ projects.[63] The credits are then distributed to participants in the fund in proportion to their contribution.[64]

There has historically been no process within the UNFCCC framework for crediting emissions reductions generated through REDD/REDD+ projects.[65] Thus, for example, developed countries could not meet their emissions reduction targets under the Kyoto Protocol by funding

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[61] Decisions Adopted by the Conference of the Parties on its Thirteen Session, Decision 2/CP.13 (Mar. 14, 2008), https://perma.cc/QPP4-U7Z7; Decisions Adopted by the Conference of the Party on its Fifteenth Session, Decision 4/CP.15 (Mar. 30, 2010), https://perma.cc/G394-2TKX; Decisions Adopted by the Conference of the Parties on its Sixteenth Session, Decision 1/CP.16 (Mar. 15, 2011), https://perma.cc/4G5Z-5NDZ.

[62] One example of a donation type REDD/REDD+ scheme is Brazil's Amazon Fund. See Government of Brazil, Amazon Fund, http://www.amazonfund.gov.br/en/home/ (accessed Mar. 1, 2018).

[63] *See generally* WORLD BANK FOREST CARBON PARTNERSHIP FACILITY, THE CARBON FUND OF THE FOREST CARBON PARTNERSHIP FACILITY (2013), https://perma.cc/CMM3-U8W3; WORLD BANK FOREST CARBON PARTNERSHIP FACILITY, THE FCPF: PILOTING REDD+ PROGRAMS AT SCALE (2013), https://perma.cc/2QD7-FRN3.

[64] *Id*.

[65] UN-REDD PROGRAMME, TOWARDS A COMMON UNDERSTANDING OF REDD+ UNDER THE UNFCCC 102 (2016), https://perma.cc/LQ6W-FPLA.

REDD/REDD+ projects.[66] However, that may be possible under the Paris Agreement, with various stakeholders arguing that the ITMO framework established in Article 6.2 can be used to credit REDD/REDD+ projects.[67] Assuming the Parties agree to this, various questions relating to interaction of the ITMO and REDD/REDD+ frameworks will need to be considered, including whether projects must meet the requirements of both regimes and how and by whom compliance with those requirements will be assessed.[68]

3.3 Carbon Offsetting and Reduction Scheme for International Aviation

A third market-based mechanism with implications for Article 6 of the Paris Agreement is the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA). Established by the International Civil Aviation Organization (ICAO) in 2016, CORSIA requires international airlines to offset any growth in their carbon dioxide emissions above 2020 levels by purchasing credits, reflecting emissions reductions in other sectors.[69] Such credits may originate from the cooperative approaches in Article 6 of the Paris Agreement and/or other market-based mechanisms under the UNFCCC.

The resolution establishing CORSIA indicates that "units generated from mechanisms established under the UNFCCC . . . are eligible for use" by airlines to offset emissions increases, "provided that they align with [applicable ICAO] decisions."[70] The mechanisms must, for example, be consistent with ICAO-developed criteria on the emissions units eligible for use under CORSIA

[66] International Institute for Environment and Development, *REDD: Protecting Climate, Forests, and Livelihoods*, https://perma.cc/3L5T-HRLL (accessed Mar. 3, 2018).

[67] *See e.g.*, PETER GRAHAM, COOPERATIVE APPROACHES FOR SUPPORTING REDD+: LINKING ARTICLES 5 AND 6 OF THE PARIS AGREEMENT (2017), https://perma.cc/HBJ8-F73Q.

[68] Some parties appear to assume that, in order to be credited, REDD/REDD+ projects must meet the requirements of any guidance issued under Article 6.2 of the Paris Agreement. *See e.g.*, Submission of the Democratic Republic of the Congo on behalf of the Coalition of Rainforest Nations on Article 6, Paragraph 2 of the Paris Agreement (Mar. 8, 2017), https://perma.cc/Q3PU-94JX. Others, however, have argued that the REDD+ framework already establishes project requirements and that further rules are unnecessary. *See e.g.*, Submission of the Republic of Rwanda on behalf of Member States of the Central African Forestry Commission (COMIFAC) on Article 6 (Mar. 21, 2017), https://perma.cc/UY6U-NEUK.

[69] ICAO Resolution A39-3: Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection – Global Market-Based Measure (MBM) Scheme (2016), https://perma.cc/698X-CM28.

[70] *Id*. at 21.

(emissions unit criteria or EUCs).[71] At the time of writing, draft EUCs had been developed by ICAO, but were yet to be finalized.[72] Given this, and as the draft EUCs have not been made public, it is not yet known whether emissions units generated through UNFCCC mechanisms will be available for use under CORSIA.[73]

Incorporating Human Rights Safeguards in the New Article 6 Mechanisms

There has been some debate as to whether the rules and guidelines promulgated under Articles 6.2 and 6.4 should incorporate social and environmental safeguards aimed at protecting human rights in the context of mitigation projects. Social and environmental safeguards are frequently employed by international financial institutions and multilateral development banks to prevent and mitigate harm associated with financed projects. Such safeguards are also embedded within the governing rules for UNFCCC financial mechanisms, including the Global Environment Facility (GEF), Global Climate Fund (GCF), and Adaptation Fund (AF), as well market-based mechanisms such as the CDM and REDD+.

Most safeguard policies focus on the protection of procedural rights: for example, by requiring the disclosure of information to and consultations with the communities that may be adversely affected by a particular project. In some cases, the policies go beyond consultation and require the prior informed consent of the affected community (for example, where an indigenous community will be seriously affected by the project). Some safeguard policies also incorporate more substantive elements, such as requirements to minimize adverse social and environmental impacts and to provide compensation to people who are adversely affected by a project.[74]

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[71] *Id*. at 20(c).

[72] *See* ICAO, PROPOSAL FOR THE FIRST EDITION OF ANNEX 16, VOLUME IV, CONCERNING STANDARDS AND RECOMMENDED PRACTICES RELATING TO THE CARBON OFFSETTING AND REDUCTION SCHEME FOR INTERNATIONAL AVIATION (CORSIA) (2017), https://perma.cc/7KBF-RDBK.

[73] Regardless of the content of the EUCs, using SDM-generated units may be difficult, at least in the short-term. As one commentators has observed, until more detailed rules are developed for the SDM, ICAO may be unable to determine whether units generated by the mechanism meet the EUCs. *See* SUSAN BINIAZ, ICAO'S CORSIA AND THE PARIS AGREEMENT: CROSS-CUTTING ISSUES (2017), https://perma.cc/X9ND-RJZ4.

[74] For more information about the nature of existing safeguard policies and how they might be updated in the context of Article 6, see *infra* Section 4.3 ("Learning from Existing Safeguards").

There is a compelling rationale for incorporating procedural and substantive human rights safeguards into the SDM and ITMO mechanisms. However, because Article 6 is silent on this topic, there are many questions about whether and how safeguards could be embedded within the mechanisms' governing rules. Based on their submissions to the SBSTA, most Parties appear to agree that human rights safeguards can and should be embedded within the rules governing the SDM,[75] but there is less agreement on whether and how safeguards should be incorporated into the ITMO guidance (and whether the Paris Agreement even envisions safeguards in that context).[76] Going forward, the Parties will also need to determine exactly what the Article 6 safeguard policies should entail and to what extent they should differ from existing policies, such as that established for the CDM. Some considerations relevant to the design and implementation of Article 6 safeguards are discussed below.

3.4 Policy Rationale and Legal Justification

The primary function of environmental and social safeguard policies is to avoid and/or mitigate the harmful impacts of programs and projects on people and the environment. This is important because even projects that are aimed at delivering social and/or environmental benefits can result in serious harms, including violations of fundamental human rights. Hydroelectric dams provide one example of a climate change mitigation project that can deliver important benefits (clean energy and flood protection) while also causing major harms (the displacement of people and the destruction of ecosystems).[77] Bioenergy projects are similarly problematic. While such projects can reduce emissions and dependency on fossil fuels, some observers have also tied them to human rights violations such as the displacement of local people, adverse local health and environmental effects, failure to inform people about potential harms, violence and sexual

[75] *See e.g.*, Submission of Estonia and the European Commission on Behalf of the European Union and its Members on Article 6 (Oct. 6, 2017), https://perma.cc/4XC3-KPMY.

[76] Parties supporting the integration of human rights safeguards in the context of Article 6.2 include Switzerland, Liechtenstein, Mexico, and Monaco. *See* Submission by Switzerland on behalf of the Environmental Integrity Group on Article 6 of the Paris Agreement (Oct. 31, 2017), https://perma.cc/EB52-4YFR.

[77] *Economic, Social & Cultural Rights and Climate Change: A Legal Reference Guide* 68-69 (Sébastien Jodoin & Katherine Lofts eds., CISDL, GEM & ASAP 2013); Naomi Roht-Arriaza, *'First, Do No Harm': Human Rights and Efforts to Combat Climate Change* (2010) 38 Ga. J. Int'l. & Comp. L. 593, 597-98.

exploitation perpetrated by contractors and employees, bad faith negotiations, and failure to comply with promises to the community.[78] Examples of projects that have resulted in serious human rights violations include the CDM-funded Bajo Aguá biogas recovery project in Honduras[79] and the OPIC-funded Buchanan Renewables biofuels project in Liberia.[80]

A secondary function of safeguards is to minimize the risk of public opposition and other controversies that have, in the past, derailed individual projects and called entire programs into question. While this function may not be the stated purpose of safeguard policies, it does incentivize their uptake. It also helps to ensure that money invested in, for example, climate mitigation efforts is not wasted on lengthy disputes and dysfunctional projects.

The aforementioned considerations are all relevant to the question of whether safeguards should be incorporated into the Article 6 mechanisms. But there is also the question of legal justification, and in particular, whether the Paris Agreement explicitly authorizes or requires the incorporation of safeguards. Granted, even in the absence of an express authorization, the Parties to the UNFCCC could enter into a subsequent agreement to adopt safeguards. But this would prove more politically challenging than implementing safeguards which can be tied to specific requirements and/or authorities within the Paris Agreement.

Article 6 is silent on the issue of human rights and safeguards. But there is one important textual reference to human rights in the preamble to the Paris Agreement, where the Parties acknowledge that they "should . . . respect, promote, and consider their respective obligations on human rights" when taking action to address climate change.[81] This creates an overarching expectation that the Parties will, in implementing the Paris Agreement, take steps to safeguard human rights.

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[78] Accountability Counsel, *Fueling Human Rights Disasters: An examination of the U.S. Overseas Private Investment Corporation's Investment in Buchanan Renewables* (2014); ActionAid, *Feeling the biofuels pressure: Human rights abuses in Guatemala* (2013); Center for Human Rights and Global Justice, *Foreign Land Deals and Human Rights: Case Studies on Agricultural and Biofuel Investment* (NYU School of Law 2010).

[79] Jeanette Schade & Wolfgang Obergassel, *Human Rights and the Clean Development Mechanism*, 27(4) Cambridge Review of International Affairs 717 (2014).

[80] Accountability Counsel (2014), *supra* note 80.

[81] Paris Preamble.

The need for human rights safeguards in the context of Article 6 is further reinforced by language tying its implementation to the sustainable development goals (SDGs). Specifically, Article 6.2 directs Parties to "promote sustainable development" when engaging in cooperative approaches that use ITMOs, and Article 6.4 states that one goal of the SDM is to "support sustainable development." The UN Office of the High Commissioner for Human Rights has repeatedly affirmed that respect for, and fulfillment of, human rights is essential to sustainable development.[82] Consistent with this view, in adopting the 2030 Agenda for Sustainable Development, the UN General Assembly recognized that the SDGs "seek to realize the human rights of all" and emphasized "the responsibilities of all states . . . to respect, protect, and promote human rights."[83] It would therefore be appropriate to interpret Article 6 of the Paris Agreement – particularly when read in conjunction with the preamble – as authorizing the imposition of safeguards aimed at ensuring human rights are respected in the implementation of cooperative approaches.

There is also a structural justification for adopting human rights safeguards in the context of the SDM. As discussed in Part II, the SDM will likely serve a function similar to that of the CDM, providing a mechanism whereby Parties can sponsor climate change mitigation projects and then take credit for the emission reductions. Recognizing this, the Paris Agreement provides for centralized oversight and enforcement of rules pertaining to the SDM. The CDM was governed in a similar manner, with an executive board charged with its oversight, and the CDM modalities and procedures included a set of rules aimed at ensuring adequate stakeholder consultation.[84] While those rules have been criticized as too weak, and have failed to alleviate all concerns about human rights violations in the context of CDM projects, their adoption was an important first step towards

[82] *See, e.g.*, UN OHCHR, *supra* note 7; UN OHCHR, *Sustainable Development Goals and Related Human Rights*, https://perma.cc/UGW9-MEEA.

[83] UN General Assembly Resolution, Transforming our world: the 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1 (Oct. 21, 2015).

[84] UNFCCC Decision 3/CMP.1, Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol, UN Doc. FCCC/ KP/CMP/2005/8/Add.1 (March 30, 2006); UNFCCC, *CDM Standards*, https://perma.cc/4XZG-JSW2.

protecting human rights.[85] It would be illogical and retrogressive to exclude such protections from the SDM procedures and modalities.

In light of these factors, some Parties have advocated for the inclusion of human rights safeguards in the SDM in their submissions to the SBSTA, often linking this to the requirement that the SDM "promote sustainable development" and to the broader understanding that all Parties respect human rights in implementation of the Paris Agreement.[86] The European Union submission, for example, has stated that the rules, modalities and procedures for the SDM should require host Parties to "report on the promotion of sustainable development and conformity with their respective obligations on human rights" and "ensure the transparency of decision-making processes at all levels, local stakeholder consultations, the rights of directly affected entities to hearings prior to decision-making, that issues linked to human rights are promptly referred to relevant UN bodies, and timely decisions."[87] The submission specifically links this proposal to the human rights language in the preamble to the Paris Agreement, as well as the fact that all Parties have adopted the 2015 Sustainable Development Goals.[88]

The structural case for safeguards is less clear for Article 6.2 ITMOs. The mechanism envisioned under Article 6.2 will likely be a system for verifying and crediting emission reductions, and as noted above, there are no express provisions for centralized oversight of this mechanism and several Parties believe the ITMO guidance should be limited to accounting.[89] There is also less precedent for the adoption of safeguards in this context: while safeguards are standard

[85] See *infra* Section 4.3 for a more detailed discussion of concerns pertaining to CDM projects, human rights abuses, and the inadequacy of existing CDM safeguards.

[86] *See e.g.,* Submission of Estonia and the European Commission on Behalf of the European Union and its Members on Article 6 (Oct. 6, 2017), https://perma.cc/4XC3-KPMY; Submission of the Federal Democratic Republic of Ethiopia on behalf of the Least Developed Countries Group on Matters Relating to Article 6, Paragraph 4 of the Paris Agreement (July 11, 2017), https://perma.cc/C87C-HYM5; Submission by Switzerland on behalf of the Environmental Integrity Group on Article 6 of the Paris Agreement (Oct. 31, 2017), https://perma.cc/EB52-4YFR; Submission of Tuvalu on Accounting Under Article 6, Paragraph 4 of the Paris Agreement (Oct. 11, 2017), https://perma.cc/PT5W-L2U2.

[87] Submission of Estonia and the European Commission on Behalf of the European Union and its Members on Article 6 (Oct. 6, 2017), https://perma.cc/4XC3-KPMY at p. 2, 9.

[88] Id. at 9.

[89] See *supra* section 2.1.

practice for project finance mechanisms, they are not commonly incorporated into cap and trade systems. That said, the lack of precedent is not a compelling reason to disregard the potential value of safeguards in this context. Programs and activities that generate ITMO credits have the potential to adversely affect human rights in the same manner as SDM projects and thus there is an equally compelling rationale for safeguards in this context. Recognizing this, several Parties have called for the incorporation of human rights safeguards for ITMOs in their submissions to the SBSTA. Tuvalu, for example, has stated that all ITMOs "must include a certificate indicating that the units traded or received have not resulted in environmental harm or have not adversely affected any human rights."[90] Switzerland, Liechtenstein, Mexico, and Monaco have argued that human rights must be protected in the context of all cooperative approaches implemented under Article 6, and that any party engaging in an "Article 6.2 activity" (i.e., an activity generating a tradeable ITMO credit)—including the host party, the transferring party, and the acquiring party—must "ensure that the activity is consistent with the Sustainable Development Goals, including that it is consistent with and represent[s] no threat to human rights."[91] However, most countries have been silent on the issue of whether human rights should be addressed in the context of Article 6.2 ITMOs, even where they have advocated for human rights protections in the context of the Article 6.4 SDM.[92]

3.5 Approaches for Adopting Safeguard Policies

There are three different approaches for incorporating human rights safeguards into the Article 6 market mechanisms that have been discussed: (1) the CMA could promulgate safeguards solely for the SDM, (2) the CMA could develop separate safeguards for both the SDM and ITMOs, or (3) the CMA could develop an overarching safeguard policy that applies to both mechanisms.

Safeguards only applicable to the SDM **-** The most conservative approach would be to promulgate safeguards that are only applicable to SDM projects. The process for this would be

[90] Submission of Tuvalu on Accounting Under Article 6, Paragraph 4 of the Paris Agreement (Oct. 11, 2017), https://perma.cc/PT5W-L2U2.

[91] Submission by Switzerland on behalf of the Environmental Integrity Group on Article 6 of the Paris Agreement (Oct. 31, 2017), https://perma.cc/EB52-4YFR.

[92] See, e.g., Submission of Estonia and the European Commission on Behalf of the European Union and its Members on Article 6 (Oct. 6, 2017), https://perma.cc/4XC3-KPMY (lengthy discussion of human rights protections for the SDM, no discussion of such protections for ITMOs).

relatively straightforward: a safeguard policy could be embedded within the rules, modalities, and procedures promulgated by the CMA pursuant to paragraph 7 of Article 6. There is little question that the CMA has the authority to include such a policy in the rules, given the textual and structural justifications described above. The body tasked with overseeing implementation of the SDM could be tasked with fleshing out a general safeguard policy adopted by the CMA and could play a role in verifying compliance with safeguards.

Separate safeguards for both the SDM and ITMOs – A separate set of safeguards could also be promulgated for ITMOs, potentially embedded within the guidance to be adopted by the CMA pursuant to paragraph 2 of Article 6. While there is no explicit authorization in the Paris Agreement and slightly less support from the Parties for the adoption of safeguards in this context, the CMA could interpret the Paris Agreement as providing authority to adopt such safeguards if it felt they were necessary for the promotion of sustainable development and the protection of rights.[93]

The "safeguards" promulgated for the ITMOs could also take the form of non-binding guidance. This may be the most politically feasible approach if many Parties object to the idea that the Paris Agreement authorizes a binding safeguard policy for ITMOs, but it would also be the least protective of human rights.

Overarching safeguards applicable to both ITMOs and the SDM - A third approach would be for the CMA to establish an overarching set of human rights safeguards that apply to both market mechanisms. This "integrated governance" approach would help to ensure consistent treatment of human rights across both mechanisms. The rationale for such an integrated approach can be found in the language and structure of Article 6 – specifically, the fact that both the ITMO and SDM frameworks a fall under the umbrella of "voluntary cooperation" and are subject to very similar standards (e.g., promoting sustainable development) – as well as the Preamble language directing Parties to respect and promote human rights in the implementation of all aspects of the

[93] While the need to protect human rights is only recognized in the preamble to the Paris Agreement, the preambular text may be taken into account in interpreting Article 6. The Vienna Convention on the Law of Treaties indicates that a textual approach should be taken to interpreting international agreements and describes an agreement's preamble as forming part of its text. Many international tribunals have, in interpreting treaty provisions, considered preambular text. *See generally* Max H. Hulme, *Preambles in Treaty Interpretation*, 164 U. PA. L. REV. 1281 (2016).

agreement.[94] These overarching human rights safeguards could also be incorporated into an even higher-level guidance document – such as the *Paris Implementation Guidelines* that are currently under development. However, those guidelines will likely be extremely broad and may not provide the same specificity of requirements that a more targeted set of safeguards would provide. The same could be said of an integrated safeguard policy promulgated exclusively for the Article 6 market mechanisms – it may be difficult to promulgate adequate safeguards that apply to both mechanisms, and thus a more tailored approach may be preferable.

3.6 Substance of the Safeguards: Learning from Existing Frameworks

Assuming the CMA does go forward with the adoption of human rights safeguards for one or both of the Article 6 market mechanisms, the next question is what exactly those safeguards might entail. The CMA could draw on existing experience with the safeguard policies utilized by international financial institutions, multilateral development banks, and UNFCCC financial and market-based mechanisms to determine the proper scope and substance of safeguards for the SDM and ITMOs. For the ITMO mechanism, it may be helpful to look at how comparable emission credit trading schemes currently account for environmental and social justice considerations, as those elements are the closest analogs to safeguard policies in this context.

As noted above, the SDM is similar to the CDM and the governing body for the SDM will likely be modelled on the CDM EB. It would therefore make sense to adopt safeguards that, at a minimum, are as protective as those which have been adopted for the CDM. The key requirement in the CDM safeguards is for local stakeholder consultations,[95] with project participants (PPs) and coordinating/managing entities (CMEs)[96] required to:

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[94] When interpreting a treaty, Parties are to consider: (i) the express terms of the treaty, (ii) the context of those terms, and (iii) the object and purpose of the treaty. Where the express terms are ambiguous or would lead to a result which is manifestly absurd or unreasonable, parties may also refer to supplementary means of interpretation – for example, by looking at the structural framework of the provisions being interpreted. *See* Vienna Convention on the Law of Treaties, Arts. 31-32.

[95] The CDM rules include a project standard (PS), a validation and verification standard (VVS), and a project cycle procedure (PCP). The consultation requirements are set forth at Version 9.0 of the PS (para. 74–80), VVS (para. 161–166) and PCP (para. 26, 33).

[96] For a description of the roles of the PPs, CMEs, DOE, and DNA, see UNFCCC, *CDM Glossary*, Version 09.1, CDM-EB07-A04-GLOS, https://perma.cc/V58E-G937.

- invite local stakeholders to provide comments on the proposed CDM project or program in an open and transparent manner, and in a way that facilitates local participation and allows for a reasonable time for comments to be submitted;
- describe the proposed CDM project or program in a manner that allows the local stakeholders to understand the project or program; and
- demonstrate how measures were taken to appropriately engage stakeholders and solicit comments.[97]

These consultations must be carried out before the start date of the project or program. The CDM rules charge the designated operational entity (DOE)[98] for the CDM project or program with ensuring that PPs and CMEs comply with these requirements. The CDM rules also establish a complaint mechanism whereby local stakeholders can submit complaints to the designated national authorities (DNAs) of the host country Party if they believe that there was a violation of these requirements.[99]

While it could serve as a baseline for the SDM, the CDM safeguard policy has frequently been critiqued as relatively weak compared to the safeguard policies adopted by, e.g., international financial institutions, and insufficiently protective of human rights. Perhaps the most significant gap in the policy is that there are no substantive requirements as to exactly how PPs and CMEs must respond to comments during the local stakeholder consultation, and in particular, there are no provisions for how to address comments on matters concerning human rights and negative environmental impacts due to the implementation of the proposed project or program. Other gaps include: (i) there is no requirement to monitor the status of completion of commitments made to address concerns raised during the local stakeholder consultation process, and (ii) there is no procedure to address stakeholder concerns after the project has been registered.[100] Perhaps in part due to these problems, there have been documented instances of human rights violations in the

[97] CDM Project Standard Version 9.0, ¶¶74–80, CDM Validation and Verification Standard, ¶¶para. 161–166, and CDM Project Cycle Procedure, ¶¶ 26, 33.

[98] The DOE is the entity designated by the CMP as qualified to validate proposed SDM project activities and verify and certify reported GHG emission reductions. See *CDM Glossary*, *supra* note 95, at 10.

[99] CDM Project Standard Version 9.0, ¶ 79; CDM Validation and Verification Standard, ¶ 164; CDM Project Cycle Procedure, ¶ 33.

[100] UNFCCC CDM, *Concept Note: Improving Stakeholder Consultation Processes*, Version 01.0, CDM-EB86-AA-A15 (2015) at 11-12.

context of CDM projects,[101] and advocates have called for reform of CDM procedures to incorporate stronger human rights protections.[102] Responding to concerns, the CDM EB did issue a report in 2015 which requests the UNFCCC Secretariat to ensure that "in the case that any stakeholder comments are received by the Board, which the stakeholders perceive to pertain to human rights issues, that these comments be forwarded to the relevant bodies within the United Nations system and within the host government."[103] But apart from that, no further action has been taken to address these deficiencies.

In light of the perceived inadequacies of the CDM safeguards, it would be prudent for the CMA and the SDM governing body to adopt a safeguard policy that is significantly more protective of human rights than the local stakeholder consultation requirements embedded within the CDM rules. Certainly, the CMA and SDM governing body could draw on more comprehensive safeguard policies, such as those adopted for REDD+ and the various climate funds (GEF, GCF, AF). A complete review of those safeguard policies is beyond the scope of this paper,[104] but some elements that could be incorporated into the SDM policy include requirements to:

- consult with affected communities and individuals during project planning, development, and implementation;
- obtain free, prior, and informed consent from any indigenous peoples potentially affected by the project;
- avoid adverse effects on people and the environment and take steps to mitigate any unavoidable adverse effects (particularly the displacement of local communities);

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[101] Schade & Obergassel (2014), *supra* note 81; Wolfgang Obergassel et al., *Human Rights and the Clean Development Mechanism: Lessons Learned from Three Case Studies*, 8 Journal of Human Rights and the Environment 51 (2017); *Human Rights Implications of Climate Change Mitigation Actions*, (CIDSE, Nature Code, & Carbon Market Watch 2015).

[102] See, e.g., International Rivers, *Submission on Views Regarding the Revision of the CDM Modalities and Procedures* (March 25, 2013), https://perma.cc/HZD9-D7H3; *Carbon Market Watch Recommendations for CDM Reforms under SBSTA and CMP* (July 11, 2013), https://perma.cc/ZB2J-EJAR; Carbon Market Watch, *Recommendations for the Review of the Modalities and Procedures for the Clean Development Mechanism* (May 2016), https://perma.cc/2SCB-PK86.

[103] CDM-EB87 meeting report, para. 52

[104] For an overview of safeguard policies for the CDM, REDD+, Green Climate Fund, Adaptation Fund, and Global Environment Facility, see Michael Burger and Jessica Wentz, *Climate Change and Human Rights* (UNEP 2014) at 36-39.

- engage with the affected community when determining appropriate measures to mitigate adverse effects; and
- periodically monitor and report on compliance with environmental and social safeguards (preferably through a third-party).

In designing an ITMO safeguard policy, the CMA could also refer to the governing frameworks for other emission trading schemes that have incorporated requirements aimed at ensuring the equitable distribution of benefits and burdens associated with those trading schemes.[105] One such example is California's cap and trade program. The 2006 Global Warming Solutions Act (AB32), which set the groundwork for the state's cap and trade program, contained broadly worded requirements pertaining to public participation, environmental justice, and the equitable distribution of clean energy investments. Specifically, AB 32 provided that:

> "The state board shall ensure that the greenhouse gas emission reduction rules, regulations, programs, mechanisms, and incentives under its jurisdiction, where applicable and to the extent feasible, direct public and private investment toward the most disadvantaged communities in California and provide an opportunity for small businesses, schools, affordable housing associations, and other community institutions to participate in and benefit from statewide efforts to reduce greenhouse gas emissions."[106]

AB 32 also directed the California Air Resources Board (CARB) to convene an Environmental Justice Advisory Committee to advise CARB on the development of a scoping plan for implementation of these requirements, and specified that the Committee "be comprised of representatives from communities in the state with the most significant exposure to air pollution,

[105] The "benefits" of trading schemes include, *inter alia*, the benefits of local air quality improvements that correspond with reductions in greenhouse gas emissions and other socio-economic benefits associated with the transition to clean energy. History has shown that low-income and minority communities do not always enjoy these benefits in an equitable fashion because polluting facilities in their neighborhoods may choose to purchase emission allowances rather than actually reducing emissions. Perhaps the most significant "burden" of such trading scheme is the potential increase in electricity prices and the corresponding impact on low-income households and businesses.

[106] AB32, codified at Cal. Health & Safety Code §38565

including, but not limited to, communities with minority populations or low-income populations, or both."[107]

During the development and subsequent revision of the scoping plan, CARB and the Committee held numerous meetings with affected communities in an effort to address environmental justice concerns – particularly those pertaining to the distributive effects of cap and trade (and the inequitable distribution of both the costs and benefits of the system).[108] Some substantive measures that California has taken to address these impacts include: the California Alternate Rates for Energy (CARE) program and the Family Electric Rate Assistance (FERA) program, under which low-income customers are eligible to receive a rebate or credit on residential and small business electricity bills resulting from the sale of allowances under the Cap and Trade program.[109] California has also passed legislation that sets minimum thresholds for investing cap and trade revenue in vulnerable and disadvantaged communities.[110]

The CMA could adopt rules or guidance aimed at achieving similar goals. For example, the ITMO guidelines could instruct countries participating in ITMO transfers (both hosts and recipients) to undertake measures aimed at ensuring full participation of civil society in the development of policies pertaining to ITMOs, promoting the equitable distribution of benefits and burdens associated with ITMO-generating programs and projects, and mitigating the impacts of any additional costs on those who cannot afford them. The Parties to the UNFCCC could also potentially adopt rules aimed at channeling a portion of the revenue from ITMOs to vulnerable countries for adaptation, but as discussed in greater detail below, such rules would likely fall outside of what the Paris Agreement authorizes.[111]

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[107] Cal. Health & Safety Code §38591.

[108] CARB, *California's 2017 Climate Change Scoping Plan* (2017).

[109] *Id.* at 15. Even with these measures in place, California has received criticism for failing to achieve environmental justice goals. See, e.g., Lara Cushing et al., *A Preliminary Environmental Equity Assessment of California's Cap and Trade Program* (USC Dornsife Program for Environmental and Regional Equity 2016).

[110] SB 535 (2012) and AB 1550 (2016).

[111] See *infra* section 5.

3.7 Monitoring and Enforcing Human Rights Safeguards

The body tasked with overseeing implementation of the SDM could also be charged with monitoring and enforcing human rights safeguards established for the SDM. However, given the sheer magnitude of potential SDM projects, it is unlikely that a single body could adequately monitor and respond to all human rights violations arising from these projects. It would likely be necessary to establish one or more subsidiary bodies to deal with compliance or to outsource this role to other accredited entities (similar to the DOEs that oversee compliance for CDM projects).[112]

Should the CMA also adopt safeguards for ITMOs, it is unclear what body (if any) would oversee the implementation of and verify compliance with those safeguards, as the Paris Agreement does not designate any governing body for the ITMO framework, and the Parties have yet to reach agreement as to whether a body should be established. As discussed above, some Parties have also advocated for the SDM supervising body to have oversight over the implementation of the ITMO mechanism as well. This would greatly expand the scope of projects subject to that body's supervision and would create an even more compelling need for creating one or more subsidiary enforcement bodies and/or outsourcing compliance monitoring and verification to accredited third Parties.

If a centralized body is not established to oversee the use of ITMOs, it will be more difficult to ensure that countries and project proponents adhere to any rules pertaining to human rights. In that situation, national governments would need to take the lead in ensuring that human rights are fully respected and promoted in the context of ITMO-generating programs and projects. Switzerland, Liechtenstein, Mexico, and Monaco have proposed one model for national certification, specifically that the host country should "provide a confirmation, to be publicly available, that the activity is in conformity with sustainable development and human rights when authorizing private and/or public entities to participate in cooperating approaches."[113] This would provide some measure of accountability, particularly if the host country is required to confirm compliance with specific requirements embedded within the safeguards. However, without

[112] UNFCCC, *Designated Operational Entities*, ABOUT CDM, https://perma.cc/2Y6Y-3QJ4.

[113] Submission by Switzerland on behalf of the Environmental Integrity Group on Article 6 of the Paris Agreement (Oct. 31, 2017), https://perma.cc/EB52-4YFR.

centralized oversight, there would be no formal mechanism for evaluating the accuracy or adequacy of these national certifications.

The Parties could also adopt a "hybrid" approach to ITMO governance, whereby national governments are primarily responsible for certifying compliance with standards pertaining to human rights and other matters, but a centralized body is tasked with reviewing those certifications. The SDM supervising body could play this role. Another approach would be to rely on the committee established under Article 15 to evaluate national claims pertaining to ITMOs and human rights protections. As noted above, that committee will be generally responsible for facilitating implementation and promoting compliance with the agreement and will have the authority to monitor national activities and issue warnings to Parties not complying with the rules. However, that committee's mandate is extremely broad and it will most likely be tasked with monitoring broader compliance issues (for example, whether Parties are achieving their NDCs).[114] An oversight body charged with a more narrow mandate would probably be better positioned to monitor and verify national certifications on human rights matters.

4. OTHER APPROACHES TO PROTECTING AND PROMOTING HUMAN RIGHTS IN THE ARTICLE 6 MECHANISMS

4.1 Funding Adaptation under the New Article 6 Mechanisms

Social and environmental safeguards help to prevent human rights violations associated with responses to climate change, but they do not necessarily address the effect of climate change itself on human rights. The potential for such effects has been recognized by numerous UN bodies, including the Human Rights Council (HRC) and the Office of the High Commissioner for Human Rights (OHCHR),[115] as well as the Parties to the UNFCCC. In the 2010 Cancun Agreements,

[114] Susan Biniaz, *Elaborating Article 15 of the Paris agreement: Facilitating Implementation and Promoting Compliance*, IDDRI Policy Brief (Oct. 2017).

[115] See, e.g., UN HRC Res. 7/23, Human Rights and Climate Change, A/HRC/Res/7/23 (Mar. 2008); UN HRC Res. 10/4, Human Rights and Climate Change, A/HRC/Res/10/4 (Mar. 25, 2009); OHCHR, *Report on the Relationship Between Climate Change and Human Rights* (2009), UN Doc A/HRC/10/61; UN HRC Res. 18/22, Human Rights and Climate Change, A/HRC/Res/18/22 (Oct. 17, 2011); UN HRC Res. 26/27, Human Rights and Climate Change, A/HRC/Res/26/27 (July 15, 2014);

UNFCCC Parties recognized that "climate change represents an urgent and potentially irreversible threat to human societies," and took notice of the HRC's findings on climate change and human rights.[116] The UN Special Procedures Mandates Holders and other UN Agencies have also issued numerous reports on this topic.[117] Those reports make clear that action will be needed to safeguard human rights from infringements associated with the harmful impacts of climate change.

Certainly, ambitious mitigation measures are needed to mitigate the harmful effects of climate change on human rights, and the Article 6 market mechanisms will help to support the implementation of such measures. But investments will also be needed to protect vulnerable communities and individuals from the adverse impacts of sea level rise, more intense storms, heat waves, droughts, and other climate change-related phenomena. Such investments are essential for the protection and promotion of human rights in communities that are disproportionately affected by climate change.

Article 6 establishes a mechanism to provide some funding for this purpose. Specifically, Article 6.6 specifies that the CMA "shall ensure that a share of the proceeds from activities under the [SDM] is used… to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation."[118] The SDM funding mechanism could benefit from a rights-based approach whereby adaptation funds are channeled to countries and communities where climate change poses the greatest risk to human rights. The magnitude of

UN HRC Res. 29/15, Human Rights and Climate Change, A/HRC/Res/29/15 (July 2, 2015); OHCHR, *Key Messages on Human Rights and Climate Change* (2015); UN HRC Res. 32/33, Human Rights and Climate Change, A/HRC/RES/32/33 (July 18, 2016); UN OHCHR, Analytical Study on the Relationship Between Climate Change and the Human Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, ¶ 45, UN Doc. A/HRC/32/23 (May 6, 2016); UN OHCHR, *The Rights of Those Disproportionately Impacted by Climate Change* (30 September 2016); UN HRC Res. 35/20, A/HRC/35/20 (July 7, 2017)

[116] Decision 1/CP.16 (15 March 2011), UN Doc FCCC/CP/2010/7/Add.1, 2.

[117] See, e.g., *A New Climate Change Agreement Must Include Human Rights Protections for All: An Open Letter from Special Procedures Mandates Holders to the State Parties to the UNFCCC* (Oct. 17, 2014); *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Focus Report on Human Rights and Climate Change* (June 2014); Michael Burger and Jessica Wentz, *Climate Change and Human Rights (*UNEP 2014).

[118] Paris Agreement Art. 6.6.

the risk to human rights could be gauged based on the threat posed to human lives and health and access to fundamental necessities like clean water, food, and housing.

A number of countries, including the Least Developed Countries (LDCs) and the Association of Small Island States (AOSIS), have advocated for the inclusion of a similar adaptation funding provision for ITMO mechanism.[119] As noted in a submission by the Maldives (on behalf of AOSIS): "The application of these Article 6.4 elements under Article 6.2 would avoid disadvantaging the role of Article 6.4 and leverage the utility of these provisions."[120] Channeling funds from ITMO revenue to adaptation in vulnerable countries would also help support the goal of promoting sustainable development.

However, Article 6 does not contain any express provision for channeling funds from the ITMO mechanism to adaptation efforts in vulnerable countries, which raises the question of whether it is permissible. Arguably, the language requiring that ITMOs "promote sustainable development" could be interpreted as authorizing such action when read in the context of the preamble's reference to human rights and the U.N.'s many statements on the nexus between

[119] Submission by Ethiopia on behalf of the Least Developed Countries Group on Matters Relating to Art. 6.2 of the Paris Agreement (Nov. 2017), https://perma.cc/TK77-33G9, ("A share of proceeds from the sale of CAITMOs shall be used to support the Adaptation Fund. The share of proceeds shall be X % of issued units."); Submission of views on the content of Article 6.2 guidance and Article 6.4 rules, modalities, and procedures, presented by the Republic of the Maldives on behalf of the Alliance of Small Island States (Nov. 2017), https://perma.cc/V2YE-2NHY ("the achievement of an overall mitigation in global emissions and the delivery of a share of proceeds for adaptation are features of the 6.4 mechanism, but they could also be features of cooperative approaches under Article 6.2, so that Article 6 as a whole contributes to the mitigation and adaptation goals of the Paris Agreement. The application of these Article 6.4 elements under Article 6.2 would avoid disadvantaging the role of Article 6.4 and leverage the utility of these provisions."): Submission of Ecuador on behalf of the Like Minded Countries on Items Related to Article 6 of the UNFCCC's Paris Agreement (Oct. 19, 2017) at 3, https://perma.cc/KK9N-NQVV ("Share of proceeds should also be applied to the internationally transferred mitigation outcomes (ITMOs) in Article 6.2"); Submission by Saudi Arabia on behalf of the Arab Group on Articles 6.2 and 6.4 of the Paris Agreement (Oct. 18, 2017) at 2, https://perma.cc/2K3X-KY93 ("Share of proceeds: Shall apply to both Articles 6.2 and 6.4 and fund adaptation and sustainable development for developing country Parties of the Paris Agreement. These shares of proceeds shall be allocated to the Adaptation Fund.").

[120] Submission of views on the content of Article 6.2 guidance and Article 6.4 rules, modalities, and procedures, presented by the Republic of the Maldives on behalf of the Alliance of Small Island States (Nov. 2017), https://perma.cc/V2YE-2NHY.

human rights and sustainable development.[121] However, this interpretation may stretch the provisions of Article 6 beyond that which many members of the CMA would view as reasonable and politically acceptable. To protect against these risks the UNFCCC Parties might need to enter into a new agreement in order to adopt *requirements* that a portion of ITMO revenue be channeled to adaptation funds. That said, the Paris Agreement could easily be interpreted as authorizing soft guidelines, recommendations, or incentives aimed at encouraging Parties to channel ITMO revenue to adaptation projects in vulnerable countries (for example, as a means of meeting obligations or pledges pertaining to financial transfers). Such recommendations could be incorporated into the sort of "overarching guidance" on human rights discussed in the following section.

4.2 Overarching Guidelines on Human Rights and Paris Implementation

Another approach would be to adopt broader guidance on how countries should respect, protect, and fulfill human rights as they implement and report on their NDCs. There has already been a fair amount of discussion about integrating human rights protections into the broader Paris Implementation Guidelines.[122] Thus far, the discussion has centered on integrating those protections into provisions pertaining to NDCs, adaptation communications, the transparency framework, and the Global Stocktake. For example, the Center for International Environmental Law (CIEL) has recommended that the guidelines for NDCs and Adaptation Communications should require that these communications: (i) be prepared in a manner that enables the full and effective participation by all members of civil society, and (ii) include information on how the country is respecting and promoting human rights in both mitigation and adaptation actions.[123] In addition, CIEL has recommended that the Transparency Framework established under Article 13 of the Paris agreement should focus not only on accounting for emissions and financial transfers but also how Parties fulfill their obligations with respect to human rights in climate-related actions.[124] Finally, during the Global Stocktake, countries should be evaluated not only on the basis

[121] *See, e.g.*, UN OHCHR, *supra* note 7.

[122] *See, e.g.*, Sébastien Duyck et al., *Delivering on the Paris Promises: Combating Climate Change While Protecting Rights – Recommendations for the Negotiations of the Paris Rule Book* (2017).

[123] *Id.* at 13-15.

[124] Id. at 16.

of their quantitative achievements (e.g., emission reductions) but also the extent to which they have respected human rights and promoted sustainable development through climate action.[125]

Overarching guidelines of this sort could be used to facilitate reporting on and assessment of how countries respect human rights in the context of the Article 6 market mechanisms. However, they may not provide the same level of protection as more targeted rules. The most protective approach would be to combine these overarching guidelines with specific safeguards for the SDM and possibly ITMOs.

5. CONCLUSION

The Parties to the Paris Agreement have acknowledged that they should "respect, promote, and consider their respective obligations on human rights" when taking action to address climate change.[126] However, the Paris Agreement does not impose any specific requirements pertaining to the protection of human rights in the context of mitigation and adaptation actions. This paper explores the critical question of whether and to what extent the Parties can adopt rules aimed at safeguarding human rights in the context of the Article 6 ITMO and SDM frameworks. We find that there are several possible approaches:

(i) The adoption of social and environmental safeguards for the SDM and ITMO frameworks that resemble (but ideally improve upon) the types of safeguards adopted for the CDM and other project finance mechanisms.

(ii) The establishment of guidelines aimed at ensuring that a portion of the revenue from the SDM, and perhaps the ITMO framework, is channeled to countries and communities where climate change poses the greatest risk to human rights.

(iii) The incorporation of human rights considerations into the overarching implementation guidelines for the Paris Agreement.

None of these measures is explicitly required by the Paris Agreement.[127] However, as detailed above, implicit authorization for such measures can be found in the language in the

[125] Id. at 17.

[126] *Id*. at Preamble.

[127] As discussed above, Article 6 does expressly require that a portion of SDM revenue be used to fund adaptation projects in vulnerable countries. But there is no express requirement that the Parties undertake a human rights-based approach when deciding how to allocate adaptation funds from the SDM.

preamble calling upon Parties to respect, promote, and consider human rights when acting on climate change. Further support for options (i) and (ii) is also found in the text and structure of Article 6. Perhaps the most compelling textual justification in Article 6 is the requirement that both the ITMO mechanism and SDM "promote sustainable development." This language must be interpreted in the context of the broader recognition that the protection of human rights is an essential element of sustainable development.

The Paris Agreement could also be interpreted as leaving matters pertaining to the protection of human rights to the discretion of individual Parties. But history has shown that national authorities may lack the incentives and/or resources to safeguard human rights in the context of mitigation actions financed or facilitated through UNFCCC market-based mechanisms like the CDM. The adoption of binding rules accompanied by centralized oversight and enforcement would be the most effective way to protect and promote human rights in the implementation of ITMOs and the SDM.