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The Missing Link:
Human Rights and the Clean Development Mechanism
A Case Study on Sri Lanka

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THE MISSING LINK: HUMAN RIGHTS AND THE CLEAN DEVELOPMENT MECHANISM

A CASE STUDY ON SRI LANKA

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I INTRODUCTION

This paper will critically examine the adequacy of human rights protection and social and environmental safeguards embedded into the Clean Development Mechanism (CDM) of the Kyoto Protocol, by exploring how the CDM has been governed and implemented in Sri Lanka. While human rights are not expressly reinforced in the Kyoto Protocol or its superior convention, the United Nations Framework Convention on Climate Change, the advancement of ‘sustainable development’ is core to the purpose of the CDM.¹ Unfortunately the concept of sustainable development does not enjoy conceptual clarity in international law. Nevertheless, in an era of near universal acceptance of core human rights such as the right to life, liberty and non-discrimination, it would seem common ground that the international climate governance regime ensure the advancement of sustainable development is consistent with, and actively reinforces human rights norms.

A human rights based approach to sustainable development is now considered best practice by most UN agencies and non-government organisations responsible for development and increasingly the international financial institutions responsible for funding major development projects.² It is also consistent with states’ commitments to pursue the progressive realisation of human rights within their societies. A rights based approach to sustainable development warrants ensuring that sufficient safeguards are in place to prevent exploitation, abuse and negative unintended consequences of development initiatives on local stakeholders in the name of climate change mitigation. To date the design and implementation of the CDM has focussed on ensuring its environmental integrity. There has been relatively little attention towards ensuring that the mechanism genuinely contributes to sustainable development.

This paper will explore these issues in detail by examining both the global and national dimensions of CDM governance, with a focus on Sri Lanka. First I will begin by providing an overview analysis of the problem of climate change and its disproportionate impact not only on developing countries, but the poorest and most marginalised groups within developing societies. By focussing on Sri Lanka as a case study, I will illustrate how particular segments in society may be disproportionately disadvantaged not only by climate change but also by ‘clean development’ efforts aimed at addressing it.

¹ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005), art 12.2.

² Zoe Loftus-Farren and Cáitín McKiernan, *Protecting People and the Planet: A Proposal to Address the Human Rights Impacts of Climate Change Policy* (International Human Rights Law Clinic and the Miller Institute for Global Challenges and the Law, University of California, Berkeley, School of Law, and the Center for Law & Global Justice at the University of San Francisco School of Law, December 2009); Capacity Development Group Bureau for Development Policy, 'Applying a Human Rights-Based Approach to Development Cooperation and Programming: A UNDP Capacity Development Resource' (UNDP, September 2006).

I will then examine how the international climate governance regime has attempted to grapple with this inequity problem by adopting the principles of ‘common but differentiated responsibility’ and advancing ‘sustainable development’ as a co-benefit along with climate change mitigation. I will critique the state-centric constructions of these principles and propose a broader interpretation that takes into account differing responsibilities and development prerogatives *within* as well as *between* states.

Finally I will examine the adequacy of social and environmental safeguards of the CDM at global, national and local levels, with a focus on Sri Lanka. As a middle-income developing country with strong economic growth but also deep seeded divisions and inequities within the community, Sri Lanka is an interesting case study to examine risks of gaps in social and environmental protection in relation to the CDM. To do this I will draw on a range of studies examining the CDM from a sustainable development perspective, as well as a brief study of climate change and environmental law in Sri Lanka. Finally, I will draw out some conclusions about how the sustainable development integrity of the CDM could be enhanced through stronger human rights protections and social and environmental safeguards both at the global level and in the Sri Lanka context.

II CLIMATE CHANGE: UNEQUAL CAUSES, UNJUST CALAMITY

It is now undisputed that the Earth’s temperature has risen over the last one hundred years, resulting in widespread melting of snow and ice leading to observed global average sea level rise.³ The observed and predicted detrimental impacts of various scenarios of anthropogenic climate change on the environment, economy and the future of human civilisation are documented comprehensively elsewhere and do not need repeating here.⁴ While pockets of scepticism remain, the consensus of the international scientific community is that it is ‘very likely’⁵ that most of this temperature increase is due

³ Intergovernmental Panel on Climate Change (IPCC), 'Climate Change 2007: Synthesis Report to the Fourth Assessment Report' (2007), 30.

⁴ See especially Ian Allison et al, 'The Copenhagen Diagnosis: Updating the World on the Latest Climate Science' (2009); National Research Council Committee on Stabilization Targets for Atmospheric Greenhouse Gas Concentrations, *Climate Stabilization Targets: Emissions, Concentrations, and Impacts over Decades to Millennia* (The National Academic Press, 2011); Dr. Steve Jennings and John Magrath, 'What Happened to the Seasons?' (Oxfam Research Report, October 2009); Cynthia Rosenzweig et al, 'Assessment of observed changes and responses in natural and managed systems' in M.L. Parry et al (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007) 79; Sir Nicholas Stern, *The Economics of Climate Change: The Stern Review* (Cambridge University Press, 2007); United Nations Development Programme, 'Fighting climate change: Human solidarity in a divided world' (2007).

⁵ 'Very likely' refers to a probability of 90%. See Intergovernmental Panel on Climate Change (IPCC), 'Climate Change 2007: Synthesis Report to the Fourth Assessment Report' (2007), 27.

to the observed increase in anthropogenic greenhouse gas emissions (GHGs) in the atmosphere since the mid-20th century.⁶

As the science has become more and more conclusive, states and scientists alike have acknowledged that climate change is an ‘urgent and potentially irreversible threat to human societies and the planet’.⁷ The prevailing view is that warming must be kept well below 2 degrees Celsius if we are to avoid triggering ‘runaway, irreversible and catastrophic climate change’.⁸ Nevertheless there remains a wide gulf between this modest goal and the ambition of states’ to make the necessary GHG emissions cuts. The combined impact of binding and non-binding commitments to cut emissions would put the Earth on a collision course towards 3–4 degrees Celsius of warming, which would have disastrous environmental, social and economic consequences.⁹

A *The “haves” and “have-nots” of climate change resilience*

The contribution of the world’s people to climate change is not equally distributed and neither are its impacts. It is now well established that climate change will disproportionately impact countries that are least responsible for producing GHGs.¹⁰ As an explicit illustration of this asymmetry, the state of New South Wales in Australia, with a population of 6.9 million people, has a carbon footprint that is comparable to Bangladesh, Cambodia, Ethiopia, Kenya, Morocco, Nepal and Sri Lanka combined.¹¹ While climate change is of course a threat to Australia, given the country’s wealth and substantial adaptive capacity the risk pales in comparison to these other countries, which are all at high or extreme risk of exposure to climate change and related extreme weather events.¹²

Developing countries are dealt a double blow by climate change. Firstly, they missed out on the benefits of carbon intensive industrialisation and economic expansion that have given developed countries extraordinary adaptive capacity in preparing for climate change. As such, the effects of climate change threaten to push poor countries deeper into poverty. Secondly, due to the urgency of

⁶ Intergovernmental Panel on Climate Change (IPCC), 'Climate Change 2007: Synthesis Report to the Fourth Assessment Report' (2007), 39.

⁷ *Report of the Conference of the Parties on its Fifteenth Session, held in Copenhagen from 7 to 19 December 2009*, Dec 2/CP.15, UNFCCC, FCCC/CP/2009/11/Add.1 (30 March 2010), 5 [2].

⁸ Dr Stephen Spratt, 'Assessing the Alternatives: Financing climate change mitigation and adaptation in developing countries' (Stamp Out Poverty, May 2009), 4.

⁹ Tracy Carty, 'Righting two wrongs: Making a new Global Climate Fund work for poor people' (Oxfam International October 2010), 1.

¹⁰ Transparency International, 'Defining the challenge: Threats to effective climate governance' in Gareth Sweeney et al (eds), *Global Corruption Report: Climate Change*, Transparency International (Earthscan, 2011), 4.

¹¹ United Nations Development Programme, 'Fighting climate change: Human solidarity in a divided world' (2007), 43.

¹² See Maplecroft, 'Climate Change Vulnerability Map 2011' (2011) <<http://maplecroft.com/about/news/ccvi.html>>

emissions abatement poor countries are likely to experience a comparatively more expensive 'clean development' path than that traversed by their developed country counterparts.¹³

As such, climate change has been labelled the 'defining human development issue of our generation'.¹⁴ Failure to mitigate dangerous climate change would diminish the development prospects of the poorest 40 percent of the global population – 2.6 billion people.¹⁵

The bad news is that forces generated by climate change will be superimposed on a world marked by deep and pervasive human development deficits, and by disparities that divide the "haves" and the "have-nots".¹⁶

These disparities exist not only between developed and developing countries, but increasingly within developing country societies – as despite economic growth and poverty reduction overall, domestic social and economic inequality in many countries is increasing.¹⁷ It is predicted that climate change will sharpen these existing inequities as national societies and economies reach their ecological limits.¹⁸ There may also be climate inequality feedback loops in that poor and marginalised sections of societies may be vulnerable to harm in the name of un-checked 'clean development' and other carbon offsetting programs that privatise natural resources.

B *Paying the price for climate change in Sri Lanka*

Sri Lanka is an illustrative example of how the risks and costs of climate change are unevenly spread. Sri Lanka is at high risk of the threat of climate change,¹⁹ perhaps not surprisingly for a developing tropical island nation in South Asia. The island exhibits an exceptional array of diverse species and supports remarkable terrestrial and freshwater ecosystems for which it is internationally renowned.²⁰ Sea level rise associated with climate change will have a particularly devastating impact on coastal ecosystems, human settlements and the tourism industry.²¹ Sri Lanka already experiences a high rate of

¹³ Tim Gore, 'Climate Finance Post-Copenhagen: The \$100bn questions' (Oxfam International, 31 May 2010), 1.

¹⁴ United Nations Development Programme, 'Fighting climate change: Human solidarity in a divided world' (2007), 1.

¹⁵ United Nations Development Programme, 'Fighting climate change: Human solidarity in a divided world' (2007), 2.

¹⁶ United Nations Development Programme, 'Fighting climate change: Human solidarity in a divided world' (2007)

¹⁷ International Institute for Labour Studies International Labour Office, 'World of Work Report 2008: Income Inequalities in the Age of Financial Globalization' (2008), 8–14.

¹⁸ *Development and International Economic Co-operation: Environment*, UN GAOR, 42nd sess, Agenda Item 83(e), UN Doc A/43/427 (4 August 1987) annex ('*Report of the World Commission on Environment and Development: Our Common Future*'), 59 [25].

¹⁹ 34th out of 170 countries ranked on the Climate Change Vulnerability Index. See Maplecroft, Big economies of the future - Bangladesh, India, Philippines, Vietnam and Pakistan - most at risk from climate change <<http://maplecroft.com/about/news/ccvi.html>> .

²⁰ Nayana Mawilmada et al, 'Sector Vulnerability Profile: Biodiversity and Ecosystem Services' (2010), 20.

²¹ Sri Lanka Ministry of Environment, 'Climate Change Vulnerability Data Book: Maps and Data by Sector' (January 2011), 7.

natural hazards compared to the global average, including flooding, drought and landslides.²² The frequency and intensity of disasters is expected to increase as a consequence of climate change.²³ Climate change is also expected to lead to significant pressure on meeting urban drinking water and agricultural irrigation needs and exacerbate the spreading of vector and water borne diseases.²⁴

Vulnerability to these impacts is not uniform across the country. As observed throughout the world, where individuals, families and communities endure high rates of poverty or marginalisation in society their capacity to manage the volatility and scarcity associated with climate change is undermined.²⁵

1 *Geographic, ethnic and gender dimensions to climate change vulnerability*

While poverty has steadily declined in Sri Lanka since 1990,²⁶ poverty reduction has been uneven and income inequality is high.²⁷ Poverty is highly concentrated in the northern, eastern, central, Uva and Sabaragamuwa provinces and with particular at-risk groups including people displaced by conflict in the North and East, tea estate populations in the central highlands and the rural poor.²⁸ Average consumption rates in Western Province (the richest province), is almost twice that of Uva Province in the central region.²⁹ At the district level the disparity is even more pronounced – for example Colombo has a poverty head count ratio of 3.6 per cent compared to 20.3 per cent in Batticaloa on the east coast.³⁰ This data was captured prior to the 2010–11 floods which affected over half a million people in Batticaloa alone, pushing thousands of families further into poverty.³¹ Poor households often have no access to insurance, little or no surplus assets or savings and are more likely to be reliant on the land for subsistence needs – making them inherently more vulnerable to climate change impacts.³²

²² Sri Lanka Ministry of Environment, 'Climate Change Vulnerability Data Book: Maps and Data by Sector' (January 2011), 61.

²³ Sri Lanka Ministry of Environment, 'Climate Change Vulnerability Data Book: Maps and Data by Sector' (January 2011), 61.

²⁴ Sri Lanka Ministry of Environment, 'Climate Change Vulnerability Data Book: Maps and Data by Sector' (January 2011), 151.

²⁵ United Nations Development Programme, 'Fighting climate change: Human solidarity in a divided world' (2007), 8.

²⁶ Department of Census and Statistics - Sri Lanka, 'Poverty Indicators: Household Income and Expenditure Survey - 2009/10' (Ministry of Finance and Planning, May 2011), 1; Institute of Policy Studies of Sri Lanka, 'Millennium Development Goals Sri Lanka: Country Report 2008/2009' (National Council for Economic Development (NCED) and United Nations Development Programme (UNDP), July 2010), 1.

²⁷ Cite GINI index

²⁸ AusAID, 'Australia's strategic approach to aid in Sri Lanka: 2011–2015' (2010)

²⁹ Dileni Gunewardena, 'Inequality in Sri Lanka: Key Trends and Policy Response' (UNDP Regional Centre for Asia Pacific, 2009), 247.

³⁰ Department of Census and Statistics - Sri Lanka, 'Poverty Indicators: Household Income and Expenditure Survey - 2009/10' (Ministry of Finance and Planning, May 2011), 2.

³¹ United Nations Office for the Coordination of Humanitarian Affairs (OCHA), 'Sri Lanka Monsoon Flood Update' (15 February 2011), 1.

³² United Nations Development Programme, 'Fighting climate change: Human solidarity in a divided world' (2007), 8.

Systematic ethnic and gender discrimination have also had a profound influence on the landscape of poverty in Sri Lanka. Discrimination of ethnic minority Tamils was one of the root causes of the quarter-century brutal civil war between the Government of Sri Lanka and paramilitary groups it supported, and separatist group Liberation Tamil Tigers Eelam (LTTE), which ended in 2009.³³ Ethnic discrimination is still empirically evident in contemporary Sri Lanka. For example a study of wage equality in 2008 found that young Tamil men are underpaid by as much as 28 per cent in the public sector and 9–14 in the private sector compared to their Sinhalese counterparts.³⁴

While the status of women in Sri Lanka is seen as comparably strong compared to other countries in the region, it is clear that women in Sri Lanka suffer more acutely than men from material resource poverty, gender based violence and disempowerment in families, communities and political affairs.³⁵ The same study mentioned above also found that young Sinhala and Tamil men are paid approximately 9 and 11 percent higher respectively than Sinhala and Tamil women, pointing to gender inequality that cuts across ethnic lines.³⁶ While women have achieved parity in primary and secondary education,³⁷ they make up just 5.3% per cent of national Parliament seats.³⁸ Women also do not enjoy equal rights to property and land ownership.³⁹ These factors limit the ability of women and girls and other marginalised groups to claim their rights, leaving them more vulnerable to the threat of climate change.⁴⁰

2 *Uneven costs of climate change mitigation efforts*

Poverty and marginalisation can also present barriers to the full and effective participation of all stakeholders in decision-making processes around climate change adaptation and mitigation strategies. Development projects linked to carbon offsetting, like any other development projects, have the potential to result in harmful, rights violating effects on local populations if environmental and social safeguards are not put in place. Given mitigation activities often require changes in land access, use and control, they can potentially create conflict between the interests of existing landholders (who may

³³ Dileni Gunewardena, 'Inequality in Sri Lanka: Key Trends and Policy Response' (UNDP Regional Centre for Asia Pacific, 2009), 253.

³⁴ Dileni Gunewardena, 'An Analysis of Gender and Ethnic Wage Differentials among Youth in Sri Lanka' in Ramani Gunatilaka, Markus Mayer and Milan Vodopivec (eds), *The challenge of youth employment in Sri Lanka*, Directions in Development: Human Development (The World Bank, 2010), 233.

³⁵ Asia Development Bank, 'Country Gender Assessment - Sri Lanka' (2008), 26–9.

³⁶ Ramani Gunatilaka, Markus Mayer and Milan Vodopivec (eds), *The challenge of youth employment in Sri Lanka*, Directions in Development: Human Development (The World Bank, 2010), 228

³⁷ AusAID, 'Australia's strategic approach to aid in Sri Lanka: 2011–2015' (2010), 13.

³⁸ Inter-Parliamentary Union, 'Women in national parliaments' (30 April 2011) <<http://www.ipu.org/wmn-e/classif.htm>>

³⁹ Asia Development Bank, 'Country Gender Assessment - Sri Lanka' (2008), 2.

⁴⁰ See generally Geraldine Terry (ed), *Climate Change and Gender Justice* (Practical Action Publishing in association with Oxfam GB, 2009).

or may not have land rights protected by law) and the interests of those who seek to financially gain from mitigation activities (be they private or public entities). Unless there is adequate protection of the rights and interests of all parties then it is likely that impoverished and marginalised groups will bare the greatest costs of developing country mitigation efforts.

Post-war Sri Lanka is generally going through a phase of 'aggressive development',⁴¹ including large-scale infrastructure, industry, energy and other reconstruction activities throughout the country. While even during the war the Sri Lankan economy enjoyed strong economic growth,⁴² the Government of Sri Lanka was reluctant to invest seriously in clean development due to war-related budget restrictions and the perceived costs and risks involved.⁴³ Now, the strength of Sri Lanka's economy is such that last year the International Monetary Fund recognised it as a 'Middle Income Emerging Market'.⁴⁴ In this light it is not surprising that the Government of Sri Lanka and private entities in the country are seeking out opportunities for 'clean development' finance, participation in global carbon markets and initiatives like the CDM, which will be discussed in greater detail in the following section. The Government of Sri Lanka is also increasingly enthusiastic about exploring opportunities for reducing emissions from deforestation and forest degradation (REDD) and REDD+ (incorporating conservation, sustainable forest management, and forest carbon stock enhancement).⁴⁵

At the same time, there are concerns that the intensive growth-focussed economic development process is occurring without sufficient attention being paid to proper consultation, social and environmental impact assessments and addressing of the significant complexities around land rights in the conflict affected areas. For example, there are mounting reports of private and government land grabbing and forced displacement of communities in the North and East of the country for the purpose of expanding High Military Zones and pursuing economic development projects.⁴⁶ Criticism has been levelled at many of these activities for striking the wrong balance by placing the interests of national security and rapid economic growth before the interests of local populations who are already

⁴¹ Institute of Policy Studies of Sri Lanka, 'Millennium Development Goals Sri Lanka: Country Report 2008/2009' (National Council for Economic Development (NCED) and United Nations Development Programme (UNDP), July 2010), 100; Sri Lanka Ministry of Environment, 'Climate Change Vulnerability Data Book: Maps and Data by Sector' (January 2011), 7.

⁴² Ajit Kumar Singh, 'Sri Lankan economy grows despite conflict' (9 August 2007) *Asia Times* <http://www.atimes.com/atimes/South_Asia/IH09Df01.html>

⁴³ B.M.S. Batagoda, 'Sri Lankan policy perspectives on the Clean Development Mechanism (CDM) and the Kyoto Protocol' (March 2002) VI(1) *Energy for Sustainable Development* 21, 26.

⁴⁴ Sugeeswara Senadhira, 'Sri Lanka upgraded to middle income country status' (21 January 2010) 11(67) *Asian Tribune* <<http://www.asiantribune.com/news/2010/01/21/sri-lanka-upgraded-middle-income-country-status>>

⁴⁵ See generally Unna Chokkalingam and S. Anuradha Vanniarachchy, 'Sri Lanka's REDD+ Potential: Myth or Reality?' (Forest Carbon Asia, May 2011).

⁴⁶ Bhavani Fonseka and Mirak Raheem, 'Land in the Eastern Province: Politics, Policy and Conflict' (Centre for Policy Alternatives, May 2010); Centre on Housing Rights and Evictions, 'High Security Zones and the Rights to Return and Restitution in Sri Lanka: A case study of Trincomalee District' (April 2009); Bhavani Fonseka, 'Commentary on Returns, Resettlement and Land Issues in the North of Sri Lanka' (Centre for Policy Alternatives, September 2010).

grappling with the extreme challenges of immediate post-war recovery. The risk that climate change mitigation initiatives like the CDM and REDD+ could lead to new forms of land grabbing is not exclusive to Sri Lanka – it is very much a global risk that is receiving increasing attention elsewhere.⁴⁷ But it should clearly be seen as a red flag for CDM and REDD+ initiatives in Sri Lanka – given the ferocity of armed struggle in Sri Lanka over the last two and a half decades and the resulting contestation over who legitimately owns, controls and has access to use and sustain livelihoods off the land, particularly in the North and East of the country.

Climate change has been superimposed onto existing inequalities between and within states – creating the ‘haves ‘ and ‘have nots’ of climate change resilience, both due to the direct impacts of climate change and the indirect impacts of its mitigation. As we have seen in Sri Lanka, the landscape of climate change vulnerability within states is uneven. The segments of society that are impoverished and disenfranchised generally are vulnerable to being further impoverished and disenfranchised by climate change unless strong and effective safeguards are put in place. I will now turn to examining how international environmental law generally, and the climate governance regime in particular has attempted to address the inequity problem by adopting the principles of ‘common but differentiated responsibility’ and ‘sustainable development’.

III SUSTAINABLE DEVELOPMENT IN INTERNATIONAL ENVIRONMENTAL LAW

The tension between the sustainability of natural resources and the environment and the pursuit of economic growth and human development has long been acknowledged by society.⁴⁸ International environmental law has grappled with this tension since it was kick started in earnest at the 1972 United Nations Conference on the Human Environment in Stockholm.⁴⁹ In the lead-up to the Conference developing countries were encouraged to attend in order that environmentally protective measures emerging from it would not be used as ‘the medium for inhibiting their economic development’.⁵⁰ The Conference resulted in the establishment of the United Nations Environment

⁴⁷ Biofuel Watch African Biodiversity Network, Carbon Trade Watch, the Gaia Foundation and Timberwatch Coalition, 'The CDM and Africa: Marketing a new land grab' (February 2011)

⁴⁸ Nicola Durrant, *Legal Responses to Climate Change* (The Federation Press, 2010), 202.

⁴⁹ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press, 3rd ed, 2009), 48; Lynton Keith Caldwell and Paul Stanley Weiland, *International Environmental Policy: From the Twentieth to the Twenty-First Century* (Duke University Press, 3rd ed, 1996), 48; Louis B Sohn, 'The Stockholm Declaration on the Human Environment' (1973) 14(3) *Harvard International Law Journal* 423, 515.

⁵⁰ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press, 3rd ed, 2009), 48.

Program (UNEP), creation of the Environment Fund and the adoption of an Action Plan for the development of environmental policy administered by UNEP.⁵¹

A *Stockholm Declaration: Linking the human environment to human rights*

The conference also produced the Stockholm Declaration on the Human Environment,⁵² an important but non-binding statement of so-called ‘soft law’.⁵³ The Stockholm Declaration did not make explicit reference to sustainable development despite the concept being widely in use in academia at the time.⁵⁴ However the Stockholm Declaration did make human rights central to the purpose of environmental protection:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.⁵⁵

As such environmental protection obligations were linked to existing human rights norms such as equality and non-discrimination,⁵⁶ the right to life and liberty⁵⁷ and rights to adequate standards of living.⁵⁸ This was considered an innovation at the time, and had some success in influencing the formulation of national environmental laws and policies.⁵⁹ At the time the Stockholm Declaration was agreed in 1972, human rights norms were in the process of being transformed into binding international law. In 1966 the two core human rights covenants – the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights

⁵¹ David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (Foundation Press, 3rd ed, 2007), 170.

⁵² *Declaration of the United Nations Conference on the Human Environment*, Stockholm, 5 - 6 June 1972, UN Doc A/CONF.48/14/Rev.1 (16 June 1972).

⁵³ David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (Foundation Press, 3rd ed, 2007), 170.

⁵⁴ David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (Foundation Press, 3rd ed, 2007), 174.

⁵⁵ *Declaration of the United Nations Conference on the Human Environment*, Stockholm, 5 - 6 June 1972, UN Doc A/CONF.48/14/Rev.1 (16 June 1972), principle 1.

⁵⁶ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), art 1, 2 and 3; *Charter of the United Nations*, art 1(3); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, (entered into force 23 March 1976), art 3; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 3.

⁵⁷ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), art 3; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, (entered into force 23 March 1976), art 6(1).

⁵⁸ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), art 25; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 11.

⁵⁹ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press, 3rd ed, 2009), 49.

(ICESCR) – were opened for signature and ratification.⁶⁰ By 1976 both Covenants had entered into force. While the adequacy of human rights enforcement mechanisms was and is still highly variable,⁶¹ the binding nature of these instruments gives them potentially far greater impact over states' behaviour than a non-binding declaration. The Stockholm Declaration was thus widely seen as visionary,⁶² in that it strategically hinged its 'soft law' environmental principles on the rapidly developing body of 'hard law' international human rights norms – giving the former greater weight and longevity.

B *The Brundtland Commission and 'sustainable development'*

The concept of sustainable development did not achieve international prominence amongst policymakers until the World Commission on Environment and Development (WCED) in 1987. Known as the 'Brundtland Commission' after its Chairman, Gro Harlem Brundtland, the WCED produced the still most widely used definition of sustainable development as:

... development that meets the needs of the present without compromising the ability of future generations to meet their own needs.⁶³

Drawing on the principles of the Stockholm Declaration, the WCED Report outlined a series of recommendations aimed at recognising the rights and responsibilities of states and individuals with respect to sustainable development and strengthening and extending laws, international agreements and norms for state behaviour to advance sustainable development.⁶⁴ The WCED specifically recommended that the fundamental right of human beings to an environment adequate for the health and well-being be a core legal principle to be encapsulated in a proposed Universal Declaration and Convention on Environmental Protection and Sustainable Development.⁶⁵

⁶⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁶¹ Kofi Annan, 'Secretary-General's Address to the General Assembly', 21 September 2004, available at www.un.org/apps/sg/sgstats/asp?nid=1088 cited in Donald R Rothwell et al, *International Law: Cases and Materials with Australian perspectives* (Cambridge University Press, 2011), 8; Anne F Bayefski, *The UN Human Rights Treaty System: Universality at the Crossroads* (Kluwer Law International, 2001), xv.

⁶² David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (Foundation Press, 3rd ed, 2007), 171.

⁶³ *Development and International Economic Co-operation: Environment*, UN GAOR, 42nd sess, Agenda Item 83(e), UN Doc A/43/427 (4 August 1987) annex ('*Report of the World Commission on Environment and Development: Our Common Future*'), 54 [1].

⁶⁴ *Development and International Economic Co-operation: Environment*, UN GAOR, 42nd sess, Agenda Item 83(e), UN Doc A/43/427 (4 August 1987) annex ('*Report of the World Commission on Environment and Development: Our Common Future*'), 323 [83].

⁶⁵ *Development and International Economic Co-operation: Environment*, UN GAOR, 42nd sess, Agenda Item 83(e), UN Doc A/43/427 (4 August 1987) annex ('*Report of the World Commission on Environment and Development: Our Common Future*'), annex 1, 339 [1].

In response to the WCED Report the UN General Assembly convened the ‘Rio Earth Summit’ in 1992 – formally known as the UN Conference on Environment and Development (UNCED).⁶⁶ At the time the Earth Summit was the most heavily reported single event in history and produced a range of landmark agreements including *inter alia* the United Nations Framework Convention on Climate Change,⁶⁷ the *Agenda 21* “blueprint” for sustainable development and the Rio Declaration on the Environment and Development.⁶⁸

C *Rio Declaration and sustainable development*

The Rio Declaration cemented ‘sustainable development’ as a leading concept of international development, but it made an unfortunate departure from the Stockholm Declaration and the Brundtland Commission in stopping short of a human rights based conception of sustainable development. For example, principle 1 of the Declaration effectively de-links the concept of sustainable development from human rights law by invoking arbitrary ‘entitlements’ and the ambiguous notion of ‘harmony with nature’ rather than established human rights norms:

Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.⁶⁹

The only two explicit references to rights in the Declaration is the reaffirmation of the right of states to exploit their own natural resources,⁷⁰ and qualification that ‘[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.’⁷¹ The latter reference cannot be understood as an affirmation of the human right to sustainable development. Rather it is a qualification to the already accepted universal right to development,⁷² that it must be pursued consistent to principles of inter-generational equity.

⁶⁶ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press, 3rd ed, 2009), 51.

⁶⁷ *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force on 21 March 1994)

⁶⁸ David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (Foundation Press, 3rd ed, 2007), 181, 187.

⁶⁹ *Rio Declaration on Environment and Development*, Rio de Janeiro, 3-14 June 1992, A/CONF.151/26 (Vol. I) (12 August 1992), principle 1.

⁷⁰ *Rio Declaration on Environment and Development*, Rio de Janeiro, 3-14 June 1992, A/CONF.151/26 (Vol. I) (12 August 1992), principle 2.

⁷¹ *Rio Declaration on Environment and Development*, Rio de Janeiro, 3-14 June 1992, A/CONF.151/26 (Vol. I) (12 August 1992), principle 3.

⁷² *Declaration on the Right to Development*, UNGA Res. 41/128, annex (4 December 1986), art 1.

This perhaps indicates a deeper definitional issue with the concept of sustainable development – a concept that while lacking precise legal definition has become a ‘buzz word extraordinaire’.⁷³ Perhaps the reason why it has achieved almost universal acceptance is, as Hunter et al suggests, its ‘brilliant ambiguity’.⁷⁴ The failure to strengthen the links between sustainable development and human rights norms has perhaps resulted in a missed opportunity to ensure coherence between the two. As the next section will explore, this may have potentially problematic implications for ensuring basic minimum human rights standards are met in the pursuit of sustainable development through mechanisms like the CDM.

D *Sustainable Development and Climate Change Law*

Also emerging from the Rio Earth Summit was the UN Framework Convention on Climate Change (UNFCCC). The UNFCCC was the first *binding* international legal framework for addressing climate change, which has attracted almost universal ratification.⁷⁵ The Convention’s ultimate objective is the stabilisation of atmospheric concentrations of GHGs:

... at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.⁷⁶

As such ensuring sustainable development is core to the object of the UNFCCC, as well as related legal instruments that flow from it, including the Kyoto Protocol.⁷⁷ The UNFCCC also affirms the principles of intergenerational equity,⁷⁸ and for the first time made the concept of ‘common but differentiated responsibility’ an explicit basis for developed (‘Annex I’) and developing states to adopt varying obligations for emissions reductions.⁷⁹ The Convention made special consideration of the circumstances of developing country Parties and the need to prevent them from bearing a

⁷³ Bob Lloyd and Srikanth Subbarao, ‘Development challenges under the Clean Development Mechanism (CDM)—Can renewable energy initiatives be put in place before peak oil?’ (2009) 37(1) *Energy Policy* 237, 238.

⁷⁴ David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (Foundation Press, 3rd ed, 2007), 175.

⁷⁵ Nicola Durrant, *Legal Responses to Climate Change* (The Federation Press, 2010), 39.

⁷⁶ *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force on 21 March 1994), art 2.

⁷⁷ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005), art 1.

⁷⁸ *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force on 21 March 1994), art 3.1.

⁷⁹ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press, 3rd ed, 2009), 357; David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (Foundation Press, 3rd ed, 2007), 670.

disproportionate burden under the Convention.⁸⁰ While the Convention affirms the right of states to ‘promote sustainable development’,⁸¹ it does not assert a right of human beings to enjoy sustainable development, nor does it reaffirm fundamental human rights to life, liberty and non-discrimination as had the Stockholm Declaration some twenty years before.

While the UNFCCC was a landmark agreement, setting the tone for international cooperation to address climate change, it did not actually set binding emissions reduction targets. This was not achieved until the Kyoto Protocol to the UNFCCC came into force in 2005, some eight years after it had been opened for signature.

1 *Kyoto Protocol and flexible market mechanisms*

The Kyoto Protocol extended the ‘common but differentiated responsibility’ principle by legally binding Annex I countries to reducing their overall emissions in line with quantified targets outlined in Annex B to the Protocol (‘Annex B Parties’).⁸² This would result in the collective reduction of GHGs of Annex B Parties by 5 per cent below 1990 levels during an initial commitment period between 2008 and 2012.⁸³ The Kyoto Protocol incorporated a range of flexible market-based mechanisms designed to reduce the cost of abatement. These included joint implementation involving the transfer of certified emission reduction units (CERs) between Annex B Parties;⁸⁴ ‘cap-and-trade’ emissions trading,⁸⁵ and the CDM involving the transfer of CERs between developing countries and Annex B Parties.⁸⁶ Each of the mechanisms share the common idea that, ‘rights to pollute may be transferred between different sources of pollution’,⁸⁷ and build on the economic theory that environmental

⁸⁰ *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force on 21 March 1994), art 3.2.

⁸¹ *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force on 21 March 1994), art 3.4.

⁸² The only Annex I countries under the UNFCCC that are not listed in Annex B of the Kyoto Protocol are Turkey and Belarus. Otherwise the lists are almost identical.

⁸³ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005), art 3.1.

⁸⁴ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005), art 6.

⁸⁵ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005), art 17.

⁸⁶ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005), art 12.

⁸⁷ Alfred Endres and Cornelia Ohl, ‘Kyoto, Europe?—An Economic Evaluation of the European Emission Trading Directive’ (2005) 19 *European Journal of Law and Economics* 17, 17.

conservation can be enhanced through privatisation of the commons.⁸⁸ They are first and foremost geared towards enabling least-cost or preferably profitable abatement of GHG emissions.⁸⁹

As with the UNFCCC there is no assertion of human rights throughout the Kyoto Protocol, which is predominantly focussed on translating the UNFCCC's broad principles and commitments into measurable and time bound quantitative targets. In addition to the binding targets the Protocol also contains a number of provisions for States Parties to advance sustainable development objectives through national and regional programs to enhance emissions reporting and mitigation measures,⁹⁰ transfer and facilitate the development of environmentally sound technology,⁹¹ cooperate in research and systematic observation systems,⁹² and education and training relating to climate change.⁹³

From this cursory exploration of the UNFCCC and Kyoto Protocol adoptions of sustainable development goals it appears that human rights may be a missing link. Increasingly since 2007 the links between human rights and climate change have been strengthened within the human rights architecture of the UN.⁹⁴ In 2009 the Human Rights Council agreed on a Resolution drawing clear links between sustainable development and human rights:

... the right to development must be fulfilled so as to meet equitably the development and environmental needs of present and future generations.⁹⁵

While the work of the human rights community may assist to strengthen and encourage states' to adopt a rights base approach to their combined pursuit of sustainable development and climate change mitigation, there is not currently sufficient human rights protection within the climate change regime. A closer examination of the CDM will assist in exploring this challenge further.

⁸⁸ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press, 3rd ed, 2009), 363–4.

⁸⁹ Thanakvaro De Lopez et al, 'Clean Development Mechanism and Least Developed Countries: Changing the Rules for Greater Participation' (2009) 18(4) *The Journal of Environment and Development* 436,442.

⁹⁰ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005), art 10(a)–(b).

⁹¹ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005), art 10(c).

⁹² *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005), art 10(d).

⁹³ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005), art 10(e).

⁹⁴ Margreet Wewerinke and Vicente Paolo Yu III, 'Addressing Climate Change through Sustainable Development and the Promotion of Human Rights' (South Centre, November 2010), 9.

⁹⁵ UN HRC Res. 10/4 (25 March 2009), reprinted in UN Human Rights Council, Report of the Human Rights Council on Its Tenth Session, 14, UN Doc. A/HRC/10/L.11 (12 May 2009) cited in Margreet Wewerinke and Vicente Paolo Yu III, 'Addressing Climate Change through Sustainable Development and the Promotion of Human Rights' (South Centre, November 2010), 9.

IV CLEAN DEVELOPMENT MECHANISM: SUSTAINABLE DEVELOPMENT AND HUMAN RIGHTS PROTECTION

The CDM emerged out of a proposal for a ‘Clean Development Fund’ put forward by Brazil at the Kyoto negotiations. Initially pitched as a mechanism to shift financial resources to support mitigation activity from the North to the South, it morphed into a ‘geographic flexibility’ mechanism, enabling Annex B Parties to avoid non-compliance by investing in climate change mitigation initiatives in developing countries.⁹⁶ Nevertheless, the purpose of the CDM as framed in the Kyoto Protocol is to promote the ‘co-benefits’ of sustainable development and climate change mitigation.⁹⁷

A *The nuts and bolts of the CDM*

The CDM works by allowing Annex B industrialised countries to implement projects in developing countries that both benefit the host country and reduce emissions. The projects in return generate CERs that have monetary value and can be traded in the international carbon markets to contribute to meeting Kyoto emissions reductions targets.⁹⁸ As a project-based mechanism, the CDM involves a complex process of project design, validation and registration of projects, monitoring of emissions reductions, verification and certification and issuance of CERs – the modalities and procedures for which are outlined in the Marrakech Accords of the 7th Conference of the Parties (COP) to the UNFCCC.⁹⁹ The CDM is supervised by an Executive Board under the guidance and authority of the COP.¹⁰⁰ The Executive Board accredits Designated Operational Entities (DOEs) to validate project design documents (PDDs) and verify and certify CERs.¹⁰¹ Host Parties are each responsible for establishing a Designated National Authority (DNA) for the CDM, responsible for giving written

⁹⁶ Sebastian Oberthür and Hermann E Ott, *The Kyoto Protocol: International Climate Policy for the 21st Century* (Springer, 1999), 166.

⁹⁷ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005), art 12.2.

⁹⁸ Note however CERs from projects involving land use change and forestry (LULUCF) are excluded from the European Union Emissions Trading Scheme. See Emily Boyd et al, 'Reforming the CDM for sustainable development: Lessons learned and policy futures' (2009) 12 *Environmental Science and Policy* 820, 821.

⁹⁹ *Report of the Conference of the Parties on its Seventh Session held in Marrakesh, 29 October to 10 November 2001*, Dec 17/CP.7, UNFCCC, FCCC/CP/2001/13/Add.2 (21 January 2002)

¹⁰⁰ *Report of the Conference of the Parties on its Seventh Session held in Marrakesh, 29 October to 10 November 2001*, Dec 17/CP.7, UNFCCC, FCCC/CP/2001/13/Add.2 (21 January 2002), annex ('Modalities and procedures for a clean development mechanism'), C(5).

¹⁰¹ *Report of the Conference of the Parties on its Seventh Session held in Marrakesh, 29 October to 10 November 2001*, Dec 17/CP.7, UNFCCC, FCCC/CP/2001/13/Add.2 (21 January 2002), annex ('Modalities and procedures for a clean development mechanism'), D–E.

approval to projects and confirming that each project activity ‘assists it in achieving sustainable development’.¹⁰²

The CDM has been seen by many as a ‘trailblazer’ – the first global environmental investment and credit scheme of its kind,¹⁰³ and the first international mechanism for North-South cooperation on climate change mitigation.¹⁰⁴ Since its inception the CDM has become an immense global market, valued in 2010 at US \$2.7 billion dollars.¹⁰⁵ The mechanism has been widely acknowledged as being responsible for changing emission trends in some industries, and enabling entities in some developing countries to enhance participation in the emerging global carbon market.¹⁰⁶

At the same time, the CDM has raised a number of concerns including questions around the authenticity and environmental integrity of associated emission reductions;¹⁰⁷ danger that overuse of CDM is making it viable for industrialised countries to maintain environmentally unsustainable emissions trajectories;¹⁰⁸ issues around the high transaction costs of assessing and monitoring each project; and conflicts of interest of DOEs given they have a monetary incentive to validate PDDs.¹⁰⁹ The CDM has also been criticised for the geographic concentration of projects in large developing countries like China and India and the significant underrepresentation of the poorest developing countries.¹¹⁰ The sustainable development integrity of the CDM has also been seriously questioned in recent years, which will be examined in detail in the following section.

B *Co-benefits or competing aims?*

In order for CDM projects to successfully result in CERs there must be evidence in the project design and monitoring of ‘real, measurable, and long-term benefits related to the mitigation of climate change’ as well as ‘reductions in emissions that are *additional* to any that would occur in the absence of

¹⁰² *Report of the Conference of the Parties on its Seventh Session held in Marrakesh, 29 October to 10 November 2001*, Dec 17/CP.7, UNFCCC, FCCC/CP/2001/13/Add.2 (21 January 2002), annex (‘Modalities and procedures for a clean development mechanism’), G(40)(a).

¹⁰³ United Nations Framework Convention on Climate Change, Clean Development Mechanism (CDM) <http://unfccc.int/kyoto_protocol/mechanisms/clean_development_mechanism/items/2718.php>

¹⁰⁴ B.M.S. Batagoda, ‘Sri Lankan policy perspectives on the Clean Development Mechanism (CDM) and the Kyoto Protocol’ (March 2002) VI(1) *Energy for Sustainable Development* 21, 22.

¹⁰⁵ Asia-Pacific Emissions Trading Forum, ‘The Clean Development Mechanism: Supply, demand and future prospects’ (September 2010), iii.

¹⁰⁶ Lambert Schneider, ‘Is the CDM fulfilling its environmental and sustainable development objectives? An evaluation of the CDM and options for improvement’ (Oeko-Institut, 5 November 2007), 15.

¹⁰⁷ United Nations Development Programme, ‘Fighting climate change: Human solidarity in a divided world’ (2007), 132; Lambert Schneider, ‘Is the CDM fulfilling its environmental and sustainable development objectives? An evaluation of the CDM and options for improvement’ (Oeko-Institut, 5 November 2007), 5.

¹⁰⁸ United Nations Development Programme, ‘Fighting climate change: Human solidarity in a divided world’ (2007), 132.

¹⁰⁹ United Nations Development Programme, ‘Fighting climate change: Human solidarity in a divided world’ (2007), 154.

¹¹⁰ United Nations Development Programme, ‘Fighting climate change: Human solidarity in a divided world’ (2007), 155.

the certified project activity'.¹¹¹ There is no such corresponding requirement of evidence of sustainable development benefits. Indeed, the Marrakesh Accords made clear that it is entirely the Host Party's prerogative to confirm 'whether a clean development mechanism project activity assists it in achieving sustainable development'.¹¹² This usually means assessment by the DNA of projects against nationally derived sustainable development criteria.¹¹³

Ensuring that developing countries are able to drive their own sustainable development trajectory is appropriate – both from a sovereignty and self-determination perspective. Nevertheless, as developing countries increasingly compete for CDM funds, it has been observed that the least cost motivation of the CDM market may be creating a 'race to the bottom' with regards to cutting costs on social and environmental safeguards.¹¹⁴ DNA's have little incentive to reject projects that will bring in revenue, even where they will have little or no sustainable development benefits.¹¹⁵

Several studies have highlighted that the contribution of CDM projects to 'local' sustainable development has been negligible.¹¹⁶ This is due to a mix of factors including lack of institutional capacity within DNA's to assess projects against sustainable development criteria, corrupt and unscrupulous behaviour of investors and lack of monitoring of sustainable development impacts. These critiques have led to a number of proposals for reform of the CDM to better meet the intended co-benefits of the mechanism. Proposals have included the development of minimum global standards for sustainable development including requisite social and environmental safeguards;¹¹⁷ clearer requirements for ongoing consultation and seeking free prior and informed consent (FPIC) with local communities;¹¹⁸ post-implementation monitoring of sustainable development impacts of

¹¹¹ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005), art 12(b)–(c) (emphasis added).

¹¹² *Report of the Conference of the Parties on its Seventh Session held in Marrakesh, 29 October to 10 November 2001*, Dec 17/CP.7, UNFCCC, FCCC/CP/2001/13/Add.2 (21 January 2002).

¹¹³ Emily Boyd et al, 'Reforming the CDM for sustainable development: Lessons learned and policy futures' (2009) 12 *Environmental Science and Policy* 820, 822.

¹¹⁴ Arild Vatn and Paul Vedeld, 'Getting Ready! A study of National Governance Structures for REDD+' (Department of International Environment and Development Studies, Norwegian University of Life Sciences, April 2011), 13.

¹¹⁵ Lambert Schneider, 'The Trade-Offs of Trade Realities and Risks of Carbon Markets', Gareth Sweeney et al (eds), *Global Corruption Report: Climate Change*, Transparency International (Earthscan, 2011)

¹¹⁶ Emily Boyd et al, 'Reforming the CDM for sustainable development: Lessons learned and policy futures' (2009) 12 *Environmental Science and Policy* 820, 822–3; Srikanth Subbarao and Bob Lloyd, 'Can the Clean Development Mechanism (CDM) deliver?' (2001) 39 *Energy Policy* 1600, 1602; Lambert Schneider, 'Is the CDM fulfilling its environmental and sustainable development objectives? An evaluation of the CDM and options for improvement' (Oeko-Institut, 5 November 2007), 10; Asia-Pacific Emissions Trading Forum, 'The Clean Development Mechanism: Supply, demand and future prospects' (September 2010), 9.

¹¹⁷ Asia-Pacific Emissions Trading Forum, 'The Clean Development Mechanism: Supply, demand and future prospects' (September 2010), 24.

¹¹⁸ Jacob Olander and Johannes Ebeling, 'Building Forest Carbon Projects: A Step-by-Step Guide' (Forest Trends, The Katoomba Group, , November 2010), 12.

projects;¹¹⁹ and adjustments to CERs to provide incentives for projects with high sustainable development integrity.¹²⁰

To understand fully the nature of these concerns with reference to the Sri Lanka context it will be necessary to examine the extent to which the governance of CDM in Sri Lanka is capable of ensuring sustainable development benefits of projects are prioritised and human rights are protected. The following section will explore this question in detail by examining the policy and legal framework within which CDM is governed.

V CDM GOVERNANCE AND SOCIAL AND ENVIRONMENTAL PROTECTION IN SRI LANKA

While to date Sri Lanka has only registered seven CDM projects, the Government of Sri Lanka has long been interested in securing opportunities for development financing through the mechanism.¹²¹ The government established CDM Centres at two major universities in 2002 to advance research and development of CDM potential.¹²² Then in 2008 the government established the Sri Lanka Carbon Fund, a state-owned private company aiming to provide technical and financial assistance to CDM project developers.¹²³ These investments point to a strong interest in building Sri Lanka's capacity to host CDM projects. There are currently Letters of Approval on another 20 projects about to go underway.¹²⁴

Most projects being developed are in the energy sector in renewables and fuel quality improvement. The Government of Sri Lanka is also interested in advancing future potential in low emissions transport, methane recovery from landfill capping, industry fuel efficiency and energy conservation projects as well as reforestation and afforestation, REDD initiatives and biofuel plantations.¹²⁵

¹¹⁹ Bob Lloyd and Srikanth Subbarao, 'Development challenges under the Clean Development Mechanism (CDM)—Can renewable energy initiatives be put in place before peak oil?' (2009) 37(1) *Energy Policy* 237, 1611.

¹²⁰ Emily Boyd et al, 'Reforming the CDM for sustainable development: Lessons learned and policy futures' (2009) 12 *Environmental Science and Policy* 820, 828.

¹²¹ Akiko Yamane, 'Climate change and hazardscape of Sri Lanka' (2009) 41(10) *Environment and planning A* 2396, 2396.

¹²² Ministry of Environment Climate Change Secretariat, History & Background <<http://www.climatechange.lk/DNA/history&background.htm>>

¹²³ Government of Sri Lanka, 'Climate Change Secretariat and Carbon Fund launched' (29 April 2008) *The Official Government News Portal of Sri Lanka*

<http://www.news.lk/index.php?option=com_content&task=view&id=5680&Itemid=44>

¹²⁴ Unna Chokkalingam and S. Anuradha Vanniarachchy, 'Sri Lanka's REDD+ Potential: Myth or Reality?' (Forest Carbon Asia, May 2011), 40.

¹²⁵ Ministry of Environment and Natural Resources Climate Change Secretariat, 'Opportunities for Clean Development Mechanism (CDM)' <<http://www.climatechange.lk/Documents/CDM/Page-02.jpg>>

Regulation of environmental protections and management is primarily governed via the *National Environmental Act 1980* which established the Central Environment Authority (CEA),¹²⁶ and subsequent amendments to the Act in 1988, 2000 and 2005 which widened its powers.¹²⁷ The *National Environmental Act* incorporates three primary approaches to conservation and sustainability, environmental protection, environmental quality and mandating environmental assessment and licensing of 'prescribed activities' determined by an authorised Minister.¹²⁸

Sri Lanka became a signatory to the UNFCCC in 1993 and ratified the Kyoto Protocol in 2002.¹²⁹ The Government of Sri Lanka has been adamant since signing the Kyoto Protocol that the sustainable development priorities of the CDM must be set by host governments. As stated by the Ministry of Environment and Natural Resources:

The developing country party where the setting up of the CDM project activity is proposed shall be the sole judge for deciding whether that project activity meets its national sustainable development objectives and priorities.¹³⁰

The Ministry of Environment and Natural Resources (MENR) was established in December 2001 and has overall responsibility for the affairs of the CEA with the objective of integrating environmental considerations in the development process of the country. MENR is also the national focal point for the UNFCCC. In 2003 the DNA for CDM projects was established within MENR, and then in 2008 the DNA was transferred to the newly established Climate Change Secretariat which sits under the MENR. The Climate Change Secretariat is responsible for providing, 'a rational platform to address climate change issues at the national level for incorporation into the development process'.¹³¹ In this capacity the Secretariat is required to evaluate and approve CDM projects including establishing national guidelines on CDM project development. The Secretariat also takes a lead role in capacity building and market promotion for CDM projects.¹³²

¹²⁶ *National Environmental Act No. 47*, Sri Lanka (1980), s 2.1.

¹²⁷ Anandalal Nanayakkara, 'Environmental Laws, Institutions and Mechanisms: An Overview' in Mario Gomez (ed), *Judges and Environmental Law: A Handbook for the Sri Lankan Judiciary* (Environmental Foundation Limited, 2009), 77.

¹²⁸ *National Environmental (Protection and Quality) Regulations No. 1*, Sri Lanka (2008), Gazette No. 1534/18 of 1 February 2008, s 23A.

¹²⁹ Ministry of Environment Climate Change Secretariat, History & Background <<http://www.climatechange.lk/DNA/history&background.htm>>

¹³⁰ B.M.S. Batagoda, 'Sri Lankan policy perspectives on the Clean Development Mechanism (CDM) and the Kyoto Protocol' (March 2002) VI(1) *Energy for Sustainable Development* 21, 26.

¹³¹ Ministry of Environment Climate Change Secretariat, About Us <http://www.climatechange.lk/About_us.html>

¹³² Government of Sri Lanka Climate Change Secretariat, Designated National Authority <http://www.climatechange.lk/DNA/index_dna.htm>

A National Advisory Committee on Climate Change (NACCC), also under MENR, has the purpose of coordinating all activities relating to climate change and ensuring climate policies and programmes are consistent with national development priorities and objectives.¹³³ The NACCC is responsible for facilitating the development and implementation through all relevant line ministries of national policies relating to climate change, and indeed Sri Lanka is in the midst of a period of major policy development around climate change and the CDM.

A National Climate Change Policy is currently in draft form and is being circulated for public comment.¹³⁴ The policy is framed around the goal of ‘adaptation to and mitigation of climate change impacts within the framework of sustainable development’, and contains the guiding principle that ‘steps taken to address climate change shall be environmentally sound, nationally appropriate, socially acceptable, and economically viable’.¹³⁵ The policy includes a commitment to ‘strengthen legal and regulatory mechanisms to take effective measures to meet climate change challenges by integrating legal requirements in to the respective sectors [and] ... [e]nsure equitable enforcement of these regulatory provisions’.¹³⁶ While loosely worded these provisions do provide some basis for consideration of social and environmental safeguards on CDM projects, as well as impetus for future legislative reform to bolster protections in the interest of equitable enforcement. It remains to be seen how the policy will influence practice in Sri Lanka when it is finalised.

There is also a draft National Policy on the CDM circulating for comment, which intends to establish the institutional, administrative and legislative framework necessary for Sri Lanka to effectively participate in the mechanism.¹³⁷ The policy contains some provisions relevant to sustainable development including a guiding principle that ‘CDM projects shall be *encouraged* to include elements that would contribute to poverty reduction and employment generation’.¹³⁸ The policy also affirms that:

¹³³ Ministry of Environment Climate Change Secretariat, About Us <http://www.climatechange.lk/About_us.html>

¹³⁴ Ministry of Environment, 'Draft National Climate Change Policy: Request for Public Views and Comments' (2011)

¹³⁵ Ministry of Environment, 'Draft National Climate Change Policy: Request for Public Views and Comments' (2011)

¹³⁶ Ministry of Environment, 'Draft National Climate Change Policy: Request for Public Views and Comments' (2011), 6–7.

¹³⁷ Ministry of Environment and Natural Resources, 'Calling for Public Comments on the National Policy on Clean Development Mechanism (CDM)' (26 February 2009)

<[http://www.climatechange.lk/DNA/data/National_Policy_CDM\(Draft\).pdf](http://www.climatechange.lk/DNA/data/National_Policy_CDM(Draft).pdf)>

¹³⁸ Ministry of Environment and Natural Resources, 'Calling for Public Comments on the National Policy on Clean Development Mechanism (CDM)' (26 February 2009)

<[http://www.climatechange.lk/DNA/data/National_Policy_CDM\(Draft\).pdf](http://www.climatechange.lk/DNA/data/National_Policy_CDM(Draft).pdf)>

CDM projects shall be provided through a transparent process that involves an assessment of their economic, social and environmental benefits and their relevance to local needs and priorities.¹³⁹

Under the policy, projects that do not 'adequately incorporate' sustainable development criteria will need to share a portion of CERs generated with the Sri Lanka Carbon Fund (SLCF). Rather than these funds going back to local communities or otherwise into initiatives to support sustainable development co-benefits, the SLCF will use these funds to 'promote new CDM projects in the country'.¹⁴⁰ Depending on how this redistribution process works it could create a perverse disincentive to developers adequately incorporating sustainable development benefits into the project designs. It could also lead to conflicts of interest by encouraging developers to pay into SLCF fund rather than invest in sustainable development benefits, given the former avenue will boomerang funds back into future CDM projects. In the context of a history of fraud and corrupt practices linked to commercial land use and natural resource management,¹⁴¹ and persistently high risks of corruption generally in Sri Lanka,¹⁴² this could present a significant moral hazard.

In addition to these climate change focussed policies there are a range of related environmental policies including most notably the National Environment Policy 2003 which aims to 'promote the sound management of Sri Lanka's environment balancing needs for social and economic development and environment integrity'.¹⁴³ While there is no comprehensive policy framework governing how development projects must safeguard local communities from negative social impacts, there is a Environmental Impact Assessment scheme in place which perhaps provides the greatest rights protection opportunity.

B *Social and environmental safeguards Environmental Impact Assessment scheme*

Sri Lanka has in place the legal and policy architecture for Environmental Impact Assessments (EIA) which are mandatory for all large-scale development projects, including CDM, under the *National Environment Act*. Designated Project Approving Agencies (of which there are currently twenty-two

¹³⁹ Ministry of Environment and Natural Resources, 'Calling for Public Comments on the National Policy on Clean Development Mechanism (CDM)' (26 February 2009) <[http://www.climatechange.lk/DNA/data/National_Policy_CDM\(Draft\).pdf](http://www.climatechange.lk/DNA/data/National_Policy_CDM(Draft).pdf)> , 1 [1.1].

¹⁴⁰ Ministry of Environment and Natural Resources, 'Calling for Public Comments on the National Policy on Clean Development Mechanism (CDM)' (26 February 2009) <[http://www.climatechange.lk/DNA/data/National_Policy_CDM\(Draft\).pdf](http://www.climatechange.lk/DNA/data/National_Policy_CDM(Draft).pdf)> 1 [3.3].

¹⁴¹ See eg. *Watte Gedara Wijebanda v Conservator General of Forests* [2007] SCFR No. 118/2004; *Mohamed Faiz v Attorney General* [1995] 1 Sri LR 372 cited in Jane E Schukoske, 'Enforcing Environmental Laws in Sri Lanka Through Fundamental Rights Litigation' (1996) 8 *International Legal Perspectives* 155.

¹⁴² Maplecroft, New in-depth reports from Maplecroft analyse the key investment risks in Liberia, Singapore and Sri Lanka <<http://maplecroft.com/about/news/country-reports-may18.html>>

¹⁴³ Government of Sri Lanka Ministry of Environment, Policies <<http://www.environmentmin.gov.lk/policies.htm>>

authorised government departments),¹⁴⁴ may approve prescribed projects to require submission of either an Initial Impact Assessment Report or a more expansive Environmental Impact Assessment Report.¹⁴⁵

There are a number of documented shortcomings of the process, including conflicts of interest,¹⁴⁶ inadequacies of provisions for public participation and the reality that people living in remote and impoverished circumstances are often excluded;¹⁴⁷ a lack of clear guidelines and failure to properly monitor impacts.¹⁴⁸ The quality and consistency of EIA's has also been questioned, with a recent study of 130 EIAs finding that almost one-fifth made no mention of ecological impacts of projects and over forty per cent documented impacts in only a couple of sentences.¹⁴⁹ There is also evidence of Project Approving Agencies failing to exercise their proper powers in ensuring complete and rigorous EIAs. For example in *Environmental Foundation Limited v Central Environmental Authority and others* a mini hydro power project was approved without an EIA Report, and it became clear through the case that approval was granted entirely on the basis of a preliminary environmental questionnaire and letter from the Department of Forest.¹⁵⁰ The court found this was not a proper exercise of the powers in the *National Environmental Act* and quashed the approval.¹⁵¹

C Potential role of the judiciary in safeguarding social and environmental rights

Environmental rights cases are increasingly being raised in the courts within the ambit of the fundamental rights chapters of the Constitution.¹⁵² In the event that communities are adversely affected by CDM projects this avenue may provide safeguards not available through the normal project cycle.

¹⁴⁴ Transparency International, 'Shortcomings and Shortcuts: Sri Lanka's Environmental Impact Assessments' in Gareth Sweeney et al (eds), *Global Corruption Report: Climate Change*, Transparency International (Earthscan, 2011), 152.

¹⁴⁵ *National Environmental (Amendment) Act No. 56*, Sri Lanka (1988), s 23BB.

¹⁴⁶ Transparency International Sri Lanka, 'Shortcomings and Shortcuts: Sri Lanka's Environmental Impact Assessments', in Gareth Sweeney et al (eds), *Global Corruption Report: Climate Change*, Transparency International (Earthscan, 2011), 151.

¹⁴⁷ Lareef Zubair, 'Challenges for Environmental Impact Assessment in Sri Lanka' (2001) 21 *Environmental Impact Assessment Review* 469, 475.

¹⁴⁸ Transparency International Sri Lanka, 'Shortcomings and Shortcuts: Sri Lanka's Environmental Impact Assessments', in Gareth Sweeney et al (eds), *Global Corruption Report: Climate Change*, Transparency International (Earthscan, 2011), 151.

¹⁴⁹ Transparency International Sri Lanka, 'Shortcomings and Shortcuts: Sri Lanka's Environmental Impact Assessments', in Gareth Sweeney et al (eds), *Global Corruption Report: Climate Change*, Transparency International (Earthscan, 2011), 153 citing Miriya Samarakoon and John Rowan, 'A Critical Review of Environmental Impact Statements in Sri Lanka with Particular Reference to Ecological Impact Assessment' (2008) 41 *Environment Management* 441.

¹⁵⁰ *Environmental Foundation Limited v Central Environmental Authority and others*, Application No. 1556/2004, decided on 31 July 2006, per K Sripavan J.

¹⁵¹ *Environmental Foundation Limited v Central Environmental Authority and others*, Application No. 1556/2004, decided on 31 July 2006, per K Sripavan J.

¹⁵² Ruana Rajepakse, 'How Environmental Cases Come Before the Courts' in Mario Gomez (ed), *Judges and Environmental Law: A Handbook for the Sri Lankan Judiciary* (Environmental Foundation Limited, 2009), 101.

The Sri Lankan Constitution protects fundamental rights to equality before the law;¹⁵³ freedom from discrimination on the grounds of *inter alia* sex, language, race and caste;¹⁵⁴ and freedom from cruel, inhumane and degrading treatment.¹⁵⁵ In the event of executive or administrative infringement of these rights individuals are entitled to apply to the Supreme Court,¹⁵⁶ which has exclusive jurisdiction to hear and determine questions relating to infringement of fundamental rights recognised in Chapter III and IV of the Constitution.¹⁵⁷ Significantly, the Supreme Court of Sri Lanka has read as inherent and implied in a meaningful reading of Article 12(1) of the Constitution the ‘right to a clean environment and the principle of inter generational equity with respect to the protection and preservation of the environment’.¹⁵⁸

The most famous environmental rights case in Sri Lanka’s recent history is *Bulankulama v The Secretary, Ministry of Industrial Development*, otherwise known as the *Eppawela phosphate mining* case. The case involved an agreement between the Government and Freeport Mac Moran of USA to extract phosphate rock at Eppawela in the Anuradhapura district.¹⁵⁹ The petitioners were local land-owners who complained that the development would be both an environmental and economic disaster for the local population – and an infringement of their rights under Article 12(1), 14(1)(g) and 14(1)(h) of the Constitution.¹⁶⁰

In a landmark judgement the Supreme Court found the petitioners claims of rights infringement were established and ordered the Government to desist from entering into the Eppawela phosphate contract and provide compensation to the communities affected.¹⁶¹ In reaching this conclusion the leading decision refers extensively to principles of sustainable development in international law, and in particular to the Stockholm and Rio Declarations. While noting that the Declarations are not binding on Sri Lanka, Justice Amerasinghe J argued that ‘as a Member of the United Nations, they could hardly be ignored by Sri Lanka’.¹⁶² He went on to state:

In my view, the human development paradigm needs to be placed within the context of our finite environment ... Due account must also be taken of our unrenovable cultural heritage. Decisions with regard to the nature and scale of activity require the most anxious consideration from the point of view of safeguarding the health and safety of the people, naturally, including the

¹⁵³ *The Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978, art 12(1).

¹⁵⁴ *The Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978, art 12(2).

¹⁵⁵ *The Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978, art 11.

¹⁵⁶ *The Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978, art 17.

¹⁵⁷ *The Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978, art 126.

¹⁵⁸ *Watte Gedara Wijebanda v Conservator General of Forests* [2007] SCFR No. 118/2004

¹⁵⁹ *Bulankulama v Secretary, Minister of Industrial Development* [2000] 3 Sri LR 243, 249 per Amerasinghe J.

¹⁶⁰ *Bulankulama v Secretary, Minister of Industrial Development* [2000] 3 Sri LR 243, 252 per Amerasinghe J.

¹⁶¹ *Bulankulama v Secretary, Minister of Industrial Development* [2000] 3 Sri LR 243, 230–1 per Amerasinghe J.

¹⁶² *Bulankulama v Secretary, Minister of Industrial Development* [2000] 3 Sri LR 243, 274 per Amerasinghe J.

petitioners, ensuring the viability of their occupations, and protecting the rights of future generations of Sri Lankans.¹⁶³

This unambiguous expression of the responsibility of Sri Lanka to ensure due diligence in regard to both advancing sustainable development and safeguarding the rights of local populations and future generations creates a very good advocacy platform for future cases. Nevertheless, poor and marginalised people face significant obstacles in accessing and obtaining remedy through the court system in Sri Lanka. Lack of knowledge about legal rights and entitlements, lack of access to legal representation and the significant opportunity costs of taking matters to court mean that people most vulnerable to unscrupulous development are least likely to access this form of remedy. At the same time, Supreme Court decisions can set an important signal to lower courts and administrative decision makers and it will be interesting continue to watch how these signals are interpreted in Sri Lanka's rapid development phase.

VI CONCLUSION

This paper has attempted to delve into the inequities of climate change mitigation policies – not from the common vantage point of assessing inequity between states – but instead looking at how poverty and marginalisation can create climate inequities within states. It is also clear that despite putting sustainable development at the centre of the purpose of the Kyoto Protocol and the CDM, the principle is legally and politically ambiguous. Reluctance of the international community to set human rights based standards for the advancement of sustainable development into the climate regime has meant that the principle is not as powerful as it could be.

In the Sri Lanka context it is evident that there are both high risks of exploitation of marginalised and impoverished groups in this rapid phase of 'clean development', but also opportunities for existing and developing social and environmental safeguards to mitigate these negative consequences. Still, there are undoubtedly legal protection gaps in Sri Lanka. Coupled with systematic discrimination of groups based on gender, ethnicity and geographic location as well as high rates of corruption, these gaps mean that exploitation resulting from these projects is probably inevitable. Many, if not most developing countries would be in a similar position. To safeguard against the CDM undermining its own commitment to sustainable development it is necessary for standards to be set at the global level. A tick-box approach to sustainable development will not be adequate. Any effective development intervention projects need to be designed with partner communities rather than imposed upon them,

¹⁶³ *Bulankulama v Secretary, Minister of Industrial Development* [2000] 3 Sri LR 243, 279 per Amerasinghe J.

and impacts need to be monitored over time. At present there is no mechanism for requiring this of project developers, which creates risks of exploitation and unintended harm.

Adopting a more rigorous global standard setting approach does not mean that developing countries will not have control over the direction of CDM projects. Rather, setting minimum standards, linked to existing human rights norms, is a mechanism for holding states accountable to what they have already agreed to do – ensure CDM projects contribute towards genuine sustainable development.

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